National Park Service
U.S. Department of the Interior

USING ARPA CIVIL PENALTIES

TO PROTECT ARCHEOLOGICAL RESOURCES ON PUBLIC AND INDIAN LANDS

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PREFACE*

ARCHEOLOGICAL RESOURCES PROTECTION[1]

Over the last several millennia, today's public and Indian lands have been inhabited by cultural groups who have left evidence of their activities, such as structures, food remains, pottery, clothing, and tools. Undisturbed, this evidence of prehistoric or historic human activity remains within its archeological context. When archeologists apply systematic and scientific data recovery methods to this archeological context, they can extract information about those cultures – diet, plant and animal husbandry, economy, cultural practices, tool-making and use, life-span, trade, and social stratification—and thereby enhance the public's understanding of the past.

For hundreds, and even thousands, of years, archeological resources situated on lands that came to form the United States lay where they were last used, deposited, or interred, but by the end of the nineteenth century, their vulnerability to disturbance, whether intentional or accidental, had caused them to become endangered. The disappearance of the archeological record became so acute that, in 1906, Congress passed the Antiquities Act, one of the first environmental laws and *the* first Federal law to specifically protect cultural heritage resources.

In 1979, Congress passed the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm) to, among other things, "secure for the present and future benefit of the American people the protection of archaeological resources and sites" (16 U.S.C. 470aa (b)). ARPA is a resource management law. Through statute and regulation, it provides a permitting scheme to foster cooperation between qualified researchers and archeological resources stewards, and through its enforcement provisions, the law addresses the injury to archeological remains located on public lands and Indian lands, as well as their sale, offer for sale, or transportation in interstate or international commerce in violation of state or local law.

ARPA provides several protection tools. Prohibited acts are subject to criminal punishment and/or civil penalties. ARPA's criminal enforcement provisions have been employed extensively to protect various categories of archeological resources located on public and Indian lands or, when they are sold, offered for sale, or transported in interstate or international commerce in violation of state or local law, archeological resources located on other lands inside and outside of the United States. ARPA civil penalties, on the other hand, have not been as widely utilized, even though they are an effective enforcement tool in circumstances where criminal prosecution is determined not to be the appropriate legal choice.

In order to address the underuse of ARPA civil penalties, this handbook has been developed to explain the civil enforcement provisions of ARPA, both from a legal and procedural standpoint. It is intended to be a reference for anyone considering the appropriate type of enforcement action when an act prohibited by the law occurs and a suspect is identified, and it explains how to resolve an ARPA violation that has been detected and investigated but not criminally prosecuted. For ARPA violations warranting a civil penalty, this handbook provides a step-by-step reference for initiating and completing a case.

This handbook demonstrates the usefulness of ARPA civil penalties in cases where criminal prosecution is inappropriate, unsuccessful, or for whatever reason is not pursued, as well as how to enforce the Act administratively.

WHO ARE THE INTENDED USERS OF THIS HANDBOOK?

This handbook explains the enforcement of ARPA administratively. It is an aid to informed decision making by Federal attorneys, law enforcement agents, and land managers as they proceed to enforce the prohibited acts section of ARPA (16 U.S.C. 470ee). Also, it is a step-by-step guide to the civil penalty process for the Federal land manager and legal counsel once they decide to enforce ARPA administratively.

The intended users of the handbook are all Federal departmental or agency personnel whose duties involve the protection of archeological resources located on public or Indian lands. They include law enforcement officers who investigate cultural heritage resources violations; archeologists and cultural resources professionals who assess the archaeological and commercial value of archeological resources involved in a violation, as well as the costs of restoration and repair of the resources; attorneys who enforce cultural heritage resources laws criminally or civilly; and Federal land managers who, by law, are responsible for ARPA civil enforcement.

- **Law enforcement officers** generally focus on redressing violations of law involving archeological resources by seeking criminal punishment of the offender rather than forcing the offender to make the general public or

Indian tribe (as the case may be) whole, through restitution. This handbook demonstrates the usefulness of ARPA civil penalties in cases where criminal prosecution is inappropriate, unsuccessful, or for whatever reason is not pursued, as well as how to enforce the Act administratively.

- **Archeologists and cultural resources professionals** are experts who assess, and attest to, the actual damages caused to an archeological resource by a violation of ARPA. They also provide the facts tending to prove that a resource is "of archaeological interest," as defined by the law. This handbook explains the industry standard for a reliable damage assessment—and particularly an "archaeological value" determination—capable of withstanding legal scrutiny, regardless of whether the assessment is used in a criminal prosecution and subsequent sentencing, or a civil penalty proceeding.

- **Federal land managers** – Forest Supervisors, Park Superintendents, District Managers, and State Directors – are the primary decision makers in the ARPA civil penalty process, as they issue notices of violation and civil penalty assessments. This handbook describes the ARPA civil penalty process step-by-step, and provides examples of the documents that are to be sent by the Federal land manager to the violator.

- **Lawyers** who serve as departmental or agency counsel are responsible for assisting the department or agency in pursuing an ARPA civil penalty through the administrative process, and represent the Federal land manager in administrative judicial proceedings. This handbook provides templates for legal documents that are generated during various stages of the ARPA civil penalty process, and is intended to insure that counsel effectively advises and represents the Federal land manager. In addition, Assistant U.S. Attorneys should be familiar with both ARPA's criminal and civil remedies in order to make an informed decision concerning the legal action that most appropriately addresses a violation of the Act.

ENDNOTES

*The legal form of citation is used throughout this handbook. Any text that is indented and in italic has been taken verbatim from the statute and regulations.

1. The Federal government spelling, "archeological," is used throughout this handbook, except where statute and regulation spell it "archaeological."

CHAPTER 1

The ARPA Civil Enforcement Option

1

This Peavine petroglyph was recovered from a residential yard in Reno, Nevada.
Courtesy of Debra Mathews, Special Agent, Humboldt-Toiyabe National Forest.

Introduction: The Need for Effective Archeological Resources Protection

Archeological resources are an important part of our cultural environment. They are capable of providing intellectual understandings of past human behavior and cultural adaptation, as well as stimulating emotional responses from otherwise disparate groups of people. Archeological items are also the focus of private collectors and a global commercial market.

Despite ARPA's protection provisions, the looting of, and inadvertent injury[1] caused to, archeological resources on public and Indian lands is occurring on a scale that, until recently, even Federal land managers did not fully understand. **In 2007, one of the nation's experts on archeological resources crimes concluded that, just by themselves, the lands managed by the Forest Service, National Park Service, Bureau of Land Management, and Fish and Wildlife Service suffer roughly 4,655 looting incidents per year, or over 12 incidents per day.**[2]

In order to protect this irreplaceable cultural heritage, ARPA provides for criminal punishment when violations of the Act are committed knowingly ("knowingly" refers to the requisite criminal intent). ARPA also provides for civil enforcement, through a monetary penalty, when violations are committed regardless of intent.

On the civil side, ARPA deters people from using public lands and Indian lands as they please and without permission, by making the violator strictly liable for any unpermitted action that causes damage to an archeological resource. In doing so, ARPA reinforces the principle that there are legal consequences to creating new roads, building structures, or doing whatever one wishes without the approval of the Federal land manager, thereby deterring future, unapproved actions on public and Indian lands.

Analyzing the criminal enforcement side of ARPA yields some interesting findings. If a person suspected of committing an act prohibited by ARPA is apprehended and the Department of Justice (through the Federal district office of the United States Attorney) decides to prosecute, the probability of obtaining a finding of guilt is more than 95%[3], yet approximately 94% of charged ARPA violations are only at the misdemeanor level.[4] Furthermore, approximately 32% of all purported violations of ARPA referred to U.S. Attorneys are formally declined, with the actual number of declinations being even larger, as not all referrals are formally reviewed and declined.[5] Several reasons might account for these declinations [6] but, regardless of the reason, holding an ARPA violator accountable for their actions is one goal of justice, with a second being the deterrence of looting. Consequently, when ARPA violations are not effectively prosecuted, the deterrent effect of ARPA is eroded, and this lack of deterrence, in turn, breeds more looting and devastation of archaeological resources.[7]

In addition, the lack of enforcement engenders the belief that the public, generally, can do as it pleases on public and Indian lands.

While giving cause for concern, a declination to prosecute an ARPA violation criminally does not preclude a Federal land manager from pursuing the matter. Much of the time, a case can be pursued administratively, using ARPA's civil penalty provisions. ARPA civil penalties offer the well-informed land manager an opportunity to recover actual damages for the injury and destruction caused to the archeological resource, and to further two important purposes of justice – deterrence and education.

Why Utilize the Civil Enforcement Option?

Why would a Federal land management agency resort to an ARPA civil penalty instead of a criminal prosecution charging ARPA, theft of government property (18 U.S.C. 641), or injury to government property (18 U.S.C. 1361), or even instead of a citation for violation of a regulation promulgated under the agency's general authority (such as 36 C.F.R. 2.1 or 261.9(g)-(h))? Here are six reasons why an ARPA civil penalty might be a good option:

1. **A civil violation of ARPA is a strict liability offense.** In the last several years, particularly in Federal courts located in the Ninth Circuit, proving the element of intent in a criminal prosecution for violation of ARPA has become more onerous for the United States.[8] By contrast, proving a civil violation of ARPA does not require any proof of intent. Strict liability means the department or agency still must prove that the suspect committed a prohibited act on public or Indian land and that the damages caused by the suspect are in the amount of the proposed penalty, but need not prove the intent of the violator in committing the act. Thus, both the person who unintentionally commits an act prohibited by ARPA and the person who intentionally engages in offensive conduct, but whom the United States Attorney declines to prosecute criminally, may be assessed an ARPA civil penalty.

2. **Acts prohibited by ARPA that are committed negligently or inadvertently may only be pursued through the civil penalty process.** When a person injures or destroys archeological resources through negligence or inadvertence, the recovery of actual damages through a civil penalty is the only means by which ARPA is able to redress the violation conduct, as criminal guilt requires proof that the offender knew facts making the conduct illicit. An example of a prohibited act committed negligently is the contractor who, trying to cut costs or time during infrastructure development, takes a shortcut through an archeological site and causes injury to the site.

Hundreds, and perhaps thousands, of incidents resulting in unintentional damage to archaeological resources occur each year. Many of them go undetected, but many are not pursued because the agency is not familiar with the ARPA civil penalty process, doesn't realize that ARPA also redresses unintentional acts, or simply believes that inadvertent damages ought not to be recovered under ARPA.

3 **No criminal statute mandates the recovery of actual damages for a violation involving an archeological resource.** In general, criminal remedies focus on punishment rather than restitution. Consequently, the criminal provisions of ARPA provide for incarceration, the payment of fines to the U.S. Treasury, and forfeiture of the instrumentalities of the crime, but they do not mandate payment of actual damages. In the case of a plea in a criminal case involving only an ARPA charge, a court may order restitution, but only to the extent that it is agreed to by the United States and the defendant. In 2002, the United States Court of Appeals for the Tenth Circuit held, in *U.S. v. Quarrell* (310 F.3d 664), that if a defendant is convicted of an offense codified in Title 18 of the United States Code (the Criminal Code) involving an archeological resource, rather than a conviction under ARPA alone (ARPA is in Title 16 of the United States Code (historic preservation)), then the offense qualifies for mandatory restitution under the Mandatory Victim Restitution Act (18 U.S.C. 3663A), with the United States Government being the victim. Even so, with respect to the amount of restitution, the court in *Quarrell* would not agree to include the "archaeological value" of the resources involved in the offense.[9] Similarly, citations for damage to archeological resources in violation of regulations promulgated by agencies (pursuant to their general authority) permit fines of up to $5000, but do not permit full restitution for injury caused to the resources. By contrast, ARPA civil penalties, which are based on "archaeological value" or "commercial value" plus the "cost of restoration and repair," provide for the recovery of actual damages caused by the violation.

4 **ARPA civil penalties may be used by the Federal land manager to restore, repair, and rehabilitate archeological resources involved in a violation.** ARPA alone does not grant Federal land managers the authority for the retention and use of civil penalties. The Miscellaneous Receipts Act, 31 U.S.C. 3302, requires that an agency deposit moneys received into the General Treasury, unless they have specific statutory authority authorizing its retention by the agency. Pursuant to 16 U.S.C. 579 (c), the Department of Agriculture is permitted to retain an ARPA civil penalty and use it to redress the injury caused to the resource. Amounts in excess of funds used for rehabilitation must be deposited to the United States Treasury. The National Park Service may retain and use civil penalties to reimburse response or assessment costs and to restore, replace, or acquire the equivalent of resources which were involved in the violation, under the authority of 16 U.S.C. 19jj-3, when the sums are equal to or less than the actual damages.[10] Under 16 U.S.C. 19jj-3(c),

amounts that exceed actual damages and are penalties, such as double amounts for a second offense, must be sent to the General Fund of the United States Treasury. Thus, obtaining funds to maintain archeological resources in perpetuity for the public benefit and to redress injury to these resources serves as an incentive to land managing agencies to pursue ARPA civil penalties when appropriate.

5 **The ARPA civil penalty process offers time and resource efficiencies over criminal prosecution.** The legal standard of proof in a civil case requires a finding by a preponderance of the evidence, a "more likely than not" standard, while the standard in a criminal case is "beyond a reasonable doubt." Even for the Federal land manager who approaches the burden of proof in criminal and civil cases in like manner, the ARPA civil penalty process still consumes less time and requires fewer personnel than a criminal prosecution, where the freedom of the accused is at issue. First, a civil hearing, or proceeding, occurs before an administrative law judge, not a jury. Second, only two issues can be contested in a civil proceeding: the identity of the party responsible for the prohibited act and the amount of damages caused by the responsible party. A criminal case, on the other hand, might require the consideration of constitutional factors that could dwarf those two issues. Furthermore, while both civil and criminal cases can be appealed to an appellate court for review, the review of an appeal from an administrative decision is narrower in scope than for a criminal conviction.

6 **The disposition of the ARPA civil penalty matter is within the discretion of the Federal land manager.** Both the investigation of an ARPA violation by the law enforcement agent and the assessment, by the archeologist, of the damage to the archeological resources involved in the offense conduct are the same regardless of whether the case is pursued criminally or civilly. A criminal prosecution, though, is controlled by the Department of Justice, and while the department or agency has some degree of input regarding case resolution, essentially they are a crime victim. In an ARPA civil penalty proceeding, by contrast, the Federal land manager controls each stage of the case.

ENDNOTES

1. See Public Employees for Environmental Responsibility (PEER), RUINED RELICS (2002) for information on the inadvertent injury caused to archeological resources in Los Padres National Forest by construction projects, fire-prevention activities, motorized vehicle trails, cattle grazing, and recreational uses.

2. Todd Swain, *Cultural Resource Damage on the Public Lands: What the Statistics Show*, *in* YEARBOOK OF CULTURAL PROPERTY LAW 201, 216 (Sherry Hutt ed., 2007).

3. Robert Palmer, *Federal Prosecutions under the Archaeological Resources Protection Act of 1979: A Ten-Year Review (1996-2005)*, *in* YEARBOOK OF CULTURAL PROPERTY LAW 221, 225 (Sherry Hutt ed., 2007). Almost always, this verdict results from a plea.

4. Swain, supra, at 214.

5. Palmer, supra, at 227.

6. For a discussion of declinations to prosecute purported violations of ARPA and the reasons for them, see id. and Swain, supra.

7. Swain, supra, at 216, citing a personal communication from Martin McAllister, an archeologist expert on ARPA.

8. In 2000, the United States Court of Appeals for the Ninth Circuit held, in *U.S. v. Lynch* (233 F.3d 1139), that in order to prove the defendant had the criminal intent necessary to sustain a conviction for violating ARPA's prohibition on excavating, removing, or disturbing archeological resources on public or Indian lands (16 U.S.C. 470ee (a)), the United States would have to prove the defendant knew the object of the offense conduct was an "archaeological resource" within the statutory meaning of that term. Following *Lynch*, the number of purported ARPA violations formally declined for prosecution by U.S. Attorneys in districts within the Ninth Circuit due to "lack of criminal intent" increased markedly. Prior to 2000, districts within the Ninth Circuit accounted for 47% of all declinations citing lack of criminal intent as the reason for the declination. After 2000, these districts accounted for 77% of such declinations. See Palmer, supra, at 230.

9. For a discussion of restitution upon conviction of a crime involving archeological resources, see Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later*, *in* 42 DUQUESNE LAW REVIEW 221, 238-244 (2004).

10. Accounting for penalties/damages retained under 16 USC 19jj are governed by NPS Director's Order 14 (Sept. 28, 2004).

CHAPTER 2

ARPA Civil Enforcement: Law and Regulations

2

Unauthorized road on Federal land impacting an archaeological site. Pin flags mark disturbed archaeological artifacts. Courtesy of Debra Mathews, Special Agent, Humboldt-Toiyabe National Forest.

This section of the handbook highlights and annotates only the portions of the statute and regulations directly bearing on civil enforcement. For the full text of the statute and regulations, please refer to Appendix A and Appendix B, respectively.

The Statute

PURPOSE – 16 U.S.C. 470aa

a. Congress finds that:

1. archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

2. these resources are increasingly endangered because of their commercial attractiveness;

3. existing federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

4. there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

b. The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections . . . .

In this opening statement, Congress recognized the irreplaceable nature of archeological resources, their vulnerability to being stripped of their "heritage" value (which includes informational value), and the need for specific legislation to protect them. At the same time, Congress conceded that many collections of archeological resources are in private hands, and advised archeologists that engaging private collectors through education and outreach would enable them to extract information about the past from these collections. ARPA, though, does not excuse past acts of looting from public and Indian lands nor does it transfer to private individuals property which the United States holds in trust for the public or American Indians. [1]

DEFINITIONS – 16 U.S.C. 470bb

Definitions for the terms used in the statute are established in this section; below are some of them.

1. *[T]he term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest … [and] is at least 100 years of age . . . . Paleontological specimens . . . shall not be considered archaeological resources . . . unless found in an archaeological context.*

The term "archaeological interest" is defined in ARPA uniform regulations (see 43 C.F.R. §7.3(a)(1); 36 C.F.R. §296.3(a)(1); 32 C.F.R. §229.3(a)(1); 18 C.F.R. §1312.3(a)(1)). The regulations also contain an illustrative – and by no means exhaustive—list of items that are archeological resources (see 43 C.F.R. §7.3(a)(3); 36 C.F.R. §296.3(a)(3); 32 C.F.R. §229.3(a)(3); 18 C.F.R. §1312.3(a)(3)). Similarly, the statute itself contains a modest, illustrative list of archeological resources ("pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items"; 16 U.S.C. 470bb(1)). Thus, an "archaeological resource" has three attributes: 1) it is the material remains of past human life or activity; [2]) it is "of archaeological interest," meaning it is capable of providing information about past human life or activity; and 3) it is at least 100 years old. The savings provision of ARPA, at 16 U.S.C. 470kk, exempts from the statute's purview "any rock, coin, bullet, or mineral *which is not an archaeological resource*." To be considered an "archaeological resource," a rock, coin, bullet, or mineral must be associated with an archeological resource. Without anything more, an unworked rock or mineral does not provide evidence of past human activity. As for bullets and coins, they, indeed, are the remains of past human activity, but, nevertheless, ARPA exempted them as a concession to metal detecting enthusiasts. Consequently, a random coin on a lakeshore or seashore is not protected by ARPA, but a shell casing lying on a Civil War battlefield *is* protected. [2]

2. *The term "Federal land manager" means . . . the Secretary of the department, or head of the agency . . . having primary management authority over such lands.*

   Upon mutual consent, ARPA responsibilities may be delegated by a Federal land manager to the Secretary of Interior. Also, where no other agency or instrumentality has primary management authority over "public lands" or "Indian lands," the Secretary of Interior is the Federal land manager.

3. *The term "public lands" means (A) lands which are owned and administered by the United States as part of – (i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and . . . the Smithsonian Institution.*

With respect to these lands, the Federal government's territorial jurisdiction under ARPA is more limited than under the Antiquities Act (16 U.S.C. 431-433) or the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001-3013). Those laws authorize the government to carry out the statute on lands owned *or controlled* by the Government of the United States.

4. *The term "Indian lands" means lands of Indian tribes or individuals, which are either held in trust by the United States or subject to a restriction against*

alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual.

With respect to these lands, the Federal government's territorial jurisdiction under ARPA also is more limited than under NAGPRA. NAGPRA applies to "tribal land," which includes "all lands within the exterior boundaries of any Indian reservation" (25 U.S.C. 3001 (15)(A)); ARPA does not. Thus, under **NAGPRA** (25 U.S.C. 3002(c)(1)), the intentional excavation or removal of NAGPRA-protected items from tribal land requires a permit issued under section 4 of ARPA (16 U.S.C. 470cc), yet the enforcement provisions of **ARPA**, contained in sections 6, 7, and 8 of the Act (16 U.S.C. 470ee-gg), are not available to enforce the permit requirement or its terms where the land in question is "tribal land" but not "Indian lands."[3]

EXCAVATION AND REMOVAL – 16 U.S.C. §470cc

As irreplaceable archeological resources – particularly the components comprising the context for enabling relationships between deposited items to be determined—often are destroyed or injured during archeological investigation, ARPA mandates that the recovery of scientific data from archeological resources be subject to a permitting scheme, and provides prerequisites that all ARPA permit applicants must satisfy. By doing so, ARPA establishes uniform permitting standards for all authorized Federal land managers to follow. Today, the ARPA permit and permitting process have supplanted the earlier Antiquities Act permit that agencies had issued for archeological investigation pursuant to their own particularized criteria. This scheme seeks to insure that archeologists are qualified to conduct their work, and are doing so in the public interest. The Antiquities Act permitting requirement (16 U.S.C. 432) remains in effect but, following the enactment of ARPA, it applies only where the archeological activity is to be carried out on lands controlled, but not owned, by the United States, or where the activity involves an antiquity which is not an "archaeological resource," as defined by ARPA. In addition, an Antiquities Act permit remains in effect according to its terms and conditions if it both was issued before the enactment of ARPA and has not yet expired (see 43 C.F.R. §7.5(b)(4); 36 C.F.R. §296.5(b)(4); 32 C.F.R. §229.5(b)(4); and 18 C.F.R. §1312.5(b)(4)).

While this handbook does not go into detail regarding the components of an ARPA permit, both the criminal and civil enforcement provisions of ARPA require proof that the violator acted without authority. An act prohibited by ARPA and committed without a permit, or a prohibited act committed outside the scope of an ARPA permit are considered to have been committed without authority. Acting outside the scope of an ARPA permit not only subjects the actor to a civil penalty, it also is grounds for suspension of the permit, as prescribed by section 4(f) of the Act (16 U.S.C. 470cc (f)) –

Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of section 6 of this Act. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty

under section 7 of this Act against the permittee or upon the permittee's conviction under section 6 of this Act.

CUSTODY OF RESOURCES – 16 U.S.C. §470dd

Among other things, an ARPA permit contains terms controlling the custody and curation of archeological resources that are recovered pursuant to the permit. In 1989, 36 C.F.R. Part 79 was promulgated to regulate the curation of Federally owned and administered archeological collections, including resources recovered under an ARPA permit (see Appendix C). The Federal curation regulations address matters such as the location of the curation facility relative to the resources' place of discovery and removal, the physical conditions under which the resources are stored, and the preservation, security, and inventory of the resources. The regulations also mandate that data related to the resources be retained at the curation facility together with the items. ARPA also mandates that the disposition of archeological resources recovered from "Indian lands" be "subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands" (16 U.S.C. 470dd). [4]

For purposes of ARPA civil penalties, post-excavation curation provisions are as dispositive for determining a breach of the ARPA permit as are the terms governing actual excavation. Either breach can be subject to a civil enforcement action.

PROHIBITED ACTS AND CRIMINAL PENALTIES – 16 U.S.C. §470ee

The entire prohibited acts section of the ARPA statute may be enforced criminally. It reads as follows:

a. No person may excavate, remove, damage or otherwise alter or deface or attempt to excavate, remove, damage or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit . . . .

b. No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of . . . . subsection (a) of this section, or any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

c. No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

d. Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) . . . shall, upon conviction, be fined . . . or imprisoned . . . or both . . . .

By contrast, the uniform regulations governing the assessment of civil penalties (see 43 C.F.R. §7.15; 36 C.F.R. §296.15; 32 C.F.R. §229.15; and 18 C.F.R. §1312.15) allow the "Federal land manager" to assess a civil penalty *only* for an act prohibited by the uniform regulations, or for violation of a term or condition included in an ARPA permit. Not all of the acts prohibited by the statute are repeated in the uniform regulations to the Act (see 43 C.F.R. §7.4; 36 C.F.R. §296.4; 32 C.F.R. §229.4; and 18 C.F.R. §1312.4). Thus, a civil penalty cannot be assessed for an "offer to sell, purchase, or exchange" an archeological resource excavated or removed from public lands or Indian lands in violation of section 6(a) of ARPA or another provision of Federal law because, while "offer" is a prohibited act under the statute, it is not a prohibited act under the uniform regulations. Likewise, a Federal land manager could not bring a civil enforcement action for violation of section 6(c) of ARPA (16 U.S.C. 470ee (c)), as the acts prohibited by that section of the statute do not appear in the uniform regulations. [5]

CIVIL PENALTIES – 16 U.S.C. §470ff

> *a) (1) Any person who violates any prohibition contained in an applicable regulation or permit issued under this Act may be assessed a civil penalty by the Federal land manager concerned. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.*

An ARPA criminal prosecution and a civil penalty proceeding both require the United States to prove the following elements of their case [6]:

1. There is **Federal jurisdiction** – an act was committed on public or Indian land, or (*in a criminal prosecution only*) in interstate commerce, and (*in a civil penalty only*), consistent with 16 U.S.C. 470bb (2), the official bringing the action is *the* "Federal land manager" having statutory authority to act;
2. An **"archaeological resource"** was involved in the act – the property was the material remains of past human life or activities, at least 100 years old, and of "archaeological interest" (per the definition in the uniform regulations; see 43 C.F.R. §7.3; 36 C.F.R. §296.3; 32 C.F.R. §229.3; and 18 C.F.R. §1312.3);
3. The act involving the archeological resource was a **prohibited act** – in a criminal prosecution, the act violated a prohibition in section 6(a), (b), (c), or (d) of the statute or, in a civil penalty proceeding, the act violated a prohibition contained in the uniform regulation (43 C.F.R. §7.4; 36 C.F.R. §296.4; 32 C.F.R. §229.4; and 18 C.F.R. §1312.4) or an ARPA permit; and
4. The prohibited act was committed **without permission** – the conduct occurred without an ARPA permit, outside the scope of an ARPA permit, or outside the scope of any other authority to act with respect to the archeological resource in question.

In addition, there is a fifth element of proof, but it operates differently in the criminal and civil settings. In a criminal prosecution, the calculation of the "archaeological value" or commercial value of the archeological resources involved in the offense conduct, plus the cost of their restoration and repair, determines whether the violation is a felony or a misdemeanor. Likewise, the total of all three values is part of the calculation of the sentence following conviction. These values, though, do not necessarily determine a criminal fine or restitution.[7] By contrast, "archaeological value" or commercial value of the archeological resources involved in the violation conduct, plus the cost of their restoration and repair, does determine the amount of a civil penalty. These amounts constitute "actual damages" and become the civil penalty amount, thus making the penalty a restitutionary remedy, rather than a punitive one.

> *§470ff(a)(2) . . . in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person. The amount of any penalty assessed under this subsection for any violation shall not exceed any amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered.*

Any person assessed a civil penalty must receive "notice and an opportunity for a hearing." Further, the Federal land manager is authorized to "remit" or "mitigate" any civil penalty. Thus, essentially, the Federal land manager has the power to impose civil penalties and to determine whether a penalty will be assessed, and, if so, the amount proposed to be assessed – though, in the case of a first violation, the amount may not exceed the actual damages—as long as due process is provided to the respondent. The specific steps to be taken in an ARPA civil penalty action are discussed below, in the section dealing with the regulations.

Even where all the elements of a case are present, subsection (a)(3) of this section establishes one exception to the civil penalty provision. *"No penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground"* (16 U.S.C. §470ff (a)(3)). Section 6(g) provides the same limitation with respect to criminal enforcement (16 U.S.C. §470ee (g)).

REWARDS, FORFEITURE, AND DISPOSITION TO INDIAN TRIBES – 16 U.S.C. §470gg

Under §470gg(a), following certification by the Federal land manager concerned, up to one half of a fine or penalty paid to the U.S. Treasury, or $500, whichever is less, may be paid to persons who furnish information leading to the fine or penalty. Thus, if $1,000 were to be paid to the Treasury, up to $500 would be available as a reward. Although not spelled out explicitly in the statute, the Treasury must have collected the fine or penalty in order to pay the reward. Consequently, in the case of an ARPA civil penalty, the penalty must have been paid to the Treasury in order for the Treasury, in turn, to pay the reward.

Subsection (b) provides for the forfeiture of all archeological resources involved in a violation of the statute, as well as the potential forfeiture of all vehicles and equipment used in connection with the violation. Forfeiture of vehicles and equipment is at the discretion of an administrative law judge or a Federal court judge (also known as an "Article III judge"), and can be ordered when there is a determination that the resources, vehicles, or equipment were involved in a violation of the Act –

- as part of the jury verdict, in a criminal prosecution;
- as a finding and order of the administrative law judge, in a civil proceeding; or
- in a separate, civil *in rem* action brought against the item. [8]

When a violation of the Act involves resources excavated or removed from "Indian lands," subsection (c) provides that the tribe involved shall receive all civil penalties collected. Tribes likewise receive all forfeited items.

Uniform Regulations

In 1984, uniform regulations for ARPA were promulgated jointly by the Departments of the Interior, Agriculture, and Defense, and the Tennessee Valley Authority, meaning that each department or agency codified the same set of regulations in its respective title of the Code of Federal Regulations. The uniform regulations for each department or agency have been codified as follows:

- **Department of the Interior:** 43 C.F.R. Part 7
- **Department of Agriculture (Forest Service):** 36 C.F.R. Part 296
- **Department of Defense:** 32 C.F.R. Part 229
- **Tennessee Valley Authority:** 18 C.F.R. Part 1312

In addition to expanding upon some of the definitions and concepts contained in the Act, the uniform regulations set forth detailed procedures for the issuance of permits, and for civil penalty assessments and proceedings. Uniform regulations related to civil penalties
are summarized below, and are more fully explored in Chapter 4—The ARPA Civil Enforcement Process.

This section of the handbook highlights and annotates only portions of the uniform regulations directly bearing on civil enforcement. For the full text of the regulations, please refer to Appendix B.

DEFINITIONS – 43 C.F.R. §7.3; 36 C.F.R. §296.3; 32 C.F.R. §229.3; and 18 C.F.R. §1312.3

By defining the term "of archaeological interest," the definition section of the uniform regulations lends further specificity to the meaning of "archaeological resource" found in the Act. At the same time, the regulation amplifies the

illustrative classes of material remains which, if they are at least 100 years old, are archeological resources under the Act. This section also confers authority on the Federal land manager to declare "under specified circumstances" that a resource no longer is "of archaeological interest" (see 43 C.F.R. §7.3(a)(5); 36 C.F.R. §296.3(a)(5); 32 C.F.R. §229.3(a)(5); and 18 C.F.R. §1312.3(a)(5)). In 1987, the Department of the Interior issued a supplemental regulation, codified at 43 C.F.R. §7.33(b), which states:

> *The Federal land manager may make such a determination if he/she finds that the material remains are not capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics.*

Essentially, the Department of the Interior has specified that if a resource does not satisfy the definition of "of archaeological interest" in the uniform regulations, then a circumstance exists under which an Interior Federal land manager may declare it to be no longer "of archaeological interest."

PERMITS – 43 C.F.R. §§7.5-.11; 36 C.F.R. §§296.5-.11; 32 C.F.R. §§229.5-.11; and 18 C.F.R. §§1312.5-.11

Seven sections of the uniform regulations are devoted to permits, and cover applicant qualifications, application requirements, notification to Indian tribes, issuance, terms and conditions, suspension and revocation, and appeals of decisions by the Federal land manager. A permit constitutes an agreement between the permittee and the Federal land managing agency concerning the permittee's responsibilities and scope of authority to undertake scientific activity involving archeological resources on public or Indian lands. A civil penalty based on the violation of a term or condition included in an ARPA permit, thus, is a determination by the Federal land manager that the permittee has breached that agreement.

DETERMINATION OF DAMAGES – 43 C.F.R. §7.14; 36 C.F.R. §296.14; 32 C.F.R. §229.14; and 18 C.F.R. §1312.14

This regulatory section will be discussed in detail in Chapter 5 – Damage Assessments in Civil Penalty Proceedings. Briefly, the uniform regulations, promulgated pursuant to section 7(a)(2) of the Act (16 U.S.C. 470ff (a)(2)), allow a Federal land manager to assess a civil penalty based upon the following types values and costs: archaeological value, commercial value, and the cost of restoration and repair.

- **Archaeological value** is "the value of the information associated with the archaeological resource." This value is calculated by determining the cost to retrieve scientific information from the resource in its undisturbed state. "These costs may include . . . preparing a research design, conducting field work, [and] carrying out laboratory analysis . . . ."
- **Commercial value** is the fair market value of the archeological resources involved in the violation conduct. This determination is based on the condition of the artifact but for the violation.

- **Cost of restoration and repair** includes the actual costs already expended for emergency restoration and repair (for example, site stabilization), plus the costs required to be expended in the future on things such as reconstruction, stabilization, protective physical barriers, curation, reinterment, analysis, and the preparation of reports.

ASSESSMENT OF CIVIL PENALTIES – 43 C.F.R. §7.15; 36 C.F.R. §296.15; 32 C.F.R. §229.15; and 18 C.F.R. §1312.15

This section describes the procedure for a civil enforcement action. The basics of this process are outlined in Chapter 4. For the precise text of the regulations, please refer to Appendix B.

CIVIL PENALTY AMOUNTS – 43 C.F.R. §7.16; 36 C.F.R. §296.16; 32 C.F.R. §229.16; and 18 C.F.R. §1312.16

a. Maximum amount of penalty.

1. Where the person has not committed any previous violation of any prohibition in §7.4 (prohibited acts) or any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

For a second or subsequent violation of either subsection .4 of the uniform regulations (43 C.F.R. §7.4; 36 C.F.R. §296.4; 32 C.F.R. §229.4; and 18 C.F.R. §1312.4) or a term of an ARPA permit, the maximum penalty that may be assessed is double the cost of restoration and repair, plus double the archaeological or commercial value of the resources involved in the violation.

Three aspects of the determination of a civil penalty amount need to be addressed. First, the Federal land manager has discretion to determine the civil penalty assessed, meaning that *the Federal land manager **may** assess a penalty amount less than the maximum amount of the penalty, and **may** offer to mitigate or remit the penalty.* There are seven bases for mitigation listed in the regulation:

1. Agreement by the respondent to return resources removed from public or Indian lands;
2. Agreement by the respondent to assist in preservation, restoration, or protection of archeological resources on public or Indian land;
3. Agreement by the respondent to provide information to detect, prevent, or prosecute violations of the Act or the uniform regulations;
4. Hardship or inability to pay;
5. Determination that the violation was not willful;
6. Determination that the penalty proposed would constitute excessive punishment; or

7 Determination of other mitigating circumstances in reaching a "fair and expeditious assessment."

Second, when a violation is committed on Indian lands, the Federal land manager ***must*** consult with and consider the interests of the affected Indian tribe prior to proposing the mitigation or remission of the penalty (43 C.F.R. §7.16(b)(2); 36 C.F.R. §296.16(b)(2); 32 C.F.R. §229.16(b)(2); and 18 C.F.R. §1312.16(b)(2)). Similarly, prior to proposing to mitigate or remit the penalty for a violation on public lands *which may have had an effect on a known Indian tribal religious or cultural site*, the Federal land manager ***should*** consider the interests of the affected tribe(s) (43 C.F.R. §7.16(b)(3); 36 C.F.R. §296.16(b)(3); 32 C.F.R. §229.16(b)(3); and 18 C.F.R. §1312.16(b)(3)). Third, if the respondent seeks a hearing on a penalty assessment that has been mitigated or lowered, the administrative law judge ***may*** assess the full civil penalty following a hearing, as the hearing judge is not limited by the mitigated or lower penalty amount.

Supplemental Regulations

The Department of Interior promulgated Supplemental Regulations to ARPA in 1987. They are codified at 43 C.F.R. Part 7. The sections that refer to the civil penalty process are described here. For the full text of the supplemental regulations, please see Appendix B.

Besides allowing an Interior Federal land manager, in coordination with professional archeologists, to determine that sites or artifacts are no longer "of archaeological interest" and, therefore, are not "archaeological resources" under the Act, the supplemental regulations also address permitting procedures for Indian lands and permit reviews and disputes, and provide additional civil penalty procedures dealing with the hearing and administrative appeal of a decision by an administrative law judge (ALJ) (43 C.F.R. §7.37(f)). Note that the supplemental regulations dealing with civil penalties apply only to those matters which either originate in the Department of Interior or utilize the Department of the Interior's Office of Hearings
and Appeals.

The U.S. Army Corps of Engineers has promulgated additional guidance regarding implementation of the ARPA uniform regulations in their Engineer Regulations (at ER 405-1-12). This guidance pertains primarily to the issuance of permits under the authority of ARPA.

ENDNOTES

1. This section of ARPA is not inconsistent with the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001-3013), which became law in 1990. ARPA provides an enforcement mechanism to protect archeological resources located on public and Indian lands without regard to ownership of the resources themselves. NAGPRA, on the other hand, provides a process for determining the interest of individuals and tribes who are culturally affiliated with certain categories of items located on these lands, some of which might also be archeological resources.

2. ARPA's nonprohibition on the removal of coins or bullets from public or Indian land does not mean that the law allows their removal; see U.S. v. Shivers, 96 F.3d 120 (5th Cir. 1996).

3. ARPA's criminal enforcement provision in section 6(c) (16 U.S.C. 47ee (c)) *would* be available where a NAGPRA item that is an "archaeological resource" is removed without, or contrary to, an ARPA permit and is sold, offered for sale, or transported in interstate or international commerce in violation of state or local law because land ownership is not an element of a section 6(c) offense.

4. This provision is consistent with NAGPRA.

5. The section 6(c) prohibited acts likely were omitted from the uniform regulation as a practical matter. Although, as a matter of law, a party might be prosecuted criminally for a violation of section 6(c) committed on public or Indian lands, as a matter of fact, prosecutions under that section have involved lands owned by a private person, or a state or subdivision thereof.

6. In a criminal prosecution, the United States also must prove that the defendant acted "knowingly," meaning that the defendant knew facts that made their conduct illegal. Additionally, in order to convict a defendant of a felony violation of ARPA, the United States must prove that the "archaeological value" or commercial value of the archeological resources involved in the offense conduct, plus the cost of their restoration and repair, exceeds $500. Otherwise, the defendant may only be convicted of a misdemeanor offense. Following conviction, and if offered and proved by a preponderance of the evidence, the total of all three values must be used in determining the sentence if the conviction involved an archeological resource. For a discussion of sentencing, see Paula J. Desio, *Crimes and Punishment: Developing Sentencing Guidelines for Cultural Heritage Resource Crimes*, *in* LEGAL PERSPECTIVES ON CULTURAL RESOURCES 61 (Jennifer P. Richman & Marion P. Forsyth eds., 2004).

7. In the case of a plea involving *only* an ARPA violation, a court may order restitution, but only to the extent that it is agreed to by the United States and the defendant. In 2002, the United States Court of Appeals for the Tenth Circuit held, in *U.S. v. Quarrell* (310 F.3d 664), that if a defendant is convicted of an offense codified in Title 18 of the United States Code (the Criminal Code) involving an archeological resource, rather than ARPA alone – ARPA being in Title 16 of the United States Code (historic preservation) - then the offense qualifies for mandatory restitution under the Mandatory Victim Restitution Act (18 U.S.C. 3663A), with the United States Government being the victim. Even so, with respect to the amount of restitution, the court in *Quarrell* would not include "archaeological value." For a discussion of restitution upon conviction of a crime involving archeological resources, see Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later, in* 42 DUQUESNE LAW REVIEW 221, 238-244 (2004).

8. For a detailed discussion of forfeiture, see Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, *in* PRESENTING ARCHAEOLOGY IN COURT 169 (Sherry Hutt, Marion P. Forsyth & David Tarler eds., 2006).

CHAPTER 3

Case Law and Issues in ARPA Civil Enforcement

3

This talus slope is an archaeological resource on Federal land that is increasingly threatened by nearby development. Courtesy of Humboldt-Toiyabe National Forest.

To date, only a handful of legal opinions have been written by an administrative law judge or an administrative judge as a result of an ARPA civil penalty hearing or, following a hearing, an appeal from the ALJ decision; no ARPA civil penalty issue has ever reached a Federal district court. All the opinions that do exist were issued by the Office of Hearings and Appeals in the Department of the Interior. Thus, the case numbers that appear in this handbook are the docket numbers given by Interior's Office of Hearings and Appeals.

Despite the lack of extensive case law relating to ARPA civil penalties, a number of fundamental concepts exist to guide legal counsel. This section discusses those concepts.

BURDEN OF PROOF

When a proposed civil penalty proceeds to a hearing, or proceeding, the party against whom the civil penalty is assessed, the complainant, asks the administrative law judge for redress from the Federal land manager's proposed penalty. The Federal land managing agency is the respondent.

"The respondent has the burden of going forward with evidence sufficient to establish a prima facie case as to the fact of violation and the propriety of the penalty assessment. If a prima facie case is presented, the burden then shifts to complainant(s) to overcome respondent's prima facie case" (*Eel River Sawmills, Inc. v. United States*, Nos. ARPA 90-1 & 90-2 (Dept. of Interior, Office of Hearings & Appeals, Aug. 10, 1992)). Upon presentation of the evidence, the court, in its findings of fact, considers whether the preponderance of the evidence establishes the violation and the penalty assessment.

INTENT

Eel River Sawmills squarely decided the issue of intent with respect to civil liability for a violation of ARPA. In the first section of the opinion, headed "Inadvertent Acts may be Penalized under ARPA," the ALJ made clear that a comparison of the civil and criminal penalty provisions of ARPA demonstrates that Congress intended for a civil violation of ARPA to be a strict liability offense (*Eel River Sawmills*, at 6). Thus, a person may be held civilly liable under ARPA if the Federal land managing agency can demonstrate that an act prohibited by the regulations occurred on land under the management of the Federal authority assessing the penalty, and that the identified violator was the actor. No evidence of intent need be offered.

A second case, *Arizona Silica Sand Company v. Acting Navajo Area Director, Bureau of Indian Affairs* (No. IBIA 94-186-A (Dept. of Interior, Office of Hearings & Appeals, Oct. 21, 1996)), followed *Eel River Sawmills* in holding

that an ARPA civil violation is a strict liability offense. In *Arizona Silica Sand*, the complainant argued that ARPA was essentially aimed at commercial profiteering from theft of archaeological resources. This argument was rejected squarely by the ALJ, who stated that "ARPA was, in fact, designed to get everybody." Thus, the little existing case law uniformly holds that a civil ARPA violation is a strict liability offense and, therefore, proof of intent is not required.

MITIGATION

Because mitigation of the proposed civil penalty is at the Federal land manager's discretion, an administrative review might visit the issue of whether or not the Federal land manager's consideration of mitigation was arbitrary and capricious. *Eel River Sawmills* (at 10-11) discusses the factors which a Federal land manager may consider in mitigating a civil penalty.

The Federal land manager's consideration of a complainant's request for mitigation of a penalty arose in *Arizona Silica Sand* (at 10-11). In that case, the complainant argued that the agency and tribe involved had refused to mitigate the penalty, and that the ALJ should compel the agency to mitigate under 43 C.F.R. 78.16(b)(2). As the land manager is vested with discretion to mitigate or not, and the ALJ "cannot compel an exercise of discretion but may only measure whether the exercise or non-exercise thereof was arbitrary," the presiding ALJ remanded the matter to the agency to articulate a reasoned decision addressing the mitigation requested by the complainant. In a supplemental decision (Apr. 2, 1997), the ALJ reviewed the government's mitigation analysis, and found the Federal land manager's conclusion, that none of the alleged mitigating factors submitted by the complainant justified reduction of the penalty, to be reasonable.

ACTS OF A SUBCONTRACTOR

Eel River Sawmills, one of the first ARPA civil cases to reach a hearing, and the only ALJ decision to address the issue, holds that a general contractor cannot be held liable for a civil violation of ARPA due to the acts of an independent contractor working as its subcontractor. In *Eel River Sawmills*, a civil penalty was assessed by the Federal land manager against Eel River and two of its subcontractors, Mr. Brown and Western Pacific. All three parties challenged the assessment. The ALJ declared the assessment against Eel River to be invalid, holding that "Nowhere does ARPA indicate that under its provisions contractors should be held liable for the acts of their subcontractors" (at 11), but *did* uphold the assessments against the two subcontractors, as Mr. Brown and an employee of Western Pacific caused the damage to the archeological resources outside the scope of their contract.

ARPA does not specifically address the civil liability of contractors and subcontractors, so the common law of agency should step in when needed

to fill a gap. Thus, the general contractor's liability should be adjudged, as a factual matter, according to the terms of the contract and, as a matter of law, on whether or not liability for the act can be shifted to the subcontractor.

RESPONDEAT SUPERIOR

Under the doctrine of *respondeat superior*, a Latin phrase meaning, literally, "let the master answer," an employer was found liable for an ARPA civil penalty arising from violations committed by its employees acting within the scope of their employment in *Arizona Silica Sand* (at 12). Arizona Silica Sand Company (ASSC) argued that the ARPA violations were committed by their employees outside the scope of employment, asserting that they "strictly forbade" workers from activities near the archeological site in question. ASSC's theory of the case was rejected and the company was held liable, as the ALJ found no evidence of a strict prohibition on the acts in question by ASSC, and further found that the employees were doing their job when the incident occurred.

STATUTE OF LIMITATIONS

No statute of limitations for bringing a civil action to enforce ARPA appears in the Act itself, and no ALJ decision on the matter existed prior to 2002. In that year, the Office of Hearings in the Department of the Interior decided *Jack Lee Harelson v. Bureau of Land Management* (No. ARPA 97-1 (Dept. of Interior, Office of Hearings & Appeals, Dec. 6, 2002), *adopted*, No. D 2003-28 (Dept. of Interior, Ad Hoc Bd. of Appeals, Apr. 5, 2004)). Harelson argued that the BLM's ARPA civil penalty action was time-barred by the statute of limitations for judicial actions commenced by the United States (see 28 U.S.C. §2415, as well as §2462, which latter U.S. Code section was not discussed by the court). The ALJ found against Harelson, and reiterated a general rule found in earlier decisions by the Interior Board of Land Appeals, that statutory limits applying to the commencement of *judicial actions* do not limit *administrative proceedings* by the Department of the Interior (*Harelson*, at 10). Thus, *Harelson* stands for the proposition that no limitations period exists for a Federal land manager to initiate a civil enforcement action under ARPA; at least 28 U.S.C. §2415 does not provide one.

ENDNOTES

1. For further discussion of limitations periods and ARPA civil penalties, see Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later*, in 42 DUQUESNE LAW REVIEW 221, 255-256 (2004).

CHAPTER 4

The ARPA Civil Enforcement Process

4

A looters pile of flakes from site 26CK192 in Nevada.

INTRODUCTION: THE PROCESS FOR INITIATING AND PURSUING A CIVIL ENFORCEMENT ACTION

Numerous ARPA civil enforcement cases have arisen from ground disturbance which incidentally damaged or altered previously unrecorded archeological resources. Thus, virtually any unauthorized ground disturbance on public or Indian land should be investigated for possible archeological resource damage.

ARPA cases generally begin with the discovery of a prohibited act, sometimes (but not always) together with a suspect. The law enforcement investigation that follows this discovery includes, among other things, an archeological damage assessment whose purpose is to determine the archaeological value and commercial value of the archeological resources involved in the prohibited conduct, as well as the cost of their restoration and repair. If the agency wishes to proceed criminally against a suspect, it refers the matter for review to the Office of the United States Attorney. Generally, the district receiving the referral is the one in which the violation was committed. As neither the Act nor the regulations require a purported violation of ARPA to be referred to the United States Attorney for criminal prosecution, under the law, a matter could be pursued as a civil penalty from the start. Thus, if the conduct were obviously committed unintentionally, the civil process might be the initial enforcement option.

When an ARPA matter referred to the U.S. Attorney is declined for criminal prosecution, the prosecutor should be able to articulate the reason(s) for the declination and recommend to the Federal land managing agency that the matter be reviewed for civil prosecution. A recommended practice would be for the Assistant U.S. Attorney to send a declination letter to the law enforcement agent, Federal land manager, and agency counsel. As the Federal land manager has sole and exclusive authority to initiate the ARPA civil penalty process and assess civil penalties, this legal option almost always should be given consideration by the agency, in consultation with law enforcement and agency counsel.

To reiterate, the Federal land manager may assess a civil penalty against any person for any act prohibited by the uniform regulations (see 43 C.F.R. §7.4; 36 C.F.R. §296.4; 32 C.F.R. §229.4; and 18 C.F.R. §1312.4) or for the violation of any term or condition of an ARPA permit. As the acts prohibited by the civil penalty provision of ARPA are fewer than the acts prohibited by the criminal provision of ARPA—some prohibitions, such as interstate trafficking in violation of sate or local law, can only be enforced through criminal prosecution—when reviewing a matter for civil enforcement, the land manager should confirm that the act in question is, indeed, prohibited by the uniform regulations or violates the terms of an ARPA permit.

The ARPA civil enforcement process begins with the Federal land manager, assisted by agency counsel, the archaeologist, and the law enforcement agent, deciding that a civil penalty is an appropriate legal remedy. This chapter details the process for initiating and proceeding with a civil penalty. [1] It references the appropriate sections set out in the Uniform Regulations (see 43 C.F.R. §§7.14-.16; 36 C.F.R. §§296.14-.16; 32 C.F.R. §§229.14-.16; and 18 C.F.R. §§1312.14-.16).

NOTICE OF VIOLATION AND PROPOSED PENALTY

The Notice of Violation and Proposed Penalty formally initiates a civil enforcement action. The requirements for this notice are set forth at 43 C.F.R. §7.15(b), 36 C.F.R. §296.15(b), 32 C.F.R. §229.15(b), and 18 C.F.R. §§1312.15(b), and include the following:

1. *A concise statement of the facts believed to show a violation;*
2. *A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;*
3. *The amount of the penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;*
4. *Notification of the right to file a petition for relief pursuant to paragraph (d) of this section or to await the Federal land manager's notice of assessment, and to request a hearing . . . . The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.*

The notice is signed by the Federal land manager. A template for a Notice of Violation and Proposed Penalty is found in Chapter 6 (Form 1). The notice is served personally, or by certified or registered mail. Generally, the notice must include a factual statement about the violation and the amount of the proposed penalty, and must inform the addressee, or respondent, that they—

have 45 calendar days from the date of its service (or the date from the date of its service of a proposed penalty amount, if later) in which to respond. During this time the person may:

1. *Seek informal discussions with the Federal land manager;*
2. *File a petition for relief in accordance with paragraph (d) of this section;*
3. *Take no action and await the Federal land manager's notice of assessment;*
4. *Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing . . . .*

The notice might further inform the respondent that, pursuant to 16 U.S.C. 470gg (b), any and all equipment used in the commission of an ARPA violation may be subject to forfeiture upon the assessment of a civil penalty. [2]

RESPONSE TO A NOTICE

The respondent has 45 days from the date of service of a notice of violation and proposed penalty to respond. If the notice of violation and the notice of proposed penalty are sent separately by the Federal land manager, then the respondent has 45 days to respond from the date of service of the proposed penalty. The uniform

regulations (43 C.F.R. §7.15(c); 36 C.F.R. §296.15(c); 32 C.F.R. §229.15(c); and 18 C.F.R. §1312.15(c)) describe the potential responses to a notice of violation and proposed penalty:

1. *Seek informal discussions with the Federal land manager;*
2. *File a petition for relief;*
3. *Take no action and await the Federal land manager's notice of assessment;*
4. *Accept in writing, or by payment the proposed penalty, or any mitigation or remission offered in the notice, which acceptance shall be deemed a waiver of the notice of assessment and of the right to request a hearing . . . .*

PETITION FOR RELIEF

As described in the uniform regulations (43 C.F.R. §7.15(d); 36 C.F.R. §296.15(d); 32 C.F.R. §229.15(d); and 18 C.F.R. §1312.15(d)), a petition for relief to the Federal land manager must be in writing, and it must be submitted within 45 days of the date on which the notice of violation and proposed penalty was served.

The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Federal land manager within 45 calendar days of the date of service of the notice of violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

The petition for relief might indicate that the person named in the notice of violation and proposed penalty is not the person who caused the damage, that no damage occurred, or that the amount of the proposed penalty is excessive. Regardless, the Federal land manager should consider only well-supported defenses for the reduction or mitigation of a civil penalty. A decision to mitigate or not mitigate a penalty, in turn, must be well reasoned and explained in the Notice of Assessment.

INFORMAL DISCUSSIONS

The recipient of a notice of violation and proposed penalty has the right to request an informal meeting with the Federal land manager within 45 days of the date on which the notice is served. The respondent and the land manager might call on counsel or others with particularized knowledge, such as a law enforcement agent or an archeologist, to be present during the discussions. Informal discussions with the Federal land manager typically are treated as settlement negotiations. Each side should have an opportunity to state its position. A decision to contact the Federal land manager and enter into informal discussions does not constitute an admission of the violation conduct. Similarly, a penalty amount negotiated

during informal discussions is not binding on the parties if the matter proceeds to a hearing. Often, though, these exchanges lead to agreement on a compromise penalty amount. As a violation is a strict liability offense, many informal discussions do not raise the issue of liability at all, only the amount of the civil penalty. As a practical matter, where the liability of the respondent and the desire of the Federal land manager to repair or restore the injured resources are both clear, the incentive to reach agreement on a civil penalty is great.

If an agreement is reached during informal discussions, a settlement document should be drafted that includes the agreed-upon civil penalty. This document can become the basis for the Notice of Assessment.

As informal discussions might continue longer than 45 days, a Notice of Assessment should not issue until informal discussions have concluded (see 43 C.F.R. §7.15(e); 36 C.F.R. §296.15(e); 32 C.F.R. §229.15(e); and 18 C.F.R. §1312.15(e)). A template letter for memorializing informal discussions is found in Chapter 6 (Form 6), as are examples of settlement agreements that derive from informal discussions (Forms 3a and b).

ASSESSMENT OF PENALTY

Taking into consideration the petition for relief and informal discussions, the Federal land manager assesses a civil penalty. This occurs following the expiration of the time period for filing a petition for relief (45 days) or the completion of informal discussions.

1. *The Federal land manager shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.*

2. *The Federal land manager shall take into consideration all available information . . . .*

3. *If the facts warrant a conclusion that no violation has occurred, the Federal land manager shall so notify the person served with a notice of violation, and no penalty shall be assessed.*

4. *Where the facts warrant a conclusion that a violation has occurred, the Federal land manager shall determine a penalty amount . . . .*

For a first violation, the maximum ARPA civil penalty permissible is the total amount of the cost of restoration and repair plus either the commercial value or the archaeological value of the archeological resources involved in the violation conduct (43 C.F.R. §7.16(a)(1); 36 C.F.R. §296.16(a)(1); 32 C.F.R. §229.16(a)(1); and 18 C.F.R. §1312.16(a)(1)). For a second or subsequent violation, the maximum penalty is double the otherwise permissible amount (43 C.F.R. §7.16(a)(2); 36 C.F.R. §296.16(a)(2); 32 C.F.R. §229.16(a)(2); and 18 C.F.R. §1312.16(a)(2)). The method of calculating the penalty and the meaning of the terms "restoration and repair," "commercial value," and "archaeological value" are explained in detail in Chapter 5.

The Federal land manager may assess the maximum penalty allowable or anything less, as long as the decision can be supported on a rational basis. The uniform regulations prescribe factors that may be considered by the land manager in determining whether to mitigate or lower the penalty amount (43 C.F.R. §7.16(b)(1); 36 C.F.R. §296.16(b)(1); 32 C.F.R. §229.16(b)(1); and 18 C.F.R. §1312.16(b)(1)), and they include, but are not limited to:

i. Agreement by the person being assessed a civil penalty to return to the Federal land manager archaeological resources removed from public lands or Indian lands;

ii. Agreement by the person being assessed a civil penalty to assist the Federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands;

iii. Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act;

iv. Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

v. Determination that the person being assess a civil penalty did not willfully commit the violation;

vi. Determination that the proposed penalty would constitute excessive punishment under the circumstances;

vii. Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

The Federal land manager is not required to lower the penalty even when the factors listed in the regulations are present. To the extent it does not exceed the actual damages, determination of the penalty assessment is within the discretion of the Federal land manager.

The uniform regulations clearly allow the Federal land manager to consider whether the person assessed a penalty has returned the items, or will assist in the return and preservation of archeological resources or the detection of others who might be damaging sites. At the same time, the action of the violator has caused certain archeological resources to require continuing curation, and has prevented the retrieval of scientific information from other resources, so mitigation likely will not completely relieve the violator of financial responsibility. Three other factors—hardship, willfulness, or excessive punishment—consider the circumstances of the violator rather than the impact of the action on the archeological resources. If any of these factors is raised by the person assessed the penalty, the Federal land manager may look into the violator's past actions, their personal assets (even when there is no known source of income), and the magnitude of the violation conduct.

This list of factors is not exhaustive. The uniform regulations allow the Federal land manager to consider other factors appropriate to the unique set of circumstances.

Examples of mitigating circumstances are: an agreement by the violator to surrender all archeological resources under the control of the violator, which were removed from public and Indian lands but which are not the subject of the civil penalty; an agreement by the violator to provide information that will enable law enforcement agents to apprehend other bad actors and further protect archeological resources; the violator's funding of an archeological resources protection training program or other, similar educational activity; the violator's voluntary donation of time or services; and the violator's agreement to forfeit valuable instrumentalities used in the violation conduct, such as a backhoe, a large watercraft, or an airplane.

THE NOTICE OF ASSESSMENT

A written notice of assessment is served on the respondent to notify him or her of the assessment of the penalty. Templates for a notice of assessment are found in Chapter 6 (Forms 2a and 2b). The notice must include:

1. *The facts and conclusions from which it was determined that a violation did occur;*
2. *The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and*
3. *Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty. (43 C.F.R. §7.15(f); 36 C.F.R. §296.15(f); 32 C.F.R. §229.15(f); and 18 C.F.R. §1312.15(f)).*

If the respondent filed a petition for relief, the notice of assessment should discuss the issues raised in the petition and explain the basis for the assessment.[3] Where appropriate, the uniform regulation factors to consider in deciding whether to reduce or mitigate a penalty should be used. The notice of assessment also must notify the respondent of his or her right to request a hearing (and where to file the request) and to seek judicial review of any final agency action assessing a penalty.

ADMINISTRATIVE HEARINGS AND APPEALS

The respondent served with a notice of assessment must file a request for a hearing within 45 days of the date of service or the right to a hearing will be deemed to have been waived (see 43 C.F.R. §§7.15(g)(2) & .37; 36 C.F.R. §296.15(g)(2); 32 C.F.R. §229.15(g)(2); and 18 C.F.R. §1312.15(g)(2)). Hearings must be conducted in accordance with the Administrative Procedure Act (APA; 5 U.S.C. §554). The APA guarantees notice to the parties, sets reasonable timeframes for legal actions (such as a response), and sets due process standards for the conduct of a hearing and the judgment.

A hearing before an Administrative Law Judge (ALJ) is less formal than a trial before

an Article III judge in a Federal district court. There is no jury in administrative proceedings. While general agreement exists that the presentation of evidence is usually less formal than required by the Federal Rules of Evidence, basic rules of relevance and competence still apply. The ALJ expects evidence that is credible and tied to the point in controversy, so the Federal agency must present facts tending to prove the elements of the case by a preponderance of the evidence. Once the Federal agency makes its *prima facie* case, though, the hearing will focus on whether the person assessed the civil penalty (the petitioner) has met their burden of rebutting the notice. Issues of fact that might arise in a hearing are:

- Was an archeological resource damaged, altered, or disturbed?
- Did the petitioner cause the archeological resource to be damaged, altered, or disturbed?
- Are the monetary damages (and, in turn, the penalty) rationally based on the values set forth in the regulations?
- Was a vehicle or tool an instrumentality of the violation, and thus subject to forfeiture?

Although the civil penalty amount must be determined in accordance with the uniform regulations –

In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under §7.15 of this part or any offer of mitigation or remission made by the Federal land manager. (43 C.F.R. §7.15(g)(3); 36 C.F.R. §296.15(g)(3); 32 C.F.R. §229.15(g)(3); 18 C.F.R. §1312.15(g)(3); and also see Department of the Interior supplemental regulation, at 43 C.F.R. §7.37(e)(4)).

Thus, following the hearing, an ALJ may decide to impose a civil penalty greater than that assessed by the Federal land manager, up to the maximum penalty amount permissible.

A Department of the Interior ALJ's decision may be appealed to the Director of the Office of Hearings and Appeals (OHA), who may appoint an *ad hoc* board to hear the appeal pursuant to the Department's supplemental ARPA regulations (43 C.F.R. §7.37(f)(2)).[4] If OHA affirms the ALJ's decision assessing a civil penalty, OHA's action constitutes final agency action for purposes of APA review. Other departments and agencies might have hearing and appellate forums that differ somewhat from those of the Department of the Interior.

PAYMENT AND COLLECTION OF PENALTY

Following receipt of the Notice of Assessment or a decision after a hearing, unless judicial review has been sought in the United States District Court, the respondent has 45 days to pay a civil penalty. The penalty becomes a debt to the government, and is collectible through appropriate debt collection channels as required by the Debt Collection Improvement Act, 31 U.S.C. §3701 et seq.

If the debt was acknowledged by the debtor, or if partial payment was made, the agency may treat the debt as "valid", and refer it to the Department of Treasury for

administrative offset in accordance with 31 U.S.C. §3716 and the agency's regulations governing administrative offset. If, on the other hand, the debt was disputed, and the debtor's challenge failed, or the debtor did not pursue appeals, the agency can initiate its own debt collection procedures, which may even include referral to the Department of Justice for enforced collection (31 U.S.C. §3711).

The ARPA statute provides that, once the assessment becomes final, if a collection action is brought in a Federal district court to enforce a civil penalty, the validity and amount of the penalty is not subject to review (16 U.S.C. §470 ff (b)(2)). An example of a complaint to enforce a civil penalty is included in Chapter 6.

FINAL AGENCY ACTION FOR PURPOSES OF JUDICIAL REVIEW

An agency action must be final before it can be appealed to a Federal court. The uniform regulations provide that administrative action is final --

- *Where the person served with a **notice of violation** has accepted the penalty . . . the notice of violation shall constitute the final administrative decision* (43 C.F.R. §7.15(h)(1)); 36 C.F.R. §296.15(h)(1); 32 C.F.R. §229.15(h)(1); and 18 C.F.R. §1312.15(h)(1));
- *Where the person served with a notice of assessment has not filed a timely request for a hearing . . . the **notice of assessment** shall constitute the final administrative decision* (43 C.F.R. §7.15(h)(2); 36 C.F.R. §296.15(h)(2); 32 C.F.R. §229.15(h)(2); and 18 C.F.R. §1312.15(h)(2)); and
- *Where the person served with a notice of assessment has filed a timely request for a hearing . . . the **decision resulting from the hearing** or any applicable administrative appeal therefrom shall constitute the final administrative decision* (see, for example, 43 C.F.R. §7.15(h)(3); 36 C.F.R. §296.15(h)(3); 32 C.F.R. §229.15(h)(3); and 18 C.F.R. §1312.15(h)(3)).
- *Unless a notice of appeal is filed . . . the **administrative law judge's decision** shall constitute the final administrative determination of the Secretary in the matter and shall become effective 30 calendar days from the date of this decision* (Department of the Interior supplemental regulation, at 43 C.F.R. §7.37(e)(3)).
- *The **decision of the (appeals) board** on the appeal shall be in writing and shall become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered* (Department of the Interior supplemental regulation, at 43 C.F.R. §7.37(f)(2)).

The emphasis above is added to show the progression from the notice of violation, to the notice of assessment, to the decision of the hearing judge, to the decision of the administrative appeals board. The next step in challenging the ARPA civil penalty is to appeal the final agency action to a Federal district court.

APPEAL OF AGENCY ACTION IN U.S. DISTRICT COURT

The ARPA uniform regulations designate certain actions as final agency actions in order to satisfy the jurisdictional requirements for APA review. A Federal court

may be requested to review the administrative process, once final, at each stage. The Department of Agriculture, though, requires exhaustion of all administrative appeals prior to a judicial action against constituent agencies or the Secretary of Agriculture (7 U.S.C. §6912(e)). Thus, in a matter involving the Forest Service, anyone who fails to pursue an administrative appeal *at any level* forever waives his or her right to seek judicial review.

The APA grants a waiver of Federal immunity from challenges to agency action or inaction under a substantive statute, such as ARPA (5 U.S.C. §701). In an APA challenge, rather than focusing on damages, the inquiry focuses on whether the United States complied with the process for conducting the matter in a manner that was not arbitrary and capricious, an abuse of discretion, or a violation of law.[5] The APA does not create a private right of action against the United States. Instead, the court reviews the process employed by the Federal agency to determine whether the agency was arbitrary and capricious, abused its discretion, or violated the law. If a judge finds against the Federal agency, the usual remedy is to send the matter back to the agency with instructions, so that the agency can proceed without offense. One example of an APA action in the ARPA civil penalty context might be a challenge for failure to consider facts offered in mitigation of the penalty. If the court were to find the agency's inaction to be arbitrary and capricious, it would send the matter back to the agency for a determination that considered all of the evidence. In the end, the new decision could turn out to be the same as the original one, as the job of the court is to insure that the process of decision making is fair, and not to substitute its decision for that of the agency.

ENDNOTES

1. Sometimes – particularly where a business association is remorseful about the violation, or where an individual has legal representation – prior to sending a Notice of Violation and Proposed Penalty (or just a Notice of Violation, for that matter), counsel for the Federal land manager might send the violator a demand letter explaining the government's case and the respondent's potential liability. Though not expressed in the regulations, some ARPA matters might actually be resolved by a mutual agreement on restitution to the victim Federal land manager before any formal process is instituted.

2. For a discussion of forfeiture law generally, and forfeiture of archeological resources specifically, see Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, *in* PRESENTING ARCHAEOLOGY IN COURT 169 (Sherry Hutt, Marion P. Forsyth & David Tarler eds., 2006).

3. See *Arizona Silica Sand Company v. Acting Navajo Area Director, Bureau of Indian Affairs*, No. IBIA 94-186-A (Dept. of Interior, Office of Hearings & Appeals, Oct. 21, 1996), at 20.

4. For an example of an *ad hoc* board of appeals deciding the appeal of an ALJ's decision an in an ARPA civil penalty case, see *Jack Lee Harelson v. Bureau of Land Management*, No. ARPA 97-1 (Dept. of Interior, Office of Hearings & Appeals, Dec. 6, 2002), *adopted*, No. D 2003-28 (Dept. of Interior, Ad Hoc Bd. of Appeals, Apr. 5, 2004).

5. The United States is immune from suit, except when it consents to be sued. For a detailed discussion of the APA, see Sherry Hutt, Caroline M. Blanco & Ole Varmer, HERITAGE RESOURCES LAW 172-179 (1999) and Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, CULTURAL PROPERTY LAW 3-5 (2004).

CHAPTER 5

ARPA Damage Assessments in Civil Proceedings

5

Willow cradleboards or receiving baskets believed to be for newborn or infant, Northern Paiute Tribe, Nevada. Found inadvertently by a cave explorer. Courtesy, Debra Mathews, Special Agent, Humboldt-Toiyabe National Forest.

All ARPA civil penalty amounts depend on the assessment of damages to the archeological resources involved in the violation conduct.[1] The statute (16 U.S.C. §470ff (a)) provides that—

> *The amount of such penalty shall be determined under regulations . . . taking into account . . .*
>
> *a. the archaeological or commercial value of the archaeological resource involved, and*
>
> *b. the cost of restoration and repair of the resource and the archaeological site involved.*

The damage assessment is a report which, on its face, describes the resources involved in the violation conduct in detail sufficient to prove they are "archaeological resources," and applies the concepts of damage valuation in the ARPA uniform regulations to assign a dollar value to the violation. Proper investigation and documentation of an ARPA violation depends on close coordination between law enforcement and archeology staffs. The damage assessment, though, must be performed by a qualified archeologist.

To prove that the resources in question are protected by ARPA, the report must establish that:

1. they are or were located on public or Indian lands;
2. they are the remains of past life or human activity at least 100 years old;
3. they are "of archaeological interest" (which, incidentally, does not mean the same thing as "significant" in the National Historic Preservation Act);
4. they were involved in an otherwise prohibited act such as damage to, or alteration or removal of, the resource; and
5. the otherwise prohibited act was not authorized (no ARPA permit was issued, or the ARPA permit did not authorize the act, or some permit issued for another purpose did not authorize the act).

The damage assessment should incorporate earlier research and other sources of information in order to prove 2) and 3) if they relevant. Also, it should include maps and other graphic evidence to aid in understanding the location, size, and attributes of the resource, and to put the area of disturbance into perspective. Further, the damage assessment must be limited to the injury, alteration, or damage caused by the violation under consideration.

The uniform regulations describe in detail the three values or costs used in a damage assessment. They are archaeological value, commercial value, and the cost of restoration and repair. Assuming that commercial value is ascertainable, all three classes of damages should be assessed in the report.

ARCHAEOLOGICAL VALUE

The traditional concept of "value" (that is, market value or commercial value; and see 18 U.S.C. 641 for the Theft of Government Property statute's definition of "value") cannot capture all types of loss, especially when property is irreplaceable and the loss relates to the increase of knowledge and emotional attachment. As the purpose of archeology is to retrieve information from material cultural remains in order to understand past human life or activity, Congress, through ARPA, provided a method to calculate actual damages to archeological resources involved in a violation by capturing the cost for an archeologist to scientifically retrieve information from the resources but for the violation. Thus, "archaeological value" quantifies actual damages by using conventional costs for professional archeological work. These costs are capable of being replicated and explained in court, are consistent, and assure due process to violators.

- **Archaeological value** is:

. . . the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the 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. (43 C.F.R. §7.14(a); 36 C.F.R. §296.14(a); 32 C.F.R. §229.14(a); and 18 C.F.R. §1312.14(a)).

"Archaeological value" is calculated by determining the cost of retrieving scientific information which would have been obtainable **prior** to the violation. Essentially, the archeologist answers the question "What type of research would I perform if I approached this site prior to the damages caused by the violation conduct, and how much would it cost?" The calculation of archaeological value is accomplished by writing a detailed, itemized budget for conducting an archeological investigation using standard scientific methods appropriate for the size and type of resource involved in the violation, and costs used by businesses that perform professional archeological work.

The scope of work represented in the budget must be proportional to the size of the resources involved in the violation. Thus, if damage to the site consists of a single hole affecting less than a cubic yard of cultural deposit, an archaeological value based on the excavation of the entire site would not be justified. On the other hand, if the site had been bulldozed in its entirety, an archaeological value based on a full excavation of the site would be warranted. Also, if the site is located in a remote area and the excavation would require extraordinary support equipment, those support costs would be permissible, too. Other costs included in archaeological value are the preparation of a research design, fieldwork, consultation, the preparation of post-excavation reports, and the analysis and curation of items known to have been removed as a result of the violation but which never actually were recovered by the Federal land manager (the costs of analysis and curation of items actually recovered fall under restoration and repair). The narrative section of the report should explain and justify the items in the budget.

The budget should be conservative. It should not include the universal set of tests that could have been performed on the resources, but it should include the costs of those tests and procedures that, considering the resources in question, reasonably would have been included but for the violation. Thus, for example, tests for dating purposes would be reasonable where the date of the resources is in question.

COMMERCIAL VALUE

- The uniform regulations define **commercial value** as "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. (43 C.F.R. §7.14(b); 36 C.F.R. §296.14(b); 32 C.F.R. §229.14(b); and 18 C.F.R. §1312.14(b)).

Whereas archaeological value is the loss of information, commercial value is the market value of the tangible items involved in the violation, based (where ascertainable) on their condition but for the violation. "The archaeologist may solicit appraisals by artifact dealers and appraisers, museum curators, and insurance and estate appraisers, or may determine values through use of collector literature, buying guides, value guides, or prices posted on websites."[2]

The investigation team should attempt to obtain a commercial value for every archeological item involved in a violation, and should seek commercial value only from persons who, by education or experience, are experts on the commercial valuation of archeological resources of the kind involved in the violation. Sometimes, determining a commercial value can be extremely difficult, especially if the resource is not commonly offered for sale on the open market. Then, the commercial value of an analogous resource might be appropriate, but the report should explain why the commercial value of the analogous resource is being used and why it is a defensible value. The best practice for reporting commercial value is to include in the report, beside the narrative, a table listing the resources individually, along with their commercial value and summary documentation to support the value.

RESTORATION AND REPAIR

In addition to either archaeological value or commercial value, the costs of restoration and repair of the archeological resources involved in the violation are recoverable in a civil penalty. The uniform regulations define the costs of restoration and repair as:

> *. . . 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, including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

7. Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager;

8. Preparation of reports relating to any of the above activities.

(43 C.F.R. §7.14(c); 36 C.F.R. §296.14(c); 32 C.F.R. §229.14(c); and 18 C.F.R. §1312.14(c)).

EMERGENCY RESTORATION AND REPAIR

Emergency restoration and repair costs are costs that already have been incurred. They include, but are not limited to, the archeologist's field investigation of the violation, stabilization of archeological sites and artifacts, reconstruction of structures, ground contouring, construction of barriers, the salvage of information from resources whose loss is threatened by the violation, collection and cataloguing of resources or artifacts at the time of the investigation, and preparation of the damage assessment report and other reports related to these tasks. These costs *do not* include the cost of law enforcement staff. An example of emergency restoration and repair is the stabilization of an archeological site by lining holes caused by the violation with a material that contrasts with areas unaffected by the violation, measuring fill material, and then backfilling the holes.

Emergency restoration and repair costs can be itemized in a separate cost sheet. Alternatively, they may be combined with the other restoration and repair costs.

PROJECTED RESTORATION AND REPAIR

The projected costs of restoration and repair are the foreseeable costs that the violator has caused the Federal land manager to incur through the violation conduct. These costs include, but are not limited to, the curation of artifacts pursuant to Federal curation regulations (36 C.F.R. Part 79), consultation and repatriation pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001-3013), and reinterment.

In determining the foreseeable costs of restoration and repair, the archeologist must provide a detailed budget and justification for each item in the work plan, and must never speculate. The itemized costs of things such as salaries, materials, and equipment, as well as the particular actions to be undertaken by the Federal land manager should be based on current industry standards. Also, a review of cost determinations by another expert (who might be the case agent, an attorney, a contractor, or another archeologist) might be useful in corroborating the projected costs of restoration and repair.

THE SAA STANDARDS FOR THE DETERMINATION OF ARCHAEOLOGICAL VALUE

The Society for American Archaeology (SAA) has developed professional standards to guide archeologist assessors in determining the archaeological value of archeological resources involved in a violation of ARPA.[3] There are four of them, and they address the steps in preparing a damage assessment.[4]

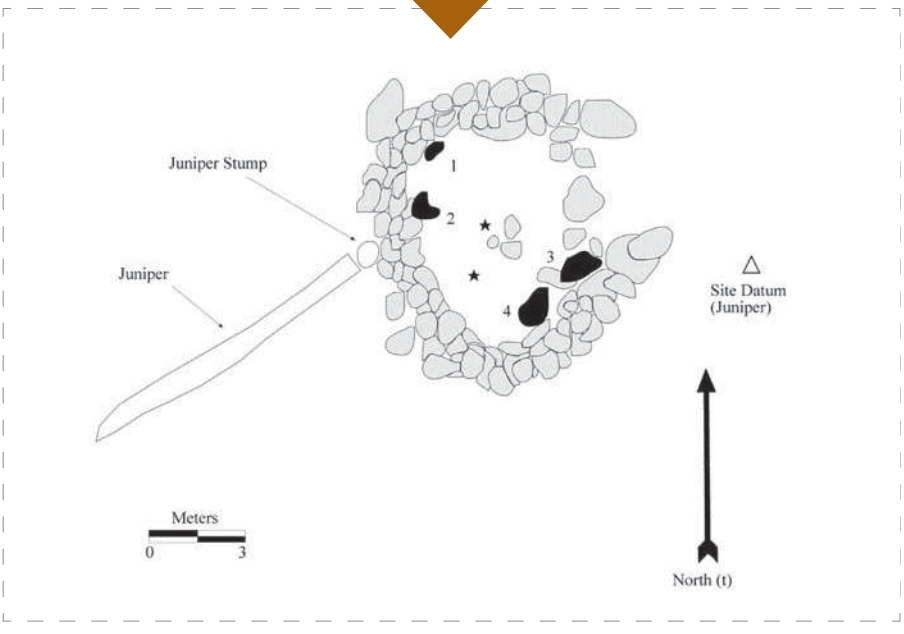
Standard 1: Identification of the Archaeological Resource(s) Involved in the ARPA Violation.
This standard provides four types of factors for the archeologist to consider in the identification of the resource. The factors focus on the physical attributes of the resource, evidence of the violation, comparative information about similar resources, and other sources of information that contribute to scientific knowledge.

Standard 2: Scale of Scientific Information Retrieval to be Used in Determining Archaeological Value.
This standard assists professionals in determining the appropriate scale for "the costs of the retrieval of the scientific information which would have been obtainable prior to the violation" (43 C.F.R. §7.14(a); 36 C.F.R. §296.14(a); 32 C.F.R. §229.14(a); and 18 C.F.R. §1312.14(a)). According to Standard 2, "the scale of scientific information retrieval must be proportional to the nature and extent of the prohibited conduct." The standard provides that, when the context of the archeological resource is not ascertainable with specificity, the scale for determining archaeological value is based on standard excavation units which, at minimum, are coequal with the extent of the disturbance. If, on the other hand, the context *can* be determined, the standard archeological unit used to examine contexts of that particular type is employed.

Standard 3: Methods of Scientific Information Retrieval.
This standard holds that methods of information gathering specified in the value determination should be appropriate to the scale of the archeological units used. Methodologies should be the ones normally used with respect to similarly situated archeological resources, and should be proportional to the prohibited conduct.

Standard 4: Scientific Information Retrieval Standards.
Standard 4 suggests that the methods for information retrieval used in the value

Maps and diagrams are important tools to include in a damage assessment. (courtesy of Tim Canaday, Archaeologist, Salmon-Challis NF, formerly with Klamath Falls Research Natural Area, BLM.)



determination should meet government agency standards as well as "current and customary professional standards appropriate to the archaeological resource . . . context, and the standard archaeological unit in the region." Government agency standards include the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.[5]

CONCLUSION

The damage assessment report is the most important document generated for use in an ARPA civil enforcement case. It is relied upon by the Federal land manager to provide the valuation of damages leading to the penalty assessment and final judgment. Often, liability for a civil ARPA violation is not contested at all. If a challenge occurs, it most likely involves the penalty amount based on the damage assessment. Consequently, anyone involved in investigating ARPA violations and assessing archeological resource damages must approach the report with due care. Conservative estimates of projected costs are recommended as the best way to create defensible damage assessments that are not vulnerable to claims of inflation. Furthermore, review of the draft damage assessment for factual accuracy, legal sufficiency, and reasonableness by other competent archeologists, law enforcement personnel, and attorneys involved in the case is advised.

ENDNOTES

1. See Guy Prentice, *The Archaeological Damage Assessment Report*, *in* PRESENTING ARCHAEOLOGY IN COURT 85 (Sherry Hutt, Marion P. Forsyth & David Tarler eds., 2006) for useful, practical information on preparing a damage assessment report, including stylistic rules, organizational tips, and detailed explanations of requirements for each section of the report.

2. Id., at 99.

3. Society for American Archaeology, *Professional Standards for the Determination of Archaeological* Value (2003), *available at* http://www.saa.org/goverment/ARPAstandards.pdf.

4. For an overview of the SAA Standards and examples of how they are applied, as well as a primer on archeological damage assessment, see Martin E. McAllister, *The Society for American Archaeology Professional Standards for the Determination of Archaeological Value: Solving the Archaeological Value Determination Problem in ARPA Cases*, *in* PRESENTING ARCHAEOLOGY IN COURT 67 (Sherry Hutt, Marion P. Forsyth & David Tarler eds., 2006) and Martin E. McAllister, *Archeological Resource Damage Assessment: Legal Basis and Methods* (Archeology Program, National Park Service, Technical Brief 20, 2007), *available at* http://www.nps.gov/archeology/pubs/techBr/TCH20.htm.

5. National Park Service, The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 Fed. Reg. 44,716 (1983), *amended and annotated at* http://www.nps.gov/history/local-law/arch_stnds_0.

CHAPTER 6

Forms

6

This chapter includes examples of documents that might be used in the ARPA civil penalty process. They serve as illustration and guidance, and are not intended as limitations on ARPA civil penalty practice. They include the following:

Form 1	Notice of Violation
Form 2a	Notice of Assessment - Review of Petition for Relief Included
Form 2b	Notice of Assessment - No Petition for Relief Filed
Form 3a	Settlement Agreement - Civil Penalty
Form 3b	Settlement Agreement - Includes Civil Penalty and Volunteer Service
Form 4a	Letter and Stipulation to Dismiss Case Following Mediation
Form 4b	Stipulation to Dismiss Without Prejudice
Form 5	Notice of Intent to Seek Forfeiture
Form 6	Letter Confirming Agreement to Conduct "Informal Discussions" and Extension of 45-day Deadline to File Petition for Relief

Form 1 : Notice of Violation

NOTICE OF VIOLATION
Under the Archaeological Resources Protection Act of 1979
(16 U.S.C. 470ee (a))

CERTIFIED MAIL–RETURN RECEIPT REQUESTED

Notice To:	First Corporation 123 Melarky Street Winnemucca, NV Attn: Mr. _____
Federal Land Management Agency:	USDA–Forest Service, Intermountain Region Humboldt-Toiyabe National Forest Santa Rosa Ranger District
Federal Land Manager:	R. Vogel, Forest Supervisor
Violation:	Damage, alteration or disturbance of archaeological resources located on National Forest System (NFS) lands in violation of the Archaeological Resources Protection Act 16 U.S.C. 470ee and 36 C.F.R. 296.4(a).

Please take note that on or about July 16, 2001, you, your employee, or agent operated a D-7 Cat to remove a stock truck and trailer, registered to First Corporation, which had overturned off of the North Fork Road on the Santa Rosa Ranger District, Humboldt-Toiyabe National Forest, Nevada. You, your employee, or agent operated the D-7 Cat to move the overturned truck and to open a new road segment around the area of the overturned truck. You are hereby notified that the above described actions damaged disturbed, excavated, or otherwise altered archaeological resources on National Forest System (NFS) lands administered by the U.S. Department of Agriculture, Forest Service. The bulldozing work damaged or altered a prehistoric archaeological site now known as HM-2687. In statements made to U.S. Forest Service Law Enforcement Officers, you, your employees, or agents admitted that you instructed Mr. R. to use earthmoving equipment to remove the overturned truck from near the North Fork Road. The Forest Service investigation, which included a review by a qualified land surveyor, reveals that the bulldozing and road bypass work was done near the center of the NW 1/4 of Section 19, Township 45 North, Range 41 East, MDM, Nevada, and this parcel is National Forest System Land, administered by the Humboldt-Toiyabe National Forest. This action on NFS lands was not authorized by the Forest Service.

Damage to a prehistoric archaeological site, as described above is a violation of the Archaeological Resources Protection Act, 16 U.S.C. 470ee, and et seq. The site has been disturbed in an area of approximately .12 acres. The Forest archaeologist's assessment of damages is detailed in the attached report, entitled "Archaeological Damage Assessment Report, HM-03-0893, and The Unauthorized Blading of Prehistoric Archaeological Site HM-2687 on the North Fork Road".

A penalty is proposed against you for violation of 16 U.S.C. 470ee (a) and 36 C.F.R. 296.4(a) in accordance with the civil penalty procedures set forth in 16 U.S.C. 470 ff and 36 C.F.R. 296.15. The proposed penalty is $10,434.00, which represents the archaeological value plus the cost of restoration and repair determined pursuant to 36 C.F.R. 296.14. A Notice of Violation for this offense has also been served upon Mr. R. Please also be advised that under 16 U.S.C. 470gg (b), any and all equipment used in the commission of this violation may be subject to forfeiture upon the assessment of a civil penalty. Specifically, the D-7 Cat bulldozer used in the commission of this offense may be subject to forfeiture under the Act.

Please be further advised that under item 10 of your Term Grazing Permit Number XXXXX issued by the Humboldt-Toiyabe National Forest, you agreed to the following condition: "The permittee will pay the United States for any damage to its land or property, including range improvements, resulting from negligence or from violation of the provisions and requirements of this permit or any law or regulation applicable to the National Forest System." Because of this agreement, you are obligated to pay damages to the United States as a result of the violation described herein.

If you have insurance, we encourage you to contact your insurer with regard to this notice.

You have the following rights:

- You may seek informal discussions with the Federal Land Manager named in this notice to discuss mitigation of the proposed penalty.
- You may file a petition for relief with the Federal Land Manager under the ARPA Uniform Regulations, 36 C.F.R. 296.15(d) within 45 days of receipt of this notice.
- You may take no action and await a Notice of Assessment.
- Upon receipt of the Notice of Assessment you will have 45 days to request a hearing in accordance with 36 C.F.R. 296.15(d).
- You may accept the proposed penalty in writing or by making payment. Acceptance of the proposed penalty shall be deemed a waiver of the notice of assessment and of the right to request a hearing under 36 C.F.R. 296.15(g).
- You may also seek judicial review of any final administrative decision assessing a civil penalty, 16 U.S.C. 470 ff (b) (1), 36 C.F.R. 296.15(h).

Failure to meet the deadlines set forth in the ARPA Uniform regulations (36 C.F.R. 296 et. seq.) may constitute a waiver of rights. We encourage you to contact the Federal Land Manager at your earliest opportunity to discuss resolving this matter. All communication directed to the Federal Land Manager should be submitted to:

R. Vogel, Forest Supervisor
Humboldt-Toiyabe National Forest
1200 Franklin Way
Sparks, NV 89431

_____ _____

Forest Supervisor Date
Humboldt-Toiyabe National Forest

cc:
Santa Rosa Ranger District
R-4 Special Uses
R-4 Heritage
R-4 OGC

Form 2a: Notice of Assessment – Review of Petition for Relief Included

UNITED STATES DEPARTMENT OF AGRICULTURE	**Forest Service**	**Gila National Forest**

Date:

CERTIFIED-RETURN RECEIPT REQUESTED

Mr. Q. P. S.
Q. Pipe and Welding
P.O. Box 25
Maggie, NM 87825

NOTICE OF ASSESSMENT

Dear Mr. Q:
After a review of the allegations contained in the Notice of Violation issued to you, and a review of your petition for relief of August 31, 2000, we have determined that you are responsible for damage, alteration, or other disturbance of archeological sites located on National Forest System lands. The incident occurred when you conducted unauthorized road work, including bulldozing, widening, and other ground disturbing activities, on the Gila National Forest in order to improve access to private property located at Section 22, T .5 S, R. 15 W., New Mexico Prime Meridian. Your company, Q. Pipe and Welding, was hired by Mr. C. Cook and bulldozed, graded and widened over two miles of two track road that was known to be Forest Service land. These activities caused damage, alteration and disturbance to archaeological sites and constitute violations of the Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq., and 36 C.F.R. 296.4.

We have fully reviewed your Petition for Relief in accordance with 36 C.F.R. 296.15. The issues raised in the petition do not provide a defense to the alleged violations, nor do they provide a basis for mitigation of the initial penalty assessed.

You assert that Mr. Cook assured you that everything was done with the Forest Service and that all necessary authorizations were obtained. This is not a basis for mitigation of the penalty, since it would be unreasonable for you as a contractor not to have either obtained the permit yourself or to have reviewed the permit.

You suggest that Mr. Cook assumed total responsibility for any damage to the U.S. Forest Service. Without a commitment from Mr. Cook to indemnify you from any damage resulting from your actions, we cannot accept this as a defense to the violation.

The total amount of the penalty assessed is $323,493.86, which includes the cost of restoration and repair plus archaeological value determined pursuant to 36 C.F.R. 296.14. Please be further advised that the equipment used in the commission of this violation is subject to forfeiture under 16 U.S.C. 470gg. Furthermore, we have determined that you and

Mr. Cook are jointly responsible for the abovementioned damage and associated penalty. Please be advised that payment of this penalty may be made to the Reserve Ranger District, Gila National Forest. If you have insurance, we encourage you to contact your insurance carrier about this incident. If you would like to conduct further discussions on the potential to settle this assessment, please contact the undersigned.

In accordance with a Memorandum of Agreement between the Forest Service and the Department of the Interior for implementing administrative procedures under the Archaeological Resources Protection Act, you may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, Department of the Interior, 801 Quincy Street, Suite 300, Arlington, Virginia 22203 within 45 days of service of this Notice of Assessment. You should enclose a copy of the Notice of Violation previously sent to you and a copy of this Notice of Assessment. Your request should state the relief requested and your basis for challenging the facts alleged by the Forest Service. You should also include your preferences as to the place and date for a hearing.

A copy of the request for a hearing should be served upon the Office of General Counsel personally or by registered or certified mail, return receipt requested, at 507 25th Street, Room 205, Ogden, UT 84404.

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

_____ _____

M. Andrews Date
Forest Supervisor
Gila National Forest

Form 2a: Notice of Assessment – No Petition for Relief Filed.

NOTICE OF ASSESSMENT
Under the Archaeological Resources Protection Act of 1979
(16 U.S.C. 470ee (a))

HAND DELIVERY

Notice To:	Mr. Peter Rabbit, Mr. Chew Bone 422 Desert Drive Reno, NV 89501
Federal Land Management Agency:	USDA–Forest Service, Intermountain Region Humboldt-Toiyabe National Forest Carson Ranger District
Federal Land Manager:	Roger Clean, Forest Supervisor
Violation:	Damage, alteration or disturbance of archaeological resources located on National Forest System (NFS) lands in violation of the Archaeological Resources Protection Act, 16 U.S.C. 470ee, and 36 C.F.R. 296.4(a).
Penalty Assessed:	$25,624.00

You are hereby notified that we have determined you are jointly and severally responsible for damage, alteration, or other disturbance of archeological site(s) located on National Forest System lands. The incidents occurred when you established an unauthorized road on National Forest System (NFS) lands managed by the Carson Ranger District, Humboldt-Toiyabe National Forest, Nevada. Between approximately March, 1999 and December, 2001, you pioneered a road on NFS lands to your residence after being advised by the Forest Service that: a) the road was not authorized; and b) use of the unauthorized road was causing damage or disturbance to archaeological resources on Federal land. These activities caused damage, alteration and/or disturbance to prehistoric archaeological site 26Wa2033/ Locality 6 on NFS lands and constitute violations of the Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq., and 36 C.F.R. 296.4.

In conversations with Forest Service Law Enforcement Officers, Mr. Bone admitted using the unauthorized road, and acknowledged that he was aware of the archaeological resources. You received a Notice of Violation on March, 2004, containing a proposed civil penalty of $25,624.00 for violation of 16 U.S.C. 470ee (a) and 36 C.F.R. 296.4(a) in

accordance with the civil penalty procedures set forth in 16 U.S.C. 470ff and 36 C.F.R. 296.15. The Forest Service archaeologist's assessment of damages, detailed in a report entitled, "Archaeological Damage Assessment Report, Trespass, and Damage to Prehistoric Archaeological Site No. 26Wa2033, Locality 6" was provided to you with the Notice.

You met with the Federal Land Manager for informal discussions about the proposed penalty. During the meeting, you identified yourselves as Messrs. Bone and Rabbit. A compromise civil penalty sum was agreed upon, but you failed to sign the proposed settlement agreement, failed to pay the compromise penalty amount, and failed to respond to our follow up letters dated April 19 and June 14, 2004.

You did not file a written petition for relief under the ARPA Uniform Regulations, 36 C.F.R. 296.15(d), within the time period provided to you by the Federal Land Manager. You have not provided, nor have I found, any evidence that warrants mitigation of the proposed penalty under 36 C.F.R. 296.16(b). It is therefore my conclusion that the maximum penalty under 36 C.F.R. 296.16(a)(1) should be assessed. The total amount of the penalty assessed is $25,624.00, which is comprised of the cost of restoration and repair plus archaeological value as set forth in the archaeologist's Damage Assessment report. Payment should be made to Humboldt-Toiyabe National Forest, 1200 Franklin Way, Sparks, NV 89431, ATTN: Fiscal.

If no action is taken in response to this Notice of Assessment within 45 days of the date of service, this Notice will constitute the final administrative decision. 36 C.F.R. 296.15(h). Payment of the penalty assessed herein will be due 45 calendar days from the date of the final administrative decision. 36 C.F.R. 296.15(i). Please be further advised that any vehicles or equipment used in the commission of this violation are subject to forfeiture under 16 U.S.C. 470gg (b).

In accordance with a Memorandum of Agreement between the Forest Service and the Department of the Interior for implementing administrative procedures under the Archeological Resources Protection Act, you may file a written request for a hearing with the Hearing Division, Office of Hearings and Appeals, Department of the Interior, 801 Quincy Street, Suite 300, Arlington, Virginia 22203 within 45 days of service of this Notice of Assessment. You should enclose a copy of the Notice of Violation previously sent to you and a copy of this Notice of Assessment. Your request should state the date, the relief requested and your basis for challenging the facts alleged by the Forest Service. A copy of the request for a hearing should also be served upon the Office of General Counsel personally or by registered or certified mail, return receipt requested, at 507 25th Street, Room 205, Ogden, UT 84404.

You have a right to seek judicial review of any final administrative decision assessing a civil penalty, 16 U.S.C. 470 ff (b)(1), 36 C.F.R. 296.15(h). If you have any further questions, or if you would like to conduct further discussions on a possible compromise settlement of this penalty assessment, please contact the Federal Land Manager named below.

_____ _____

Forest Supervisor Date
Humboldt-Toiyabe National Forest

Form 3a: Settlement Agreement – Civil Penalty.

SETTLEMENT AGREEMENT

PARTIES

This Settlement Agreement ("Agreement") is made between the United States of America ("United States") and Company International Americas, Inc., 501 11th Street, Oakland, CA 94607.

PREAMBLE

WHEREAS, based upon an investigation by the U.S. Forest Service (File No. 97-04-P-0121), the United States believes that Company International Americas, Inc. damaged archaeological resources on Federal Lands on the Ashley National Forest during excavation performed at the Long Park Reservoir on or about September 23, 1997;

WHEREAS, Company International Americas, Inc. denies any liability in connection with the alleged archeological damage referenced above; and,

WHEREAS, the parties mutually desire to resolve the matter without resort to administrative proceedings under the Archaeological Resources Protection Act, 16 U.S.C. 470ee, or to litigation;

NOW, THEREFORE, in consideration of the mutually negotiated promises, covenants and obligations in this Agreement, the parties agree as follows:

TERMS OF AGREEMENT

For good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree that Company International Americas, Inc. will pay to the United States within 10 days of execution of this Agreement the sum of Eighteen Thousand Dollars ($18,000). Such payment shall be made by (insert appropriate agency information).

In consideration for payment of the settlement amount stated in paragraph 1 above, the United States releases Company International Americas, Inc., as well as its guardians, heirs, executors, administrators, assigns, parent, subsidiary, and related entities from any civil or administrative claim which the United States has or may have for or stemming from the above referenced alleged archaeological damage.

The United States agrees to waive any and all further action that may be or could have been taken as a result of the incidents that gave rise to this settlement.

This Agreement shall not be construed as an admission of liability on the part of Company International Americas, Inc.

This Agreement shall bind all heirs, executors, administrators, assigns, or successors-in-interest of the United States and Company International Americas, Inc.

Each person who signs this Agreement in a representative capacity warrants that he or she is duly authorized to do so.

UNITED STATES OF AMERICA
Department of Agriculture,
Forest Service
Ashley National Forest

Dated: _____

_____
Forest Supervisor

Dated: _____

_____
Prosecutrix _____, ESQ
Office of General Counsel
U.S. Department of Agriculture
507 25th Street, Room 205
Ogden, Utah 84401

COMPANY INTERNATIONAL AMERICAS, INC.

Dated: _____

_____
Joe Jimbob, Vice President
Company International
Americas, Inc.
501 11th Street
Oakland, CA 94607

Form 3b: Settlement – Agreement Includes Civil Penalty and Volunteer Service

SETTLEMENT AGREEMENT

PARTIES

This Settlement Agreement ("Agreement") is made between the United States of America ("United States") and George Jetson, Co-Ed Youth Organization ("Organization"), and Steven Baker.

PREAMBLE

WHEREAS, based upon an investigation by the U.S. Forest Service (Case 02-04-3404277), the United States believes that member(s) of the Organization altered, damaged or disturbed archaeological resources on Federal Lands on the Dixie National Forest while on an Organization-sponsored outing on or about August 18, 2001;

WHEREAS, George Jetson and the Organization deny any liability in connection with the alleged archeological damage referenced above; and,

WHEREAS, the parties mutually desire to resolve the matter without resort to administrative proceedings under the Archaeological Resources Protection Act, 16 U.S.C. 470ee, or to litigation;

NOW, THEREFORE, in consideration of the mutually negotiated promises, covenants and obligations in this Agreement, the parties agree as follows:

TERMS OF AGREEMENT

For good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree that the George Jetson, the Organization, and Steven Baker will pay a civil penalty to the United States the sum of Two Thousand Dollars ($2000). Such payment shall be made upon execution of this agreement by check payable to "U.S.D.A., Forest Service."

The parties further agree that the Organization will sponsor its members to provide two eight-hour days (including travel time) of volunteer labor and community service to the Dixie National Forest under the supervision of at least one adult leader and under the direction of the Forest Archaeologist. Such volunteer labor and community service will be directed toward the protection and preservation of archaeological resources on Federal land.

In consideration for payment of the settlement amount stated in paragraph 1 above, and in consideration for performance of the conditions set forth in paragraph 2 above, the United States will release George Jetson, the Organization, and Steven Baker, as well its employees, executors, administrators, assigns, subsidiary, and related entities from any civil or administrative claim which the United States has or may have for or stemming from the above referenced alleged archaeological damage.

The United States and the Respondents agree to mutually waive any and all further action that may be or could have been taken as a result of the incidents that gave rise to

this settlement.

This Agreement shall not be construed as an admission of liability on the part of George Jetson, the Organization, or Steven Baker, and shall bind all heirs, executors, administrators, assigns, or successors-in-interest of the parties.

Each person who signs this Agreement warrants that s/he is duly authorized to do so.

UNITED STATES OF AMERICA
USDA, Forest Service
Dixie National Forest

Dated: _____ _____
Forest Supervisor

Dated: _____ _____
Prosecutrix _____, ESQ
Office of General Counsel
U.S. Department of Agriculture
507 25th Street, Room 205
Ogden, Utah 84401

CO-ED YOUTH ORGANIZATION

Dated: _____ _____
George Jetson

Dated: _____ _____
Steven Baker

Dated: _____ _____

Form 4a: Letter and Stipulation to Dismiss Docket Case Following Mediation

United States Department of Agriculture
Office of the General Counsel

Mountain Region - Ogden Office
507 25th Street, Room 205
Ogden, Utah 84401

Telephone: 801-625-5443
Facsimile: 801-625-5465
E-Mail: elisefoster@usda.gov

Administrative Law Judge R. G. Melton
U.S. Department of the Interior
Office of Hearings and Appeals
301 North 27th Street, Suite 300
Billings, MT 59101-1260

Administrative Law Judge P. J. McLeod
U. S. Department of the Interior
Office of Hearings and Appeals
1700 Louisiana NE, Suite 220
Albuquerque, NM 87110

RE: U.S.D.A. Forest Service v. Q.R.S. and Q. Pipe and Welding
U.S.D.A. Forest Service v. C. Cook

Dear ALJ Melton and McLeod:
Attached please find a stipulation to dismiss each of the above-captioned cases without prejudice. These matters were referred from ALJ McLeod to ALJ Melton for mediation, and the mediation resulted in settlement agreements satisfactory to all parties. The dismissal enclosed is without prejudice until such time as the requirements of the settlement agreement are fulfilled. Please forward dismissal orders to us at your earliest convenience.

I would like to thank both of you and the Office of Hearings and Appeals in both Albuquerque and Billings for assisting the parties to successfully resolve these matters without lengthy litigation. It is our opinion that this is the most efficient use of scarce resources.

Thank you for your cooperation in these matters.

Sincerely,

_____

cc:
AUSA _____, District of New Mexico, for the United States.
_____, Esq., for Mr. xxxxx
_____, Esq., for Mr. xxxxx

Form 4b: Stipulation to Dismiss Without Prejudice

United States Department of the Interior
Office of Hearings and Appeals

U.S.D.A. Forest Service,	)	
Complainant,	)	Docket No. ARPA 2001-2
v.	)	
	)	Civil Penalty Proceeding
C_____ Cook,	)	
Respondent.	)	Archeological Resources Protection Act of 1979, 16 U.S.C. s 470aa et seq.

STIPULATION TO DISMISS WITHOUT PREJUDICE

The Complainant, United States of America, by and through the U.S.D.A. Forest Service, and the Respondent, C_____ Cook, by and through his attorney, hereby jointly move to dismiss this action without prejudice.

In consideration of the terms set forth in the SETTLEMENT AGREEMENT executed by the parties, and in consideration of the fulfillment of the promises contained therein, the Parties stipulate to dismiss without prejudice Case No. ARPA 2001-2, pending before the Department of Interior, Office of Hearings and Appeals. In the event that Respondent defaults on the payment schedule contained in the Agreement, Respondent agrees that ARPA 2001-2 shall be reinstated in its entirety upon Motion of the United States, that Respondent shall not contest such Motion, and that any monies that he may have paid prior to such default shall be retained by the United States without prejudice to the United States' remedies and rights in relation to Case No. ARPA 2001-2.

U.S. DEPARTMENT OF AGRICULTURE

Dated: _____

_____
U.S.D.A. Office of the General Counsel
507 25th Street, Room 205
Ogden, Utah 84401
L. B_____ , P.C.

Dated: _____

_____
Counsel for C_____ Cook
4014 12th Street
Alamogordo, NM 55790

Form 5: Notice of Intent to Seek Forfeiture

United States Department of the Interior
Office of Hearings and Appeals

U.S.D.A. Forest Service,	)	
Complainant,	)	Docket No. ARPA 2001-1
v.	)	
	)	Civil Penalty Proceeding
C_____ Cook,	)	
Respondent.	)	Archeological Resources Protection Act of 1979, 16 U.S.C. s 470aa et seq.

NOTICE OF INTENT TO SEEK FORFEITURE

The United States of America, by and through the U.S.D.A. Forest Service, hereby notifies Q. R. S. and Q. Pipe and Welding that it intends, pursuant to the Archaeological Resources Protection Act, 16 U.S.C. § 470aa et seq., and the uniform regulations promulgated there under, at 36 C.F.R. 296.17, to seek forfeiture of the following vehicles and/or equipment which it alleges were used in the commission of a violation of the Archaeological Resources Protection Act:

- Caterpillar AA Model 140H, Serial Number 2ZK03091, Mach ID Number M12678.
- Caterpillar Model D6R Tractor Crawler Dozer, Serial Number 3BR00090
- Peterbuilt transport and lowboy trailer owned by Respondent.

16 U.S.C. 470gg provides that all vehicles or equipment used in connection with a violation of the Act may be subject to forfeiture in the discretion of the Administrative Law Judge, upon assessment of a civil penalty under 16 U.S.C. 470ff. It is the intent of the United States to request the presiding Administrative Law Judge to order forfeiture of the aforementioned vehicles and equipment upon assessment of a civil penalty in this matter.

This Notice has been served upon counsel for the Respondent, Q.R.S. and Q. Pipe and Welding.

_____

Attorney
U.S. Department of Agriculture
Office of the General Counsel
Ogden, Utah

Form 6: Example letter confirming agreement to conduct "informal discussions", confirm extension of 45-day deadline to file Petition for Relief.

Office of the General Counsel
United States Department of Agriculture
507 25th Street, Room 205
Ogden, Utah 84401

August 26, 1999

Moody Law Firm
25 North Canyon Way
Country Club Suites
Garland, UT 84000

RE: ARPA Notice of Violation to P. T. L.

Dear Mr. Moody:
This is to confirm that we have agreed to conduct informal discussions, pursuant to 36 C.F.R. 296.15, with the Federal Land Manager in response to the ARPA Notice of Violation which was issued to P. T. L. on July 30, 1999. Those discussions will take place during a telephone conference we have scheduled for Thursday, September 2, 1999, at 3:00 p.m. MDT. I will forward to you the telephone number to call shortly.

This letter also confirms that the Forest Service has agreed to postpone the 45-day response period set forth in 36 C.F.R. 295.15(d) for 30 days, in order to conduct informal discussions. Furthermore, you requested a copy of the Law Enforcement Report of Investigation, which we have agreed to provide to you in order to assist you in understanding this case. You will find a copy of the narrative portion of the report attached, as well as photos and copies of the witness statements. The Archaeological Damage Assessment report was not included because that report has already been provided to you.

Please contact me if you would like to discuss this matter prior to our scheduled call. Thank you in advance for your cooperation in resolving this matter.

Sincerely,

_____

Attorney
U. S. Department of Agriculture
Forest Service

CHAPTER 7

Additional Resources

7

Peavine petroglyph, recovered after theft from Federal land. Surface damage consists of lighter colored scratches. Courtesy of Debra Mathews, Special Agent, Humboldt-Toiyabe National Forest

The following list of additional resources, while not exhaustive, provides additional support for ARPA civil penalty casework.

On-Line Resources

Advisory Council on Historic Preservation, Archaeology Guidance, *available at* http://www.achp.gov/archguide

National Park Service, Archeology Program, Technical Brief Series:

Martin E. McAllister, *Archeological Resource Damage Assessment: Legal Basis and Methods* (Archeology Program, National Park Service, Technical Brief 20, 2007), *available at* http://www.nps.gov/archeology/pubs/techBr/TCH20.htm.

Sherry Hutt, *The Civil Prosecution Process of the Archaeological Resources Protection Act* (Archeology Program, National Park Service, Technical Brief 16, 1994), *available at* http://www.nps.gov/archeology/pubs/techbr/tch16A.htm

Carol L. Carnett, *Legal Background of Archaeological Resources Protection Act* (Archeology Program, National Park Service, Technical Brief 11, revised ed. Sept. 1991), *available at* http://www.nps.gov/archeology/pubs/techbr/tch11A.htm

National Park Service, Archeology Program, NPS Archeology Guide: Archeological Permits, http://www.nps.gov/archeology/npsGuide/permits/index.htm

National Park Service, The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 Fed. Reg. 44,716 (1983), *amended and annotated at* http://www.nps.gov/history/local-law/arch_stnds_0

Society for American Archaeology, *Professional Standards for the Determination of Archaeological Value* (2003), *available at* http://www.saa.org/goverment/ARPAstandards.pdf

Books

S. Terry Childs, OUR COLLECTIVE RESPONSIBILITY: THE ETHICS AND PRACTICE OF ARCHAEOLOGICAL COLLECTIONS STEWARDSHIP (2004)

Sherry Hutt, Elwood Jones & Martin McAllister, ARCHEOLOGICAL RESOURCE PROTECTION (1992)

Sherry Hutt, Caroline M. Blanco & Ole Varmer, HERITAGE RESOURCES LAW (1999)

Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, CULTURAL PROPERTY LAW (2004).

Sherry Hutt, Marion P. Forsyth & David Tarler eds., PRESENTING ARCHAEOLOGY IN COURT (2006)

Lynne P. Sullivan & S. Terry Childs, CURATING ARCHEOLOGICAL COLLECTIONS: FROM THE FIELD TO THE REPOSITORY (2003)

Articles

Roberto Iraola, *The Archaeological Resources Protection Act—Twenty Five Years Later*, 42 DUQ. L. REV. 221 (2004)

Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 Vand. J. Transnat'l L. 1199 (2005)

Robert Palmer, *Federal Prosecutions under the Archaeological Resources Protection Act of 1979: A Ten-Year Review (1996-2005)*, *in* YEARBOOK OF CULTURAL PROPERTY LAW 221 (Sherry Hutt ed., 2007)

Todd Swain, *Cultural Resource Damage on the Public Lands: What the Statistics Show*, *in* YEARBOOK OF CULTURAL PROPERTY LAW 201 (Sherry Hutt ed., 2007)

Above : Framed artifacts seized during Archaeological Resource Protection Act investigation. Courtesy of Tim Canaday, Archaeologist, Salmon-Challis NF.

Below: petroglyph recovered from a residential yard.

APPENDIX A

The Archaeological Resources Protection Act of 1979

(16 U.S.C. 470aa-mm)

Petroglyph depicting a human foot, southern Nevada.

CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE

a. The Congress finds that -

1. Archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

2. These resources are increasingly endangered because of their commercial attractiveness;

3. Existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

4. There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

b. The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979.

Section 470bb. DEFINITIONS

As used in this chapter -

1. The term **"archaeological resource"** means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures, or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

2. The term **"Federal land manager"** means, with respect to any public lands, the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior. If the Secretary of the Interior consents, the responsibilities (in whole or in part)under this chapter of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary of the Interior with respect to any land managed by such other Secretary or agency

head, and in any such case, the term "Federal land manager" means the Secretary of the Interior.

3. The term **"public lands"** means -

   A. Lands which are owned and administered by the United States as part of –
      i. the national park system,
      ii. the national wildlife refuge system, or
      iii. the national forest system; and

   B. All other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

4. The term **"Indian lands"** means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual.

5. The term **"Indian tribe"** means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.].

6. The term **"person"** means an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof.

7. The term **"State"** means any of the fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

Section 470cc. EXCAVATION AND REMOVAL

a. Application for permit
Any person may apply to the Federal land manager for a 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 chapter, 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.

b. Determinations by Federal land manager prerequisite to issuance of permit. A permit may be issued pursuant to an application under subsection (a) of this section if the Federal land manager determines, pursuant to uniform regulations under this chapter, that –

1. The applicant is qualified, to carry out the permitted activity,

2. The activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,

3. the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution, and

4. The activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

c. Notification to Indian tribes of possible harm to or destruction of sites having religious or cultural importance. If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 470hh of this title.

d. Terms and conditions of permit
Any permit under this section shall contain such terms and conditions, pursuant to uniform regulations promulgated under this chapter, as the Federal land manager concerned deems necessary to carry out the purposes of this chapter.

e. Identification of individuals responsible for complying with permit terms and conditions and other applicable laws. Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this chapter and other law applicable to the permitted activity.

f. Suspension or revocation of permits; grounds
Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of section 470ee of this title. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty under section 470ff of this title against the permittee or upon the permittee's conviction under section 470ee of this title.

g. Excavation or removal by Indian tribes or tribe members; excavation or removal of resources located on Indian lands

1. No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.

2. In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

h. Permits issued under Antiquities Act of 1906

1. No permit or other permission shall be required under the Act of June 8, 1906 (16 U.S.C. 431-433), for any activity for which a permit is issued under this section.

2. Any permit issued under the Act of June 8, 1906 [16 U.S.C. 431-433], shall remain in effect according to its terms and conditions following the enactment of this chapter. No permit under this chapter shall be required to carry out any activity under a permit issued under the Act of June 8, 1906, before October 31, 1979, which remains in effect as provided in this paragraph, and nothing in this chapter shall modify or affect any such permit.

i. Compliance with provisions relating to undertakings on property listed in the National Register not required Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 470f of this title.

j. Issuance of permits to State Governors for archaeological activities on behalf of States or their educational institutions Upon the written request of the Governor of any State, the Federal land manager shall issue a permit, subject to the provisions of subsections (b)(3), (b)(4), (c), (e), (f), (g), (h), and (i) of this section for the purpose of conducting archaeological research, excavation, removal, and curation, on behalf of the State or its educational institutions, to such Governor or to such designee as the Governor deems qualified to carry out the intent of this chapter.

Section 470dd. CUSTODY OF ARCHAEOLOGICAL RESOURCES

The Secretary of the Interior may promulgate regulations providing for –

1. the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this chapter, and

2. the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 (16 U.S.C. 469-469c) [16 U.S.C. 469-469c-1] or the Act of June 8, 1906 (16 U.S.C. 431-433).

Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands. Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this chapter.

Section 470ee. PROHIBITED ACTS AND CRIMINAL PENALTIES

a. Unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources. No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in

section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

b. Trafficking in archaeological resources the excavation or removal of which was wrongful under Federal law. No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of -

1. the prohibition contained in subsection (a) of this section, or

2. any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

c. Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law. No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

d. Penalties

Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both: Provided, however, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.

e. Effective date

The prohibitions contained in this section shall take effect on October 31, 1979.

f. Prospective application

Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to October 31, 1979.

g. Removal of arrowheads located on ground surface

Nothing in subsection (d) of this section shall be deemed applicable to any person with respect to the removal of arrowheads located on the surface of the ground.

Section 470ff. CIVIL PENALTIES

a. Assessment by Federal land manager

1. Any person who violates any prohibition contained in an applicable regulation or permit issued under this chapter may be assessed a civil penalty by the Federal land

manager concerned. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.

2. The amount of such penalty shall be determined under regulations promulgated pursuant to this chapter, taking into account, in addition to other factors–

A. the archaeological or commercial value of the archaeological resource involved, and

B. the cost of restoration and repair of the resource and the archaeological site involved.

Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person. The amount of any penalty assessed under this subsection for any violation shall not exceed an amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered.

3. No penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground.

b. Judicial review of assessed penalties; collection of unpaid assessments

1. Any person aggrieved by an order assessing a civil penalty under subsection (a) of this section may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such a person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Federal land manager and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

2. If any person fails to pay an assessment of a civil penalty -

A. after the order making the assessment has become a final order and such person has not filed a petition for judicial review of the order in accordance with paragraph (1), or

B. after a court in an action brought under paragraph (1) has entered a final judgment upholding the assessment of a civil penalty, the Federal land managers may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.

c. Hearings

Hearings held during proceedings for the assessment of civil penalties authorized by subsection (a) of this section shall be conducted in accordance with section 554 of title 5. The Federal land manager may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to

witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Federal land manager or to appear and produce documents before the Federal land manager, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 470gg. ENFORCEMENT

a. Rewards

Upon the certification of the Federal land manager concerned, the Secretary of the Treasury is directed to pay from penalties and fines collected under sections 470ee and 470ff of this title an amount equal to one-half of such penalty or fine, but not to exceed $500, to any person who furnishes information which leads to the finding of a civil violation, or the conviction of criminal violation, with respect to which such penalty or fine was paid. If several persons provided such information, such amount shall be divided among such persons. No officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall be eligible for payment under this subsection.

b. Forfeitures

All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 470ee of this title occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be) subject to forfeiture to the United States upon -

1. such person's conviction of such violation under section 470ee of this title,

2. assessment of a civil penalty against such person under section 470ff of this title with respect to such violation, or

3. a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

c. Disposition of penalties collected and items forfeited in cases involving archaeological resources excavated or removed from Indian lands. In cases in which a violation of the prohibition contained in subsection (a), (b), or (c) of section 470ee of this title involve archaeological resources excavated or removed from Indian lands, the Federal land manager or the court, as the case may be, shall provide for the payment to the Indian or Indian tribe involved of all penalties collected pursuant to section 470ff of this title and for the transfer to such Indian or Indian tribe of all items forfeited under this section.

Section 470hh. CONFIDENTIALITY OF INFORMATION CONCERNING NATURE AND LOCATION OF ARCHAEOLOGICAL RESOURCES

a. Disclosure of information

Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 or under any other provision of law unless the Federal land manager concerned determines that such disclosure would -

1. further the purposes of this chapter or the Act of June 27, 1960 (16 U.S.C. 469-469c) [16 U.S.C. 469-469c-1], and

2. not create a risk of harm to such resources or to the site at which such resources are located.

b. Request for disclosure by Governors

Notwithstanding the provisions of subsection (a) of this section, upon the written request of the Governor of any State, which request shall state -

1. the specific site or area for which information is sought,

2. the purpose for which such information is sought,

3. a commitment by the Governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation, the Federal land manager concerned shall provide to the Governor information concerning the nature and location of archaeological resources within the State of the requesting Governor.

Section 470ii. RULES AND REGULATIONS; INTERGOVERNMENTAL COORDINATION

a. Promulgation; effective date

The Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, and after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this chapter. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996 [, 1996a]). Each uniform rule or regulation promulgated under this chapter shall be submitted on the same calendar day to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Natural Resources of the United States House of Representatives, and no such uniform rule or regulation may take effect before the expiration of a period of ninety calendar days following the date of its submission to such Committees.

b. Federal land managers' rules

Each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations under subsection (a) of this section, as may be appropriate for the carrying out of his functions and authorities under this chapter.

c. **Federal land managers' public awareness program of archaeological resources on public lands and Indian lands.** Each Federal land manager shall establish a program to increase public awareness of the significance of the archaeological resources located on public lands and Indian lands and the need to protect such resources.

Section 470jj. COOPERATION WITH PRIVATE INDIVIDUALS

The Secretary of the Interior shall take such action as may be necessary, consistent with the purposes of this chapter, to foster and improve the communication cooperation, and exchange of information between -

1. private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this chapter, and
2. Federal authorities responsible for the protection of archaeological resources on the public lands and Indian lands and professional archaeologists and associations of professional archaeologists.

In carrying out this section, the Secretary shall, to the extent practicable and consistent with the provisions of this chapter, make efforts to expand the archaeological data base for the archaeological resources of the United States through increased cooperation between private individuals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

Section 470kk. SAVINGS PROVISIONS

a. **Mining, mineral leasing, reclamation, and other multiple uses**
Nothing in this chapter shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

b. **Private collections**
Nothing in this chapter applies to, or requires a permit for, the collection for private purposes of any rock, coin, bullet, or mineral which is not an archaeological resource, as determined under uniform regulations promulgated under section 470bb(1) of this title.

c. **Lands within chapter**
Nothing in this chapter shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.

Section 470ll. ANNUAL REPORT TO CONGRESS

As part of the annual report required to be submitted to the specified committees of the Congress pursuant to section 469a-3(c) of this title, the Secretary of the Interior shall comprehensively report as a separate component on the activities carried out under the provisions of this chapter, and he shall make such recommendations as he deems appropriate as to changes or improvements needed in the provisions of this chapter. Such report shall

include a brief summary of the actions undertaken by the Secretary under section 470jj of this title, relating to cooperation with private individuals.

Section 470mm. SURVEYING OF LANDS; REPORTING OF VIOLATIONS

The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority shall -

a. develop plans for surveying lands under their control to determine the nature and extent of archeological resources on those lands;

b. prepare a schedule for surveying lands that are likely to contain the most scientifically valuable archeological resources; and

c. develop documents for the reporting of suspected violations of this chapter and establish when and how those documents are to be completed by officers, employees, and agents of their respective agencies.

APPENDIX B

B

ARPA Uniform Regulations

(43 C.F.R. Part 7; 36 C.F.R. Part 296; 32 C.F.R. Part 229; and 18 C.F.R. Part 1312)

and Department of the Interior Supplemental Regulations

(43 C.F.R. §§7.31-.37)

Old Crump Rockshelter – Death Valley National Park

Uniform Regulations

(43 C.F.R. Part 7; 36 C.F.R. Part 296; 32 C.F.R. Part 229; and 18 C.F.R. Part 1312)

SECTION

.1 Purpose.

.2 Authority.

.3 Definitions.

.4 Prohibited Acts and Criminal Penalties.

.5 Permit Requirements and Exceptions.

.6 Application for Permits and Information Collection.

.7 Notification to Indian Tribes of Possible Harm to, or Destruction of, Sites on Public Lands Having Religious or Cultural Importance.

.8 Issuance of Permits.

.9 Terms and Conditions of Permits.

.10 Suspension and Revocation of Permits.

.11 Appeals Relating to Permits.

.12 Relationship to Section 106 of the National Historic Preservation Act.

.13 Custody of Archaeological Resources.

.14 Determination of Archaeological or Commercial Value and Cost of Restoration and Repair.

.15 Assessment of Civil Penalties.

.16 Civil Penalty Amounts.

.17 Other Penalties and Rewards.

.18 Confidentiality of Archaeological Resource Information.

.19 Report.

.20 Public Awareness Programs.

.21 Surveys and Schedules.

Section .1 – PURPOSE.

a. The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa-mm) by establishing the uniform definitions, standards, and procedures to be followed by all Federal Land Managers in providing protection for archaeological resources, located on public lands and Indian lands of the United States. These regulations enable Federal Land Managers to protect archaeological resources, taking into consideration provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996), through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

b. The regulations in this part do not impose any new restrictions on activities permitted under other laws, authorities, and regulations relating to mining, mineral leasing, and reclamation.

Section .2 – AUTHORITY.

a. The regulations in this part are promulgated pursuant to Section 10(a) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ii), which requires that the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Board of the Tennessee Valley Authority, jointly develop uniform rules and regulations for carrying out the purposes of the Act.

b. In addition to the regulations in this part, Section 10(b) of the Act (16 U.S.C. 470ii) provides that each Federal Land Manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations in this part, as may be necessary for carrying out the purposes of the Act.

Section .3 – DEFINITIONS.

As used for purposes of this part:

a. **Archaeological Resource** means any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.

1. Of archaeological interest means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

2. Material remains means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated.

3. The following classes of material remains (and illustrative examples), if they are at least 100 years of age, are of archaeological interest and shall be considered

archaeological resources unless determined otherwise pursuant to paragraph (a)(4) or (a)(5) of this Section:

i. Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, and middens);

ii. Surface or subsurface artifact concentrations or scatters;

iii. Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments (including, but not limited to, pottery and other ceramics, cordage, basketry and other weaving, bottles, and other glassware, bone, ivory, shell, metal, wood, hide, feathers, pigments, and flaked, ground, or pecked stone);

iv. By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials;

v. Organic waste (including, but not limited to, vegetal and animal remains, coprolites);

vi. Human remains (including, but not limited to, bone, teeth, mummified flesh, burials, cremations);

vii. Rock carvings, rock paintings, intaglios and other works of artistic or symbolic representation;

viii. Rock shelters and caves or portions thereof containing any of the above material remains;

ix. All portions of shipwrecks (including, but not limited to, armaments, apparel, tackle, cargo);

x. Any portion or piece of any of the foregoing.

4. The following material remains shall not be considered of archaeological interest, and shall not be considered to be archaeological resources for purposes of the Act and this part, unless found in a direct physical relationship with archaeological resources as defined in this Section:

i. Paleontological remains;

ii. Coins, bullets, and unworked minerals and rocks.

5. The Federal Land Manager may determine that certain material remains, in specified areas under the Federal Land Manager's jurisdiction, and under specified circumstances, are not or are no longer of archaeological interest and are not to be considered archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such determination shall in no way affect the Federal Land Manager's obligations under other applicable laws or regulations.

6. For the disposition following lawful removal or excavations of Native American human remains and "cultural items", as defined by the Native American Graves Protection and Repatriation Act (NAGPRA; Pub. L. 101-601; 104 Stat. 3050; 25 U.S.C. 3001-13), the Federal Land Manager is referred to NAGPRA and its implementing regulations.

b. Arrowhead means any projectile point which appears to have been designed for use with an arrow.

c. **Federal Land Manager** means:

1. With respect to any public lands, the Secretary of the Department, or the head of any other Agency or instrumentality of the United States, having primary management authority over such lands, including persons to whom such management authority has been officially delegated;

2. In the case of Indian lands, or any public lands with respect to which no department, agency or instrumentality has primary management authority, such term means the Secretary of the Interior;

3. The Secretary of the Interior, when the head of any other agency or instrumentality has, pursuant to Section 3(2) of the Act and with the consent of the Secretary of the Interior, delegated to the Secretary of the Interior the responsibilities (in whole or in part) in this part.

d. **Public Lands** means:

1. Lands which are owned and administered by the United States as part of the National Park System, the National Wildlife Refuge System, or the National Forest System; and

2. All other lands the fee title to which is held by the United States, except lands on the Outer Continental Shelf, lands under the jurisdiction of the Smithsonian Institution, and Indian Lands.

e. **Indian Lands** means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian Tribe or Indian individual.

f. **Indian tribe** as defined in the Act means any Indian tribe, band, nation, or other organized group or community, including any Alaska village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688). In order to clarify this statutory definition for purposes of this part, "Indian tribe" means:

1. Any tribal entity which is included in the annual list of recognized tribes published in the Federal Register by the Secretary of the Interior pursuant to 25 CFR Part 54;

2. Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 CFR Part 54 since the most recent publication of the annual list; and

3. Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and any Alaska Native Village or Tribe which is recognized by the Secretary of the Interior as eligible for services provided by the Bureau of Indian Affairs.

g. **Person** means an individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian Tribe, or of any State or political subdivision thereof.

h. **State** means any of the 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

i. **Act** means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm).

Section .4 – PROHIBITED ACTS AND CRIMINAL PENALTIES.

a. Under Section 6(a) of the Act, no person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under Sec. .8 or exempted by Sec. .5(b) of this Part.

b. No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource was excavated or removed in violation of:

1. The prohibitions contained in paragraph (a) of this Section; or

2. Any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

c. Under Section (d) of the Act, any person who knowingly violates or counsels, procures, solicits, or employs any other person to violate any prohibition contained in Section 6 (a), (b), or (c) of the Act will, upon conviction, be fined not more than $10,000.00 or imprisoned not more than one year, or both: provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500.00, such person will be fined not more than $20,000.00 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation, upon conviction such person will be fined not more than $100,000.00, or imprisoned not more than five years, or both.

Section .5 – PERMIT REQUIREMENTS AND EXCEPTIONS.

a. Any person proposing to excavate and/or remove archaeological resources from public lands or Indian lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Federal Land Manager for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Federal Land Manager may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in Sec. .8(a) of this part.

b. **Exceptions:**

1. No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal Land Manager's responsibility to comply with other authorities which protect archaeological

resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with those authorities shall be conducted in accordance with the permit requirements of this part.

2. No permit shall be required under this part for any person collecting for private purposes any rock, coin, bullet, or mineral which is not an archaeological resource as defined in this part, provided that such collecting does not result in disturbance of any archaeological resource.

3. No permit shall be required under this part or under Section 3 of the Act of June 8, 1906 (16 U.S.C. 432), for the excavation or removal by any Indian Tribe or member thereof of any archaeological resource located on Indian lands of such Indian Tribe, except that in the absence of tribal law regulating the excavation or removal or archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this part;

4. No permit shall be required under this part for any person to carry out any archaeological activity authorized by a permit issued under Section 3 of the Act of June 8, 1906 (16 U.S.C. 432), before the enactment of the Archaeological Resources Protection Act of 1979. Such permit shall remain in effect according to its terms and conditions until expiration.

5. No permit shall be required under Section 3 of the Act of June 8, 1906 (16 U.S.C. 432), for any archaeological work for which a permit is issued under this part.

c. Persons carrying out official agency duties under the Federal Land Manager's direction, associated with the management of archaeological resources, need not follow the permit application procedures of Sec. .6. However, the Federal Land Manager shall insure that provisions of Sec. .8 and .9 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian Tribal religious or cultural site, as determined by the Federal Land Manager, have been the subject of consideration under Sec. .7.

d. Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Federal Land Manager shall issue a permit, subject to the provisions of Sec. .5(b)(5), .7, .8(a)(3), (4), (5), (6), and (7), .9, .10, .12, and .13(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Federal Land Manager.

e. Under other statutory, regulatory, or administrative authorities governing the use of public lands and Indian lands, authorizations may be required for activities which do not require a permit under this part. Any person wishing to conduct on public lands or Indian lands any activities related to but believed to fall outside the scope of this part should consult with the Federal Land Manager, for the purpose of determining whether any authorization is required, prior to beginning such activities.

Section .6 – APPLICATION FOR PERMITS AND INFORMATION COLLECTION.

a. Any person may apply to the appropriate Federal Land Manager for a permit to excavate and/or remove archaeological resources from public lands or Indian lands and to carry out activities associated with such excavation and/or removal.

b. Each application for a permit shall include:

1. The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed time of performance, locational maps, and proposed outlet for public written dissemination of the results.

2. The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in Sec. .8(a).

3. The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this Section, proposed to be responsible for carrying out the terms and conditions of the permit.

4. Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

5. Where the application is for the excavation and/or removal of archaeological resources on public lands, the names of the university, museum, or other scientific or educational institution in which the applicant proposes to store all collections, and copies of records, data, photographs, and other documents derived from the proposed work. Applicants shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the collections, records, data, photographs, and other documents and to safeguard and preserve these materials as property of the United States.

6. Where the application is for the excavation and/or removal of archaeological resources on Indian lands, the name of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Indian owners do not wish to take custody or otherwise dispose of the archaeological resources. Applicants shall submit written certification, signed by an authorized official of the institution, or willingness to assume curatorial responsibility for the collections, if applicable, and/or the records, data, photographs, and other documents derived from the proposed work.

c. The Federal Land Manager may require additional information, pertinent to land management responsibilities, to be included in the application for permit and shall so inform the applicant.

d. Paperwork Reduction Act. The information collection requirement contained in Sec. .6 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1024-0037. The purpose of the

information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist Federal Land Managers in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

Section .7 – NOTIFICATION TO INDIAN TRIBES OF POSSIBLE HARM TO, OR DESTRUCTION OF, SITES ON PUBLIC LANDS HAVING RELIGIOUS OR CULTURAL IMPORTANCE.

a. If the issuance of a permit under this part may result in harm to, or destruction of, any Indian Tribal religious or cultural site on public lands, as determined by the Federal Land Manager, at least 30 days before issuing such a permit the Federal Land Manager shall notify any Indian Tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of Section 9 of the Act.

1. Notice by the Federal Land Manager to any Indian Tribe shall be sent to the Chief Executive Officer or other designated official of the Tribe. Indian Tribes are encouraged to designate a Tribal Official to be the focal point for any notification and discussion between the Tribe and the Federal Land Manager.

2. The Federal Land Manager may provide notice to any other Native American group that is known by the Federal Land Manager to consider sites potentially affected as being of religious or cultural importance.

3. Upon request during the 30-day period, the Federal Land Manager may meet with official representatives of any Indian Tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under Sec. .9.

4. When the Federal Land Manager determines that a permit applied for under this part must be issued immediately because of an imminent threat of loss or destruction of an archaeological resource, the Federal Land Manager shall so notify the appropriate Tribe.

b. 1. In order to identify sites of religious or cultural importance, the Federal Land Manager shall seek to identify all Indian Tribes having aboriginal or historic ties to the lands under the Federal Land Manager's jurisdiction and seek to determine, from the Chief Executive Officer or other designated official of any such Tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on sites eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to Section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w-3).

2. If the Federal Land Manager becomes aware of a Native American group that is not an Indian Tribe as defined in this part, but has aboriginal or historic ties to public lands

under the Federal Land Manager's jurisdiction, the Federal Land Manager may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

3. The Federal Land Manager may enter into agreement with any Indian Tribe or other Native American group for determining locations for which such Tribe or group wishes to receive notice under this Section.

4. The Federal Land Manager should also seek to determine, in consultation with official representatives of Indian Tribes or other Native American groups, what circumstances should be the subject of special notification to the Tribe or group after a permit has been issued. Circumstances calling for notification might include the discovery of human remains. When circumstances for special notification have been determined by the Federal Land Manager, the Federal Land Manager will include a requirement in the terms and conditions of permits, under Sec. .9(c), for permittees to notify the Federal Land Manger immediately upon the occurrence of such circumstances. Following the permittee's notification, the Federal Land Manager will notify and consult with the Tribe or group, as appropriate. In cases involving Native American human remains and other "cultural items", as defined by NAGPRA, the Federal Land Manager is referred to NAGPRA and its implementing regulations.

Section .8 – ISSUANCE OF PERMITS.

a. The Federal Land Manager may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

1. The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

i. A graduate degree in anthropology or archaeology, or equivalent training and experience;

ii. The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

iii. The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

iv. Completion of at least 16 months of professional experience and/or specialized training in the archaeological field, laboratory, or library research, administration, or management, including at least four month's experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

v. Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

2. The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

3. The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

4. Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands or Indian lands, and the proposed work has been agreed to in writing by the Federal Land Manager pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a)(2) and (a)(3) shall be deemed satisfied by the prior approval.

5. Written consent has been obtained for work proposed on Indian lands, from the Indian landowner and the Indian Tribe having jurisdiction over such lands;

6. Evidence is submitted to the Federal Land Manager that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

7. The applicant has certified that, not later than 90 days after the date the final report is submitted to the Federal Land Manager, the following will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit:

i. All artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit where the permit is for the excavation and/or removal of archaeological resources from public lands.

ii. All artifacts, samples, and collections resulting from work under the requested permit for which the custody or disposition is not undertaken by the Indian owners, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit, where the permit is for the excavation and/or removal of archaeological resources from Indian lands.

b. When the area of the proposed work would cross jurisdictional boundaries so that permit applications must be submitted to more than one Federal Land Manager, the Federal Land Managers shall coordinate the review and evaluation of applications and the issuance of permits.

Section .9 – TERMS AND CONDITIONS OF PERMITS.

a. In all permits issued, the Federal Land Manager shall specify:

1. The nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work;

2. The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit;

3. The name of any university, museum, or other scientific or educational institutions in which any collected materials and data shall be deposited; and

4. Reporting requirements.

b. The Federal Land Manager may specify such terms and conditions as deemed necessary, consistent with this part, to protect public safety and other values and/or resources, to secure work areas, to safeguard other legitimate land uses, and to limit activities incidental to work authorized under a permit.

c. The Federal Land Manager shall include in permits issued for archaeological work on Indian lands such terms and conditions as may be requested by the Indian landowner and the Indian Tribe having jurisdiction over the lands, and for archaeological work on public lands shall include such terms and conditions as may have been developed pursuant to Sec. .7.

d. Initiation of work or other activities under the authority of a permit signifies the permittee's acceptance of the terms and conditions of the permit.

e. The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

f. The permittee may request that the Federal Land Manager extend or modify a permit.

g. The permittee's performance under any permit issued for a period greater than one year, shall be subject to review by the Federal Land Manager, at least annually.

Section .10 – SUSPENSION AND REVOCATION OF PERMITS.

a. Suspension or revocation for cause. **1.** The Federal Land Manager may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or Sec. .4. The Federal Land Manager shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

2. The Federal Land Manager may revoke a permit upon assessment of a civil penalty under Sec. .15 upon the permittee's conviction under Section 6 of the Act, or upon determining that the permittee has failed after notice under this Section to correct the situation which led to suspension of the permit.

b. Suspension or revocation for management purposes. The Federal Land Manager may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements not in effect when the permit was issued. The Federal Land Manager shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

Section .11 – APPEALS RELATING TO PERMITS.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit through existing administrative appeal procedures, or through procedures which may be established by the Federal Land Manager pursuant to Section 10(b) of the Act and this part.

Section .12 – RELATIONSHIP TO SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT.

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with Section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Federal Land Manager from compliance with Section 106 where otherwise required.

Section .13 – CUSTODY OF ARCHAEOLOGICAL RESOURCES.

a. Archaeological resources excavated or removed from the public lands remain the property of the United States.

b. Archaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian Tribe having rights of ownership over such resources.

c. The Secretary of the Interior may promulgate regulations providing for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, for the ultimate disposition of archaeological resources, and for standards by which archaeological resources shall be preserved and maintained, when such resources have been excavated or removed from public lands and Indian lands.

d. In the absence of regulations referenced in paragraph (c) of this Section, the Federal Land Manager may provide for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Federal Land Manager.

e. Notwithstanding the provisions of paragraphs (a) through (d) of this Section, the Federal Land Manager will follow the procedures required by NAGPRA and its implementing regulations for determining the disposition of Native American human remains and other "cultural items", as defined by NAGPRA, that have been excavated, removed, or discovered on public lands.

Section .14 – DETERMINATION OF ARCHAEOLOGICAL OR COMMERCIAL VALUE AND COST OF RESTORATION AND REPAIR.

a. Archaeological value. For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in Sec. .4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information

associated with the archaeological resource. This value shall be appraised in terms of the costs of the 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.

b. Commercial value. For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in Sec. .4 of this part or conditions of a permit issued pursuant to this part 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.

c. Cost of restoration and repair. For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be 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 resource, including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

7. Reinterment of human remains in accordance with religious custom and State, local, or Tribal law, where appropriate, as determined by the Federal Land Manager.

8. Preparation of reports relating to any of the above activities.

Section .15 – ASSESSMENT OF CIVIL PENALTIES.

a. The Federal Land Manager may assess a civil penalty against any person who has violated any prohibition contained in Sec. .4 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

b. Notice of Violation. The Federal Land Manager shall serve a Notice of Violation upon any person believed to be subject to a civil penalty, either in person or by registered or certified mail (return receipt requested). The Federal Land Manager shall include in the notice:

1. A concise statement of the facts believed to show a violation;

2. A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

3. The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

4. Notification of the right to file a petition for relief pursuant to paragraph (d) of this Section, or to await the Federal Land Manager's notice of assessment, and to request a hearing in accordance with paragraph (g) of this Section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

c. The person served with a Notice of Violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

1. Seek informal discussions with the Federal Land Manager;

2. File a Petition for Relief in accordance with paragraph (d) of this Section;

3. Take no action and await the Federal Land Manager's Notice of Assessment;

4. Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the Notice of Assessment and of the right to request a hearing under paragraph (g) of this Section.

d. Petition for Relief. The person served with a Notice of Violation may request that no penalty be assessed or that the amount be reduced, by filing a Petition for Relief with the Federal Land Manager within 45 calendar days of the date of service of the Notice of Violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the Notice of Violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

e. Assessment of Penalty.

1. The Federal Land Manager shall assess a civil penalty upon expiration of the period for filing a Petition for Relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

2. The Federal Land Manager shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this Section or furnished upon further request by the Federal Land Manager.

3. If the facts warrant a conclusion that no violation has occurred, the Federal Land Manager shall so notify the person served with a Notice of Violation and no penalty

shall be assessed.

4. Where the facts warrant a conclusion that a violation has occurred, the Federal Land Manager shall determine a penalty amount in accordance with Sec. .16.

f. Notice of Assessment. The Federal Land Manager shall notify the person served with a Notice of Violation of the penalty amount assessed by serving a written Notice of Assessment, either in person or by registered or certified mail (return receipt requested). The Federal Land Manager shall include in the Notice of Assessment:

1. The facts and conclusions from which it was determined that a violation did occur;

2. The basis in Sec. .16 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

3. Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

g. Hearings.

1. Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this Section, the person served with a Notice of Assessment may file a written Request for a Hearing with the adjudicatory body specified in the notice. The person shall enclose with the Request for Hearing a copy of the Notice of Assessment, and shall deliver the request as specified in the Notice of Assessment, personally or by registered or certified mail (return receipt requested).

2. Failure to deliver a written request for a hearing within 45 days of the date of service of the Notice of Assessment shall be deemed a waiver of the right to a hearing.

3. Any hearing conducted pursuant to this Section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal Land Manager under paragraph (f) of this Section or any offer of mitigation or remission made by the Federal Land Manager.

h. Final Administrative Decision.

1. Where the person served with a Notice of Violation has accepted the penalty pursuant to paragraph (c)(4) of this Section, the Notice of Violation shall constitute the Final Administrative Decision;

2. Where the person served with a Notice of Assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this Section, the Notice of Assessment shall constitute the Final Administrative Decision;

3. Where the person served with a Notice of Assessment has filed a timely Request for a Hearing pursuant to paragraph (g)(1) of this Section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the Final Administrative Decision.

i. Payment of Penalty.

1. The person assessed a civil penalty shall have 45 calendar days from the date of

issuance of the Final Administrative Decision in which to make full payment of the penalty assessed, unless a timely Request for Appeal has been filed with a U.S. District Court as provided in Section 7(b)(1) of the Act.

2. Upon failure to pay the penalty, the Federal Land Manager may request the Attorney General to institute a civil action to collect the penalty in a U.S. District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Federal Land Manager is not represented by the Attorney General, a civil action may be initiated directly by the Federal Land Manager.

j. Other remedies not waived. Assessment of a penalty under this Section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

Section .16 – CIVIL PENALTY AMOUNTS.

a. Maximum amount of penalty.

1. Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in Sec. .4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

2. Where the person being assessed a civil penalty has committed any previous violation of any prohibition in Sec. .4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

3. Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this Section.

b. Determination of penalty amount, mitigation, and remission. The Federal Land Manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

1. Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

i. Agreement by the person being assessed a civil penalty to return to the Federal Land Manager archaeological resources removed from public lands or Indian lands;

ii. Agreement by the person being assessed a civil penalty to assist the Federal Land Manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands;

iii. Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;

iv. Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

v. Determination that the person being assessed a civil penalty did not willfully

commit the violation;

vi. Determination that the proposed penalty would constitute excessive punishment under the circumstances;

vii. Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

2. When the penalty is for a violation on Indian lands, the Federal Land Manager shall consult with and consider the interests of the Indian landowner and the Indian tribe having jurisdiction over the Indian lands prior to proposing to mitigate or remit the penalty.

3. When the penalty is for a violation which may have had an effect on a known Indian tribal religious or cultural site on public lands, the Federal Land Manager should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty.

Section .17 – OTHER PENALTIES AND REWARDS.

a. Section 6 of the Act contains criminal prohibitions and provisions for criminal penalties. Section 8(b) of the Act provides that archaeological resources, vehicles, or equipment involved in a violation may be subject to forfeiture.

b. Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Federal Land Manager may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the performance of their official duties and persons who have provided information under Sec. .16(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

c. In cases involving Indian lands, all civil penalty monies and any item forfeited under the provisions of this Section shall be transferred to the appropriate Indian or Indian tribe.

Section .18 – CONFIDENTIALITY OF ARCHAEOLOGICAL RESOURCE INFORMATION.

a. The Federal Land Manager shall not make available to the public, under subchapter II of chapter 5 of title 5 of the United States Code or any other provision of law, information concerning the nature and location of any archaeological resource, with the following exceptions:

1. The Federal Land Manager may make information available, provided that the disclosure will further the purposes of the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469 through 469c), without risking harm to the archaeological resource or to the site in which it is located.

2. The Federal Land Manager shall make information available, when the Governor of any State has submitted to the Federal Land Manager a written request for information, concerning the archaeological resources within the requesting Governor's State, provided that the request includes:

i. The specific archaeological resource or area about which information is sought;

ii. The purpose for which the information is sought; and

iii. The Governor's written commitment to adequately protect the confidentiality of the information.

b. [Reserved]

Section .19 – REPORT.

a. Each Federal Land Manager, when requested by the Secretary of the Interior, will submit such information as is necessary to enable the Secretary to comply with Section 13 of the Act and comprehensively report on activities carried out under provisions of the Act.

b. The Secretary of the Interior will include in the annual comprehensive report, submitted to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate under Section 13 of the Act, information on public awareness programs submitted by each Federal Land Manager under Sec. .20(b). Such submittal will fulfill the Federal Land Manager's responsibility under Section 10(c) of the Act to report on public awareness programs.

c. The comprehensive report by the Secretary of the Interior also will include information on the activities carried out under Section 14 of the Act. Each Federal Land Manager, when requested by the Secretary, will submit any available information on surveys and schedules and suspected violations in order to enable the Secretary to summarize in the comprehensive report actions taken pursuant to Section 14 of the Act.

Section .20 – PUBLIC AWARENESS PROGRAMS.

a. Each Federal Land Manager will establish a program to increase public awareness of the need to protect important archaeological resources located on public and Indian lands. Educational activities required by Section 10(c) of the Act should be incorporated into other current agency public education and interpretation programs where appropriate.

b. Each Federal Land Manager annually will submit to the Secretary of the Interior the relevant information on public awareness activities required by Section 10(c) of the Act for inclusion in the comprehensive report on activities required by Section 13 of the Act.

Section .21 - Surveys and Schedules.

a. The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority will develop plans for surveying lands under each agency's control to determine the nature and extent of archaeological resources pursuant to Section 14(a) of the Act. Such activities should be consistent with Federal agency planning policies and other historic preservation program responsibilities required by 16 U.S.C. 470 et seq. Survey plans prepared under this Section will be designed to comply with the purpose of the Act regarding the protection of archaeological resources.

b. The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will prepare schedules for surveying lands under each agency's control that are likely to contain the most scientifically valuable archaeological resources pursuant to Section 14(b) of the Act. Such schedules will be developed based on objectives and information identified in survey plans described in paragraph (a) of this Section and implemented systematically to cover areas where the most scientifically valuable archaeological resources are likely to exist.

c. Guidance for the activities undertaken as part of paragraphs (a) through (b) of this Section is provided by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

d. Other Federal land managing agencies are encouraged to develop plans for surveying lands under their jurisdictions and prepare schedules for surveying to improve protection and management of archaeological resources.

e. The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will develop a system for documenting and reporting suspected violations of the various provisions of the Act. This system will reference a set of procedures for use by officers, employees, or agents of Federal agencies to assist them in recognizing violations, documenting relevant evidence, and reporting assembled information to the appropriate authorities. Methods employed to document and report such violations should be compatible with existing agency reporting systems for documenting violations of other appropriate Federal statutes and regulations. Summary information to be included in the Secretary's comprehensive report will be based upon the system developed by each Federal Land Manager for documenting suspected violations.

Department of the Interior Supplemental Regulations, 43 C.F.R. §§7.31-.37

7.31 Scope and Authority.

7.32 Supplemental Definitions.

7.33 Determination of Loss or Absence of Archaeological Interest.

7.34 Procedural Information for Securing Permits.

7.35 Permitting Procedures for Indian Lands.

7.36 Permit Reviews and Disputes.

7.37 Civil Penalty Hearings Procedures.

Section 7.31 - Scope and Authority.

The regulations in this subpart are promulgated pursuant to Section 10(b) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ii), which requires agencies to develop rules and regulations for carrying out the purposes of the Act, consistent with the uniform regulations issued pursuant to Section 10(a) of the Act (subpart A of this part).

Section 7.32 - Supplemental Definitions.

For purposes of this subpart, the following definitions will be used:

a. Site of religious or cultural importance means, for purposes of Sec. 7.7 of this part, a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there; because it contains specific natural products which are of religious or cultural importance; because it is believed to the be dwelling place of, the embodiment of, or a place conducive to communication with spiritual beings; because it contains elements of life-cycle rituals, such as burials and associated materials; or because it has other specific and continuing significance in Indian religion or culture.

b. Allotted lands means lands granted to Indian individuals by the United States and held in trust for those individuals by the United States.

Section 7.33 - Determination of Loss or Absence of Archaeological Interest.

a. Under certain circumstances, a Federal Land Manager may determine, pursuant to Sec. 7.3(a)(5) of this part, that certain material remains are not or are no longer of archaeological interest, and therefore are not to be considered archaeological resources under this part.

b. The Federal Land Manager may make such a determination if he/she finds that the material remains are not capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics.

c. Prior to making a determination that material remains are not or are no longer archaeological resources, the Federal Land Manager shall ensure that the following procedures are completed:

1. A professional archaeological evaluation of material remains and similar materials within the area under consideration shall be completed, consistent with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716, Sept. 29, 1983) and with 36 CFR parts 60, 63, and 65.

2. The principal bureau archaeologist or, in the absence of a principal bureau archaeologist, the Department Consulting Archeologist, shall establish whether the material remains under consideration contribute to scientific or humanistic understandings of past human behavior, cultural adaptation and related topics. The principal bureau archaeologist or the Department Consulting Archeologist, as appropriate, shall make a recommendation to the Federal Land Manager concerning these material remains.

d. The Federal Land Manager shall make the determination based upon the facts established by and the recommendation of the principal bureau archaeologist or the Departmental Consulting Archeologist, as appropriate, and shall fully document the basis therefore, including consultation with Indian tribes for determinations regarding sites of religious or cultural importance.

e. The Federal Land Manager shall make public notice of the determination and its limitations, including any permitting requirements for activities associated with the materials determined not to be archaeological resources for purposes of this part.

f. Any interested individual may request in writing that the Departmental Consulting Archeologist review any final determination by the Federal Land Manager that certain remains, are not, or are no longer, archaeological resources. Two (2) copies of the request should be sent to the Departmental Consulting Archeologist, National Park Service, P.O. Box 37127, Washington, DC 20013-7127, and should document why the requestor disagrees with the determination of the Federal Land Manager. The Departmental Consulting Archeologist shall review the request, and, if appropriate, shall review the Federal Land Manager's determination and its supporting documentation. Based on this review, the Departmental Consulting Archeologist shall prepare a final professional recommendation, and shall transmit the recommendation and the basis therefore to the head of the bureau for further consideration within 60 days of the receipt of the request.

g. Any determination made pursuant to this Section shall in no way affect the Federal Land Manager's obligations under other applicable laws or regulations.

Section 7.34 - Procedural Information for Securing Permits.

Information about procedures to secure a permit to excavate or remove archaeological resources from public lands or Indian lands can be obtained from the appropriate Indian tribal authorities, the Federal Land Manager of the bureau that administers the specific area of the public lands or Indian lands for which a permit is desired, or from the state, regional, or national office of that bureau.

Section 7.35 - Permitting Procedures for Indian Lands.

a. If the lands involved in a permit application are Indian lands, the consent of the appropriate Indian tribal authority or individual Indian landowner is required by the Act and these regulations.

b. When Indian tribal lands are involved in an application for a permit or a request for extension or modification of a permit, the consent of the Indian tribal government must be obtained. For Indian allotted lands outside reservation boundaries, consent from only the individual landowner is needed. When multiple-owner allotted lands are involved, consent by more than 50 percent of the ownership interest is sufficient. For Indian allotted lands within reservation boundaries, consent must be obtained from the Indian tribal government and the individual landowner(s).

c. The applicant should consult with the Bureau of Indian Affairs concerning procedures for obtaining consent from the appropriate Indian tribal authorities and submit the permit application to the area office of the Bureau of Indian Affairs that is responsible for the administration of the lands in question. The Bureau of Indian Affairs shall insure that consultation with the appropriate Indian tribal authority or individual Indian landowner regarding terms and conditions of the permit occurs prior to detailed evaluation of the application. Permits shall include terms and conditions requested by the Indian tribe or Indian landowner pursuant to Sec. 7.9 of this part.

d. The issuance of a permit under this part does not remove the requirement for any other permit required by Indian tribal law.

Section 7.36 - Permit Reviews and Disputes.

a. Any affected person disputing the decision of a Federal Land Manager with respect to the issuance or denial of a permit, the inclusion of specific terms and conditions in a permit, or the modification, suspension, or revocation of a permit may request the Federal Land Manager to review the disputed decision and may request a conference to discuss the decision and its basis.

b. The disputant, if unsatisfied with the outcome of the review or conference, may request that the decision be reviewed by the head of the bureau involved.

c. Any disputant unsatisfied with the higher level review, and desiring to appeal the decision, pursuant to Sec. 7.11 of this part should consult with the appropriate Federal Land Manager regarding the existence of published bureau appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision.

d. Any affected person may request a review by the Departmental Consulting Archeologist of any professional issues involved in a bureau permitting decision, such as professional qualifications, research design, or other professional archaeological matters. The Departmental Consulting Archeologist shall make a final professional recommendation to the head of the bureau involved. The head of the bureau involved will consider the recommendation, but may reject it, in whole or in part, for good cause. This request should be in writing, and should state the reasons for the request. See Sec. 7.33(f) for the address of the Departmental Consulting Archeologist.

Section 7.37 - Civil Penalty Hearings Procedures.

a. Requests for hearings. Any person wishing to request a hearing on a notice of assessment of civil penalty, pursuant to Sec. 7.15(g) of this part may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203-1923. The respondent shall enclose a copy of the notice of violation and the notice of assessment. The request shall state the relief sought, the basis for challenging the facts used as the basis for charging the violation and fixing the assessment, and respondent's preference as to the place and date for a hearing. A copy of the request shall be served upon the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested), at the address specified in the notice of assessment. Hearings shall be conducted in accordance with 43 CFR part 4, subparts A and B.

b. Waiver of right to a hearing. Failure to file a written request for a hearing within 45 days of the date of service of a notice of assessment shall be deemed a waiver of the right to a hearing.

c. Commencement of hearing procedures. Upon receipt of a request for a hearing, the Hearing Division shall assign an administrative law judge to the case. Notice of assignment shall be given promptly to the parties, and thereafter, all pleadings, papers, and other documents in the proceeding shall be filed directly with the administrative law judge, with copies served on the opposing party.

d. Appearance and practice.

1. Subject to the provisions of 43 CFR 1.3, the respondent may appear in person, by representative, or by counsel, and may participate fully in those proceedings. If respondent fails to appear and the administrative law judge determines such failure is without good cause, the administrative law judge may, in his/her discretion, determine that such failure shall constitute a waiver of the right to a hearing and consent to the making of a decision on the record made at the hearing.

2. Departmental counsel, designated by the Solicitor of the Department, shall represent the Federal Land Manager in the proceedings. Upon notice to the Federal Land Manager of the assignment of an administrative law judge to the case, said counsel shall enter his/her appearance on behalf of the Federal Land Manager and shall file all petitions and correspondence exchanges by the Federal Land Manager and the respondent pursuant to Sec. 7.15 of this part which shall become part of the

hearing record. Thereafter, service upon the Federal Land Manager shall be made to his/her counsel.

e. Hearing administration.

1. The administrative law judge shall have all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions in accordance with 5 U.S.C. 554-557.

2. The transcript of testimony, the exhibits, and all papers, documents and requests filed in the proceedings, shall constitute the record for decision. The administrative law judge shall render a written decision upon the record, which shall set forth his/her findings of fact and conclusions of law, and the reasons and basis therefore, and an assessment of a penalty, if any.

3. Unless a notice of appeal is filed in accordance with paragraph (f) of this Section, the administrative law judge's decision shall constitute the final administrative determination of the Secretary in the matter and shall become effective 30 calendar days from the date of this decision.

4. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal Land Manager under Sec. 7.15 of this part or any offer of mitigation or remission made by the Federal Land Manager.

f. Appeal.

1. Either the respondent or the Federal Land Manager may appeal the decision of an administrative law judge by the filing of a "Notice of Appeal" with the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203-1923, within 30 calendar days of the date of the administrative law judge's decision. Such notice shall be accompanied by proof of service on the administrative law judge and the opposing party.

2. Upon receipt of such a notice, the Director, Office of Hearings and Appeals, shall appoint an ad hoc appeals board to hear and decide an appeal. To the extent they are not inconsistent herewith, the provision of the Department of Hearings and Appeals Procedures in 43 CFR part 4, subparts A, B, and G shall apply to appeal proceedings under this subpart. The decision of the board on the appeal shall be in writing and shall become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein.

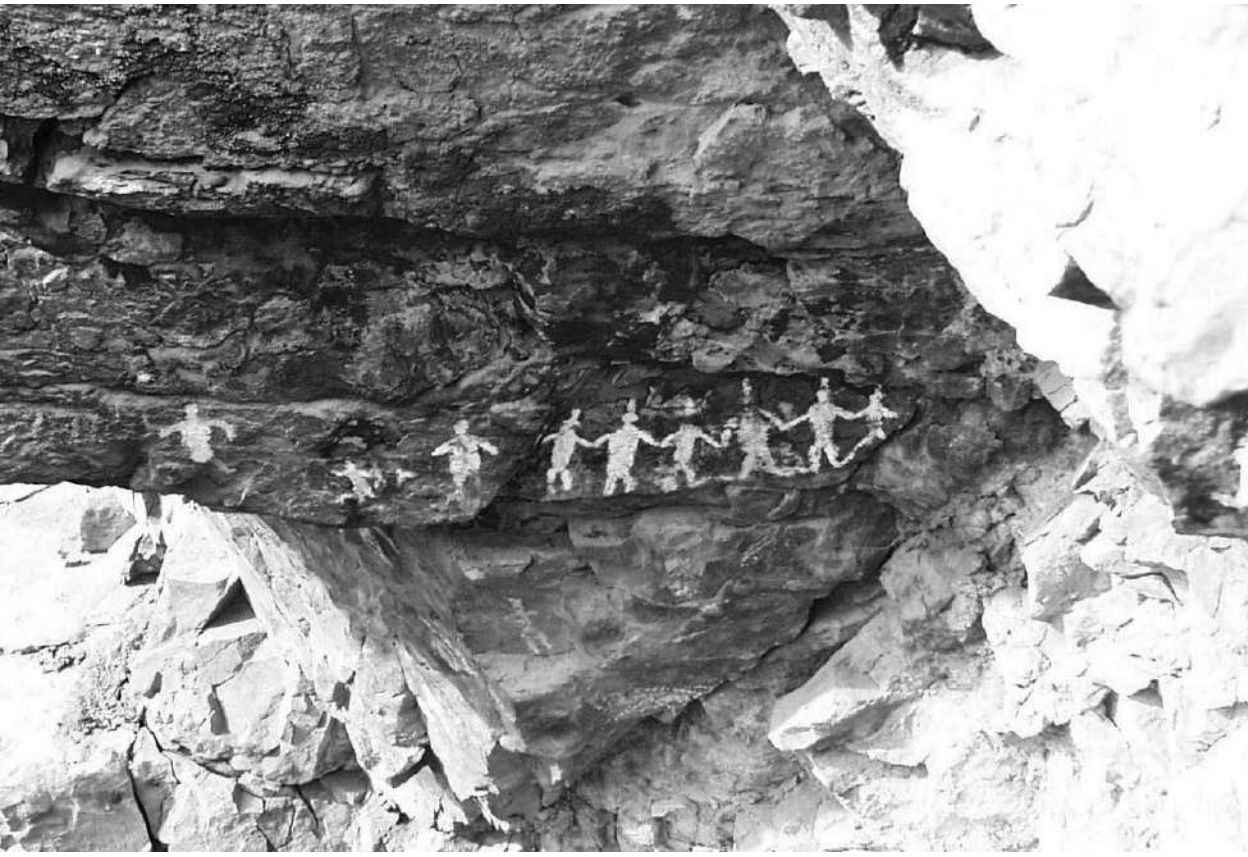
g. Report service. Copies of decisions in civil penalty proceedings instituted under the Act may be obtained by letter of request addressed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203-1923. Fees for this service shall be as established by the Director of that Office.

APPENDIX C

Curation Regulations

(36 C.F.R. Part 79)

C



Pictograph of a rabbit drive in Death Valley National Park.

Part 79: Curation of Federally-Owned and Administered Archeological Collections

SECTION

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79.2 Authority.

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Appendix A to Part 79: Example of a Deed of Gift

Appendix B to Part 79: Example of a Memorandum of Understanding for Curatorial Services for a Federally-Owned Collection.

Appendix C to Part 79: Example of a Short-Term Loan Agreement for a Federally-Owned Collection Corrections as Amended in 1990

Authority: 16 U.S.C. 470aa-mm, 16 U.S.C. 470 et seq.

s 79.1 Purpose.

a. The regulations in this part establish definitions, standards, procedures and guidelines to be followed by Federal agencies to preserve collections of prehistoric and historic material remains, and associated records, recovered under the authority of the Antiquities Act (16 U.S.C. 431- 433), the Reservoir Salvage Act (16 U.S.C. 469-469c), section 110 of the National Historic Preservation Act (16 U.S.C. 470h-2) or the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm). They establish:

1. Procedures and guidelines to manage and preserve collections;

2. Terms and conditions for Federal agencies to include in contracts, memoranda, agreements or other written instruments with repositories for curatorial services;

3. Standards to determine when a repository has the capability to provide long-term curatorial services; and

4. Guidelines to provide access to, loan and otherwise use collections.

b. The regulations in this part contain three appendices that provide additional guidance for use by the Federal Agency Official.

1. Appendix A to these regulations contains an example of an agreement between a Federal agency and a non-Federal owner of material remains who is donating the remains to the Federal agency.

2. Appendix B to these regulations contains an example of a memorandum of understanding between a Federal agency and a repository for long-term curatorial services for a federally-owned collection.

3. Appendix C to these regulations contains an example of an agreement between a repository and a third party for a short-term loan of a federally- owned collection (or a part thereof).

4. The three appendices are meant to illustrate how such agreements might appear. They should be revised according to the:

i. Needs of the Federal agency and any non-Federal owner;
ii. Nature and content of the collection; and
iii. Type of contract, memorandum, agreement or other written instrument being used.

5. When a repository has preexisting standard forms (e.g., a short-term loan form) that are consistent with the regulations in this part, those forms may be used in lieu of developing new ones.

s 79.2 Authority.

a. The regulations in this part are promulgated pursuant to section 101(a)(7)(A) of the National Historic Preservation Act (16 U.S.C. 470a) which requires that the Secretary of the Interior issue regulations ensuring that significant prehistoric and historic artifacts, and associated records, recovered under the authority of section 110 of that Act (16 U.S.C. 470h-2), the Reservoir Salvage Act (16 U.S.C. 469-469c) and the Archeological Resources Protection Act (16 U.S.C. 470aa-mm) are deposited in an institution with adequate long-term curatorial capabilities.

b. In addition, the regulations in this part are promulgated pursuant to section 5 of the Archeological Resources Protection Act (16 U.S.C. 470dd) which gives the Secretary of the Interior discretionary authority to promulgate regulations for the:

1. Exchange, where appropriate, between suitable universities, museums or other scientific or educational institutions, of archeological resources recovered from public and Indian lands under that Act; and

2. Ultimate disposition of archeological resources recovered under that Act (16 U.S.C. 470aa-mm), the Antiquities Act (16 U.S.C. 431-433) or the Reservoir Salvage Act (16 U.S.C. 469-469c).

3. It further states that any exchange or ultimate disposition of resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe that owns or has jurisdiction over such lands.

s 79.3 Applicability.

a. The regulations in this part apply to collections, as defined in s 79.4 of this part, that are excavated or removed under the authority of the Antiquities Act (16 U.S.C. 431-433), the Reservoir Salvage Act (16 U.S.C. 469-469c), section 110 of the National Historic Preservation Act (16 U.S.C. 470h-2) or the Archeological Resources Act (16 U.S.C. 470aa-mm). Such collections generally include those that are the result of a prehistoric or historic resource survey, excavation or other study conducted in connection with a Federal action, assistance, license or permit.

1. Material remains, as defined in s 79.4 of this part, that are excavated or removed from a prehistoric or historic resource generally are the property of the landowner.

2. Data that are generated as a result of a prehistoric or historic resource survey, excavation or other study are recorded in associated records, as defined in s 79.4 of this part. Associated records that are prepared or assembled in connection with a Federal or federally authorized prehistoric or historic resource survey, excavation or other study are the property of the U.S. Government, regardless of the location of the resource.

b. The regulations in this part apply to preexisting and new collections that meet the requirements of paragraph (a) of this section. However, the regulations shall not be applied in a manner that would supersede or breach material terms and conditions in any contract, grant, license, permit, memorandum, or agreement entered into by or on behalf of a Federal agency prior to the effective date of this regulation.

c. Collections that are excavated or removed pursuant to the Antiquities Act (16 U.S.C. 431-433) remain subject to that Act, the Act's implementing rule (43 CFR part 3), and the terms and conditions of the pertinent Antiquities Act permit or other approval.

d. Collections that are excavated or removed pursuant to the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm) remain subject to that Act, the Act's implementing rules (43 CFR part 7, 36 CFR part 296, 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.

e. Any repository that is providing curatorial services for a collection subject to the regulations in this part must possess the capability to provide adequate long-term curatorial services, as set forth in s 79.9 of this part, to safeguard and preserve the associated records and any material remains that are deposited in the repository.

s 79.4 Definitions.

As used for purposes of this part:

a. .Collection means material remains that are excavated or removed during a survey, excavation or other study of a prehistoric or historic resource, and associated records that are prepared or assembled in connection with the survey, excavation or other study.

1. Material remains means artifacts, objects, specimens and other physical evidence that are excavated or removed in connection with efforts to locate, evaluate, document, study, preserve or recover a prehistoric or historic resource. Classes of material remains (and illustrative examples) that may be in a collection include, but are not limited to:

i. Components of structures and features (such as houses, mills, piers, fortifications, raceways, earthworks and mounds);

ii. Intact or fragmentary artifacts of human manufacture (such as tools, weapons, pottery, basketry and textiles);

iii. Intact or fragmentary natural objects used by humans (such as rock crystals, feathers and pigments);

iv. By-products, waste products or debris resulting from the manufacture or use of man-made or natural materials (such as slag, dumps, cores and debitage);

v. .Organic material (such as vegetable and animal remains, and coprolites);

vi. Human remains (such as bone, teeth, mummified flesh, burials and cremations);

vii. Components of petroglyphs, pictographs, intaglios or other works of artistic or symbolic representation;

viii. Components of shipwrecks (such as pieces of the ship's hull, rigging, armaments, apparel, tackle, contents and cargo);

ix. Environmental and chronometric specimens (such as pollen, seeds, wood, shell, bone, charcoal, tree core samples, soil, sediment cores, obsidian, volcanic ash, and baked clay); and

x. Paleontological specimens that are found in direct physical relationship with a prehistoric or historic resource.

2. Associated records means original records (or copies thereof) that are prepared, assembled and document efforts to locate, evaluate, record, study, preserve or recover a prehistoric or historic resource. Some records such as field notes, artifact inventories

and oral histories may be originals that are prepared as a result of the field work, analysis and report preparation. Other records such as deeds, survey plats, historical maps and diaries may be copies of original public or archival documents that are assembled and studied as a result of historical research. Classes of associated records (and illustrative examples) that may be in a collection include, but are not limited to:

i. Records relating to the identification, evaluation, documentation, study, preservation or recovery of a resource (such as site forms, field notes, drawings, maps, photographs, slides, negatives, films, video and audio cassette tapes, oral histories, artifact inventories, laboratory reports, computer cards and tapes, computer disks and diskettes, printouts of computerized data, manuscripts, reports, and accession, catalog and inventory records);

ii. Records relating to the identification of a resource using remote sensing methods and equipment (such as satellite and aerial photography and imagery, side scan sonar, magnetometers, subbottom profilers, radar and fathometers);

iii. Public records essential to understanding the resource (such as deeds, survey plats, military and census records, birth, marriage and death certificates, immigration and naturalization papers, tax forms and reports);

iv. Archival records essential to understanding the resource (such as historical maps, drawings and photographs, manuscripts, architectural and landscape plans, correspondence, diaries, ledgers, catalogs and receipts); and

v. Administrative records relating to the survey, excavation or other study of the resource (such as scopes of work, requests for proposals, research proposals, contracts, antiquities permits, reports, documents relating to compliance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f), and National Register of Historic Places nomination and determination of eligibility forms).

b. Curatorial services. Providing curatorial services means managing and preserving a collection according to professional museum and archival practices, including, but not limited to:

1. Inventorying, accessioning, labeling and cataloging a collection;

2. Identifying, evaluating and documenting a collection;

3. Storing and maintaining a collection using appropriate methods and containers, and under appropriate environmental conditions and physically secure controls;

4. Periodically inspecting a collection and taking such actions as may be necessary to preserve it;

5. Providing access and facilities to study a collection; and

6. Handling, cleaning, stabilizing and conserving a collection in such a manner to preserve it.

c. Federal Agency Official means any officer, employee or agent officially representing the secretary of the department or the head of any other agency or instrumentality of the United States having primary management authority over a collection that is subject to this part.

d. Indian lands has the same meaning as in s -3(e) of uniform regulations 43 CFR part 7, 36

CFR part 296, 18 CFR part 1312, and 32 CFR part 229.

e. Indian tribe has the same meaning as in s -.3(f) of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229.

f. Personal property has the same meaning as in 41 CFR 100-43.001-14. Collections, equipment (e.g., a specimen cabinet or exhibit case), materials and supplies are classes of personal property.

g. Public lands has the same meaning as in s -.3(d) of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229.

h. Qualified museum professional means a person who possesses knowledge, experience and demonstrable competence in museum methods and techniques appropriate to the nature and content of the collection under the person's management and care, and commensurate with the person's duties and responsibilities. Standards that may be used, as appropriate, for classifying positions and for evaluating a person's qualifications include, but are not limited to, the following:

1. The Office of Personnel Management's "Position Classification Standards for Positions under the General Schedule Classification System" (U.S. Government Printing Office, stock No. 906--028-00000-0 (1981)) are used by Federal agencies to determine appropriate occupational series and grade levels for positions in the Federal service. Occupational series most commonly associated with museum work are the museum curator series (GS/GM-1015) and the museum technician and specialist series (GS/GM-1016). Other scientific and professional series that may have collateral museum duties include, but are not limited to, the archivist series (GS/GM-1420), the archeologist series (GS/GM- 193), the anthropologist series (GS/GM-190), and the historian series (GS/GM- 170). In general, grades GS-9 and below are assistants and trainees while grades GS-11 and above are professionals at the full performance level. Grades GS-11 and above are determined according to the level of independent professional responsibility, degree of specialization and scholarship, and the nature, variety, complexity, type and scope of the work.

2. The Office of Personnel Management's "Qualification Standards for Positions under the General Schedule (Handbook X-118)" (U.S. Government Printing Office, stock No. 906-030-00000-4 (1986)) establish educational, experience and training requirements for employment with the Federal Government under the various occupational series. A graduate degree in museum science or applicable subject matter, or equivalent training and experience, and three years of professional experience are required for museum positions at grades GS-11 and above.

3. The "Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716, Sept. 29, 1983) provide technical advice about archeological and historic preservation activities and methods for use by Federal, State and local Governments and others. One section presents qualification standards for a number of historic preservation professions. While no standards are presented for collections managers, museum curators or technicians, standards are presented for other professions (i.e., historians, archeologists, architectural historians, architects, and

historic architects) that may have collateral museum duties.

4. Copies of the Office of Personnel Management's standards, including subscriptions for subsequent updates, may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Copies may be inspected at the Office of Personnel Management's Library, 1900 E Street NW., Washington, DC, at any regional or area office of the Office of Personnel Management, at any Federal Job Information Center, and at any personnel office of any Federal agency. Copies of the "Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" are available at no charge from the Interagency Resources Division, National Park Service, P.O. Box 37127, Washington, DC 20013-7127.

i. Religious remains means material remains that the Federal Agency Official has determined are of traditional religious or sacred importance to an Indian tribe or other group because of customary use in religious rituals or spiritual activities. The Federal Agency Official makes this determination in consultation with appropriate Indian tribes or other groups.

j. Repository means a facility such as a museum, archeological center, laboratory or storage facility managed by a university, college, museum, other educational or scientific institution, a Federal, State of local Government agency or Indian tribe that can provide professional, systematic and accountable curatorial services on a long-term basis.

k. Repository Official means any officer, employee or agent officially representing the repository that is providing curatorial services for a collection that is subject to this part.

l. Tribal Official means the chief executive officer or any officer, employee or agent officially representing the Indian tribe.

s 79.5 Management and preservation of collections.

The Federal Agency Official is responsible for the long-term management and preservation of preexisting and new collections subject to this part. Such collections shall be placed in a repository with adequate long-term curatorial capabilities, as set forth in s 79.9 of this part, appropriate to the nature and content of the collections.

a. Preexisting collections. The Federal Agency Official is responsible for ensuring that preexisting collections, meaning those collections that are placed in repositories prior to the effective date of this rule, are being properly managed and preserved. The Federal Agency Official shall identify such repositories, and review and evaluate the curatorial services that are being provided to preexisting collections. When the Federal Agency Official determines that such a repository does not have the capability to provide adequate long-term curatorial services, as set forth in s 79.9 of this part, the Federal Agency Official may either:

1. Enter into or amend an existing contract, memorandum, agreement or other appropriate written instrument for curatorial services for the purpose of:

i. Identifying specific actions that shall be taken by the repository, the Federal agency or other appropriate party to eliminate the inadequacies;

ii. Specifying a reasonable period of time and a schedule within which the

actions shall be completed; and

iii. Specifying any necessary funds or services that shall be provided by the repository, the Federal agency or other appropriate party to complete the actions; or

2. Remove the collections from the repository and deposit them in another repository that can provide such services in accordance with the regulations in this part. Prior to moving any collection that is from Indian lands, the Federal Agency Official must obtain the written consent of the Indian landowner and the Indian tribe having jurisdiction over the lands.

b. New collections. The Federal Agency Official shall deposit a collection in a repository upon determining that:

1. The repository has the capability to provide adequate long-term curatorial services, as set forth in s 79.9 of this part;

2. The repository's facilities, written curatorial policies and operating procedures are consistent with the regulations in this part;

3. The repository has certified, in writing, that the collection shall be cared for, maintained and made accessible in accordance with the regulations in this part and any terms and conditions that are specified by the Federal Agency Official;

4. When the collection is from Indian lands, written consent to the disposition has been obtained from the Indian landowner and the Indian tribe having jurisdiction over the lands; and

5. The initial processing of the material remains (including appropriate cleaning, sorting, labeling, cataloging, stabilizing and packaging) has been completed, and associated records have been prepared and organized in accordance with the repository's processing and documentation procedures.

c. Retention of records by Federal agencies. The Federal Agency Official shall maintain administrative records on the disposition of each collection including, but not limited to:

1. The name and location of the repository where the collection is deposited;

2. A copy of the contract, memorandum, agreement or other appropriate written instrument, and any subsequent amendments, between the Federal agency, the repository and any other party for curatorial services;

3. A catalog list of the contents of the collection that is deposited in the repository;

4. A list of any other Federal personal property that is furnished to the repository as a part of the contract, memorandum, agreement or other appropriate written instrument for curatorial services;

5. Copies of reports documenting inspections, inventories and investigations of loss, damage or destruction that are conducted pursuant to s 79.11 of this part; and

6. Any subsequent permanent transfer of the collection (or a part thereof) to another repository.

s 79.6 Methods to secure curatorial services.

a. Federal agencies may secure curatorial services using a variety of methods, subject to Federal procurement and property management statutes, regulations, and any agency-specific statutes and regulations on the management of museum collections. Methods that may be used by Federal agencies to secure curatorial services include, but are not limited to:

1. Placing the collection in a repository that is owned, leased or otherwise operated by the Federal agency;

2. Entering into a contract or purchase order with a repository for curatorial services;

3. Entering into a cooperative agreement, a memorandum of understanding, a memorandum of agreement or other agreement, as appropriate, with a State, local or Indian tribal repository, a university, museum or other scientific or educational institution that operates or manages a repository, for curatorial services;

4. Entering an interagency agreement with another Federal agency for curatorial services;

5. Transferring the collection to another Federal agency for preservation; and

6. For archeological activities permitted on public or Indian lands under the Archaeological Resources Protection Act (16 U.S.C. 470 aa-mm), the Antiquities Act (16 U.S.C. 431-433) or other authority, requiring the archeological permittee to provide for curatorial services as a condition to the issuance of the archeological permit.

b. Guidelines for selecting a repository.

1. When possible, the collection should be deposited in a repository that:

i. Is in the State of origin;

ii. Stores and maintains other collections from the same site or project location; or

iii. Houses collections from a similar geographic region or cultural area.

2. The collection should not be subdivided and stored at more than a single repository unless such subdivision is necessary to meet special storage, conservation or research needs.

3. Except when non-federally-owned material remains are retained and disposed of by the owner, material remains and associated records should be deposited in the same repository to maintain the integrity and research value of the collection.

c. Sources for technical assistance. The Federal Agency Official should consult with persons having expertise in the management and preservation of collections prior to preparing a scope of work or a request for proposals for curatorial services. This will help ensure that the resulting contract, memorandum, agreement or other written instrument meets the needs of the collection, including any special needs in regard to any religious remains. It also will aid the Federal Agency Official in evaluating the qualifications and appropriateness of a repository, and in determining whether the repository has the capability to provide adequate long-term curatorial services for a collection. Persons,

agencies, institutions and organizations that may be able to provide technical assistance include, but are not limited to the:

1. Federal agency's Historic Preservation Officer;

2. State Historic Preservation Officer;

3. Tribal Historic Preservation Officer;

4. State Archeologist;

5. Curators, collections managers, conservators, archivists, archeologists, historians and anthropologists in Federal and State Government agencies and Indian tribal museum;

6. Indian tribal elders and religious leaders;

7. Smithsonian Institution;

8. American Association of Museums; and

9. National Park Service.

s 79.7 Methods to fund curatorial services.

A variety of methods are used by Federal agencies to ensure that sufficient funds are available for adequate, long-term care and maintenance of collections. Those methods include, but are not limited to, the following:

a. Federal agencies may fund a variety of curatorial activities using monies appropriated annually by the U.S. Congress, subject to any specific statutory authorities or limitations applicable to a particular agency. As appropriate, curatorial activities that may be funded by Federal agencies include, but are not limited to:

1. Purchasing, constructing, leasing, renovating, upgrading, expanding, operating, and maintaining a repository that has the capability to provide adequate long-term curatorial services as set forth in s 79.9 of this part;

2. Entering into and maintaining on a cost-reimbursable or cost-sharing basis a contract, memorandum, agreement, or other appropriate written instrument with a repository that has the capability to provide adequate long-term curatorial services as set forth in s 79.9 of this part;

3. As authorized under section 110(g) of the National Historic Preservation Act (16 U.S.C. 470h-2), reimbursing a grantee for curatorial costs paid by the grantee as a part of the grant project;

4. As authorized under section 110(g) of the National Historic Preservation Act (16 U.S.C. 470h-2), reimbursing a State for curatorial costs paid by the State agency to carry out the historic preservation responsibilities of the Federal agency;

5. Conducting inspections and inventories in accordance with s 79.11 of this part; and

6. When a repository that is housing and maintaining a collection can no longer provide adequate long-term curatorial services, as set forth in s 79.9 of this part, either:

i. Providing such funds or services as may be agreed upon pursuant to s 79.5(a)(1) of this part to assist the repository in eliminating the deficiencies; or

ii. Removing the collection from the repository and depositing it in another repository that can provide curatorial services in accordance with the regulations in this part.

b. As authorized under section 110(g) of the National Historic Preservation Act (16 U.S.C. 470h-2) and section 208(2) of the National Historic Preservation Act Amendments (16 U.S.C. 469c-2), for federally licensed or permitted projects or programs, Federal agencies may charge licensees and permittees reasonable costs for curatorial activities associated with identification, surveys, evaluation and data recovery as a condition to the issuance of a Federal license or permit.

c. Federal agencies may deposit collections in a repository that agrees to provide curatorial services at no cost to the U.S. Government. This generally occurs when a collection is excavated or removed from public or Indian lands under a research permit issued pursuant to the Antiquities Act (16 U.S.C. 431- 433) or the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm). A repository also may agree to provide curatorial services as a public service or as a means of ensuring direct access to a collection for long-term study and use. Federal agencies should ensure that a repository that agrees to provide curatorial services at no cost to the U.S. Government has sufficient financial resources to support its operations and any needed improvements.

d. Funds provided to a repository for curatorial services should include costs for initially processing, cataloging and accessioning the collection as well as costs for storing, inspecting, inventorying, maintaining, and conserving the collection on a long-term basis.

1. Funds to initially process, catalog and accession a collection to be generated during identification and evaluation surveys should be included in project planning budgets.

2. Funds to initially process, catalog and accession a collection to be generated during data recovery operations should be included in project mitigation budgets.

3. Funds to store, inspect, inventory, maintain and conserve a collection on a long-term basis should be included in annual operating budgets.

e. When the Federal Agency Official determines that data recovery costs may exceed the one percent limitation contained in the Archeological and Historic Preservation Act (16 U.S.C. 469c), as authorized under section 208(3) of the National Historic Preservation Act Amendments (16 U.S.C. 469c-2), the limitation may be waived, in appropriate cases, after the Federal Agency Official has:

1. Obtained the concurrence of the Secretary of the U.S. Department of the Interior by sending a written request to the Departmental Consulting Archeologist, National Park Service, P.O. Box 37127, Washington, DC 20013- 7127; and

2. Notified the Committee on Energy and Natural Resources of the U.S. Senate and the Committee on Interior and Insular Affairs of the U.S. House of Representatives.

s 79.8 Terms and conditions to include in contracts, memoranda and agreements for curatorial services.

The Federal Agency Official shall ensure that any contract, memorandum, agreement or other appropriate written instrument for curatorial services that is entered into by or on behalf of that Official, a Repository Official and any other appropriate party contains the following:

a. A statement that identifies the collection or group of collections to be covered and any other U.S. Government-owned personal property to be furnished to the repository;

b. A statement that identifies who owns and has jurisdiction over the collection;

c. A statement of work to be performed by the repository;

d. A statement of the responsibilities of the Federal agency and any other appropriate party;

e. When the collection is from Indian lands:

1. A statement that the Indian landowner and the Indian tribe having jurisdiction over the lands consent to the disposition; and

2. Such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands;

f. When the collection is from a site on public lands that the Federal Agency Official has determined is of religious or cultural importance to any Indian tribe having aboriginal or historic ties to such lands, such terms and conditions as may have been developed pursuant to s -.7 of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229;

g. The term of the contract, memorandum or agreement; and procedures for modification, suspension, extension, and termination;

h. A statement of costs associated with the contract, memorandum or agreement; the funds or services to be provided by the repository, the Federal agency and any other appropriate party; and the schedule for any payments;

i. Any special procedures and restrictions for handling, storing, inspecting, inventorying, cleaning, conserving, and exhibiting the collection;

j. Instructions and any terms and conditions for making the collection available for scientific, educational and religious uses, including procedures and criteria to be used by the Repository Official to review, approve or deny, and document actions taken in response to requests for study, laboratory analysis, loan, exhibition, use in religious rituals or spiritual activities, and other uses. When the Repository Official to approve consumptive uses, this should be specified; otherwise, the Federal Agency Official should review and approve consumptive uses. When the repository's existing operating procedures and criteria for evaluating requests to use collections are consistent with the regulations in this part, they may be used, after making any necessary modifications, in lieu of developing new ones;

k. Instructions for restricting access to information relating to the nature, location and character of the prehistoric or historic resource from which the material remains are excavated or removed;

l. A statement that copies of any publications resulting from study of the collection are to be provided to the Federal Agency Official and, when the collection is from Indian lands, to the Tribal Official and the Tribal Historic Preservation Officer, if any, of the Indian tribe that owns or has jurisdiction over such lands;

m. A statement that specifies the frequency and methods for conducting and documenting the inspections and inventories stipulated in s 79.11 of this part;

n. A statement that the Repository Official shall redirect any request for transfer or repatriation of a federally-owned collection (or any part thereof) to the Federal Agency Official, and redirect any request for transfer or repatriation of a federally administered collection (or any part thereof) to the Federal Agency Official and the owner;

o. A statement that the Repository Official shall not transfer, repatriate or discard a federally-owned collection (or any part thereof) without the written permission of the Federal Agency Official, and not transfer, repatriate or discard a federally administered collection (or any part thereof) without the written permission of the Federal Agency Official and the owner;

p. A statement that the Repository Official shall not sell the collection; and

q. A statement that the repository shall provide curatorial services in accordance with the regulations in this part.

s 79.9 Standards to determine when a repository possesses the capability to provide adequate long-term curatorial services.

The Federal Agency Official shall determine that a repository has the capability to provide adequate long-term curatorial services when the repository is able to:

a. Accession, label, catalog, store, maintain, inventory and conserve the particular collection on a long-term basis using professional museum and archival practices; and

b. Comply with the following, as appropriate to the nature and consent of the collection;

1. Maintain complete and accurate records of the collection, including:

i. Records on acquisitions;
ii. Catalog and artifact inventory lists;
iii. Descriptive information, including field notes, site forms and reports;
iv. Photographs, negatives and slides;
v. Locational information, including maps;
vi. Information on the condition of the collection, including any completed conservation treatments;
vii. Approved loans and other uses;
viii. Inventory and inspection records, including any environmental monitoring records;

ix. Records on lost, deteriorated, damaged or destroyed Government properly; and

x. Records on any deaccessions and subsequent transfers, repatriations or discards, as approved by the Federal Agency Official;

2. Dedicate the requisite facilities, equipment and space in the physical plant to property store, study and conserve the collection. Space used for storage, study, conservation and, if exhibited, any exhibition must not be used for non-curatorial purposes that would endanger or damage the collection;

3. Keep the collection under physically secure conditions within storage, laboratory, study and any exhibition areas by:

i. Having the physical plant meet local electrical, fire, building, health and safety codes;

ii. Having an appropriate and operational fire detection and suppression system;

iii. Having an appropriate and operational intrusion detection and deterrent system;

iv. Having an adequate emergency management plan that establishes procedures for responding to fires, floods, natural disasters, civil unrest, acts of violence, structural failures and failures of mechanical systems within the physical plant;

v. Providing fragile or valuable items in a collection with additional security such as locking the items in a safe, vault or museum specimen cabinet, as appropriate;

vi. Limiting and controlling access to keys, the collection and the physical plant; and

vii. Inspecting the physical plant in accordance with s 79.11 of this part for possible security weaknesses and environmental control problems, and taking necessary actions to maintain the integrity of the collection;

4. Require staff and any consultants who are responsible for managing and preserving the collection to be qualified museum professionals;

5. Handle, store, clean, conserve and, if exhibited, exhibit the collection in a manner that:

i. Is appropriate to the nature of the material remains and associated records;

ii. Protects them from breakage and possible deterioration from adverse temperature and relative humidity, visible light, ultraviolet radiation, dust, soot, gases, mold, fungus, insects, rodents and general neglect; and

iii. Preserves data that may be studied in future laboratory analyses. When material remains in a collection are to be treated with chemical solutions or preservatives that will permanently alter the remains, when possible, retain untreated representative samples of each affected artifact type, environmental specimen or other category of material remains to be treated. Untreated samples should not be stabilized or conserved beyond dry brushing;

6. Store site forms, field notes, artifacts inventory lists, computer disks and tapes, catalog forms and a copy of the final report in a manner that will protect them from theft and fire such as:

i. Storing the records in an appropriate insulated, fire resistant, locking cabinet, safe, vault or other container, or in a location with a fire suppression system;

ii. Storing a duplicate set of records in a separate location; or

iii. Ensuring that records are maintained and accessible through another party. For example, copies of final reports and site forms frequently are maintained

by the State Historic Preservation Officer, the State Archeologist or the State museum or universtiy. The Tribal Historic Preservation Officer and Indian tribal museum ordinarily maintain records on collections recovered from sites located on Indian lands. The National Technical Information Service and the Defense Technical Information Service maintain copies of final reports that have been deposited by Federal agencies. The National Archeological Database maintains summary information on archeological reports and projects, including information on the location of those reports.

7. Inspect the collection in accordance with s 79.11 of this part for possible deterioration and damage, and perform only those actions as are absolutely necessary to stabilize the collection and rid it of any agents of deterioration;

8. Conduct inventories in accordance with s 79.11 of this part to verify the location of the material remains, associated records and any other Federal personal property that is furnished to the repository; and

9. Provide access to the collection in accordance with s 79.10 of this part.

s 79.10 Use of collections.

a. The Federal Agency Official shall ensure that the Repository Official makes the collection available for scientific, educational and religious uses, subject to such terms and conditions as are necessary to protect and preserve the condition, research potential, religious or sacred importance, and uniqueness of the collection.

b. Scientific and educational uses. A collection shall be made available to qualified professionals for study, loan and use for such purposes as in-house and traveling exhibits, teaching, public interpretation, scientific analysis and scholarly research. Qualified professionals would include, but not be limited to, curators, conservators, collection managers, exhibitors, researchers, scholars, archeological contractors and educators. Students may use a collection when under the direction of a qualified professional. Any resulting exhibits and publications shall acknowledge the repository as the curatorial facility and the Federal agency as the owner or administrator, as appropriate. When the collection is from Indian lands and the Indian landowner and the Indian tribe having jurisdiction over the lands wish to be identified, those individuals and the Indian tribe shall also be acknowledged. Copies of any resulting publications shall be provided to the Repository Official and the Federal Agency Official. When Indian lands are involved, copies of such publications shall also be provided to the Tribal Offical and the Tribal Historic Preservation Officer, if any, of the Indian tribe that owns or has jurisdiction over such lands.

c. Religious uses. Religious remains in a collection shall be made available to persons for use in religious rituals or spiritual activities. Religious remains generally are of interest to medicine men and women, and other religious practitioners and persons from Indian tribes, Alaskan Native corporations, Native Hawaiians, and other indigenous and immigrant ethnic, social and religious groups that have aboriginal or historic ties to the lands from which the remains are recovered, and have traditionally used the remains or class of remains in religious rituals or spiritual activities.

d. Terms and conditions.

1. In accordance with section 9 of the Archaeological Resources Protection Act (16 U.S.C. 470hh) and section 304 of the National Historic Preservation Act (16 U.S.C. 470 w-3), the Federal Agency Official shall restrict access to associated records that contain information relating to the nature, location or character of a prehistoric or historic resource unless the Federal Agency Official determines that such disclosure would not create a risk of harm, theft or destruction to the resource or to the area or place where the resource is located.

2. Section -.18(a)(2) of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229 sets forth procedures whereby information relating to the nature, location or character of a prehistoric or historic resource may be made available to the Governor of any State. The Federal Agency Official may make information available to other persons who, following the procedures in s -.18(a)(2) of the referenced uniform regulations, demonstrate that the disclosure will not create a risk of harm, theft or destruction to the resource or to the area or place where the resource is located. Other persons generally would include, but not be limited to, archeological contractors, researchers, scholars, tribal representatives, Federal, State and local agency personnel, and other persons who are studying the resource or class or resources.

3. When a collection is from Indian lands, the Federal Agency Official shall place such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands on:

i. Scientific, educational or religious uses of material remains; and
ii. Access to associated records that contain information relating to the nature, location or character of the resource.

4. When a collection is from a site on public lands that the Federal Agency Official has determined is of religious or cultural importance to any Indian tribe having aboriginal or historic ties to such lands, the Federal Agency Official shall place such terms and conditions as may have been developed pursuant to s -.7 of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229 on:

i. Scientific, educational or religious uses of material remains; and
ii. Access to associated records that contain information relating to the nature, location or character of the resource.

5. The Federal Agency Official shall not allow uses that would alter, damage or destory an object in a collection unless the Federal Agency Official determines that such use is necessary for scientifc studies or public interpretation, and the potential gain in scientific or interpretive information outweighs the potential loss of the object. When possible, such use should be limited to unprovenienced, nonunique, nonfragile objects, or to a sample of objects drawn from a larger collection of similar objects.

e. No collection (or a part thereof) shall be loaned to any person without a written agreement between the Repository Official and the borrower that specifies the terms and conditions of the loan. Appendix C to the regulations in this part contains an example of a short-term loan agreement for a federally-owned collection. At a minimum, a loan agreement shall specify:

1. The collection or object being loaned;

2. The purpose of the loan;

3. The length of the loan;

4. Any restrictions on scientific, educational or religious uses, including whether any object may be altered, damaged or destroyed;

5. Except as provided in paragraph (e)(4) of this section, that the borrower shall handle the collection or object being borrowed during the term of the loan in accordance with this part so as not to damage or reduce its scentific, educational, religious or cultural value; and

6. Any requirements for insuring the collection or object being borrowed for any loss, damage or destruction during transit and while in the borrower's possession.

f. The Federal Agency Official shall ensure that the Repository Official maintains administrative records that document approved scentific, educational and religious uses of the collection.

g. The Repository Official may charge persons who study, borrow or use a collection (or a part thereof) reasonable fees to cover costs for handling, packing, shipping and insuring material remains, for photocopying associated records, and for other related incidental costs.

s 79.11 Conduct of inspections and inventories.

a. The inspections and inventories specified in this section shall be conducted periodically in accordance with the Federal Property and Administrative Services Act (40 U.S.C. 484), its implementing regulation (41 CFR part 101), any agency-specific regulations on the management of Federal property, and any agency-specific statutes and regulations on the management of museum collections.

b. Consistent with paragraph (a) of this section, the Federal Agency Official shall ensure that the Repository Official:

1. Provides the Federal Agency Official and, when the collection is from Indian lands, the Indian landowner and the Tribal Offical of the Indian tribe that has jurisdiction over the lands with a copy of the catalog list of the contents of the collection received and accessioned by the repository;

2. Provides the Federal Agency Official will a list of any other U.S. Government-owned personal property received by the repository;

3. Periodically inspects the physical plant for the purpose of monitoring the physical security and environmental control measures;

4. Periodically inspects the collection for the purposes of assessing the condition of the material remains and associated records, and of monitoring those remains and records for possible deterioration and damage;

5. Periodically inventories the collection by accession, lot or catalog record for the purpose of verifying the location of the material remains and associated records;

6. Periodically inventories any other U.S. Government-owned personal property in the possession of the repository;

7. Has qualified museum professionals conduct the inspections and inventories;

8. Following each inspection and inventory, prepares and provides the Federal Agency Official with a written report of the results of the inspection and inventory, including the status of the collection, treatments completed and recommendations for additional treatments. When the collection is from Indian lands, the Indian landowner and the Tribal Official of the Indian tribe that has jurisdiction over the lands shall also be provided with a copy of the report;

9. Within five (5) days of the discovery of any loss or theft of, deterioriation and damage to, or destruction of the collection (or a part thereof) or any other U.S. Government-owned personal property, prepares and provides the Federal Agency Official with a written notification of the circumstances surrounding the loss, theft, deterioration, damage or destruction. When the collection is from Indian lands, the Indian landowner and the Tribal Official and the Indian tribe that has jurisdiction over the lands shall also be provided with a copy of the notification; and

10. Makes the repository, the collection and any other U.S. Government-owned personal property available for periodic inspection by the:

i. Federal Agency Official;
ii. When the collection is from Indian lands, the Indian landowner and the Tribal Official of the Indian tribe that has jurisdiction over the lands; and
iii. When the collection contains religious remains, the Indian tribal elders, religious leaders, and other officials representing the Indian tribe or other group for which the remains have religious or sacred importance.

c. Consistent with paragraph (a) of this section, the Federal Agency Official shall have qualified Federal agency professionals:

1. Investigate reports of a lost, stolen, deteriorated, damaged or destroyed collection (or a part thereof) or any other U.S. Government-owned personal property; and

2. Periodically inspect the repository, the collection and any other U.S. Government-owned personal property for the purposes of:

i. Determining whether the repository is in compliance with the minimum standards set forth in s 79.9 of this part; and
ii. valuating the performance of the repository in providing curatorial services under any contract, memorandum, agreement or other appropriate written instrument.

d. The frequency and methods for conducting and documenting inspections and inventories stipulated in this section shall be mutually agreed upon, in writing, by the Federal Agency Official and the Repository Official, and be appropriate to the nature and content of the collection:

1. Collections from Indian lands shall be inspected and inventoried in accordance with such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands.

2. Religious remains in collections from public lands shall be inspected and inventoried in accordance with such terms and conditions as may have been developed pursuant to s -.7 of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229.

3. Material remains and records of a fragile or perishable nature should be inspected for deterioration and damage on a more frequent basis than lithic or more stable remains or records.

4. Because frequent handling will accelerate the breakdown of fragile materials, material remains and records should be viewed but handled as little as possible during inspections and inventories.

5. Material remains and records of a valuable nature should be inventoried on a more frequent basis than other less valuable remains or records.

6. Persons such as those listed in s 79.6(c) of this part who have expertise in the management and preservation of similar collections should be able to provide advice to the Federal Agency Official concerning the appropriate frequency and methods for conducting inspections and inventories of a particular collection.

e. Consistent with the Single Audit Act (31 U.S.C. 75), when two or more Federal agencies deposit collections in the same repository, the Federal Agency Officials should enter into an interagency agreement for the purposes of:

1. Requesting the Repository Official to coordinate the inspections and inventories, stipulated in paragraph (b) of this section, for each of the collections;

2. Designating one or more qualified Federal agency professionals to:

i. Conduct inspections, stipulated in paragraph (c)(2) of this section, on behalf of the other agencies; and

ii. Following each inspection, prepare and distribute to each Federal Agency Official a written report of findings, including an evaluation of performance and recommendations to correct any deficiencies and resolve any problems that were identified. When the collection is from Indian lands, the Indian landowner and the Tribal Official of the Indian tribe that has jurisdiction over the lands shall also be provided with a copy of the report; and

3. Ensuring consistency in the conduct of inspections and inventories conducted pursuant to this section.

Appendix A to Part 79: Example of a Deed of Gift

DEED OF GIFT TO THE (Name of the Federal agency)

Whereas, the (name of the Federal agency), hereinafter called the Recipient, is dedicated to the preservation and protection of artifacts, specimens and associated records that are generated in connection with its projects and programs;

Whereas, certain artifacts and specimens, listed in Attachment A to this Deed of Gift, were recoverd from the (name of the prehistoric or historic resource) site in connection with the Recipient's (name of the Recipient's project) project;

Whereas, the (name of the prehistoric or historic resource) site is located on lands to which title is held by (name of the donor), hereinafter called the Donor, and that the Donor holds free and clear title to the artifacts and specimens; and

Whereas, the Donor is desirous of donating the artifacts and speciments to the Recipient to ensure their continued preservation and protection;

Now therefore, the Donor does hereby unconditionally donate to the Recipient, for unrestricted use, the artifacts and specimens listed in Attachment A to this Deed of Gift; and

The Recipient hereby gratefully acknowleges the receipt of the artifacts and speciments.

Signed: (signature of the Donor) **Date:** (date)

Signed: (signature of the Federal Agency Official) **Date:** (date)

Attachment A: Inventory of Artifacts and Specimens.

Appendix B to Part 79: Example of a Memorandum of Understanding for Curatorial Services for a Federally-Owned Collection

MEMORANDUM OF UNDERSTANDING FOR CURATORIAL SERVICES BETWEEN THE
(Name of the Federal agency)
AND THE
(Name of the Repository)

This Memorandum of Understanding is entered into this (day) day of (month and year), between the United States of America, acting by and through the (name of the Federal agency), hereinafter called the Depositor, and the (name of the Repository), hereinafter called the Repository, in the State of (name of the State).
The Parties do witnesseth that,

Whereas, the Depositor has the responsibility under Federal law to preserve for future use certain collections of archeological artifacts, specimens and associated records, herein called the Collection, listed in Attachment A which is attached hereto and made a part hereof, and is desirous of obtaining curatorial services; and

Whereas, the Repository is desirous of obtaining, housing and maintaining the Collection, and recognizes the benefits which will accrue to it, the public and scientific interests by housing and maintaining the Collection for study and other educational purposes; and

Whereas, the Parties hereto recognize the Federal Government's continued ownership and control over the Collection and any other U.S. Government-owned personal property, listed in Attachment B which is attached hereto and made a part hereof, provided to the Repository, and the Federal Government's responsibility to ensure that the Collection is suitably managed and preserved for the public good; and

Whereas, the Parties hereto recognize the mutual benefits to be derived by having the Collection suitably housed and maintained by the Repository;

Now Therefore, the Parties do mutually agree as follows:

1. The Repository shall:

a. Provide for the professional care and management of the Collection from the (names of the prehistoric and historic resources) sites, assigned (list site numbers) site numbers. The collections were recovered in connection with the (name of the Federal or federally-authorized project) project, located in (name of the nearest city or town), (name of the county) county, in the State of (name of the State).

b. Perform all work necessary to protect the Collection in accordance with the regulation 36 CFR part 79 for the curation of federally-owned and administered archeological collections and the terms and conditions stipulated in Attachment C to this Memorandum.

c. Assign as the Curator, the Collections Manager and the Conservator having responsibility for the work under this Memorandum, persons who are qualified

museum professionals and whose expertise is appropriate to the nature and content of the Collection.

d. Begin all work on or about (month, date and year) and continue for a period of (number of years) years or until sooner terminated or revoked in accordance with the terms set forth herein.

e. Provide and maintain a repository facility having requisite equipment, space and adequate safeguards for the physical security and controlled environment for the Collection and any other U.S. Government-owned personal property in the possession of the Repository.

f. Not in any way adversely alter or deface any of the Collection except as may be absolutely necessary in the course of stabilization, conservation, scientific study, analysis and research. Any activity that will involve the intentional destruction of any of the Collection must be approved in advance and in writing by the Depositor.

g. Annually inspect the facilities, the Collection and any other U.S. Government-owned personal property. Every (number of years) years inventory the Collection and any other U.S. Government-owned personal property. Perform only those conservation treatments as are absolutely necessary to ensure the physical stability and integrity of the Collection, and report the results of inventories, inspections and treatments to the Depositor.

h. Within five (5) days of discovery, report all instances of and circumstances surrounding loss of, deterioration and damage to, or destruction of the Collection and any other U.S. Government-owned personal property to the Depositor, and those actions taken to stabilize the Collection and to correct any deficiencies in the physical plant or operating procedures that may have contributed to the loss, deterioration, damage or destruction. Any actions that will involve the repair and restoration of any of the Collection and any other U.S. Government-owned personal property must be approved in advance and in writing by the Depositor.

i. Review and approve or deny requests for access to or short-term loan of the Collection (or a part thereof) for scientific, educational or religious uses in accordance with the regulation 36 CFR part 79 for the curation of federally- owned and administered archeological collections and the terms and conditions stipulated in Attachment C of this Memorandum. In addition, refer requests for consumptive uses of the Collection (or a part thereof) to the Depositor for approval or denial.

j. Not mortgage, pledge, assign, repatriate, transfer, exchange, give, sublet, discard or part with possession of any of the Collection or any other U.S. Government-owned personal property in any manner to any third party either directly or in-directly without the prior written permission of the Depositor, and redirect any such request to the Depositor for response. In addition, not take any action whereby any of the Collection or any other U.S. Government- owned personal property shall or may be encumbered, seized, taken in execution, sold, attached, lost, stolen, destroyed or damaged.

2. The Depositor shall:

a. On or about (month, date and year), deliver or cause to be delivered to the Repository the Collection, as described in Attachment A, and any other U.S. Government-owned personal property, as described in Attachment B.

b. Assign as the Depositor's Representative having full authority with regard to this Memorandum, a person who meets pertinent professional qualifications.

c. Every (number of years) years, jointly with the Repository's designated representative, have the Depositor's Representative inspect and inventory the Collection and any other U.S. Government-owned personal property, and inspect the repository facility.

d. Review and approve or deny requests for consumptively using the Collection (or a part thereof).

3. Removal of all or any portion of the Collection from the premises of the Repository for scientific, educational or religious purposes may be allowed only in accordance with the regulation 36 CFR part 79 for the curation of federally-owned and administered archeological collections; the terms and conditions stipulated in Attachment C to this Memorandum; any conditions for handling, packaging and transporting the Collection; and other conditions that may be specified by the Repository to prevent breakage, deterioration and contamination.

4. The Collection or portions thereof may be exhibited, photographed or otherwise reproduced and studied in accordance with the terms and conditions stipulated in Attachment C to this Memorandum. All exhibits, reproductions and studies shall credit the Depositor, and read as follows: "Courtesy of the (name of the Federal agency)." The Repository agrees to provide the Depositor with copies of any resulting publications.

5. The Repository shall maintain complete and accurate records of the Collection and any other U.S. Government-owned personal property, including information on the study, use, loan and location of said Collection which has been removed from the premises of the Repository.

6. Upon execution by both parties, this Memorandum of Understanding shall be effective on this (day) day of (month and year), and shall remain in effect for (number of years) years, at which time it will be reviewed, revised, as necessary, and reaffirmed or terminated. This Memorandum may be revised or extended by mutual consent of both parties, or by issuance of a written amendment signed and dated by both parties. Either party may terminate this Memorandum by providing 90 days written notice. Upon termination, the Repository shall return such Collection and any other U.S. Government-owned personal property to the destination directed by the Depositor and in such manner to preclude breakage, loss, deterioration and contamination during handling, packaging and shipping, and in accordance with other conditions specified in writing by the Depositor. If the Repository terminates, or is in default of, this Memorandum, the Repository shall fund the packaging and transportation costs. If the Depositor terminates

this Memorandum, the Depositor shall fund the packaging and transportation costs.

7. Title to the Collection being cared for and maintained under this Memorandum lies with the Federal Government.

In witness whereof, the Parties hereto have executed this Memorandum.

Signed: (signature of the Federal Agency Official) **Date:** (date)

Signed: (signature of the Repository Official) **Date:** (date)

Attachment A: Inventory of the Collection
Attachment B: Inventory of any other U.S. Government-owned Personal Property
Attachment C: Terms and Conditions Required by the Depositor

Appendix C to Part 79: Example of a Short-Term Loan Agreement for a Federally-Owned Collection

SHORT-TERM LOAN AGREEMENT BETWEEN THE
(Name of the Repository)
AND THE
(Name of the Borrower)

The (name of the Repository), hereinafter called the Repository, agrees to loan to (name of the Borrower), hereinafter called the Borrower, certain artifacts, specimens and associated records, listed in Attachment A, which were collected from the (name of the prehistoric or historic resource) site which is assigned (list site number) site number. The collection was recovered in connection with the (name of the Federal or federally authorized project) project, located in (name of the nearest city or town), (name of the county) county in the State of (name of the State). The Collection is the property of the U.S. Government.

The artifacts, specimens and associated records are being loaned for the purpose of (cite the purpose of the loan), beginning on (month, day and year) and ending on (month, day and year).

During the term of the loan, the Borrower agrees to handle, package and ship or transport the Collection in a manner that protects it from breakage, loss, deterioration and contamination, in conformance with the regulation 36 CFR part 79 for the curation of federally-owned and administered archeological collections and the terms and conditions stipulated in Attachment B to this loan agreement.

The Borrower agrees to assume full responsibility for insuring the Collection or for providing funds for the repair or replacement of objects that are damaged or lost during transit and while in the Borrower's possession. Within five (5) days of discovery, the Borrower will notify the Repository of instances and circumstances surrounding any loss of, deterioration and damage to, or destruction of the Collection and will, at the direction of the Repository, take steps to conserve damaged materials.

The Borrower agrees to acknowledge and credit the U.S. Government and the Repository in any exhibits or publications resulting from the loan. The credit line shall read as follows: "Courtesy of the (names of the Federal agency and the Repository)." The Borrower agrees to provide the Repository and the (name of the Federal agency) with copies of any resulting publications.

Upon termination of this agreement, the Borrower agrees to properly package and ship or transport the Collection to the Repository.

Either party may terminate this agreement, effective not less than (number of days) days after receipt by the other party of written notice, without further liability to either party.

Signed: (signature of the Repository Official) **Date:** (date)

Signed: (signature of the Borrower) **Date:** (date)

Attachment A: Inventory of the Objects being Loaned
Attachment B: Terms and Conditions of the Loan

National Park Service
U.S. Department of the Interior

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