

# The Reason Behind the Rules: The Archaeological Resources Protection Act of 1979 and Scientific Study<sup>1</sup>

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<sup>1</sup> This article is dedicated to the memory of Dr. Robson Bonnichsen. Rob became my friend near the end of his life. His single-minded determination for the scientific study of the archaeological materials, which we last discussed just days before his death, served as the inspiration for this work. It is hoped that this research will help Rob’s dream of the scientific analysis of all archaeological materials to be realized, even if it is posthumously.

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**I. Introduction**

In the heavily publicized Kennewick Man case,<sup>3</sup> a battle over the rights to study or to rebury the remains of a 9,000-year-old skeleton found in Washington state, Magistrate Judge John Jelderks touched off a significant tangential debate to the case in chief: What are the federal agencies’ powers under the Archaeological Resources Protection Act of 1979 (ARPA)<sup>4</sup> to limit or control the scientific study of archaeological materials? This question does not implicate the hotly debated law, the Native American Graves Protection and Repatriation Act (NAGPRA),<sup>5</sup> which was the focus of the Kennewick Man case, but rather calls into question the relative

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<sup>3</sup> *Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116 (D.Or. 2002). The Ninth Circuit also rendered opinions in this matter. Although those decisions do not have any bearing on the research herein, as the question of scientific study of archaeological materials was not reached therein, the reader is directed to those cases for a more complete appreciation of the Kennewick Man case. See generally, *Bonnichsen v. U.S.*, 357 F.3d 962 (C.A. 9 2004); *Bonnichsen v. U.S.*, 367 F.3d 864 (C.A. 9 2004).

<sup>4</sup> 16 U.S.C. 470aa *et seq.*

<sup>5</sup> 25 U.S.C. 3001 *et seq.*

freedom of research that scientists have operated under throughout the history of past human studies in the United States.

Specifically, Judge Jelderks had this to say about the study of the Kennewick Man remains: the remains must be made available for study to “qualified professionals,”<sup>6</sup> “subject to the type of reasonable terms and conditions that normally apply to studies of archaeological resources under ARPA.”<sup>7</sup> What are these “reasonable terms and conditions”? Until now, no scholars examining the Kennewick Man or NAGPRA debates have questioned the meaning of this charge by Jelderks. This paper focuses on identifying what limits, if any, exist in ARPA to carry out the charge of Judge Jelderks.

The implications of this question reach far beyond the Kennewick Man debate. In reality, the question of whether or not, or to what extent, the federal government can impose limitations on the scientific study of archaeological materials derived from federal or Indian lands (the scope of ARPA is discussed more fully *infra*) could have far-reaching consequences that, dependant on the agenda of the politicians controlling the executive agencies, could have a chilling effect on *all* archaeological research. The ramifications surrounding this question are not limited to Kennewick Man or even ancient human remains research. Therefore, aside from this brief introduction to the problem, such contexts are not considered further in this article.

As an initial matter, it is important to have a basic understanding of what ARPA is before analyzing the more minute components of the law. On a very rudimentary level, ARPA has been, for nearly thirty years, the legislation that controls the permitting of archaeological

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<sup>6</sup> *Bonnichsen, supra*, note 3 at 1166.

<sup>7</sup> *Bonnichsen, supra*, note 3 at 1167.

excavations on federal and Indian lands.<sup>8</sup> The law and its attendant regulations contain provisions requiring professional qualifications to secure excavation permits,<sup>9</sup> criminal and civil penalties for looting archaeological sites and other violations,<sup>10</sup> and the identification of a suitable repository institution for excavated collections to be stored along with arrangements therefor.<sup>11</sup>

The research for this article has led to an ultimate conclusion that, as set forth more fully, *infra*, ARPA does not provide federal agencies with the power to limit the scope of scientific study on covered archaeological materials. The only possible portion of the law that could arguably represent a limitation to study is the requirement that permits under ARPA be issued only to qualified individuals. This author does not believe that such a requirement rises to the level of limiting scientific study, but rather merely ensures that it is science that will be carried out when study of archaeological materials is concerned. This limitation keeps anyone from doing whatever he or she wants for the study of an ARPA-covered item, whenever he or she wants and however he or she wants to do it. This provision merely ensures that the study of archaeological materials remains within the realm of science. This provision does not, nor does any other provision of ARPA, provide federal agencies with the authority to act as scientific dictators with ARPA-covered archaeological materials.

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<sup>8</sup> See Roberto Iraola, *The Archaeological Resources Protection Act - Twenty Five Years Later*, 42 DUQ. L. REV. 221, 222 (2004).

<sup>9</sup> 16 U.S.C. 470cc.

<sup>10</sup> 16 U.S.C. 470ee and 16 U.S.C. 470ff. For a comprehensive review of the criminal and civil penalty provisions of ARPA, a topic beyond the scope of this paper, the reader is directed to Iraola, *supra*, note 8. An interesting example of ARPA in action in criminal matters can be found in *United States v. Austin*, 902 F.2d 743 (C.A. 9 1990).

<sup>11</sup> 16 U.S.C. 470dd.

## II. The Standard of Regulatory Review

Before embarking on an in-depth review of ARPA, it is necessary to understand the scope of review that will be applied herein to the question of the ability of agencies to limit scientific study under ARPA. As is more fully analyzed below, there is no authority, from a plain reading of ARPA, for the government to dictate the scope of scientific research. Because of the absence of such language, a review is herein undertaken of the law and its attendant regulations to determine if the federal agencies are granted the power to so restrict scientific study. As of the writing of this article, there is no existing regulation that explicitly or implicitly grants the agencies such authority and the assumptions herein are posited solely for the purpose of analyzing Judge Jelderks' charge in *Bonnichsen*.<sup>12</sup>

The review of an agency's rulemaking authority is governed by the standards of *Chevron U.S.A., Inc. v. National Resources Defense Council*.<sup>13</sup> In *Chevron*, the question before the Supreme Court was whether the Environmental Protection Agency (EPA) had properly interpreted its authority under the Clean Air Act's 1977 amendments to promulgate and apply certain regulations related to stationary source pollution.<sup>14</sup> In ultimately reaching the decision that the EPA had properly interpreted its authority, the Court articulated a two-part inquiry to determine the reasonableness of such interpretations. First, it must be asked if Congress has "directly spoken to the precise question at issue."<sup>15</sup> Second, if not, is the agency's response to the issue "based on a permissible construction of the statute?"<sup>16</sup> It is within this general

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<sup>12</sup> *Bonnichsen, supra*, note 3 at 1167.

<sup>13</sup> 467 U.S. 837 (1984).

<sup>14</sup> *Id.* at 840.

<sup>15</sup> *Id.* at 842.

<sup>16</sup> *Id.* at 843.

framework that the question of federal agency powers to limit scientific study under ARPA is addressed. These specific questions will be completely analyzed in the Discussion.

Another authority that substantially guides the analysis herein is the Supreme Court's approach to analyzing agency interpretations of statutory law in *United States v. Vogel Fertilizer Company*.<sup>17</sup> In that case, the Court undertook a comprehensive analysis of Treasury regulations as applied to the question of whether or not two closely-held corporations constituted a brother-sister-controlled corporate group. The process of analyzing an agency's authority, as articulated by the *Vogel* Court, to promulgate and enforce specific regulations provides the depth of analysis necessary for a comprehensive understanding of ARPA.

The *Vogel* Court begins by noting the deference generally afforded to agencies if it is clear that the regulations implement the congressional mandate.<sup>18</sup> The Court also asked whether or not the agency has a source of authority to promulgate such a regulation.<sup>19</sup> This aspect of the case guides much of this ARPA analysis, as it is doubtful that the deference noted above is due based on the absence of any language regarding scientific study in ARPA. Thus, this review examines the question of whether some implicit authority exists in ARPA for such federal action. In so doing, pursuant to the *Vogel* analysis, the legislative history of ARPA is examined. Additionally, an *in pari materia*<sup>20</sup> examination of all of the statutes related to historic preservation and archaeological resources is undertaken. According to *Vogel*, the question of

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<sup>17</sup> 455 U.S. 16 (1982).

<sup>18</sup> *Id.* at 24.

<sup>19</sup> *Id.*

<sup>20</sup> *In pari materia* analyses are used to examine statutes along with surrounding statutes in order to gain a more complete appreciation of the contextual relevance of a particular law. According to Black's Law Dictionary (8<sup>th</sup> ed.), an *in pari materia* analysis "is a canon of construction that statutes that are *in pari materia* may be

whether the regulation “harmonize[s] with the statutory language”<sup>21</sup> is examined. Finally, the limitation of scientific study under ARPA is subjected to the *Vogel* tenet that a regulation does not have to be “sustained simply because it is not ‘technically inconsistent’ with the statutory language, when the regulation is fundamentally at odds with the manifest congressional design.”<sup>22</sup>

### III. ARPA’s Purpose

In *Bonnichsen*, Judge Jelderks charged that studies of the Kennewick Man remains can only be limited by reasonable terms for research under ARPA.<sup>23</sup> This charge necessarily raises the question: What are the limits to archaeological research under ARPA?

No understanding of the true nature of a statute may be had without completing a detailed examination of the purposes of that law stated in the law itself as well as in its legislative history. The stated purpose of ARPA is to “secure...the protection of archaeological resources and sites which are on public lands and Indian lands and to foster increased cooperation and exchange of information between governmental authorities [and] the professional archaeological community.”<sup>24</sup> From this stated purpose, it appears that ARPA was intended to protect against one thing: pothunting.<sup>25</sup> This is further bolstered by the Congressional findings.<sup>26</sup> These findings identify the threats to archaeological materials and sites as “their commercial

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construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”

<sup>21</sup> *Vogel, supra*, note 17 at 25.

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Bonnichsen, supra*, note 3 at 1167.

<sup>24</sup> 16 U.S.C. 470aa(b).

attractiveness”<sup>27</sup> and inadequate protection from destruction due to “uncontrolled excavations and pillage.”<sup>28</sup> Nowhere in the Congressional findings<sup>29</sup> or in the statement of purpose of ARPA<sup>30</sup> is there any mention that the law was intended to guard against scientific analyses of archaeological materials. Indeed, it appears that such scientific analyses are precisely what ARPA is intended to protect archaeological sites and materials for.<sup>31</sup>

On its face, ARPA, as it is written in the United States Code, does not restrict any scientific research.<sup>32</sup> Because the purpose of ARPA, as stated in the United States Code, does not contain any language that refers to limiting research or charges for preservation,<sup>33</sup> a review of the congressional history of this law is necessary to a complete understanding of its purpose.

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<sup>25</sup> A pothunter is defined by the Oxford English Dictionary as “[o]ne who finds or obtains objects of archaeological interest or value, esp. by unscientific or illicit methods, and for the purpose of private collection or profit.”

<sup>26</sup> 16 U.S.C. 470aa(a).

<sup>27</sup> 16 U.S.C. 470aa(a)(2).

<sup>28</sup> 16 U.S.C. 470aa(a)(3).

<sup>29</sup> 16 U.S.C. 470aa(a).

<sup>30</sup> 16 U.S.C. 470aa(b).

<sup>31</sup> It should be noted that, while it is clear from the analysis herein that ARPA was intended to preserve archaeological materials for the purpose of study, this may not be the legislation’s sole purpose. Other implicit purposes may include the reassertion of federal ownership of resources on federal land and the protection of archaeological resources for educational display and for public access to ruins.

<sup>32</sup> The purpose of ARPA, that being for the protection of archaeological materials from pothunting and illicit trade in antiquities, is supported by numerous law review articles. See, Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 607 (1995); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 629 (1995) (noting that ARPA applies only to excavation activity); David G. Bercaw, *Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters*, 30 TULSA L.J. 213, 219 (1994); Jay M. Zitter, *Validity, Construction, and Operation of Archaeological Resources Protection Act of 1979*, 16 U.S.C.A. §§ 470aa to 470mm, 184 A.L.R. FED. 139, §2[a]; Iraola, *supra*, note 8 at 222-223; Francis P. McMannamon, *Cultural Resources and Protection Under United States Law*, 16 CONN. J. INT’L L. 247, 265-266 (2001).

<sup>33</sup> See generally, 16 U.S.C. 470aa through 470mm.



## A. ARPA's Congressional History

Unlike the numerous hearings and reports that preceded the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990,<sup>34</sup> Congress only conducted one hearing on ARPA<sup>35</sup> and only produced two reports on the legislation.<sup>36</sup> Although the House of Representatives version of ARPA<sup>37</sup> was ultimately adopted and signed by President Carter as P.L. 96-95, the Senate version<sup>38</sup> is virtually identical. This is important because the Senate hearing on S. 490 was the only hearing on ARPA. The House of Representatives did not hold hearings on its version of ARPA. However, the House did issue a report that accompanied H.R. 1825.<sup>39</sup> That report, along with the S. 490 report, is included in this analysis. Therefore, much of the historical analysis of ARPA herein is based on a review of the congressional

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<sup>34</sup> See generally Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H.R. Comm. on Interior and Insular Affairs, 101st Cong. (1990); Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearings on S. 1021 and S. 1980 Before the Senate Comm. on Indian Affairs, 101st Cong. (1990); National Memorial Museum of the American Indian: Hearings on S. 978 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Administration, 101st Cong. (1989); Establishment of the National Museum of the Native American: Hearings on H.R. 2668 Before the H.R. Comm. on Interior and Insular Affairs, H. R. Comm. on House Administration, and H.R. Comm. on Public Works and Transportation, 101st Cong. (1989); Native American Museum Claims Commission Act: Hearings on S. 187 Before the Senate Comm. on Indian Affairs, 100th Cong. (1988); National American Indian Museum Act (Part 2): Hearings on S. 1722 and 1723 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Administration, 100th Cong. (1987); National American Indian Museum Act (Part I): Hearings S. 1722 and S. 1723 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Administration, 100th Cong. (1987); Native American Cultural Preservation Act: Hearings on S. 187 Before the Senate Comm. on Indian Affairs, 100th Cong. (1987); H.R. REP. NO. 101-877 (1990); S. REP. NO. 101-473 (1990); H.R. REP. NO. 101-340, pt. 2 (1989); H.R. REP. NO. 101-340, pt. 1 (1989); S. REP. NO. 101-143 (1989); S. REP. NO. 100-601 (1988); S. REP. NO. 100-494 (1988). This legislative history includes the history of NAGPRA and the National Museum of the American Indian Act (NMAIA). Inclusion of the history of the NMAIA is due to the fact that many of the provisions of NAGPRA are modeled on this earlier law. See S. REP. NO. 101-473, at 3.

<sup>35</sup> The Archaeological Resources Protection Act of 1979; and the Frederick Law Olmstead National Historic Site: Hearings on S. 490 and S. 495, Before the Senate Subcommittee on Parks, Recreation, and Renewable Resources, 96<sup>th</sup> Cong. (1979) ("Senate hearing").

<sup>36</sup> S. REP. NO. 96-179; H.R. REP. NO. 96-311.

<sup>37</sup> H.R. 1825, 96<sup>th</sup> Cong. (1979).

<sup>38</sup> S. 490, 96<sup>th</sup> Cong. (1979).

<sup>39</sup> H.R. REP. NO. 96-311.

documents associated with the virtually identical Senate companion bill, S. 490, with some discussion of the final version deriving from an examination of the House report on H.R. 1825.

It is clear, beyond question, in the congressional materials, that ARPA was created for one purpose: To stem the tide of illegal excavation and the sale of artifacts from federal and Indian lands.<sup>40</sup> The purpose of ARPA is carried out by “providing penalties commensurate with the value of the resource damaged or removed from public lands or Indian lands without a permit. In addition, information concerning the nature and location of any archaeological resource which might create a risk to such resource would be exempt under the Freedom of Information Act.”<sup>41</sup> The congressional history provides a precise explanation of the intent of ARPA: “The bill provides for the protection of archaeological resources on public and Indian lands by prohibiting unauthorized removal or sale of antiquities and outlines a means of assessing penalties to be imposed on violators.”<sup>42</sup> The fact that this statement says nothing about limiting scientific study and focuses instead entirely on the threats of illicit excavation and trade clearly leaves little room for an interpretation that ARPA was ever intended to limit or restrict scientific investigation of archaeological resources.

Indeed, the author of the Senate version of ARPA, Senator Domenici, commented that the problem intended to be addressed by the law was looters.<sup>43</sup> Much of the realization of this purpose was to be accomplished by shoring up the then-faltering Antiquities Act of 1906.<sup>44</sup> This purpose is also supported in H. Rep. No. 96-311, which cites the Ninth Circuit decision in *U.S. v.*

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<sup>40</sup> S. REP. NO. 96-179 at 1,6; H.R. REP. NO. 96-311 at 7, 13.

<sup>41</sup> S. REP. NO. 96-179 at 6.

<sup>42</sup> H.R. REP. NO. 96-311 at 13.

<sup>43</sup> Senate hearing, *supra*, note 35 at 40.

<sup>44</sup> *Id.*

*Diaz*,<sup>45</sup> which rendered a portion of the Antiquities Act unconstitutional in that circuit,<sup>46</sup> “coupled with the dramatic rise in recent years of illegal excavations on public lands and Indian lands for private gain...”<sup>47</sup>

There is no mention of limiting scientific research in the ARPA legislative history. Any “preservation” that may be intended by ARPA is a duty to preserve archaeological sites and materials *from* looting and sale so that they may be available *for* scientific study. This is the only logical purpose of ARPA that can be discerned from the congressional history. Accordingly, in case it is not already obvious, the Government’s duty to preserve, according to the congressional history of ARPA, is a duty to protect resources from looters so that those resources will be available for scientific study.<sup>48</sup> This conclusion is supported by H. Rep. No. 96-311, which states that “[i]t is the recognition of the importance of the integrity of the archaeological site and the context in which archaeological resources are found that the Committee feels should guide land managers in their protection and enforcement efforts.”<sup>49</sup> This quote highlights the importance of archaeological site integrity and context, factors that are substantially relevant for the purposes of scientific analysis.<sup>50</sup>

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<sup>45</sup> 499 F.2d 113 (C.A. Ariz. 1974).

<sup>46</sup> This case involved the criminal trial of a man who had taken some Apache face masks that were made by a medicine man in 1969 or 1970 from a cave on the San Carlos Indian Reservation in Arizona. Writing for the Ninth Circuit, Judge Merrill found the absence of a definition of the term “object of antiquity” in the Antiquities Act to render the law unconstitutionally vague and in violation of the defendant’s due process rights. *Id.* at 115. The court noted that “[o]ne must be able to know, with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he has found them.” *Id.* at 114. This language substantially undermined the utility of the Antiquities Act for future criminal prosecutions.

<sup>47</sup> H.R. REP. NO. 96-311 at 7. *See also*, Ades, *supra*, note 32 at 601.

<sup>48</sup> *See* Senate hearing, *supra*, note 35 at 1, 40, 51-2, 85-8; S. REP. NO. 96-179 at 7, 13.

<sup>49</sup> H.R. REP. NO. 96-311 at 8.

<sup>50</sup> *Id.* at 9.

Based upon the foregoing analysis, there is no stated or implied purpose in ARPA or its congressional history that the legislation was intended to thwart scientific study of archaeological materials. No issues were raised related to limiting research that would or could be done under ARPA during the legislative process.<sup>51</sup> It is apparent from the lack of discussion of this issue when the legislation was being considered by Congress that the interference of this legislation with science was not even on the radar screen. Indeed, based on the absence of any discussion of how ARPA might impact scientific study in the 1979 hearings suggests that any attempts to limit study of archaeological materials would represent a post-hoc alteration of the purpose of the statute to suit political or other ends. If such action is done by an executive agency charged with enforcing ARPA, this would raise significant separation of powers questions.

ARPA is devoid of any explicit or implicit intention to limit scientific analysis. The congressional history of ARPA is devoid of any explicit or implicit intention to limit scientific analysis. The absence of any mention of limiting scientific analysis in the statute and congressional history would render any subsequent agency attempts to limit post-excavation analyses of archaeological materials beyond the scope of the authorization granted to the relevant agencies by Congress.

## **B. ARPA in the U.S. Code**

As has already been discussed, clearly, on the face of the law, ARPA does not contain any provisions that mention the limiting of scientific study of materials excavated or removed

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<sup>51</sup> Senate hearing, *supra*, note 35 at 41-3; H.R. REP. NO. 96-311 at 23-5.

pursuant to an ARPA permit.<sup>52</sup> Although it is clear that there is no overt provision in ARPA that can allow the government to limit subsequent scientific study of excavated materials, there are a few portions of the law that may be facially confusing to some on this issue. However, considered in light of the congressional history, common sense, and logical legislative construction, the ambiguities of these provisions are easily demystified.

Title 16, Section 470aa(b) states that “[t]he purpose of this chapter is to secure for the present and future benefit of the American people, the protection of archaeological resources and sites on public lands and Indian lands.” The “protection” purpose referred to in 16 U.S.C. 470aa(b), based on the clear concerns voiced in the congressional history, refers to protecting the archaeological record from looters in order that materials may be saved for scientific analysis that benefits the general public’s understanding of the nation’s past.<sup>53</sup>

All of the permitting provisions of ARPA are contained in 16 U.S.C. 470cc. This section covers, in pertinent part, such topics as who can apply for a permit, notification to tribes (when appropriate), and terms and conditions of the permit. There is no language in this section that provides for any limit on post-excavation analyses of materials. Indeed, an *in pari materia* analysis of this section would limit any terms and conditions to be imposed under 470cc(d) to such terms and conditions necessary for excavation and removal of these materials. This is due to the simple reality that the only permitting provisions of ARPA appear in the “Excavation and Removal” section of the law.<sup>54</sup> Thus, it would be a quantum leap of legal interpretation, in the absence of clear language, to suggest, and much less to assert, that ARPA’s permitting

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<sup>52</sup> See generally, 16 U.S.C. 470aa *et seq.*

<sup>53</sup> See Senate hearings, *supra*, note 35 at 40; S. REP. NO. 96-179 at 1,6; H.R. REP. NO. 96-311 at 7, 13.

provisions provide any authority to executive agencies to limit post-excavation analysis of archaeological materials. Further, in light of the previously discussed “protection” clause of ARPA, an argument that the Government can limit such studies contradicts the purpose of the law: To protect archaeological materials *for* scientific study, not *from* scientific study.

Another relevant section to this analysis of ARPA is 16 U.S.C. 470dd. This section covers the custody of archaeological resources that are excavated or removed pursuant to an ARPA permit. This section charges the Secretary of the Interior with the duty to, among other things, promulgate regulations for “...the ultimate disposition of [archaeological] resources removed pursuant to” the Antiquities Act<sup>55</sup> and the Reservoir Salvage Act (RSA)<sup>56</sup> as well as those excavated and removed pursuant to ARPA.<sup>57</sup> One confusing term in this section, both as it appears in the quote above and the one below, is the term “disposition.” The other potentially confusing language in this section reads “such regulations shall govern the *disposition* of archaeological resources removed from public lands...pursuant to this chapter.”<sup>58</sup> In this latter portion of 16 U.S.C. 470dd, the term “disposition” is a bit ambiguous. However, if this use is interpreted in light of the other use of “disposition” in this section,<sup>59</sup> it is apparent that both of these terms are intended to control the creation of regulations on the matter of what institution ultimately becomes the repository for archaeological materials excavated or removed pursuant to ARPA, the Antiquities Act, or the RSA. Again, this intent is bolstered when the terms are examined from an *in pari materia* perspective. Under such an analysis, the placement of these

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<sup>54</sup> 16 U.S.C. 470cc.

<sup>55</sup> 16 U.S.C. 431-433.

<sup>56</sup> 16 U.S.C. 469-469c.

<sup>57</sup> 16 U.S.C. 470dd(2).

<sup>58</sup> 16 U.S.C. 470dd (emphasis added).

provisions in a section of ARPA titled “Custody of archaeological resources” suggests that the provisions contained therein will govern where collected materials will repose. There is nothing at all in this section that suggests the imposition of limits on scientific analyses of the collected materials.

The remainder of ARPA<sup>60</sup> deals with matters not related to scientific study, such as criminal<sup>61</sup> and civil penalties<sup>62</sup> and privacy of the site location,<sup>63</sup> among other things. As these matters are irrelevant to the current inquiry, there is no discussion of them herein.

In light of the congressional history of ARPA and the relevant United States Code provisions, it is abundantly apparent that ARPA is much more concerned with *in situ*<sup>64</sup> preservation of archaeological materials and their protection from “uncontrolled excavation and pillage”<sup>65</sup> due to their “commercial attractiveness”<sup>66</sup> rather than the limitation of scientific research. The language that states that ARPA “is to secure, for the present and future benefit of the American people, the protection of archaeological resources and their sites” is directed specifically at protecting these resources from commercial exploitation and not scientific research projects that are conducted within the confines of currently accepted scientific methods. Indeed, it is important to note, once again, that there are no restrictions in ARPA on any type of scientific research at all.

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<sup>59</sup> IE., “ultimate disposition” in 16 U.S.C. 470dd(2).

<sup>60</sup> 16 U.S.C. 470ee through 470mm.

<sup>61</sup> 16 U.S.C. 470ee.

<sup>62</sup> 16 U.S.C. 470ff.

<sup>63</sup> 16 U.S.C. 470hh.

<sup>64</sup> *In situ* is defined by the Oxford English Dictionary as “in its (original) place; in position.” In archaeological contexts, the term refers to archaeological materials being in their original location, usually in the ground.

<sup>65</sup> 16 U.S.C. 470aa(a)(3).

<sup>66</sup> 16 U.S.C. 470aa(a)(2).

### C. ARPA in the Code of Federal Regulations

Although ARPA regulations exist in, among other places, 36 CFR §§ 79 *et seq.*, this set of regulations derives its authority from several different laws. ARPA shares the 36 CFR §§ 79 *et seq.* regulations with rules promulgated under the authority of the National Historic Preservation Act of 1966 (“NHPA”),<sup>67</sup> the Antiquities Act of 1906 (“the Antiquities Act”), and the Reservoir Salvage Act (“RSA”).<sup>68</sup> This shared nature of at least some of these regulations is supported by the Department of the Interior in the following statement in a “reader friendly” recapitulation of the curation regulations in 36 CFR § 79 thus, “[i]ssuance of this rule fulfills the Secretary of the Interior’s obligations under the National Historic Preservation Act of 1966 and the Archaeological Resources Protection Act of 1979 to issue such regulations.”<sup>69</sup> Through each of these laws, Congress has provided various limits on the authority of the relevant agency heads for the promulgation of the laws’ respective regulations. What this means is that, though ARPA and NHPA may share the same real estate in the Code of Federal Regulations, the authority granted by the organic legislation may preclude the application of certain portions of those regulations to certain scenarios. For instance, Judge Jelderks limited the scientists’ study of the Kennewick Man remains to the restrictions with respect to scientific study under ARPA.<sup>70</sup> Thus, only the ARPA-authorized regulations in the shared CFR regulations would apply to Kennewick Man. The blanket application of all of 36 CFR §§ 79 *et seq.*, without regard to the specific

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<sup>67</sup> 16 U.S.C. 470.

<sup>68</sup> 36 CFR § 79.2.

<sup>69</sup> U.S. Department of the Interior (DOI), 36 CFR PART 79: CURATION OF FEDERALLY-OWNED AND ADMINISTERED ARCHAEOLOGICAL COLLECTIONS (DOI 1991 at 1).

<sup>70</sup> *Bonnichsen, supra*, note 3 at 1167.



organic statutes from which the regulations derive is an overextension of the application of ARPA to the study of archaeological materials.

An examination of all relevant CFR sections is warranted, along with an examination of the relevant parts of the various organic statutes that share those CFR regulations in order to identify those portions of the CFR that are authorized by ARPA and those that derive from other statutes. The regulations that remain, those specifically authorized by ARPA, are the ones that can be applied to the question of the limits of scientific study under ARPA. The application of the regulations deriving solely from any other statute to ARPA situations would be an unauthorized expansion of ARPA beyond the authority granted to the relevant agencies by Congress.

The CFR identifies four specific areas of the Code that contain regulations implemented pursuant to ARPA: 18 CFR § 1312, 32 CFR § 229, 36 CFR § 296, and 43 CFR § 7.<sup>71</sup> Although there are other portions of the CFR (e.g., 36 CFR 79.1 *et seq.*) that it would seem reasonable to apply to ARPA-collected materials,<sup>72</sup> such an application of these regulations is expressly avoided in 36 CFR 79.3(d). This section states, in pertinent part, that “[c]ollections that are excavated or removed pursuant to the Archaeological Resources Protection Act...remain subject to that Act, the Act’s implementing rules (43 CFR part 7, 36 CFR part 216, 18 CFR part 1312, and 32 CFR part 229), and the terms and conditions of the pertinent Archaeological Resources Protection Act permit or other approval.”<sup>73</sup> This avoidance of the remainder of 36 CFR §§ 79.1 *et seq.*, when dealing with ARPA, is also supported by the inconsistencies between the aims of

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<sup>71</sup> 36 CFR § 79.3(d).

<sup>72</sup> See e.g., 36 CFR §§ 79.5, 79.10(a), 79.10(b), 79.10(d)(1), 79.10(d)(5).

the rest of Part 79 and the purposes embodied in ARPA itself. It must not be forgotten that, as demonstrated above, ARPA was created to protect archaeological materials from looting and illicit trade, not from scientific analysis. Any attempt at such a restriction in the regulations under the guise of ARPA authority would be an unreasonable and unapproved expansion of Congress' delegated rulemaking power under ARPA. More specifically to the point of the cited regulations, ARPA was also not created to cover the curation of archaeological materials once they leave the ground except for situations dealing with the transfer of materials from one institution to another.<sup>74</sup>

#### **1. Possible Confusion: 36 CFR § 79.10**

Despite the fact that 36 CFR § 79.3 excepts materials governed by ARPA from the regulations of the remainder of 36 CFR §§ 79.1 *et seq.*, an examination of some of the regulations in part 79 is warranted in order to address the question of ARPA authority in these regulations specifically. The reason for this is because some of these regulations relate to collections use and other concepts that would seem to implicate an ARPA inquiry. The regulations of interest are 36 CFR § 79.10 and 36 CFR § 79.10(d). Both of these sections are encompassed in the overall review of 36 CFR § 79.10 that follows.

Section 79.10 is entitled "Use of collections." The title of this section is indicative, from the start, that its authority does not derive from ARPA. There is no provision in ARPA that dictates anything on the use of collections. Section 79.10(a) speaks to ensuring that collections are made available for "scientific, educational and religious uses, subject to such terms and

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<sup>73</sup>36 CFR § 79.3(d).

conditions as are necessary to protect and preserve the” collection. There is no doubt that the cause of this part of section 79.10 is noble; however, its authority does not derive from ARPA. Although 16 U.S.C. 470dd (part of ARPA) directs the Secretary of the Interior to create regulations concerning the ultimate disposition of materials, there is no indication in that section or in the congressional history that this attempt to foster better communication between institutions was intended to provide authority for regulating the use of collections.

Irrespective of the fact that section 79.10(a) finds no authority for its existence in ARPA, if such regulations were to be applied to an ARPA-permitted activity, even though there is no reason to believe that they should be so applied, then section 79.10(b) requires that collections “shall be made available to qualified professionals for study.”<sup>75</sup> Thus, if a court ultimately decides to apply section 79.10(a) to archaeological materials under some perceived ARPA authority, then 79.10(b) mandates (by virtue of the word “shall”) that these materials be made available for study. However, as discussed above, no court should logically ever have to address this issue as the plain language of the statute and regulations dictate against the application of section 79.10 to materials collected pursuant to ARPA permits. Additionally, there are no restrictions in 79.10(b) as to what types of studies can be performed on archaeological materials. However, again, the inquiry should not go this far, as there is no statutory authority in ARPA for any of section 79.10.

Section 79.10(c) is not relevant to this inquiry, as it pertains to religious uses. Section 79.10(d), however, does derive its authority from ARPA. This section contains the regulations

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<sup>74</sup> 16 U.S.C. 470dd.

<sup>75</sup> 36 CFR § 79.10(b).

related to the protection of archaeological site information, promulgated under authority from 16 U.S.C. 470hh. However, none of these site protection regulations are relevant to the question of the scientific study of archaeological materials.

Section 79.10(e), though not relevant to the current issue of scientific study, does derive its authority from ARPA. This section provides regulations for the transfer of materials as covered by 16 U.S.C. 470dd. Indeed, because of the absence of language in ARPA related to preservation, the authority for the majority of the provisions in section 79.10 appear to derive from other statutes that contribute to this portion of the CFR.<sup>76</sup> Thus, under the authority of ARPA, there is no statutory basis for restricting or controlling, in any manner, the types of scientific research that is ultimately performed on archaeological materials excavated pursuant to an ARPA permit.

There is one minor exception to this absence of limitations to the conduct of scientific research under ARPA: The research can be limited by the express terms of the ARPA permit that is issued for the excavation of the materials.<sup>77</sup> That being said, there are seldom such limitations or restrictions imposed by ARPA permits.<sup>78</sup>

The remainder of the CFR provisions that derive their authority from ARPA follow the general intentions and mandates of Congress for ARPA: The protection of archaeological materials and sites from looting. This purpose is accomplished through the issuance of permits for excavation to qualified individuals.<sup>79</sup> Although 36 CFR 296.1(a) charges Federal Land

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<sup>76</sup> These other statutes are the NHPA, the RSA, and the Antiquities Act.

<sup>77</sup> 36 CFR § 79.3(d). See also the discussion in and related to footnote 116, *infra*.

<sup>78</sup> See e.g., ARPA permit number DACW68-4-96-40, issued 7/30/96. See also the discussion in and related to footnote 116, *infra*.

<sup>79</sup> 36 CFR § 296.1(a).

Managers with the protection of archaeological resources through, among other methods, “provisions for the preservation of archaeological resource collections and data...” this provision, which appears throughout the CFR in the ARPA-authorized regulations,<sup>80</sup> appears to be aimed at the maintenance of archaeological materials through the permitting of excavations in the field. Such a purpose is supported by ARPA itself. There is no authority granted to the Secretary of the Interior or to Federal Land Managers in ARPA to support actual preservation, only protection and curation.<sup>81</sup> If, in the alternative, this regulation *is* aimed at preserving materials post-excavation, then the regulation’s authority does not derive from ARPA. In that case, it could either be an *ultra vires* regulation purportedly promulgated under ARPA authority or it could derive from other legislation that share CFR regulations with ARPA and thus is not applicable to ARPA-permitted activities. The remainder of the ARPA-related regulations in the CFR are limited to permitting for excavation and removal as well as criminal and civil violations of ARPA and are thus not relevant to the issue of scientific study of archaeological materials.<sup>82</sup> It should be noted, in light of the purposes of ARPA identified herein, that any attempt to apply non-ARPA-authorized regulations to an ARPA situation would violate the authority delegated to the agencies under the law and would be unconstitutional.

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<sup>80</sup> *E.g.*, 32 CFR § 229.1(a) and 43 CFR § 7.1(a).

<sup>81</sup> *See generally*, 16 U.S.C. 470aa *et seq.* This is further supported by the promulgation authority of 36 CFR § 296.2 that charges the agencies to create rules consistent with ARPA. Such consistency provisions would mean that the addition of preservation rules to the regulations, when not mentioned in the organic ARPA legislation, and when there is no other authority for the creation of the regulations, is an extension of the scope of ARPA beyond the powers that Congress intended to delegate to the agencies with the legislation.

<sup>82</sup> Despite the fact that the remaining regulations are not relevant to this discussion, they do appear to be (generally) authorized by the ARPA legislation.

## 2. Other Statutes that Share the Same CFR Regulations

If, as mentioned above, the authority for preservation provisions in the ARPA area of the CFR are absent from ARPA, where do these provisions come from? Do the preservation regulations in the CFR provisions shared by ARPA and several other statutes derive from the authority granted to the agencies by Congress under these other statutes or are these regulations completely without statutory support? Though these questions do not bear directly on the current debate as to the extent of scientific study allowed under ARPA, they may provide some insight into the misplaced authority cited in sources such as *Bonnichsen*<sup>83</sup> and Bruning<sup>84</sup> and are interesting from a statutory construction perspective.

### a. National Historic Preservation Act (NHPA)

Two sections of the NHPA are relevant to the analysis of the source of the preservation authority in 36 CFR 79.10: 16 U.S.C. 470a(7)(A) and 16 U.S.C. 470h-2(a)(1). Section 470a(7)(A) bolsters the fact that the “curation” provisions of ARPA and the NHPA refers to “institution[s] with adequate long-term curatorial capabilities”<sup>85</sup> and does not refer to curation as a means of restricting scientific study. It is possible that the preservation provisions in the shared ARPA/NHPA CFR regulations derive from 16 U.S.C. 470h-2(a)(1). This section authorizes “any preservation, as may be needed to carry out this section.”<sup>86</sup> This preservation is to support

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<sup>83</sup> *Bonnichsen, supra*, note 3 at 1167.

<sup>84</sup> Susan B. Bruning, *Complex Legal Legacies: The Native American Graves Protection and Repatriation Act, Scientific Study, and Kennewick Man*, 71(3) *AMERICAN ANTIQUITY* 501, 513, 515 (2006). In this recent article, Bruning implies, in several statements, that ARPA contains some standard for scientific study without citing a specific provision or otherwise providing support for the statements.

<sup>85</sup> 16 U.S.C. 470a(7)(A).

<sup>86</sup> 16 U.S.C. 470h-2(a)(1).

the preservation of historic properties “owned or controlled by [the] agency.”<sup>87</sup> This provision of the U.S.C. does not restrict the extent to which the preservation can reach and could thus be construed in the regulations as allowing for a limitation of scientific study in the interests of preservation. However, the clear intent of the provision cannot be appreciated in the absence of considering the NHPA congressional history. Because this NHPA provision does not affect ARPA, such a consideration is not undertaken here, as it is outside of the scope of this analysis.

More likely than the above provisions as a source for the preservation provisions of the shared CFR regulations is the overarching provision of the U.S.C. that applies to the NHPA and the RSA. This is 16 U.S.C. 462, which is part of Subchapter I of Chapter IA of Title 16 of the U.S.C. This section states, in pertinent part, that “The Secretary of the Interior..., through the National Park Service, shall have the following powers and perform the following duties and functions:

(a) Secure, collate, and preserve drawings, plans, photographs, and other data of...archaeological sites...

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(f) Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance...”<sup>88</sup>

Part (f) of 16 U.S.C. 462 appears to provide potential authority for the Secretary of the Interior to promulgate rules to preserve objects of archaeological significance. It is possible that

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<sup>87</sup> *Id.*

<sup>88</sup> 16 U.S.C. 462.

this provision is the source of the preservation language in the shared CFR regulations.

Although 16 U.S.C. 467 states that the provisions of 16 U.S.C. 461 through 467 “shall control if any of them are in conflict with any other Act or Acts relating to the same subject matter,”<sup>89</sup> this is not a problem with respect to ARPA. There is no actual conflict between the NHPA/RSA and ARPA. Rather, they are complimentary laws that serve a divergent purpose. The divergent purpose is the fact that NHPA and RSA essentially exist to protect our nation’s cultural heritage from destruction due to sprawl,<sup>90</sup> while ARPA exists to stem the tide of the looting of archaeological sites and the illicit trade in archaeological materials.<sup>91</sup> Because there is no conflict, there is nothing in ARPA for the NHPA/RSA’s preservation provisions to trump via 16 U.S.C. 467.

**b. The Reservoir Salvage Act (RSA)**

The RSA, as stated above, shares the same CFR regulations with ARPA. However, because its purpose is “to further the policy set forth in”<sup>92</sup> the NHPA, it really does not add any new provisions to the preservation debate. Like ARPA, the RSA is largely aimed at protecting *in situ* archaeological and historical sites from destruction due to construction activities. Because of its “preservation in the field” approach, it provides no more guidance on potential restrictions on scientific research than has already been reviewed under the NHPA.

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<sup>89</sup> 16 U.S.C. 467.

<sup>90</sup> *See generally*, 16 U.S.C. 470 (NHPA); 16 U.S.C. 469 (RSA).

<sup>91</sup> *See generally*, 16 U.S.C. 470aa.

<sup>92</sup> 16 U.S.C. 469.



**c. The Antiquities Act of 1906**

The Antiquities Act of 1906 occupies only a small amount of real estate in the United States Code, 16 U.S.C. 431-433, but the impact of this law has been substantial. From its inception in 1906 until ARPA was passed in 1979, the Antiquities Act was the dominant enforcement law for the protection of archaeological sites on federal lands in the United States.<sup>93</sup>

As an initial matter, there is no clear authority in the statutory language of the Antiquities Act that could be construed as the basis for the imposition of any restraints on the scientific study of archaeological materials. Section 431 of Title 16 outlines the President's power under the Antiquities Act. This section grants power to the President to declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned or controlled" by the United States as national monuments.<sup>94</sup> The practical implication of Section 431 is realized in Section 432. This section grants authority to the Secretaries of Interior, Agriculture, and the Army to issue excavation and artifact collection permits to qualified individuals to conduct such activity on Antiquities Act-protected lands.<sup>95</sup> The only caveat to securing such permits, assuming that the qualified individual requirement has been met, is that "the examinations, excavations, or gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings

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<sup>93</sup> See Ades, *supra*, note 32 at 604.

<sup>94</sup> 16 U.S.C. 431.

<sup>95</sup> 16 U.S.C. 432.

shall be made for permanent preservation in public museums.”<sup>96</sup> Section 433 provides for criminal and civil sanctions for violations of the Antiquities Act.

From the language of 16 U.S.C. 432, it is clear that no authority was granted to any agency to restrict or limit legitimate scientific study of archaeological materials. Indeed, the Antiquities Act clearly promotes the scientific study of archaeological materials in Section 432 by noting that sites and artifacts covered by the Act are to be preserved “with a view to increasing the knowledge of such objects.”<sup>97</sup> Thus, it is clear that whatever language may exist in the CFR to limit scientific study, that this language does not find its origins or authority in the Antiquities Act of 1906.

### **3. Relevance of the Presence of Other Statutes Sharing ARPA’s CFR Provisions**

Because the portions of the CFR in which ARPA’s regulations are found also contain regulations promulgated under the authority granted to agencies by Congress through other laws, it is necessary to identify what regulations are authorized by what laws in order to parse out what the Government can and cannot restrict under such a charge as the one in *Bonnichsen*: “subject to the type of reasonable terms and conditions that normally apply to studies of archaeological resources under ARPA.”<sup>98</sup> The previous examinations of the relevant laws are summarized here to clearly address the basis for any authority to restrict scientific activity on the part of the Government.

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Bonnichsen, supra*, note 3 at 1167.

**a. Where does authority for restricting scientific analyses come from in the CFR?**

The short answer to that question, as evidenced by the preceding analysis, is that the authority to restrict or limit scientific research on archaeological materials does not come from ARPA. ARPA is directed at the protection of *in situ* archaeological materials and sites<sup>99</sup> as well as stemming the tide of illicit excavations and trade of artifacts.<sup>100</sup> There are *no* provisions under ARPA, explicit or implicit, that provide any authority to limit scientific analyses on archaeological materials excavated pursuant to an ARPA permit.<sup>101</sup>

The authority to preserve archaeological materials post-excavation appears to derive from Chapter IA of Title 16 of the U.S.C., including NHPA. The significance of Chapter IA being the basis for the preservation provisions of the CFR is that ARPA is not included in that part of the U.S.C. and thus there is no authority to restrict scientific analyses for materials removed under ARPA. This is illustrated by an *in pari materia* analysis of the organization of the relevant parts of the U.S.C.

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<sup>99</sup> See e.g., H.R. REP. NO. 100-791 at 2. This later source that contains commentary on the purpose of ARPA is very important when viewed in context. This report was produced to support some ARPA amendments in 1988, the exact same time as both houses of Congress were considering versions of NAGPRA. See generally, Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W.VA. L. REV. 149 (2003). If, during the extensive debates on how to structure NAGPRA that lasted from 1987 through 1990, Congress had wanted some of the purposes of that legislation to spill-over to ARPA for the purposes of limiting scientific study, this would have been the logical time to do it. Instead, the House report reaffirms that the purpose of ARPA was the protection of archaeological remains from looting and vandalism, not scientific study.

<sup>100</sup> *Id.*

<sup>101</sup> The only limitation on study that may exist, as was noted in the Introduction, which does not implicate the scope of scientific study as the requirement of professional qualifications to obtain permits, discussed more fully, *infra*.

**b. An *In Pari Materia* Analysis of the U.S.C. as it Relates to CFR Authority to Limit Study**

Perhaps the most telling means of understanding the relationship of ARPA to the other provisions of the USC that relate to archaeological and historic resources is the arrangement of the Code. This arrangement illustrates the interaction of these statutes and how their authority plays out in the CFR. As stated *supra*, the most likely source of the preservation language, as it relates to archaeological materials that have already been excavated or removed, derives from Subchapter I of Chapter IA of Title 16 in the USC (NHPA). The USC, as it applies to the issues discussed herein is organized thus:

Title 16

Chapter I. National Parks, Military Parks, Monuments and Seashores

Chapter I.A. Historic Sites, Buildings, Objects, and Antiquities

Subchapter I. General provisions (§§461-468e)

Subchapter I. Reservoir Salvage Act (§§469-469c-2)

Subchapter II. National Historic Preservation Act (§§470-470x-6)

Chapter I.B. Archaeological Resources Protection Act (§§470aa-470mm)

The purpose of the preceding outline is to demonstrate that, within the USC, ARPA is situated in an entirely separate portion of the Code (i.e., Chapter I.B.) from the provisions that contain all of the preservation provisions in the CFR. Due to the substantial separation of these provisions, it is unreasonable to believe that the provisions of Chapter I.A. would represent authority to extend the preservation provisions to the divergent purposes of Chapter I.B.

#### **D. Has ARPA Ever Been Used in this Manner Before?**

A review of all of the reported case law that has cited ARPA demonstrates that the law and its attendant regulations have never been used to limit or restrict scientific research in the past. Despite the fact that no such use of ARPA has ever been made, the case law does provide some interesting insight from impartial interpreters of the law. Again, though these cases are somewhat informative as to others' impressions of Congress' intent for ARPA, none of them are directly on-point as to the issues addressed in this review.

In *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*,<sup>102</sup> Judge Atkins stated that “[t]he enactment of ARPA indicates a continuing interest by the government in protecting its archaeological resources from commercial excavation and pillage. ... It also requires that any objects taken from archaeological sites be preserved in a museum or other suitable institution for the public benefit.”<sup>103</sup> Judge Atkins cites 16 U.S.C. 470cc(b)(3) for authority for this statement. Based upon the context of the case, one dealing with the looting of a historic shipwreck, and the above analysis of ARPA, it is apparent that the “preservation” referred to in *Klein* refers to maintenance of archaeological materials in an institution for future scientific examination. The real key to the interpretation of ARPA that derives from *Klein* is the fact that Judge Atkins found that ARPA was enacted to protect archaeological resources “from commercial excavation and pillage.”<sup>104</sup> The protection of archaeological resources from pillage as the intent of ARPA was also echoed by the Eleventh Circuit in the appeal of *Klein*.<sup>105</sup>

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<sup>102</sup> 568 F.Supp. 1562 (S.D. Fl. 1983).

<sup>103</sup> *Id.* at 1567-8.

<sup>104</sup> *Id.*

<sup>105</sup> *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (C.A. 11, 1985) at n.5.

In *Attakai v. U.S.*,<sup>106</sup> Judge Carroll, for the United States District Court for the District of Arizona, commented that “[t]he Archaeological Resources Protection Act...sets up a permitting system to regulate excavation and removal of ‘archaeological resources’ from public and Indian lands.”<sup>107</sup> The telling aspect of this case is what ARPA is *not* stated to apply to. There is no discussion that suggests that ARPA was intended for any other purpose than to permit excavation and removal of archaeological resources.

In *Fein v. Peltier*, Chief Judge Moore, writing for the U.S. District Court for the District of the Virgin Islands, echoed that the purpose of ARPA is to protect “archaeological resources and sites which are on public lands...,”<sup>108</sup> applying the law to a construction project that threatened a historic archaeological site. The law was not used or suggested to be used in any manner to limit the scientific study of materials excavated from the site.

Indeed, Judge Jones, writing for the Fifth Circuit in *U.S. v. Shivers*,<sup>109</sup> clearly stated that “ARPA was enacted by Congress to protect ‘archaeological resources’ found on public lands and *to promote study and evaluation of these resources.*”<sup>110</sup> Judge Jones goes one step further to comment that “ARPA is concerned with protecting the integrity of archaeological sites...” by mandating certain qualifications for excavators prior to the issue of permits and through promoting *in situ* preservation of archaeological sites.<sup>111</sup>

Finally, in *U.S. v. Gerber*, Judge Posner, writing for the Seventh Circuit, stated that ARPA “is given over to the regulation, in the form of civil and criminal penalties, permit

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<sup>106</sup> 746 F.Supp. 1395 (D. Az. 1990).

<sup>107</sup> *Id.* at 1410.

<sup>108</sup> 949 F. Supp. 374, 379 (D.V.I. 1996).

<sup>109</sup> 96 F.3d 120 (C.A. 5, 1996).

<sup>110</sup> *Id.* at 122 (emphasis added).

requirements, forfeiture provisions, and other regulatory devices, of archaeological resources on federal and Indian lands.”<sup>112</sup> There is no mention of ARPA being intended to apply to limiting studies over the materials that have been removed from federal or Indian lands.

Although none of the cases that cite ARPA directly consider the issue of scientific study, there is some useful information that can be derived from them. The most notable component of all of these cases and what is absent from the reviews of the purposes and uses of ARPA is the fact that none of them find any portion of the law to apply to anything more than the protection of archaeological resources from looting and unauthorized excavation. There is *no* extension of ARPA, even in these unbiased reviews of the law, to a law that limits or restricts, or indeed has anything to do with, scientific analysis once resources have been removed from their *in situ* locations. The one inclination towards anything related to scientific study in this line of cases came from Judge Jones’ statement that the entire purpose of the protection provisions in ARPA is “to promote study and evaluation of [archaeological] resources.”<sup>113</sup> This assessment of ARPA is consistent with the congressional intent as well as the statute and its attendant regulations that archaeological resources must be protected *from* looters *for* analysis using currently accepted scientific standards or *in situ* preservation.

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<sup>111</sup> *Id.* at 123.

<sup>112</sup> 999 F.2d 1112, 1114 (C.A. 7, 1993).

## **V. Discussion**

### **A. ARPA Does Not Provide for the Limitation of Scientific Study**

Based upon the analysis of ARPA's congressional history, the statute, the regulations, and the case law, there is no existing authority, under ARPA, to limit or restrict scientific analyses of archaeological resources. As has been belabored at length above, ARPA was created to compensate for the shortcomings of the Antiquities Act of 1906 to stem the tide of the looting of archaeological sites on federal land and Indian land and the illicit sale of the stolen resources.

There is absolutely no indication, in any of ARPA's record, whether implicit or explicit, that the law was ever intended to interfere with the scientific study of this nation's past. Despite the vague language and a reference to "preservation" in ARPA, the presence of the term was not intended to restrict analysis under ARPA, but rather to ensure that a proper repository for resources removed pursuant to an ARPA permit is present before such removal.

Although some of the regulations in the CFR are shared by several laws, not all of these laws apply to all scenarios. However, though some of the regulations that ARPA shares with such laws as the NHPA and the RSA may contain provisions for limiting some measure of study, such limitations are not authorized by Congress under ARPA. Due to the fact that these regulations are shared by several laws, it is easy to understand how a less-than-complete analysis of the congressional intent for and organizational structure of ARPA could lead to a supposition that authority does exist to limit scientific study, but this complete analysis has demonstrated that assertion to be without merit.

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<sup>113</sup> 96 F.3d at 122.



**B. A Chevron/Vogel Analysis of Regulations Under Purported ARPA Authority to Limit Scientific Study Do Not Pass Muster**

As noted in Part II, *supra*, there is *no* language in ARPA or its authorized regulations that explicitly limits scientific study of archaeological materials nor has there been any clear attempt by any agency to promulgate regulations purporting to confer such authority. The analysis herein, which examines whether some implicit authority exists in ARPA, exists solely to test the statement of Judge Jelderks in *Bonnichsen*<sup>114</sup> and to assess the agencies' powers to so regulate.

A *Chevron* analysis of regulatory authority begins with the following question: Has Congress has directly spoken to the issue at hand?<sup>115</sup> The answer to this question, as has been belabored herein, is “no.” The other component of this inquiry, which is triggered by an answer in the negative to the above question is whether the agency's action is based on a permissible construction of ARPA.<sup>116</sup> Because, as discussed fully, *supra*, the purpose of ARPA is to preserve archaeological materials *for* study and not to protect them *from* study, this necessarily leads to a conclusion that a regulation to limit scientific study would *not* be based on a permissible construction of ARPA.<sup>117</sup> Based upon the foregoing analysis, it is clear that, under the language of ARPA as it has existed since 1979, any attempt, whether by promulgating a regulation or by purporting to act pursuant to an implicit grant of authority in the law or its

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<sup>114</sup> *Bonnichsen, supra*, note 3 at 1167.

<sup>115</sup> *Chevron, supra*, note 13 at 840.

<sup>116</sup> *Id.* at 842.

<sup>117</sup> It is very likely that agencies do not even have the power to insert unreasonable limitations to scientific study into ARPA permits as the terms of those permits. This probability is consistent with the fact that ARPA is intended to promote research, not stifle it. Although unreasonableness would likely be a case-by-case question for permitting, agencies with permitting authority under ARPA should tread lightly on injecting any limitations to scientific study into their permits, as such activity is likely not in line with Congress' intent for the legislation and would not be supportable on appeal.

regulations, by an executive agency to limit scientific study under ARPA would not pass muster as a valid agency activity under a *Chevron* analysis.

As if a failure to pass muster under a *Chevron* analysis is not enough, an attempt by an executive agency to limit scientific study pursuant to some perceived authority under ARPA would similarly fail under a *Vogel* analysis. The *Vogel* decision closely examines Congress' intent for passing legislation to determine the reasonableness of agency actions.<sup>118</sup> This analysis begins with the question of whether or not an agency is due deference for its actions.<sup>119</sup>

Under *Vogel*, in order for an agency to gain deference to its actions from a court, it must be clear that the action or regulation at issue implements the congressional mandate of the organic law.<sup>120</sup> ARPA was enacted by the 96<sup>th</sup> Congress to stem the tide of illicit excavations and the illicit trade in archaeological artifacts, nothing more. As is clear from the analysis herein, if any part of ARPA relates to scientific study, it would have to be said that the law supports the preservation of archaeological materials *for* study in order to enhance the public's understanding of human history in the United States, *not* to limit that study. Thus, any regulation or action by an agency to limit the scientific study of archaeological materials is in clear contravention of the mandate of Congress under ARPA and should not be afforded any deference by a court.

Another part of the *Vogel* analysis examines the law at issue through its legislative history, an *in pari materia* analysis, and for its harmony with the congressional purpose to

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<sup>118</sup> See generally, *Vogel, supra*, note 17.

<sup>119</sup> *Id.* at 24.

<sup>120</sup> *Id.*

determine whether an agency has the authority to act as it has.<sup>121</sup> Based on the clear evidence that there is no support for the limitation of scientific study in ARPA's legislative history or from an *in pari materia* perspective, it must be concluded that no such authority exists. It would be difficult to argue that a regulation or a ruling by an agency to limit scientific study is in harmony with a law that is intended to preserve archaeological materials *for* such study. Thus, such agency actions must fail this part of the *Vogel* analysis as well.

Finally, the *Vogel* Court noted that a regulation need not be sustained merely because it is not technically inconsistent with the organic legislation if it is fundamentally at odds with the congressional design for the law.<sup>122</sup> Without seeing an actual regulation that limits scientific study, it is impossible to know if it would be technically inconsistent with ARPA or not. However, limiting scientific study *is* clearly at odds with the congressional design to make archaeological materials available for study. Clearly, such a regulation should not be sustained due to its contravention with Congress' intent for ARPA.

## **VI. Conclusions**

It is apparent from the cases cited herein as well as others that ARPA has been successful in the prosecution of looters of archaeological sites on federal and Indian lands. It has served this purpose fairly well. Even if it has not stemmed the tide of looting and the illicit trade in antiquities, it has provided prosecutors with a useful tool in their arsenal to bring those who attempt to profit from the pillaging of the nation's past by bringing them to justice. In this

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<sup>121</sup> *Id.* at 25.

<sup>122</sup> *Id.* at 26.

regard, ARPA serves its purpose to the limit feasible under strained governmental budgets and in an area where it is difficult to catch offenders.

What is also apparent from the extensive analysis herein is that ARPA was never intended to lower science to the level of the criminal activity that ARPA exists to protect against. Rather, ARPA is appropriately, as largely penal legislation, silent on matters of the scientific study of archaeological remains. Indeed, it can be inferred from the analysis above that ARPA was intended to promote scientific study by protecting specimens from theft.

Yet another fact stemming from the conclusion that ARPA does not grant the authority for the government to limit scientific study is implicit in the results of the analysis herein. Whether the 96<sup>th</sup> Congress realized it or not, it created legislation that, through its avoidance of providing executive agencies with the authority to limit scientific study, insulates scientific research from political pressure that may be exerted by the ruling political party at any given time. This sort of academic freedom is essential to the conduct of unbiased science and must be maintained throughout any future tweaks to the substance of ARPA.

The only way archaeological materials excavated pursuant to an ARPA permit can be restricted as to scientific study is if those materials also fall under the types of materials covered by NAGPRA.<sup>123</sup> This small universe of NAGPRA-covered archaeological materials is also not de facto off-limits to study. Such study must merely be carried out pursuant to the terms and conditions provided for in that law. If NAGPRA does not apply to archaeological materials, then there are no restrictions to the limits of scientific study, certainly none under ARPA.

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<sup>123</sup> See generally, 25 U.S.C. 3001 *et seq.* for a complete picture of what is covered by NAGPRA. It is doubtful that even NAGPRA imposes restrictions on culturally unidentifiable remains and the extent to which any

What then is the meaning of Judge Jelderks' charge in *Bonnichsen* that the Kennewick Man remains were to be made available for study "subject to the type of reasonable terms and conditions that normally apply to studies of archaeological resources under ARPA"?<sup>124</sup> First, because Jelderks found, and the Ninth Circuit agreed,<sup>125</sup> that NAGPRA does not apply to Kennewick Man, the NAGPRA limitations for scientific study noted above do not apply. Because, per this analysis, the federal agencies charged with enforcing ARPA cannot place limits on scientific study, there would seem to be nothing left to limit the study of Kennewick Man.

Perhaps Jelderks' language can be interpreted to mean that the remains should be afforded respectful study. This should not be a problem, as all of the scientists analyzing the remains are bound by ethical codes requiring them to do just that.<sup>126</sup> Perhaps he was simply referring to the fact that the Kennewick Man remains should be subject only to the types of testing that are standard for such remains in the fields of archaeology and physical anthropology.<sup>127</sup> This would seem the logical interpretation. Based on the ARPA standard that permits are to be issued only to "qualified professionals," one would expect these professionals to follow the conventions of analysis within their respective fields of study. Thus, it seems that

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such restrictions may be applied under the remainder of the law have yet to be fleshed-out in litigation. This author takes no position herein regarding the presence or absence of such limits in NAGPRA.

<sup>124</sup> *Bonnichsen, supra*, note 3 at 1167.

<sup>125</sup> See generally, *Bonnichsen v. U.S.*, 367 F.3d 864 (C.A. 9, 2004).

<sup>126</sup> See generally, Register of Professional Archaeologists, Code of Conduct and Standards of Research Performance, URL: <http://www.rpanet.org/>, accessed Oct. 4, 2006; American Association of Physical Anthropologists, Code of Ethics of the American Association of Physical Anthropologists, URL: <http://www.physanth.org/positions/ethics.pdf>, accessed Oct. 4, 2006; American Anthropological Association, Code of Ethics of the American Anthropological Association, URL: <http://www.aaanet.org/committees/ethics/ethicscode.pdf>, accessed Oct. 4, 2006.

<sup>127</sup> Physical anthropology is one of the four major subfields of anthropology (the other three being socio-cultural anthropology, anthropological linguistics, and archaeology). Practitioners within the subfield of physical anthropology are generally considered to be experts in the area of human remains studies. See generally, Robert Jurmain, Harry Nelson & William A. Turnbaugh, UNDERSTANDING PHYSICAL ANTHROPOLOGY AND ARCHEOLOGY

Jelderks' charge was merely a guideline to the effect that the scientists studying the Kennewick Man remains should perform such tests as are reasonable (i.e., have been proven through repeated use and subjected to peer review) within archaeology and physical anthropology. Such a charge would be in keeping with the dignity and respect due to human remains, while also being consistent with ARPA's intent to preserve archaeological materials for scientific study. This would be a reasonable limitation to any analysis of archaeological materials.<sup>128</sup>

Finally, what is the source for some of the language in the Code of Federal Regulations provisions shared by ARPA, NHPA, RSA, and the Antiquities Act that appears to imply that limits can be placed on the study of certain historic/prehistoric things? It is very unclear, in NHPA, whether or not that law purports to limit some scientific research in the interest of preservation. However, if there is any such authority that subsequently showed up as a rule in the CFR, it likely derives from 16 USC 462, squarely within NHPA, and should not be applied to strictly ARPA matters, as there is no authority for such limitations in ARPA.

Based on the current analysis, it is clear that ARPA does not limit scientific study. Rather, it promotes such study in the interest of the public obtaining a better understanding of the human history of this nation through science.

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(4<sup>th</sup> ed. 1990) at 5-11.

<sup>128</sup> One final possibility is that all of the ARPA limits discussion by Jelderks was an effort merely to ensure that the study of archaeological materials remains professional and that the Kennewick Man remains not be given over to "quack-science" interpretations by such groups as the intervenors in *Bonnichsen*, the Asatru Folk Assembly. See, *Bonnichsen v. U.S.*, 969 F.Supp. 614, 618-619 (D. Or. 1997). This fringe religious group, who contend that they have revived ancient Norse religion, intervened to assert that Kennewick Man was their own descendant and thus clear evidence of an early European presence in the Americas. See, Asatru Folk Assembly, Asatru Folk Assembly: Asatru...The Way of Our Ancestors...Calling Us Home, URL: <http://www.runestone.org/flash/home.html>, accessed Oct. 4, 2006, for a discussion of the religion.