

**No. 03-08-0006 I-CV**

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**IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS  
AUSTIN, TEXAS**

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**THE ARCHAEOLOGICAL CONSERVANCY,**

*Appellant*

v.

**WILSON LAND AND CATTLE COMPANY AND  
WILL R. WILSON, JR.,**

*Appellees*

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**On Appeal from Cause No. 06-384-C638  
368th Judicial District Court of Williamson County, Texas  
Hon. Burt Carnes Presiding**

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**BRIEF OF AMICI CURIAE**

**THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, THE  
SOCIETY FOR AMERICAN ARCHAEOLOGY, THE ARCHAEOLOGICAL INSTITUTE OF  
AMERICA, AND THE LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION  
IN SUPPORT OF APPELLANT THE ARCHAEOLOGICAL CONSERVANCY**

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ARCHAEOLOGICAL INSTITUTE OF AMERICA, AND THE  
LAWYERS' COMMITTEE FOR CULTURAL HERITAGE  
PRESERVATION

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## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....	i
INDEX OF AUTHORITIES .....	v
INTEREST OF AMICI CURIAE .....	xii
IDENTITY OF AMICI CURIAE .....	xii
ISSUE PRESENTED .....	xv
I. INTRODUCTION.....	1
II. ARGUMENT AND AUTHORITIES.....	4
A. Preservation Includes Preserving the Archaeological Record in Its Original Context for Disciplined, Scientific Study—Not Just Active Use That Destroys Context.....	4
1. WLCC’s Arguments Are Contradicted by Archaeology’s Scientific Method.....	4
2. Archaeological Ethics and Best Practices Prohibit the Trial Court’s Approach.....	6
3. The Conservancy Fulfilled a Proper Archaeological Purpose in Stabilizing and Then Protecting the Site from Looting.....	9
4. Preserving Context for Archaeology’s Scientific Purposes Conforms with National Policy, Legislation, and Understandings of Archaeological Purposes.....	12
B. Preservation as a Public Interest Found Early Recognition in the Common Law and Is Now Embedded in Federal Statutes as National Policy.....	16
1. The First Preservation Law in the United States—the Antiquities Act of 1906—Preserved the Integrity of Archaeological Sites.....	17

2.	A Century of Preservation Laws—Affecting the Environment, Transportation Infrastructure, Archaeological Sites, and Historic Structures—Establish Cultural Resource Protection as a National Priority. ....	20
	CONCLUSION AND PRAYER .....	28
	CERTIFICATE OF SERVICE .....	30

APPENDIX

<b>A</b>	Antiquities Act of 1906	16 U.S.C.A. § 431 (West 2000)
<b>B</b>	Historic Sites Act of 1935 (excerpts)	16 U.S.C.A. § 461 (West 2000)
<b>C</b>	Historic and Archaeological Data Preservation Act of 1974 (excerpts)	16 U.S.C.A. § 469 (West 2000)
<b>D</b>	National Historic Preservation Act of 1966 (excerpts)	16 U.S.C.A. § 470 (West 2000)
<b>E</b>	Archaeological Resources Protection Act of 1979 (excerpts)	16 U.S.C.A. §§ 470aa-mm (West 2000)
<b>F</b>	Native American Graves Protection and Repatriation Act (excerpts)	25 U.S.C.A. § 3001 (West 2001)
<b>G</b>	Abandoned Shipwrecks Act (excerpts)	43 U.S.C.A. § 2101 (West 2007)
<b>H</b>	Department of Transportation Act (excerpts)	49 U.S.C.A. § 303 (West 2007)
<b>I</b>	National Environmental Policy Act (excerpts)	42 U.S.C.A. § 4321 (West 2003)

## INDEX OF AUTHORITIES

### Cases

<i>Morris County Trust for Historic Pres. v. Pierce</i> , 714 F.2d 271 (3d Cir. 1983) .....	24
<i>Mountain States Legal Found. v. Bush</i> , 306 F.3d 1132 (D.C. Cir. 2002), <i>cert. denied</i> , 540 U.S. 812 (2003).....	19
<i>Penn. Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	20
<i>United States v. Quarrell</i> , 310 F.3d 664 (10th Cir. 2002).....	10
<i>United States v. Diaz</i> , 499 F.2d 113 (9th Cir. 1974).....	25
<i>United States v. Gerber</i> , 999 F.2d 1112 (7th Cir. 1993), <i>cert. denied</i> , 510 U.S. 1071 (1993) .....	2, 13, 27
<i>United States v. Gettysburg Elec. Ry.</i> , 160 U.S. 668 (1896).....	16, 17
<i>United States v. McClain</i> , 545 F.2d 988 (5th Cir. 1977).....	1
<i>United States v. Schultz</i> , 178 F. Supp. 2d 445 (S.D.N.Y. 2002).....	1
<i>United States v. Schultz</i> , 333 F.3d 393 (2d Cir. 2003) .....	1
<i>United States v. Shumway</i> , 112 F.3d 1413 (10th Cir. 1997).....	26

### Statutes, Regulations, and Rules

16 U.S.C.A. § 1 (West 2000).....	21
16 U.S.C.A. § 431(West 2000).....	19
16 U.S.C.A. §§ 431-433 (West 2000).....	17

16 U.S.C.A. § 433 (West 2000) .....	18
16 U.S.C.A. §§ 461-467 (West 2000).....	21
16 U.S.C.A. § 462(a) (West 2000).....	21
16 U.S.C.A. § 468 (West 2000) .....	xii
16 U.S.C.A. § 469 (West 2000) .....	21
16 U.S.C.A. §§ 469-469(c) (West 2000) .....	21
16 U.S.C.A. § 470(b)(1), (4) (West 2000).....	xv
16 U.S.C.A. § 470(b)(2) (West 2000).....	24
16 U.S.C.A. § 470(b)(7) (West 2000).....	24
16 U.S.C.A. § 470aa (West 2000).....	26
16 U.S.C.A. § 470bb (West 2000).....	26
16 U.S.C.A. § 470cc (West 2000).....	26, 27
16 U.S.C.A. § 470ee(a) (West 2000) .....	26
16 U.S.C.A. § 470ee(b) & (c) (West 2000).....	27
16 U.S.C.A. § 470ee(c) (West 2000) .....	27
16 U.S.C.A. § 470(f) (West 2000) .....	25
16 U.S.C.A. § 470hh (West 2000).....	27
16 U.S.C.A. § 470h-2 (West 2000).....	25
16 U.S.C.A. §§ 470aa-mm (West 2000) .....	22, 23
16 U.S.C.A. §§ 470-470w-6 (West 2000) .....	22
16 U.S.C.A. § 470w-6 (West 2000).....	23
16 U.S.C.A. §§ 528-531 (West 2000).....	21



16 U.S.C. § 701 (1900) .....	18
16 U.S.C.A. § 1600 (West 2000) .....	21
16 U.S.C.A. §§ 3371-3378 (West 2007).....	18
18 U.S.C.A. Appx. § 2B1.5 (West 2007).....	3
23 U.S.C.A. § 138 (West 2006) .....	23
25 U.S.C.A. § 3001 (West 2001) .....	22
42 U.S.C.A. § 4321 (West 2003) .....	22
42 U.S.C.A. § 4331(b)(4) (West 2003).....	23
43 U.S.C.A. § 1701 (West 2007) .....	21
43 U.S.C.A. §§ 2101-2106 (West 2007).....	22
49 U.S.C.A. § 303 (West 2007) .....	22
49 U.S.C.A. § 303(a) (West 2007).....	22
49 U.S.C.A. § 303(c) (West 2007).....	23
1979 U.S.C.C.A.N. (93 Stat. 721) 1709.....	13, 25
36 C.F.R. § 60.4(d).....	25
40 C.F.R. § 1502.2(f) .....	23
65 Fed. Reg. 77,697; 77,720 (Dec. 12, 2000).....	14
Secretary of the Interior’s Standards and Guidelines for Archaeology and Historic Preservation, 48 Fed. Reg. 44,716; 44,739 (Sept. 29, 1983), <i>available at</i> <a href="http://www.nps.gov/history/local-law/Arch_Standards.htm">http://www.nps.gov/history/local-law/Arch_Standards.htm</a> .....	14
TEX. NAT. RES. CODE ANN. § 191.002 (Vernon 2001) .....	28
TEX. NAT. RES. CODE ANN. § 191.131 (Vernon 2001) .....	28
TEX. NAT. RES. CODE ANN. § 191.132(b) (Vernon 2001) .....	28

TEX. R. APP. P. 11 .....xii

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BRIAN M. FAGAN & CHRISTOPHER R. DECORSE,  
 IN THE BEGINNING (11th ed. 2005) .....5

Don D. Fowler & Barbara Malinky, *The Origins of ARPA: Crafting the  
 Archaeological Resources Protection Act of 1979*, in PRESENTING  
 ARCHAEOLOGY IN COURT: LEGAL STRATEGIES FOR PROTECTING  
 CULTURAL RESOURCES 1 (Sherry Hutt et al. eds., 2006)..... xv, 25, 26

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<http://crm.cr.nps.gov/archive/19-7/19-7-5.pdf> .....18

JAMES CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER  
 OUR ANCIENT HERITAGE (2008).....11

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 eds., 2006).....2

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 ON CULTURAL RESOURCES 3 (Jennifer R. Richman &  
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 Dec. 11, 2008).....xiii

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 Monument, <http://www.nps.gov/afbg> (last visited Dec.  
 11, 2008) .....20

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 Political Process, [http://www.nps.gov/archeology/pubs/  
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The Archaeological Conservancy, New Acquisitions, <a href="http://www.americanarchaeology.com/aaaquis.html">http://www.americanarchaeology.com/aaaquis.html</a> (last visited Dec. 14, 2008).....	12
The National Trust for Historic Preservation, <a href="http://www.preservationnation.org/about-us/">http://www.preservationnation.org/about-us/</a> (last visited Dec. 11, 2008) .....	xii
The National Historic Preservation Program: Overview, <a href="http://www.achp.gov/overview.html">http://www.achp.gov/overview.html</a> (last visited Dec. 11, 2008).....	24
USC Sequence Stratigraphy Web, Introduction to sequence stratigraphy, <a href="http://strata.geol.sc.edu/seqstrat.html">http://strata.geol.sc.edu/seqstrat.html</a> (last visited Dec. 14, 2008).....	15

## INTEREST OF AMICI CURIAE

As required under Rule 11 of the Texas Rules of Appellate Procedure, Amici and their counsel Andrews Kurth LLP represent that no fee of any kind has been or will be paid for the preparation of this brief. TEX. R. APP. P. 11. The law firm of Andrews Kurth is providing all legal services connected with the preparation of the brief as part of the firm's existing pro bono program.

## IDENTITY OF AMICI CURIAE

- **The National Trust for Historic Preservation in the United States**

The National Trust for Historic Preservation (“NTHP,” “National Trust” or the “Trust”) was founded in 1949 as a private, nonprofit membership organization to “facilitate public participation” in the preservation of our nation’s heritage, and to further the historic preservation policy of the United States. 16 U.S.C.A. § 468 (West 2000). It “provides leadership, education, advocacy, and resources to save America’s diverse historic places.”<sup>1</sup> Headquartered in Washington, D.C., the NTHP has nine regional and field offices, including a Southwest Office in Fort Worth, Texas, and 240,000 members nationwide, including almost 9,500 members in Texas. The National Trust works with thousands of preservation groups in all 50 states.<sup>2</sup> The National Trust also has extensive experience in the donation of historic properties for purposes of protection. In addition to the Trust’s collection of 29 Historic Sites open to the public, the National Trust also holds approximately 100

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<sup>1</sup> About the National Trust for Historic Preservation, <http://www.preservationnation.org/about-us/> (last visited Dec. 11, 2008).

<sup>2</sup> *Id.*

conservation easements on properties whose fee title is held by others, including at least one property whose significance is specifically archaeological in nature. The Trust also has a Gifts of Heritage program, which receives donations of real property and reconveys those properties subject to historic preservation easements that protect the properties' significant features.

- **The Lawyers' Committee for Cultural Heritage Preservation**

The Lawyers' Committee for Cultural Heritage Preservation (LCCHP) "is a nonprofit organization of lawyers, law students and interested members of the public who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy."<sup>3</sup>

- **The Society for American Archaeology**

The Society for American Archaeology (SAA) is an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 7,000 members, the society represents professional, student, and avocational archaeologists in a variety of settings including government agencies, colleges and universities, museums, and the private sector. Since its inception in 1934, the SAA has endeavored to stimulate interest and research in American archaeology; advocate and aid in the conservation of archaeological resources; encourage public access to and appreciation of archaeology; oppose all looting of sites and the purchase and sale of looted archaeological materials; and serve as a bond among those interested in the archaeology of the Americas.

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<sup>3</sup> About the Lawyers' Committee, <http://www.culturalheritagelaw.org/about-lcchp> (last visited Dec. 11, 2008).

- **The Archaeological Institute of America**

Founded in 1879 and chartered by an Act of Congress in 1906, the Archaeological Institute of America (AIA) is the nation's largest and oldest archaeological organization. The AIA promotes archaeological inquiry and public understanding of the material record of the human past worldwide. With over 200,000 members and subscribers throughout the United States, the AIA's membership comprises both professional archaeologists and interested individuals who share a passion for a better understanding of the human past and for the preservation of the world's archaeological resources. Believing that greater understanding of the past enhances our shared sense of humanity and enriches our existence, the AIA seeks to educate people of all ages about the significance of archaeological discovery. The AIA is committed to preserving the world's archaeological resources and cultural heritage for the benefit of all people in both the present and the future.



## ISSUE PRESENTED

Amici present this brief in support of the Archaeological Conservancy to explain that the trial court's decision is inconsistent with the national legal landscape involving historic preservation and archaeological protection, the value and public interest in the conduct of scientific archaeology, and contemporary understandings of those activities that fit the proper definition of "archaeological purposes." Preservation in all its manifestations, whether in protecting open spaces, landscapes, historic structures, or archaeological sites, is a matter of national public policy and in the public interest, as stated by Congress in enacting the National Historic Preservation Act in 1966.

The spirit and direction of the Nation are founded upon and reflected in its historic heritage; ... the preservation of this irreplaceable heritage is in the *public interest* so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans....<sup>4</sup>

The trial court's decision contravenes this policy. Not only does the decision misconstrue real property law, as the Archaeological Conservancy's briefs confirm, it also second-guesses the expertise of the preeminent private sector steward of archaeological resources in the United States, the Archaeological Conservancy, whose founding is "[u]ndoubtedly the most significant private-sector development related to" Congress's passage of archaeological preservation laws.<sup>5</sup> If the trial court's decision stands, it could

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<sup>4</sup> National Historic Preservation Act, 16 U.S.C.A. § 470(b)(1), (4) (West 2000) (emphasis added).

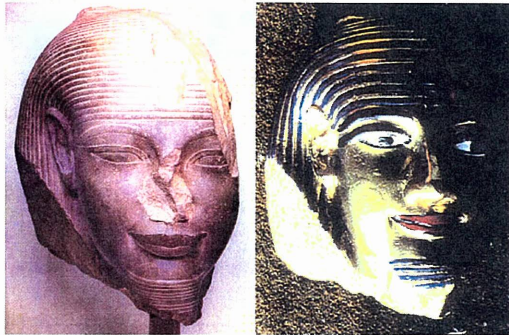
<sup>5</sup> Don D. Fowler & Barbara Malinky, *The Origins of ARPA: Crafting the Archaeological Resources Protection Act of 1979*, in PRESENTING ARCHAEOLOGY IN COURT: LEGAL STRATEGIES FOR PROTECTING CULTURAL RESOURCES 1, 17 (Sherry Hutt et al. eds., 2006) (referring to Congress's passage of the Archaeological Resources Protection Act of 1979).

have the deleterious effect of encouraging courts to apply arbitrary, unworkable standards to the science of preservation—archaeology in particular—undermining the protections necessary to preserve cultural heritage resources.

Specifically, if the trial court's decision were upheld, conservation donations throughout the state and even the nation would be put at risk. The donor's action in unilaterally repudiating a legally valid gift, resulting in a significant economic windfall to the donor, should not be countenanced or rewarded by this Court. To do so would encourage donors elsewhere to attempt to take similar actions. Organizations across the country that accept title to property to further the cause of preservation and conservation are entitled to rely on those gifts and the limited conditions placed on them—as here—and expend their limited resources for long-term planning and management strategies accordingly. Furthermore, courts interpret restrictions placed on charitable gifts narrowly, placing the onus on the donor to clarify restrictions and construing any ambiguities against the donor. This reflects a strong public policy that, once given, such gifts should remain in the public domain. If gifts of real property could be revoked on such a slim record as this, land conservation organizations across the country, such as the Conservancy, could take little comfort in the paper on which a gift deed is written.

## I. INTRODUCTION

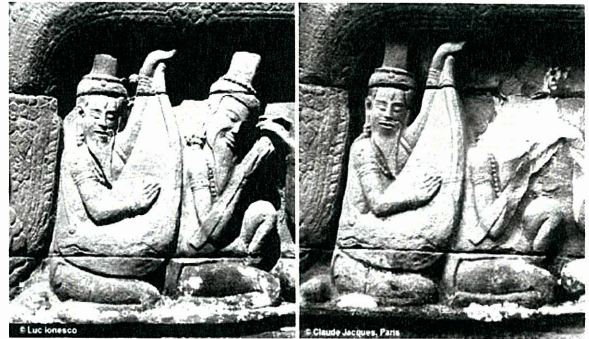
Prehistoric rocks from the Southwest desert end up decorating a rock garden surrounding a swimming pool in Nevada.<sup>6</sup>



A prominent New York antiquities dealer conspires with a British conservator, who dips the sculptured head of an Egyptian 18th Dynasty pharaoh (ca. 1403-1354 B.C.) into clear plastic and paints it to resemble a cheap tourist trinket (*see* before-and-after picture

above) so that it can be smuggled out of Egypt and ultimately offered for sale at \$1.4 million.<sup>7</sup>

Power tools are taken to the walls of a 12th-century Buddhist temple in Cambodia (right) to tear out portions of statues from their



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<sup>6</sup> Tim Canaday & Todd Swain, *Operation Indian Rocks: Interagency ARPA Investigations in the Deserts of Nevada and California*, in PRESENTING ARCHAEOLOGY IN COURT, *supra* note 5, at 27, 28. The offender was arrested as part of a large-scale sting operation, “Operation Indian Rocks,” a federal inter-agency effort that would result in the arrest and conviction of seven individuals and a corporation for looting 22 prehistoric sites and causing over \$570,000 in damages. *Id.* One of the individuals, Bobbie Wilkie, was sentenced to 37 months in prison for his theft of archaeological resources. Press Release, Daniel G. Bogden, U.S. Dep’t of Justice (Jan. 2004), *available at* [http://www.usdoj.gov/usao/nv/home/textonly/pressrelease\\_t/january2004/peterson011604\\_t.htm](http://www.usdoj.gov/usao/nv/home/textonly/pressrelease_t/january2004/peterson011604_t.htm). Federal agents eventually uncovered tens of thousands of stolen artifacts displayed around the looters’ homes. *Id.*

<sup>7</sup> The pharaoh is Amenhotep III. The successful prosecution of the offender, an international antiquities dealer, reaffirmed the earlier *McClain* Doctrine. *See United States v. McClain*, 545 F.2d 988 (5th Cir. 1977). Part of the defense in this case, which the district court rebuffed, was that the property was not considered to be “stolen” under the National Stolen Property Act. *See United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002); *aff’d*, 333 F.3d 393 (2d Cir. 2003). The district court compared the theft to a non-United States citizen’s theft of a cultural treasure for U.S. citizens: the Liberty Bell. *Id.* at 448.

bases and dismantle tons of stone bas-relief.<sup>8</sup>

Each incident is what one federal district court judge described as “stealing history.”<sup>9</sup> These artifacts or ruins contain that “history.” Their loss or destruction results in the loss of knowledge, leaving a gap in piecing together the puzzle of a common past: “Humans are by nature self-reflective, and the pursuit of knowledge and science bears witness that humanity is on a continual quest to decipher its own existence.”<sup>10</sup>

The quest for knowledge and identity is frustrated, however, when the clues by which the past is revealed are compromised. Archaeological objects, unmoored from their historical context through inappropriate handling by looters or ill-timed excavations by the inadequately trained, lose their ability to reveal the full measure of knowledge to be gleaned from the object’s surroundings. Prehistoric cultures did not commit to writing their daily activities and what year they occurred, or with whom they traded as part of their economic

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<sup>8</sup> Seth Mydans, *Raiders of Lost Art Loot Temples in Cambodia*, N.Y. TIMES, Apr. 1, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9F06E5DD1439F932A35757C0A96F958260>.

<sup>9</sup> Larry A. Mackey, *ARPA on Private Lands: The GE Mound Case*, in PRESENTING ARCHAEOLOGY IN COURT, *supra* note 5, at 47, 48. In the decision in which the district court aptly described the theft of archaeological resources as “stealing history,” see *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), the history at issue was “well worth protecting.” Mackey, *supra*, at 47, 48. It involved the theft of Hopewell artifacts from a site known as “the GE mound,” a 400-foot long and 20-foot high burial mound, one of the five largest Hopewell mounds in eastern North America. *Id.* The mound was so named because of its discovery on land owned by the General Electric Company in Posey County, Indiana. *Id.* For 1,500 years the mound stood undisturbed, contained the burial remains of ancient area inhabitants, and was “one of the largest concentrations of Hopewell artifacts in North America.” *Id.* As an example of the historical knowledge associated with such objects, “the materials used to manufacture the artifacts alone evidence impressive trading networks existing two thousand years before among the earliest inhabitants of present-day southern Indiana.” *Id.* For example, the artifacts found in Indiana included spear points from quartz found in the Arkansas mountains; silver from Canada, copper from the Upper Peninsula of Michigan, and spear points with a type of obsidian that was traced back to the Rocky Mountains. See *id.*

<sup>10</sup> Jennifer R. Richman & Marion P. Forsyth, *Preface* to LEGAL PERSPECTIVES ON CULTURAL RESOURCES xi, xi (Jennifer R. Richman & Marion P. Forsyth eds., 2004).

system, or how they used their materials, or how they lived, or what they believed. As expert testimony in the trial court showed, and scholars uniformly confirm, archaeological artifacts are an integral part of the record left of our past.<sup>11</sup> Only with the skills of trained archaeologists can the clues those artifacts reveal—by their shape, size, placement, age and associational relationship to other remains—be interpreted to tell our common history.<sup>12</sup> Federal law such as that used to charge and convict the individual who used prehistoric rocks as landscape accoutrements around his pool can value this wrong in monetary terms—and even assign prison time for the theft of the object. But the loss of a unique, irreplaceable archaeological resource cannot truly be reduced to a sum of money.<sup>13</sup>

In this case, Mr. Wilson, Sr. honored his wife’s interest in archaeology by donating a tract of land to the Archaeological Conservancy (“Conservancy”) in 1991. The donated tract, known as the “Wilson-Leonard Site,” is an “incredibly significant” archaeological site,<sup>14</sup>

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<sup>11</sup> See Lynne Sebastian, *Archaeology and the Law*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES, *supra* note 10, at 3, 3 (“The archaeological record contains the history and is the heritage of people throughout the world. We are all richer for its preservation, and poorer when it is destroyed through development, vandalism, and looting.”); Patty Gerstenblith, *From Steinhardt to Schultz: The McClain Doctrine and the Protection of Archaeological Sites*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES, *supra* note 10, at 100, 100 (noting the purpose of the *McClain* Doctrine to “reduce the incentive to loot archaeological sites, which results in the loss of significant historical, cultural, and scientific information,” and when a site is not properly managed with “systematic, scientific excavation” the cultural, historical, and scientific information that could have been retrieved is “lost forever”).

<sup>12</sup> *E.g.*, 4RR27-28 (testimony of Archaeological Conservancy Board Member).

<sup>13</sup> Congress recently indicated the seriousness with which it views harm to the archaeological heritage and its desire to incorporate the intangible historical and cultural values that are lost when archaeological sites are looted when it enacted the Cultural Heritage Resource Crimes Sentencing Guideline. 18 U.S.C.A. Appx. § 2B1.5 (West 2007). The Guideline specifically mandates inclusion of “archaeological value” in calculating the value of a cultural heritage resource in determining the sentence of a defendant where the crime involved an archaeological resource. *Id.* at app. n.2(A)(i).

<sup>14</sup> 2RR137.

with a “phenomenal record from 12,000 years ago to 8,000 years ago.”<sup>15</sup> Excavations at the site have revealed, among other things, one of the oldest and most complete human burials in North America—a young woman whose burial dates back 11,000 years.<sup>16</sup> In donating the site to the Conservancy, Mr. Wilson invoked respect for a disciplined science that dates back in this nation to Thomas Jefferson, the country’s first “scientific archaeologist.”<sup>17</sup> Unfortunately, the trial court’s decision superimposes additional and destructive requirements for use of the Wilson-Leonard site diverging both from real property law and from correct archaeological practice, as it is currently understood by leading archaeological organizations.

## II. ARGUMENT AND AUTHORITIES

### A. Preservation Includes Preserving the Archaeological Record in Its Original Context for Disciplined, Scientific Study—Not Just Active Use That Destroys Context.

#### I. WLCC’s Arguments Are Contradicted by Archaeology’s Scientific Method.

WLCC’s<sup>18</sup> arguments in the trial court and before this Court stand in stark contrast to the well-developed methodologies and practices that ensure archaeological resources are preserved for scientific study. WLCC had no evidence, no expertise, and no science to

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<sup>15</sup> 2RR160.

<sup>16</sup> Texas Beyond History: Wilson-Leonard Site, <http://www.texasbeyonhistory.net/plateaus/images/ap5.html> (last visited Jan. 14, 2009).

<sup>17</sup> Patty Gerstenblith, *Recent International Cases and Prognosis for the Future*, in PRESENTING ARCHAEOLOGY IN COURT, *supra* note 5, at 205, 205-06. Thomas Jefferson has been called the first such “scientific archaeologist” for his careful recording of explorations of Native American mounds in 1784. *Id.*

<sup>18</sup> Amici use the same reference for Appellees, Will Wilson, Jr. and Wilson Land and Cattle Company as the Conservancy used in their briefs: “WLCC.”

counter the evidence at trial showing the expertise the Archaeological Conservancy applied in protecting the Wilson-Leonard Site. The WLCC defense turned instead on criticizing the Conservancy for not spearheading more open and obvious activity on this well-known archaeological site. Despite ample evidence showing how wrong that perspective is, the trial court accepted it. The trial court then wrongly determined there was not enough of the type of use that WLCC desired or preferred for “archaeological purposes,” and that this self-interested vision of archaeology justified taking away title to a historically significant tract of land from the Conservancy.

Proper archaeological methodology is premised on an understanding of the science of stratigraphy—that is, that remains of past human life are accumulated and buried in association with other contemporary remains. A properly conducted excavation permits total reconstruction of all the elements of a site in context with each other. Archaeological remains are finite, unique, and irreplaceable resources, and great care must be taken in how they are handled, from *in situ* preservation through various methods of exploration, study, and curation. This view is well expressed in a standard introduction to archaeology: “Stewardship is the fundamental responsibility of all archaeologists—to ensure the conservation and survival of the finite archaeological record of artifacts and sites for posterity.”<sup>19</sup>

In order to recover the maximum information about the past, archaeology is premised on painstaking and careful design, execution, recovery and curation of artifacts,

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<sup>19</sup> BRIAN M. FAGAN & CHRISTOPHER R. DECORSE, *IN THE BEGINNING* 25 (11th ed. 2005).

study, and publication of a research project. Such projects require planning and appropriate funding to carry out because the archaeologist gets only one opportunity to excavate a particular site and to recover the information from which the history of our past is written.

Since the excavation process itself destroys an archaeological site, it should be confined whenever possible to situations in which adequate planning, time, and money are available to ensure that maximum useful knowledge about the past is recovered. Archaeologists are thus becoming more actively concerned with ensuring that archaeological data are preserved in the ground, secure for future generations and future archaeologists. Of course, this philosophy applies to unthreatened sites as well as immediately endangered ones.<sup>20</sup>

Archaeology has therefore evolved over the years from an emphasis on large-scale excavation to finding more conservative methods of study and exploration. For example, significant information can now be recovered through surface survey and use of newly-developed scientific techniques, such as aerial photography and remote sensing. Such conservation also allows sites to be studied again in the future when even more advanced techniques will come available. Excavation is now generally viewed as a last-resort method of obtaining information from an archaeological site and is only one activity, and not the most important activity, that fits within the rubric of “archaeological purposes.”

## **2. *Archaeological Ethics and Best Practices Prohibit the Trial Court’s Approach.***

This view of excavation as a last resort is further supported by the codes of professional ethics and practices promulgated by the two leading American professional archaeological societies, the Society for American Archaeology (SAA) and the Archaeological

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<sup>20</sup> ROBERT SHARER & WENDY ASHMORE, *ARCHAEOLOGY: DISCOVERING OUR PAST* 601 (3rd ed. 2003).



Institute of America (AIA), two of the amici. For example, the SAA lists eight Principles of Archaeological Ethics.<sup>21</sup> The first principle requires archaeologists to act as stewards of the archaeological record by promoting conservation and protection of *in situ* archaeological material and sites. Other principles include the obligation to publish research and to conserve records of exploration. The eighth principle emphasizes the need for proper preparation in the conduct of any excavation, stating:

Given the destructive nature of most archaeological investigations, archaeologists must ensure that they have adequate training, experience, facilities, and other support necessary to conduct any program of research they initiate in a manner consistent with the foregoing principles and contemporary standards of professional practice.<sup>22</sup>

Similarly, the AIA's Code of Professional Standards emphasizes the archaeologist's responsibilities to the archaeological record, including the supervision of qualified personnel in carrying out archaeological research, providing for adequate and accessible long-term storage and curation of archaeological materials and records, publication of research in a timely fashion, and ensuring that research projects include specific plans for conservation, preservation, and publication from the very outset with adequate funds to carry out these essential activities. Finally, the AIA's Code demonstrates the accepted purposes and methods for conducting archaeological research:

The purposes and consequences of all archaeological research should be carefully considered before the beginning of work. Approaches

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<sup>21</sup> SAA Principles of Archaeological Ethics, <http://www.saa.org/aboutSAA/committees/ethics/principles.html> (last visited Jan. 26, 2009).

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

and methods should be chosen that require a minimum of damage to the archaeological record.<sup>23</sup>

These statements, by the two leading professional archaeological organizations in the United States, demonstrate that “archaeological purposes” include far more than excavation, and that excavation is not the preferred way to conduct archaeological study. Rather, archaeological purposes include preservation and stabilization of a site, study and curation of artifacts previously recovered from a site, and non-invasive, non-destructive methods of exploration. As such, the activities engaged in by the Conservancy on this site clearly fall within the rubric of “archaeological purposes” contained within the deed of gift.

By contrast, the type of aggressive, overt use that WLCC suggested as necessary to satisfy the simple terms of the gift deed is ill-advised, unscientific, and contrary to the philosophical underpinnings of preservation laws protecting archaeological heritage. Although such laws may appear to protect primarily the objects themselves, an “even more significant goal is the preservation of the archaeological and historical *context* in which an object is found.”<sup>24</sup> WLCC’s position at trial and in this Court reveals a fundamental misunderstanding: preservation for archaeological purposes frequently *requires* leaving the site alone to stabilize it for later, exhaustive study. Indeed, even when performed by a trained archaeologist, excavation destroys the valuable context. For this primary reason, archaeological standards such as the above-referenced AIA Code dictate that long-term site

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<sup>23</sup> Archaeological Institute of America Code of Professional Standards, [http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_Professional\\_StandardsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_Professional_StandardsA5S.pdf) (last visited Jan. 26, 2009).

<sup>24</sup> Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 564 (1995) (emphasis added).

preservation is preferred to frequent excavation: “Although excavation is sometimes the appropriate means of research, archaeological survey, study of previously excavated material, and other means should be considered *before resort is made to excavation.*”<sup>25</sup>

**3. The Conservancy Fulfilled a Proper Archaeological Purpose in Stabilizing and Then Protecting the Site from Looting.**

During cross-examination, it was apparent that Mr. Wilson was dissatisfied with the Conservancy’s efforts to protect the land and preserve it for archaeological purposes. Although the record shows research and study for archaeological purposes has occurred on the site, the Conservancy also had to take steps to secure and stabilize the site.<sup>26</sup> Those efforts included putting in place a fence and gate, making inquiries to the sheriff’s office for patrols of the area to protect the site from trespassers, and use of local citizens for patrols as

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<sup>25</sup> *Supra* note 23 (emphasis added).

<sup>26</sup> For example, the Conservancy authorized work on the site in 1994 by Dr. Brett Bousman, a professor of anthropology who teaches archaeology at Texas State University. Dr. Bousman took 11 coring samples from the preserve, which he was able to use to test certain geological models. He testified regarding the type of information gleaned from this work:

[W]e were mainly trying to test a series of geological models about how this terrace had formed and at the same time trying to get an idea of the archaeological potential on the preserved site. There’s lots of artifacts scattered here on the surface you can see just by walking over. You can see the burned rock midden. This line here on the topography, this line is the edge of the burned rock midden. It shows up on the topographic map.

....We came back out in 2006 and looked at a 50-foot swath here. We did find artifacts and buried colluvial context up in this part of the site as well.

2RR160-61; *see also* 3RR58, 61-62, 65 (describing acts to promote and use the site for archaeological purposes).

The artifacts recovered were stored at the Texas Archaeological Research Lab, at the University of Texas. 2RR162. The information gleaned from the research is part of Dr. Bousman’s research publication, included in the record as Defendant’s Exhibit 25. Dr. Bousman also testified as to the remote sensing work he was preparing for on the site, a way of finding the artifacts without destroying the site. *See* 2RR167.

volunteer stewards to check the property as often as they deem necessary—all of which the Conservancy undertook to protect the site’s integrity and prevent looting. 2RR110 & PX19 (located in 5RR); *see also* 3RR64 (describing other protective efforts). In taking these steps, the Conservancy was doing exactly what proper stewardship requires for protecting archaeological resources. It worked to preserve the site from the worst offense against archaeological heritage—looting—and inappropriate disruption to the natural state of the site itself.<sup>27</sup>

The concern for looting was not merely speculative or hypothetical. The record showed this concern was valid. The site had shown signs of considerable intrusion and disruption. 2RR52. After the Conservancy’s involvement in stabilizing and protecting the site, the “massive” pothunting—the archaeologists’ term for looting—was visibly lessened. 2RR46, 52; *see also* 2RR135 (addressing looting on property). Indeed, the type of full-scale, overt and obvious work on the site that WLCC urged only exacerbates the problem and attracts looters, rather than deterring them. *See, e.g., United States v. Quarrell*, 310 F.3d 664, 671 (10th Cir. 2002) (noting problem of too much signage informing looters they were on

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<sup>27</sup> *See, e.g.,* Stephanie A. Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. UNIV. L. REV. 599, 599-600 (1995) (noting numerous authorities documenting that looting and trafficking of Native American artifacts is a lucrative and thriving business in the United States with a growing international market and methods used as “barbaric,” including unearthing burial grounds and bulldozing ruins with large-scale, mechanical equipment). Ades details the extent of such looting: “By 1979, archaeological looters had pillaged successfully nearly 3,000 recorded ancient sites on national forest lands in Arizona. Between 1980 and 1987, looting on private and Native American lands ‘skyrocketed.’ In 1989, vandals and thieves stole from at least ninety percent of the Native American sites in the Southwest, including all of the classic Mimbres sites. Motivation to continue archaeological looting remains strong due to the activity’s reputation as ‘a relatively low-risk activity with a high-profit potential.’” *Id.* (quoting John Neary, *A Legacy of Wanton Thievery*, ARCHAEOLOGY, Sept./Oct. 1993, at 57, 58).

federal land and subject to federal laws protecting artifacts: “Placing signs near sites, however, would draw the attention of potential looters.”).

Acts such as those the Conservancy undertook to stabilize the site are critical to protecting the valuable context. Only with context intact can the *sine qua non* of an archaeological investigation occur: methodical study by proper scientific procedures. “Once objects are removed from the ground, they can be appreciated for their aesthetic appeal, but only if they are excavated scientifically can they also be appreciated for their scientific, historic and cultural values.”<sup>28</sup> The science of archaeology simply cannot be performed once the site is compromised:

Unlike many natural resources, our archaeological resources are not renewable. Once a site has been worked over by looters in order to remove a few saleable objects, the fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the position of a skeleton – all of these sources of fugitive information are ignored and obliterated by archaeological looters.<sup>29</sup>

Just as the entire site provides the valuable context, it also is important that

artifacts be excavated together.... Careful excavation allows the archaeologist to place a found object in its proper chronological sequence and context, in turn allowing the reconstruction of each of a site’s time periods, the characteristics of society at those times, and the connections among objects found and sites located throughout the world.<sup>30</sup>

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<sup>28</sup> Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Artifacts*, 16 CONN. J. INT’ L. 197, 199 (2001) (emphasis added).

<sup>29</sup> JAMES CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 28 (2008).

<sup>30</sup> Gerstenblith, *The Public Interest in the Restitution of Cultural Artifacts*, *supra* note 28, at 199.

A site that is not handled properly for the science of archaeology to occur leads to the “irretrievable loss of such information.”<sup>31</sup> The Conservancy, cognizant of the ongoing struggle against looters, and as “the *only* national non-profit organization that acquires endangered archaeological sites,”<sup>32</sup> is well positioned to address these problems and issues, just as it does in the more than 365 sites across the country it safeguards to ensure that the archaeological record is preserved.<sup>33</sup>

**4. Preserving Context for Archaeology’s Scientific Purposes Conforms with National Policy, Legislation, and Understandings of Archaeological Purposes.**

This country has for a century incorporated preservation concepts and goals into national legislation. Such laws all have, at bottom, a concern for respecting the integrity of the historic or archaeological site and the context of artifacts, the very thing that WLCC implicitly argued against in the trial court. For example, Edgar Lee Hewitt, who spearheaded passage of the country’s first preservation legislation, the Antiquities Act of 1906 (App. A), “referred to the archaeological record of the Southwest as a ‘vast treasury of information’ and frequently emphasized the value of artifacts in context.”<sup>34</sup> This philosophy was no different seven decades later, when Congress enacted more expansive protection for archaeological heritage with the Archaeological Resources Protection Act (“ARPA”) (App.

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<sup>31</sup> *Id.*

<sup>32</sup> The Archaeological Conservancy, New Acquisitions, <http://www.americanarchaeology.com/aaaquis.html> (last visited Dec. 14, 2008) (emphasis added).

<sup>33</sup> *See id.*

<sup>34</sup> National Park Service Archaeology Program: Edgar Lee Hewitt and the Political Process, <http://www.nps.gov/archeology/pubs/antiq/antiq04.htm> (last visited Dec. 11, 2008).

E).<sup>35</sup> The House Report issued in connection with ARPA's passage recognized "the importance of the integrity of the archaeological site *and the context in which archaeological resources are found*" (see 1979 U.S.C.C.A.N. (93 Stat. 721) 1709) (emphasis added), a finding that "highlights the importance of archaeological site integrity and context, highly relevant factors for scientific analysis."<sup>36</sup>

Judge Posner also recognized site integrity as the underpinning of ARPA in *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993). Writing for the court, Judge Posner upheld Gerber's criminal conviction under ARPA for trafficking objects pillaged from a 1500-year-old Indian burial mound on land owned by General Electric in Indiana. Rejecting the argument that Gerber could not be convicted under ARPA because the rare objects were found on private land, not federal or Indian land, Judge Posner observed:

[I]t is almost inconceivable that Congress would have wanted to encourage amateur archaeologists to violate state laws in order to amass valuable collections of Indian artifacts, especially as many of these amateurs do not appreciate the importance to scholarship of leaving an archaeological site intact and undisturbed until the location of each object in it has been carefully mapped to enable inferences concerning the design, layout, size, and age of the site, and the practice and culture of inhabitants, to be drawn.

*Id.* at 1116.

Similarly, in connection with the National Historic Preservation Act, the Secretary of the Interior's Standards and Guidelines state that preservation in terms of historic properties

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<sup>35</sup> See Ryan M. Seidemann, *The Reason Behind the Rules: The Archaeological Resources Protection Act of 1979 and Scientific Study*, 13 B.U. J. SCI. & TECH. L. 193, 200 (2007) (quoting HR 96-311 (1979)).

<sup>36</sup> *Id.* at 200.

means taking measures “to sustain the existing form, integrity, and materials” of a property,”<sup>37</sup> which, in the archaeological realm constitutes “preservation in place,” recognized even at local governmental levels as “the best treatment option for archaeological resources,” through “avoidance, protection, and acquisition of protective easements.”<sup>38</sup>

Accordingly, when the regulations implementing Section 106 of the National Historic Preservation Act were amended in 2000, the Advisory Council on Historic Preservation, the government entity charged with overseeing the National Historic Preservation Act, explicitly recognized that the excavation of archaeological sites and recovery of archaeological data constitute an “adverse effect” on the site, “even if conducted in accordance with the Secretary’s standards.”

This acknowledges the reality that destruction of a site and recovery of its information and artifacts is adverse. It is intended that in eliminating data recovery as an exception to the adverse effect criteria, Federal agencies will be more inclined to pursue other forms of mitigation, including avoidance and preservation in place, to protect archeological sites.

65 Fed. Reg. 77,697; 77,720 (Dec. 12, 2000).

This approach is prudent and based on what archaeology does as a science. Just as technological advances occur in medicine and other scientific fields, advances have occurred

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<sup>37</sup> Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation, 48 Fed. Reg. 44,716; 44,739 (Sept. 29, 1983), *available at* [http://www.nps.gov/history/local-law/arch\\_standards.htm](http://www.nps.gov/history/local-law/arch_standards.htm) (emphasis added).

<sup>38</sup> D.C. Dep’t of Consumer & Regulatory Affairs Historic Pres. Div. & D.C. Historic Pres. Review Bd., Guidelines for Archaeological Investigations in the District of Columbia 21 (1998), *available at* <http://www.planning.dc.gov/planning/cwp/view,a,1284,q,570594.asp>.



in archaeology as well.<sup>39</sup> Archaeologists learned centuries ago of “the need to excavate a site layer-by-layer, with each layer representing a time period and all objects and architectural features within a layer bearing a chronological relationship that has significance for the understanding of the history, social organization, religion and cultural life of the ancient world.”<sup>40</sup>

Indeed, enormous advances have been made in all sciences that inform the archaeological work in reconstructing past civilizations. *See* 2RR138 (noting “constant technological improvements” underway that will help interpret deposits on the site). Techniques that archaeologists now consider essential to professional excavation are of relatively recent vintage. Other techniques will no doubt evolve and take the place of current state-of-the-art research tools, ones that will allow archaeologists to obtain far more information from a site than would be possible if the excavation were done today. It is therefore correct, as the testimony at trial showed, that archaeological sites should be preserved in place for as long as possible. It is for those on the cutting edge of this specialized science to determine when, where, and why to excavate, as “ever more sophisticated scientific techniques as well as interdisciplinary methods of analysis are

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<sup>39</sup> Patty Gerstenblith has traced this evolution of the scientific method in archaeology, noting that work at significant archaeological sites all over the world—such as Troy, Knossos, Egypt and Jericho—has led to the development of a scientific understanding of site stratigraphy. Stratigraphy is a geological perspective, critical to the archaeologist’s ability to accurately interpret the site and its artifacts. USC Sequence Stratigraphy Web, Introduction to sequence stratigraphy, <http://strata.geol.sc.edu/seqstrat.html> (last visited Dec. 14, 2008) (“Stratigraphy is the study of the layered character of sedimentary rocks. Geologists use a variety of strategies to interpret the origin of these rocks and predict the extent of their lithofacies and rock character.”). Gerstenblith, *The Public Interest in the Restitution of Cultural Artifacts*, *supra* note 28, at 199.

<sup>40</sup> Gerstenblith, *The Public Interest in the Restitution of Cultural Artifacts*, *supra* note 28, at 198-99.

available.”<sup>41</sup> The entity best positioned to do so, in cooperation and dialogue with colleagues at the Texas Historical Commission, is the Conservancy.

Although such entities as the Conservancy rely in great part on gifts made by conservation-minded donors, how that stewardship is carried out once the deed is signed and recorded must be the grantee’s exclusive prerogative. When a donor places simple, objective limitations on a gift deed aimed expressly at preserving an archaeological treasure, as WLCC did here, the donor implicitly recognizes the donee’s expertise to carry out the details of that stewardship. Extrapolating a different intent, more than a decade later, is a dangerous precedent, particularly when it is interested parties who would benefit by revoking the gift once commercial development pressure and property values have increased around the archaeological site. Furthermore, courts should be reluctant to order a forfeiture on a broad reading of restrictions placed in a deed of gift, as it is in the public interest for such gifts to remain in the public domain.

**B. Preservation as a Public Interest Found Early Recognition in the Common Law and Is Now Embedded in Federal Statutes as National Policy.**

As early as 1896 in *United States v. Gettysburg Electric Railway*, the Supreme Court recognized that preserving the historical record of the past as the foundation for future study and future generations was in the public interest. 160 U.S. 668 (1896). It did so without any law that mandated how history and its vestiges mattered, holding that the preservation of lands for understanding the country’s Civil War past was a “public purpose.” Thus, the U.S.

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<sup>41</sup> *Id.*

government was entitled to condemn land owned by the Gettysburg Electric Railway Company that comprises a preeminent Civil War battlefield as part of that public purpose:

The battle of Gettysburg was one of the great battles of the world. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. Can it be that government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place—and even take possession for the benefit of all the citizens of the country, for the present and for their future? Such use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.

*Id.* at 681-82.

The public purpose was all the more compelling given the “imminent danger” that the battlefield would be “irreparably defaced” if a railway were constructed over it. *Id.* at 685 (citing Joint Resolution of Congress of June 6, 1894 permitting taking for public purpose). Congress would soon take up preservation at the national level, stating clearly that protecting cultural heritage is a matter of national policy. It would turn first to the unprincipled treatment of archaeological resources across the country.

**I. The First Preservation Law in the United States—the Antiquities Act of 1906—Preserved the Integrity of Archaeological Sites.**

Just one decade after the Supreme Court’s decision in *United States v. Gettysburg Electric Railway*, Congress passed the country’s first legislative mandate to preserve the past—the Antiquities Act of 1906, 16 U.S.C.A. §§ 431-433 (App. A). The Antiquities Act was the result of over 25 years of concern and dialogue among conservation-minded scholars and

politicians<sup>42</sup> that the country's significant archaeological "sites were [being] ravaged faster than scientific expeditions could record them."<sup>43</sup> This significant legislation at the national level placed archaeological resources and their intrinsic value at the forefront and would set the stage for a century of legislation in preservation law.<sup>44</sup> This first preservation statute made it a federal crime to appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument or any object of antiquity without the authority of the Federal Government.<sup>45</sup> Although it would lose some force in later years and be superseded by more exhaustive statutes with harsher penalties for archaeological damage, the Antiquities Act was a cornerstone, "shap[ing] and inform[ing] every piece of preservation legislation since

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<sup>42</sup> See Francis P. McManamon, *The Antiquities Act—Setting Basic Preservation Policies*, 19 Cultural Resource Management 7 (1996), available at <http://crm.cr.nps.gov/archive/19-7/19-7-5.pdf> ("Enactment of the Antiquities Act required 25 years of effort.").

<sup>43</sup> SHERRY HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES xi, 60 (2004) (hereinafter "HUTT, CULTURAL PROPERTY LAW"). Congress had been debating the topic of preservation since 1882, but the sheer number of sites led representatives to consider the task of protecting them too overwhelming for one piece of legislation to provide adequate protection. *Id.*; see also Michael J. Davidson, *Native American Cultural Protection Issues in Government Contracts*, 28 PUB. CONT. L.J. 189, 191 (1999) ("Passage of the Antiquities Act reflected public concern over the growing vandalism to the nation's archaeological sites, including, in particular, the Casa Grande ruins in Arizona. Proponents of the Act sought, in part, 'to protect the American Indians from those who would appropriate, excavate or injure any historic monument or object of "antiquity" situated on Indian lands.").

<sup>44</sup> Just a few years earlier, in 1900, Congress enacted the very first wildlife conservation statute, the Lacey Act. 16 U.S.C. § 701 (1900) (current version at 16 U.S.C.A. §§ 3371-3378 (West 2007)). Despite the country's economic and international prestige, this Progressive era, "an era of unparalleled activity in the search for truth" already recognized as one of those truths that amidst the booming economic prosperity, the country's resources were not unlimited. See National Park Service Archaeology Program: Edgar Lee Hewitt and the Political Process, <http://www.nps.gov/archeology/pubs/antiq/antiq04.htm> (last visited Dec. 11, 2008).

<sup>45</sup> 16 U.S.C.A. § 433. An electronic version of an article with a detailed history of the Act, and the discourse that paved the way to its passage, may be found on the National Park Service web site. See RONALD F. LEE, ANTIQUITIES ACT OF 1906 ch. 6 (2001), available at [http://www.nps.gov/history/archeology/pubs/Lee/Lee\\_CH6.htm](http://www.nps.gov/history/archeology/pubs/Lee/Lee_CH6.htm). The Antiquities Act, and others, also is included in the attached Appendix. See, e.g., App. A.

1906.”<sup>46</sup> Its most lasting and perhaps best-known contribution to cultural heritage protection is the unilateral authority the Act grants to the President to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” through National Monument designation. 16 U.S.C.A. § 431.

Over 100 years later, 124 monuments have been named and protected in this way, with presidents of both political parties using this legislation to preserve archaeological and other historic sites. The Act is credited with protecting such national treasures as Chaco Canyon in New Mexico, the Petrified Forest in Arizona, Death Valley, Carlsbad Caverns, and the Statue of Liberty.<sup>47</sup> More recently, it was used by former President Bill Clinton to designate 19 new National Monuments, including the Upper Missouri River Breaks in Montana and Abraham Lincoln’s summer retreat at the Soldiers Home in Washington, D.C.,<sup>48</sup> and by former President George W. Bush to protect the African Burial Ground

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<sup>46</sup> Richard Moe, President, Nat’l Trust for Historic Pres., Address at the Antiquities Act Symposium (June 8, 2006), available at <http://press.nationaltrust.org/content/view/33/70>.

<sup>47</sup> *Id.*

<sup>48</sup> See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003) (upholding the constitutionality of President Clinton’s National Monument designations under the Antiquities Act). Some commentators recognize former President Clinton as having created an “environmental legacy” under the Antiquities Act, expanding its reach in unprecedented fashion. Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 581 (2001); see also *id.* at 585 (“President Bill Clinton may ultimately be recognized as one of the great conservationists of our time.”). It has been noted that he established 19 new national monuments and expanded three others, meaning that a total of some six million acres became part of the national monument system. Jennifer C. White, Note *Conserving the United States’ Coral Reefs: National Monument Designation to Afford Greater Protection for Coral Reefs in Four National Monument Sanctuaries*, 21 WM. & MARY L. & POL’Y REV. 901, 916 (2008) (citing Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 486 (2003)).

National Monument in Lower Manhattan, protection that has led to extensive and exhaustive archaeological study within a very urban setting.<sup>49</sup>

**2. A Century of Preservation Laws—Affecting the Environment, Transportation Infrastructure, Archaeological Sites, and Historic Structures—Establish Cultural Resource Protection as a National Priority.**

The Antiquities Act was just the beginning. Congress, the state legislatures, and local governments nationwide have since enacted hundreds of laws to protect historic sites and archaeological resources in growing recognition that the government has stewardship responsibilities to respect cultural heritage for the benefit of all citizens. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107-09 (1978) (noting widespread proliferation of preservation laws: “Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance” because of the “widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.”).

Given the vast land holdings of the federal government, for example, Congress ensured that its stewardship of public lands respected the cultural resources both on and beneath them. A wide variety of federal land management statutes incorporate protection for historic sites and archaeological resources, such as the Federal Land Policy and

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<sup>49</sup> National Park Service: African Burial Ground National Monument, <http://www.nps.gov/afbg> (last visited Dec. 11, 2008). As the National Park Service web site describes this new site’s history: “From the 1690s until the 1790s, both free and enslaved Africans were buried in a 6.6 acre burial ground in Lower Manhattan, outside the boundaries of the settlement of New Amsterdam, later known as New York. Lost to history due to landfill and development, the grounds were rediscovered in 1991 as a consequence of the planned construction of a Federal office building.” *Id.*

Management Act of 1976,<sup>50</sup> the National Forest Management Act of 1976,<sup>51</sup> the Multiple-Use Sustained Yield Act of 1960,<sup>52</sup> and the National Park Service Organic Act.<sup>53</sup>

Other federal legislation reflects a more direct impact on archaeological heritage, including: the Historic Sites Act of 1935;<sup>54</sup> the Reservoir Salvage Act of 1960;<sup>55</sup> The Historic and Archaeological Data Protection Act of 1974 (HADPA);<sup>56</sup> the Native American Graves

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<sup>50</sup> Federal Land and Policy Management Act of 1976, 43 U.S.C.A. § 1701 (West 2007).

<sup>51</sup> National Forest Management Act of 1976, 16 U.S.C.A. § 1600 (West 2000).

<sup>52</sup> The Multiple-Use Sustained Yield Act of 1960, 16 U.S.C.A. §§ 528-531 (West 2000).

<sup>53</sup> National Park Service Organic Act, 16 U.S.C.A. § 1 (West 2000).

<sup>54</sup> Historic Sites Act of 1935, 16 U.S.C.A. §§ 461-467 (West 2000) (App. B). This Act, amended eight times since its enactment, “declares it a federal policy to preserve historic and prehistoric areas of national significance and establishes the National Historic Landmarks program” and empowers the Secretary of the Interior to “secure, collate, and preserve drawings, plans, photographs, and other data of historic and archeologic sites, buildings, and objects.” *Id.* § 462(a). It formalized existing National Park Service salvage archeology programs designed to put people to work during the Great Depression. Sebastian, *supra* note 11, at 5; *see also* National Park Service Archeology Program: Managing Archeological Collections, [http://www.nps.gov/history/archeology/collections/laws\\_pr.htm](http://www.nps.gov/history/archeology/collections/laws_pr.htm) (last visited Dec. 11, 2008).

<sup>55</sup> Reservoir Salvage Act of 1960, 16 U.S.C.A. §§ 469-469c (West 2000). In the 1940s and 1950s, flood control projects for power generation led to large water-impoundment projects. The National Park Service and the Smithsonian Institution created a River Basin Salvage Program to collect archaeological data before sites were lost to the rising waters. Sebastian, *supra* note 11, at 5. “[P]assage of this law was related to the widespread destruction of archeological sites from large scale construction, such as federal dams and highways.” National Park Service Archeology Program: Managing Archeological Collections, [http://www.nps.gov/history/archeology/collections/laws\\_pr.htm](http://www.nps.gov/history/archeology/collections/laws_pr.htm) (last visited Dec. 11, 2008).

<sup>56</sup> Historic and Archaeological Data Protection Act of 1974 (HADPA), 16 U.S.C.A. § 469 (West 2000) (App. C). Also known as the “Moss-Bennett Act” or the Archaeological Recovery Act, this legislation broadened the type of projects covered by the Reservoir Salvage Act. It requires federal agencies to “report any projects that may cause the loss of significant scientific, historical, or archaeological data to the Secretary of the Interior” and authorizes that up to 1% of the cost of a federal project could be used for “recovery, protection, and preservation of any data deemed endangered.” National Park Service Archeology Program: Managing Archeological Collections, [http://www.nps.gov/history/archeology/collections/laws\\_pr.htm](http://www.nps.gov/history/archeology/collections/laws_pr.htm) (last visited Dec. 11, 2008).

Protection and Repatriation Act (NAGPRA);<sup>57</sup> and the Abandoned Shipwrecks Act protecting underwater archaeological resources.<sup>58</sup>

Four major statutory schemes round out the body of federal preservation legislation: the National Historic Preservation Act of 1966 (NHPA) (App. D),<sup>59</sup> the Archaeological Resources Protection Act of 1979 (ARPA) (App. E),<sup>60</sup> the National Environmental Policy Act (NEPA) (App. I),<sup>61</sup> and Section 4(f) of the Department of Transportation Act of 1966.<sup>62</sup> Section 4(f) is in fact “one of the strongest preservation statutes in existence”<sup>63</sup>; it is “result-oriented”<sup>64</sup> in that it requires the Secretary of Transportation to use special efforts to preserve historic sites in the development of transportation plans and programs.<sup>65</sup> To approve a transportation program or project that requires using land from a historic site of national, state or local significance requires meeting a two-prong test: (i) there is no prudent

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<sup>57</sup> Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C.A. § 3001 et seq. (West 2001). NAGPRA establishes a process through which Native American objects of cultural patrimony, including items found during archaeological excavations on federal or tribal lands, are to be repatriated to lineal descendants or culturally affiliated groups. See Sebastian, *supra* note 11, at 7.

<sup>58</sup> Abandoned Shipwrecks Act, 43 U.S.C.A. §§ 2101-2106 (West 2007). See generally Marilyn Phelan & Marion P. Forsyth, *A Comprehensive Regime for the Protection of Underwater Cultural Heritage*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES, *supra* note 10, at 119, 128-29.

<sup>59</sup> 16 U.S.C.A. §§ 470-470w-6 (West 2000).

<sup>60</sup> *Id.* §§ 470aa-mm.

<sup>61</sup> National Environmental Policy Act, 42 U.S.C.A. § 4321 et seq. (West 2003).

<sup>62</sup> 49 U.S.C.A. § 303 (West 2007).

<sup>63</sup> HUTT, CULTURAL PROPERTY LAW, *supra* note 43, at 14.

<sup>64</sup> *Id.*

<sup>65</sup> 49 U.S.C.A. § 303(a) (West 2007) (emphasis added).



or feasible alternative to use of the land, and (ii) the program or project includes all possible planning to minimize harm to the historic site.<sup>66</sup> (App. I). Similarly, NEPA states its purpose to “preserve important historic, cultural and natural aspects of our national heritage and maintain wherever possible an environment which supports diversity and variety of individual choice.”<sup>67</sup> NEPA expressly confirms that historical and archaeological sites are significant components of our environment, and if any federal project will impact them, rigorous review is required to address and determine how to best protect those resources in light of the planned project.<sup>68</sup>

The most visible and obvious examples of the country’s historic and archaeological heritage protection, however, are the NHPA and ARPA.<sup>69</sup>

- **The National Historic Preservation Act**

Congress passed the NHPA in 1966 as part of an expansive scheme to connect private and public initiatives for preservation at the local and national levels. It was enacted during the building boom of the 1960s, which placed at risk some of the country’s valuable historical heritage. Congress expressly recognized that a common cultural heritage was important to preserve “in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments.”<sup>70</sup> Thus, notwithstanding the

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<sup>66</sup> *Id.* § 303(c); *see also* 23 U.S.C.A. § 138 (West 2006).

<sup>67</sup> 42 U.S.C.A. § 4331(b)(4) (West 2003).

<sup>68</sup> *See, e.g.*, 40 C.F.R. § 1502.2(f).

<sup>69</sup> 16 U.S.C.A. § 470w-6 (West 2000).

<sup>70</sup> *Id.* §§ 470aa-mm.

urban renewal and the building boom of the era, Congress made clear that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”<sup>71</sup> Such an undertaking required the coordinated efforts of state and federal resources. Congress recognized that initiatives across the states had been thriving for years, and it was time for that effort to receive greater coordination at the federal level:

[I]t is necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activity of the Federal Government, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist state and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation and activities.

16 U.S.C.A. § 470(b)(7) (West 2000); *see also Morris County Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 278 (3d Cir. 1983) (citing this aspect of Congressional intent regarding NEPA and the NHPA).

The passage of the NHPA, “the cornerstone of federal historic and cultural preservation policy,”<sup>72</sup> was “a watershed event.”<sup>73</sup> The NHPA accomplishes its congressional mandate to preserve cultural resources with a unique review and consultation process. The consultation process that is set out primarily in sections 106 and 110 must take

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<sup>71</sup> 16 U.S.C.A. § 470(b)(2) (West 2000).

<sup>72</sup> HUTT, CULTURAL PROPERTY LAW, *supra* note 43, at 5.

<sup>73</sup> The National Historic Preservation Program: Overview, <http://www.achp.gov/overview.html> (last visited Dec. 11, 2008).

place before any federal “undertaking” occurs.<sup>74</sup> The breadth of expertise applied in the section 106 consulting process ensures that the national dialogue on preservation remains relevant for all stakeholders and at all levels of government.

- **The Archaeological Resources Protection Act**

Although the NHPA’s breadth is significant and includes archaeological resources,<sup>75</sup> the concerns for these fragile resources are distinct and required separate legislation. While the 1906 Antiquities Act remains in effect to this day, it could not adequately punish and deter the massive looting of the country’s rich Native American heritage.<sup>76</sup> Just as the ravages of our nation’s archaeological heritage inspired the passage of the Antiquities Act in 1906, similar shocking examples of archaeological pillaging helped to encourage new and improved legislation, and at a far more rapid pace than for the Antiquities Act.<sup>77</sup> Testimony

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<sup>74</sup> 16 U.S.C.A. §§ 470(f), 470h-2 (West 2000).

<sup>75</sup> For example, the eligibility criteria for listing on the National Register include archaeological sites. See 36 C.F.R. § 60.4(d).

<sup>76</sup> For example, the Ninth Circuit in 1974 declared as unconstitutionally vague the Act’s definition of “object of antiquity.” *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974). In that case a man was accused of stealing Apache face masks made in 1969 or 1970, and the issue arose as to whether these objects, which figured in a traditional ritual but were just a couple of years old, could meet the Act’s definition of “object of antiquity.” Instead of simply declining to convict, the court declared the term “object of antiquity” unconstitutionally vague. Other federal courts disagreed, however, and upheld the statute and its criminal ramifications despite a lack of clarity as to what constituted an “object of antiquity,” for example, sentencing individuals who looted sites on the Zuni Indian reservation in New Mexico to a 90-day jail term. See Fowler & Malinky, *supra* note 5, at 9; see also Gerstenblith, *Recent International Cases and Prognosis for the Future*, *supra* note 17, at 208. The U.S. Department of the Interior and the Department of Justice, however, began looking into ways to “cure the defects” in the Act. That effort picked up momentum in 1975 when two individuals in New Mexico were convicted of looting ruins in a national forest, but were sentenced to only forty hours of community service given the Act’s limitations. *Id.*

<sup>77</sup> See, e.g., Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 1979 U.S.C.C.A.N. (93 Stat. 721) 1709 (Congressional report citing *Diaz* decision and problem of increase of illegal excavation on public and Indian lands); Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LITIG. 47, 68 (1987) (describing national media attention of

at committee hearings from the archaeological community was persuasive. Congress was presented with hundreds of photographs of looters using heavy machinery and equipment in the Southwest desert, demonstrating the magnitude and severity of the looting.<sup>78</sup> The law passed in response was the Archaeological Resources Protection Act (ARPA), signed into law on October 31, 1979.<sup>79</sup> ARPA made significant changes in strengthening the laws punishing looters, with the goal that archaeological resources remain in as pristine a state as possible for scientific study. For example:<sup>80</sup>

- It omitted the problematic term “object of antiquity” and instead uses the broader yet more precise term “archaeological *resource*,” further defined by a non-exclusive list.<sup>81</sup>
- It vests ownership of archaeological resources found on federally-owned or controlled lands, including Indian tribal lands, in the national government and requires that anyone who wishes to excavate or remove archaeological resources first obtain permission from the federal government.<sup>82</sup> This

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particular case after press obtained lurid photographs the defendants had taken of themselves with prehistoric human remains).

<sup>78</sup> See Fowler & Malinky, *supra* note 5, at 15.

<sup>79</sup> 16 U.S.C.A. § 470aa et seq. (West 2000). The regulations implementing the ARPA were not finally published in the Federal Register until January 6, 1984. Fowler & Malinky, *supra* note 5, at 16. Law enforcement officials began applying ARPA immediately, however. *Id.*

<sup>80</sup> See Ryan M. Seidemann, *The Reason Behind the Rules: The Archaeological Resources Protection Act of 1979 and Scientific Study*, 13 B.U. J. SCI. & TECH. L. 193, 200 (2007).

<sup>81</sup> An “archaeological resource” is defined as “any material remains of past human life or activities which are of archaeological interest, ... includ[ing], but not ... 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.... No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” 16 U.S.C.A. § 470bb.

<sup>82</sup> *Id.* § 470cc; *id.* § 470ee(a); see *United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997) (affirming defendant’s conviction and sentencing for violation of ARPA, § 470ee, for carrying out illegal excavation on federal lands in Canyonlands National Park and Horse Rock Ruin in Utah).

provision is intended to assure that any excavation or removal is conducted in compliance with the highest professional standards of archaeological research.<sup>83</sup>

- It prohibits trafficking of archaeological resources illegally removed from federally-owned land or Indian lands and from state and private land if the artifacts cross state lines.<sup>84</sup>
- It allows site information relating to the illegal activity to remain confidential.<sup>85</sup>

The penalties were strengthened tremendously, allowing up to five years imprisonment and up to \$250,000 in fines. Because of the public interest in ensuring a sound archaeological record to allow for scientific study, ARPA can be applied to reach certain improper activities even on privately-owned land. 16 U.S.C.A. § 470ee(c). It does so by punishing those who remove, sell, purchase, exchange, transport or receive in interstate or foreign commerce archaeological resources held in violation of state or local law, as Mr. Gerber did. *See United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (affirming his criminal conviction).

Every state has enacted a statute equivalent to ARPA.<sup>86</sup> For example, Texas has declared it to be the state's "public policy and in the public interest ... to locate, protect, and preserve all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archeological, educational, or scientific interest, including but not limited to prehistoric and historical American Indian or aboriginal campsites, dwellings, and habitation

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<sup>83</sup> 16 U.S.C.A. § 470cc (West 2000).

<sup>84</sup> *Id.* § 470ee(b) & (c).

<sup>85</sup> *Id.* § 470hh.

<sup>86</sup> *See Gerstenblith, Identity and Cultural Property, supra* note 24, at 599-601.

sites, [and] archeological sites of every character....”<sup>87</sup> Texas law requires anyone who wishes to conduct “an operation on any landmark” to first obtain a permit<sup>88</sup> and prohibits anyone who is not the owner to “willfully injure, disfigure, remove or destroy a historical structure, monument, marker, medallion, or artifact without lawful authority.”<sup>89</sup> The public policy of Texas thus mirrors that of the federal government embodied in such statutes as ARPA and is equally concerned with the preservation of archaeological sites for scientific excavation and exploration.

### **CONCLUSION AND PRAYER**

We can’t keep allowing irreplaceable treasures to be lost. We can’t stand by while important chapters in America’s story are erased before we’ve had a chance to read them. Failure to meet this challenge would be a refutation of all that the Antiquities Act stands for – and a debit against the American Spirit.<sup>90</sup>

The Archaeological Conservancy did more than comply with the letter of the gift deed in this case. It also complied with its spirit by taking critical steps to ensure that the “archaeological purpose” of the donation could be fulfilled and that the chapters “in America’s story” that lie on the land in question are not “erased before we’ve had a chance to read them.”

This Court has a well-developed record before it on the facts and the law to reach the right result: reversal and rendition. That right result would ensure that this Texas case does

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<sup>87</sup> TEX. NAT. RES. CODE ANN. § 191.002 (Vernon 2001).

<sup>88</sup> *Id.* § 191.131.

<sup>89</sup> *Id.* § 191.132(b).

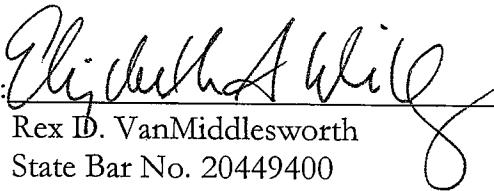
<sup>90</sup> Richard Moe Address, *supra* note 46.

not become the how-to guide for others across the country to undo a legally valid gift deed of property and to undermine the policy goals behind a century's worth of preservation legislation in this country.

The National Trust for Historic Preservation in the United States, the Society for American Archaeology, the Lawyers' Committee for Cultural Heritage Preservation, and the Archaeological Institute of America, therefore, join in the Archaeological Conservancy's request that this Court reverse and render judgment in favor of the Archaeological Conservancy.

Respectfully submitted,

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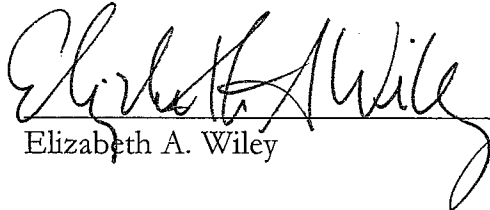
**CERTIFICATE OF SERVICE**

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## INDEX TO APPENDIX

<b>A</b>	Antiquities Act of 1906	16 U.S.C.A. § 431 (West 2000)
<b>B</b>	Historic Sites Act of 1935 (excerpts)	16 U.S.C.A. § 461 (West 2000)
<b>C</b>	Historic and Archaeological Data Preservation Act of 1974 (excerpts)	16 U.S.C.A. § 469 (West 2000)
<b>D</b>	National Historic Preservation Act of 1966 (excerpts)	16 U.S.C.A. § 470 (West 2000)
<b>E</b>	Archaeological Resources Protection Act of 1979 (excerpts)	16 U.S.C.A. §§ 470aa-mm (West 2000)
<b>F</b>	Native American Graves Protection and Repatriation Act (excerpts)	25 U.S.C.A. § 3001 (West 2001)
<b>G</b>	Abandoned Shipwrecks Act (excerpts)	43 U.S.C.A. § 2101 (West 2007)
<b>H</b>	Department of Transportation Act (excerpts)	49 U.S.C.A. § 303 (West 2007)
<b>I</b>	National Environmental Policy Act (excerpts)	42 U.S.C.A. § 4321 (West 2003)

# **APPENDIX**

# App. A

**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 16**

**Conservation**

**§§ 410s to 460j**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts



**HISTORICAL AND STATUTORY NOTES****Amendments**

**1972 Amendments.** Pub.L. 92-272 substituted "\$42,500" for "\$20,000".

**LIBRARY REFERENCES****American Digest System**

Armed Services ☞54.  
 Key Number System Topic No. 34.  
 United States ☞3, 85.  
 Key Number System Topic No. 393.  
 Woods and Forests ☞6.  
 Key Number System Topic No. 411.

**Encyclopedias**

Armed Services, see C.J.S. § 24.  
 United States, see C.J.S. §§ 7, 123.  
 Woods and Forests, see C.J.S. § 5.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**SUBCHAPTER LXI—NATIONAL AND INTERNATIONAL MONUMENTS AND MEMORIALS****CROSS REFERENCES**

Protection of timber upon national monuments from fire, disease, or insect ravages, see 16 USCA § 594.

**§ 431. National monuments; reservation of lands; relinquishment of private claims**

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

(June 8, 1906, c. 3060, § 2, 34 Stat. 225.)

## 16 § 431

### Note 6

#### 6. Reservation of water rights

The implied reservation of water rights, as applied to Devil's Hole which was reserved as a national monument by presidential proclamation, was applicable to both surface water and ground water. *Cappaert v. U. S.*, U.S.Nev.1976, 96 S.Ct. 2062, 426 U.S. 128, 48 L.Ed.2d 523.

Federal government was not entitled to reserved water for minimum stream flows in the Yampa River through Dinosaur National Monument for recreational purposes; however, determination of federal government's reserved water rights for stream flows for purpose of preserving fish habitats of historic and scientific interest could not be made without further proceedings bearing on the issue of whether Presidential Proclamation of 1938, which enlarged Dinosaur National Monument to protect "objects of historic and scientific interest," intended to reserve water for fish habitats. *U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, Colo.*1982, 656 P.2d 1.

#### 7. Submerged lands

California, and not the United States, has dominion over submerged lands and waters within one-mile belts surrounding Santa Barbara and Anacapa Islands within Channel Islands National Monument. *U. S. v. California*, U.S.Cal.1978, 98 S.Ct. 1662, 436 U.S. 32, 56 L.Ed.2d 94.

#### 8. Abolishment of monuments

Section 431 et seq. of this title, authorizing the President to establish national monuments, does not authorize him to abolish them after they have been established. 1938, 39 Op.Atty.Gen. 185.

#### 9. Transfer of monuments

It was not within executive authority to transfer national monuments under administration of War Department and Department of Agriculture to National Park Service in Department of the Interior. 1929, 36 Op.Atty.Gen. 75.

## CONSERVATION Ch. 1

#### 10. Action against United States

Where mineral claimants did not contend that federal government officers had acted beyond authority or under unconstitutional law or orders in withdrawing an area as a national monument or in causing default judgment to be entered voiding claimants' mining claim location thereon and transferring the property to the Atomic Energy Commission, claimants' action against the Commission and Secretary of Interior for declaratory and other relief was in effect an action against United States and, in absence of government's consent to be sued, could not be maintained. *Oyler v. McKay*, C.A.10 (Utah) 1955, 227 F.2d 604.

A suit by the State of Wyoming against a federal officer in the Department of Interior, alleging that defendant was exceeding his authority in exercising control over the area known as the Jackson Hole National Monument, was not a suit against the United States which was not maintainable, nor was it a suit in which it was necessary to join defendant's superior officers. *State of Wyoming v. Franke*, D.C.Wyo.1945, 58 F.Supp. 890.

#### 11. Jurisdiction

An action by the State of Wyoming challenging the validity of Proclamation No. 2578, Mar. 15, 1943, 57 Stat. 731, with respect to the creation of the Jackson Hole National Monument, was an "action arising under the laws of the United States" of which the federal district court had jurisdiction. *State of Wyoming v. Franke*, D.C.Wyo.1945, 58 F.Supp. 890.

#### 12. Declaratory judgment

Where injunction would not lie to enjoin federal interference with the state's control over the Jackson Hole Country in Wyoming, designated by Proclamation No. 2578, Mar. 15, 1943, 57 Stat. 731, as a national monument, a declaratory judgment could not be substituted for injunction. *State of Wyoming v. Franke*, D.C.Wyo.1945, 58 F.Supp. 890.

### § 431a. Limitation on further extension or establishment of national monuments in Wyoming

No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

(Sept. 14, 1950, c. 950, § 1, 64 Stat. 849.)

**HISTORICAL AND STATUTORY NOTES****Revision Notes and Legislative Reports**

1950 Acts. House Report No. 2910, see 1950 U.S. Code Cong. Service, p. 3746.

**Codifications**

Section comprises only part of the last sentence of section 1 of Act Sept. 14, 1950. The remainder of such section, except that part of the last sentence

which repealed sections 406 to 406d of this title, is set out as sections 406d-1 and 451a of this title.

**Repeal of Inconsistent Laws**

Repeal of laws inconsistent with Act Sept. 14, 1950, see note under section 406d-1 of this title.

**CROSS REFERENCES**

Grand Teton National Park, see 16 USCA §§ 406d-1 to 406d-3 and 406d-5.  
National parks in Wyoming, limitation on further extension or establishment, see 16 USCA § 451a.

**LIBRARY REFERENCES****American Digest System**

Armed Services ☞54.  
Key Number System Topic No. 34.  
United States ☞3.  
Key Number System Topic No. 393.  
Woods and Forests ☞1, 2.  
Key Number System Topic No. 411.

**Encyclopedias**

Armed Services, see C.J.S. § 24.  
United States, see C.J.S. § 7.  
Woods and Forests, see C.J.S. §§ 1 to 2.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 432. Permits to examine ruins, excavations, and gathering of objects; regulations**

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums. The Secretaries of the departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this section and sections 431 and 433 of this title.

(June 8, 1906, c. 3060, §§ 3, 4, 34 Stat. 225.)

## Notes of Decisions

Hearing	4
Power of Secretary	1
Procedure for permits	3
Removal of objects	2

**1. Power of Secretary**

This section gives the Secretary of the Interior broad discretionary power to dispose of objects of antiquity found on federal land under his jurisdiction. *People of State of Cal. ex rel. Younger v. Mead*, C.A.9 (Cal.) 1980, 618 F.2d 618.

**2. Removal of objects**

Complaint wherein the state of California and a county museum alleged that the Secretary of the Interior violated this section and regulations promulgated thereunder when he permitted the Smithsonian Institute to remove and study a 6,070 pound meteorite that was found on federal land in Southern California did not state a cause of action. *People of State of Cal. ex rel. Younger v. Mead*, C.A.9 (Cal.) 1980, 618 F.2d 618.

**3. Procedure for permits**

Though regulations issued under this section establish a uniform method of applying for antiquities permits, the regulations do not limit the ability of the Secretary of the Interior to act in absence of application nor do they require that the Secretary solicit and choose between competing applications for antiquities permits. *People of State of Cal. ex rel. Younger v. Mead*, C.A.9 (Cal.) 1980, 618 F.2d 618.

**4. Hearing**

Neither the State of California nor the San Bernardino County Museum demonstrated the kind of interest in a 6,070 pound meteorite that had been found on federal land in Southern California which would entitle them to a hearing, as a matter of constitutional right, before the Secretary of the Interior could act under this section to authorize an out-of-state museum to remove the meteorite for study. *People of State of Cal. ex rel. Younger v. Mead*, C.A.9 (Cal.) 1980, 618 F.2d 618.

**§ 433. American antiquities**

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

(June 8, 1906, c. 3060, § 1, 34 Stat. 225.)

**HISTORICAL AND STATUTORY NOTES****Transfer of Functions**

Enforcement functions of Secretary or other official in Department of Interior related to compliance with permits issued under sections 431, 432, and 433 of this title and such functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with removal of objects of antiquity under sec-

tions 431, 432, and 433 with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R.



# App. B

**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 16**

**Conservation**

**§§ 460k to 470mm**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts



## LIBRARY REFERENCES

## Law Review and Journal Commentaries

Disputes regarding the possession of Native American religious and cultural objects and human remains: A discussion of the applicable law and proposed legislation. Thomas H. Boyd, 55 Mo.L.Rev. 883 (1990).

## § 461. Declaration of national policy

It is hereby declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.

(Aug. 21, 1935, c. 593, § 1, 49 Stat. 666.)

## HISTORICAL AND STATUTORY NOTES

## Short Title

**1998 Amendments.** Pub.L. 105-365, § 1, Nov. 10, 1998, 112 Stat. 3301, provided that: "This Act [enacting provisions set out as notes under this section] may be cited as the 'Grant-Kohrs Ranch National Historic Site Boundary Adjustment Act of 1998'."

Pub.L. 105-203, § 1, July 21, 1998, 112 Stat. 678, provided that: "This Act [enacting sections 469l and 469l-1 of this title] may be cited as the 'National Underground Railroad Network to Freedom Act of 1998'."

**1935 Acts.** Act Aug. 21, 1935, c. 593, 49 Stat. 666, which enacted sections 461 to 467 of this title, is popularly known as the Historic Sites, Buildings and Antiquities Act or, simply, the Historic Sites Act.

## Route 66 Cultural Resources

Pub.L. 106-45, §§ 1 to 4, Aug. 10, 1999, 113 Stat. 224, provided that:

**Sec. 1. Definitions**

"In this Act [Pub.L. 106-45, Aug. 10, 1999, 113 Stat. 224, enacting this note], the following definitions apply:

"(1) **Route 66 Corridor.**—The term 'Route 66 corridor' means structures and other cultural resources described in paragraph (3), including—

"(A) lands owned by the Federal Government and lands owned by a State or local government within the immediate vicinity of those portions of the highway formerly designated as United States Route 66; and

"(B) private land within that immediate vicinity that is owned by per-

sons or entities that are willing to participate in the programs authorized by this Act [Pub.L. 106-45, Aug. 10, 1999, 113 Stat. 224, enacting this note].

"(2) **Cultural Resource Programs.**—The term 'Cultural Resource Programs' means the programs established and administered by the National Park Service for the benefit of and in support of preservation of the Route 66 corridor, either directly or indirectly.

"(3) **Preservation Of The Route 66 Corridor.**—The term 'preservation of the Route 66 corridor' means the preservation or restoration of structures or other cultural resources of businesses, sites of interest, and other contributing resources that—

"(A) are located within the land described in paragraph (1);

"(B) existed during the route's period of outstanding historic significance (principally between 1926 and 1970), as defined by the study prepared by the National Park Service and entitled 'Special Resource Study of Route 66', dated July 1995; and

"(C) remain in existence as of the date of the enactment of this Act [Aug. 10, 1999].

"(4) **Secretary.**—The term 'Secretary' means the Secretary of the Interior, acting through the Cultural Resource Programs at the National Park Service.

"(5) **State.**—The term 'State' means a State in which a portion of the Route 66 corridor is located.

## Notes of Decisions

Constitutionality 1  
 Injunctions 4  
 Public use or purpose 3  
 Purpose 2

**1. Constitutionality**

This section and sections 462 to 467 of this title are not unconstitutional on ground that they delegate legislative power to the Secretary. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

**2. Purpose**

Condemnation of land under this section and sections 462 to 467 of this title is not limited to the preservation and restoration of historic buildings, but the purpose of this section and sections 462 to 467 of this title is to preserve for public use, historic sites, buildings, and objects of national significance. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

**3. Public use or purpose**

Acquisition by federal government of lands in St. Louis of historic interest was for a "public purpose." *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

Granting of certain easements by Secretary of Interior over certain lands known as Virginia Historic Green Springs District did not grant right of public access to property so as to violate policy of preserving historic properties "for public use," as that term may encompass the "taking of land for commemorative purposes." *Historic Green Springs, Inc. v. Bergland*, E.D.Va.1980, 497 F.Supp. 839.

**4. Injunctions**

Where United States proposed to establish Jefferson National Expansion Memorial in city of St. Louis, provided city would pay into federal Treasury one-fourth of cost of project, city's action in paying its portion of money into federal Treasury constituted an acceptance of the offer and resulted in a contract, hence, in suit for an injunction to restrain federal officers from using either money allocated by President of United States or money paid into Treasury by city for acquiring and improving proposed site, city was an "indispensable party". *Balter v. Ickes*, App.D.C.1937, 89 F.2d 856, 67 App.D.C. 112, certiorari denied 57 S.Ct. 941, 301 U.S. 709, 81 L.Ed. 1363.

**§ 462. Administration by Secretary of the Interior; powers and duties enumerated**

The Secretary of the Interior (hereinafter in sections 461 to 467 of this title referred to as the Secretary), through the National Park Service, for the purpose of effectuating the policy expressed in section 461 of this title, shall have the following powers and perform the following duties and functions:

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

(b) Make a survey of historic and archaeological sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States.

(c) Make necessary investigations and researches in the United States relating to particular sites, buildings, or objects to obtain true and accurate historical and archaeological facts and information concerning the same.

(d) For the purpose of sections 461 to 467 of this title, acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein, title to any real property to be satisfactory to the Secretary: *Provided*, That no such property which is owned by any religious or educational institution, or which is owned or administered for the benefit of the public shall be so acquired without the consent of the owner: *Provided further*, That no such property shall be acquired or contract or agreement for the acquisition thereof made which will obligate the general fund of the Treasury for the payment of such property, unless or until Congress has appropriated money which is available for that purpose.

(e) Contract and make cooperative agreements with States, municipal subdivisions, corporations, associations, or individuals, with proper bond where deemed advisable, to protect, preserve, maintain, or operate any historic or archaeologic building, site, object, or property used in connection therewith for public use, regardless as to whether the title thereto is in the United States: *Provided*, That no contract or cooperative agreement shall be made or entered into which will obligate the general fund of the Treasury unless or until Congress has appropriated money for such purpose.

(f) Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance and where deemed desirable establish and maintain museums in connection therewith.

(g) Erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archaeological significance.

(h) Operate and manage historic and archaeologic sites, buildings, and properties acquired under the provisions of sections 461 to 467 of this title together with lands and subordinate buildings for the benefit of the public, such authority to include the power to charge reasonable visitation fees and grant concessions, leases, or permits for the use of land, building space, roads, or trails when necessary or desirable either to accommodate the public or to facilitate administration: *Provided*, That the Secretary may grant such concessions, leases, or permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids.

(i) When the Secretary determines that it would be administratively burdensome to restore, reconstruct, operate, or maintain any particular historic or archaeologic site, building, or property donated to the United States through the National Park Service, he may cause

the same to be done by organizing a corporation for that purpose under the laws of the District of Columbia or any State.

(j) Develop an educational program and service for the purpose of making available to the public facts and information pertaining to American historic and archaeological sites, buildings, and properties of national significance. Reasonable charges may be made for the dissemination of any such facts or information.

(k) Perform any and all acts, and make such rules and regulations not inconsistent with sections 461 to 467 of this title as may be necessary and proper to carry out the provisions thereof. Any person violating any of the rules and regulations authorized by said sections shall be punished by a fine of not more than \$500 and be adjudged to pay all cost of the proceedings.

(Aug. 21, 1935, c. 593, § 2, 49 Stat. 666; Oct. 9, 1965, Pub.L. 89-249, § 8, 79 Stat. 971; Nov. 13, 1998, Pub.L. 105-391, Title IV, § 415(a), 112 Stat. 3515.)

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

**1965 Acts.** Senate Report No. 765, see 1965 U.S. Code Cong. and Adm. News, p. 3489.

**1998 Acts.** Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 835.

##### Codifications

Pub.L. 105-391, Title IV, § 415(a), Nov. 13, 1998, 112 Stat. 3515, repealed Pub.L. 89-249, Oct. 9, 1965, 79 Stat. 969, section 8 of which amended subsec. (h) of this section. See 1998 and 1965 Amendments notes and Savings Provisions note under this section.

##### Amendments

**1998 Amendments.** Pub.L. 105-391, § 415(a), repealed Pub.L. 89-249, section 8 of which amended subsec. (h) of this section (see 1965 Amendments note).

**1965 Amendments.** Subsec. (h). Pub.L. 89-249 changed the proviso to allow granting concessions, leases, and permits and entering into contracts with responsible persons, firms, or corporations without advertising and without securing competitive bids. See Codifications and 1998 Amendments notes under this section.

##### Transfer of Functions

All functions of all other officers of the Department of the Interior and all functions of all agencies and employees of

such Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 3, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in Appendix 1 to Title 5, Government Organization and Employees.

##### Financial Assistance for Maintenance and Protection of Folger Library and Corcoran Gallery of Art; Limitation on Contract Authority

Pub.L. 96-344, § 1, Sept. 8, 1980, 94 Stat. 1133, provided:

"That (a) in furtherance of the purposes of subsection 2(e) of the Act of August 21, 1935 (49 Stat. 666) [subsec. (e) of this section], the Secretary of the Interior may provide financial assistance for the maintenance and protection of the Folger Library and the Corcoran Gallery of Art.

"(b) Authority to enter into contracts or cooperative agreements, to incur obligations, or to make payments under this Act [Pub.L. 96-344, Sept. 8, 1980, 94 Stat. 1133] shall be effective only to the extent, and in such amounts, as are provided in advance in appropriation Acts."

##### Savings Provisions

Repeal by Pub.L. 105-391, § 415(a), repealing Pub.L. 89-249, section 8 of which

Acceptance of preservation easements over land known as Virginia Historic Green Springs District did not "obligate the general fund of the treasury for the payment of such property" in violation of section 461, this section and sections 463 to 467 of this title. *Historic Green Springs, Inc. v. Bergland*, E.D.Va.1980, 497 F.Supp. 839.

#### 5. Valuation of property

Where the United States condemned land under section 461, this section and sections 463 to 467 of this title, the United States was liable for value of land as enhanced, if at all, by any permanent structure that was upon the land, although United States was not desirous of acquiring the structure. *U.S. v. Becktold Co.*, C.C.A.8 (Mo.) 1942, 129 F.2d 473.

In eminent domain proceeding by United States, where expert testimony on value ranged from \$7,500 to \$30,000, verdict for \$15,000 was based upon substantial evidence. *Ramming Real Estate Co. v. U.S.*, C.C.A.8 (Mo.) 1941, 122 F.2d 892.

#### 6. Conditions precedent

It is not a condition precedent to right to maintain condemnation proceedings under section 461, this section and sections 463 to 467 of this title that funds for payment of awards shall be available. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

#### 7. Presumptions

The presumption is that Congress, in enacting section 461, this section and sections 463 to 467 of this title had full knowledge of section 257 of Title 40 empowering condemnation of land by federal government and of interpretation that

had been placed upon it by the courts. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

#### 8. Admissibility of evidence

Where court's ruling in condemnation case refusing to permit defendants to prove that government had made a deposit in court for use of defendants was based on theory that offer was in nature of an estoppel, defendants, if their offer was upon some other theory, should have brought the matter specifically to court's attention. *O'Donnell v. U.S.*, C.C.A.8 (Mo.) 1942, 131 F.2d 882.

#### 9. Stipulations

Where the parties stipulated that if it should be determined that the United States had the right to condemn land under section 461, this section and sections 463 to 467 of this title judgment should be modified by restoring original award, the award would be restored as stipulated, where right to condemn was upheld. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

#### 10. Review

Where defendants in condemnation case sought to prove that government had made a deposit in court for use of defendants, but did not seek to introduce the declaration of taking, reviewing court could not consider alleged error of trial court in not allowing introduction of the declaration of taking. *O'Donnell v. U.S.*, C.C.A.8 (Mo.) 1942, 131 F.2d 882.

Determination of Secretary that specific land was necessary for the effectuation of the purposes of section 461, this section and sections 463 to 467 of this title is not reviewable. *Barnidge v. U.S.*, C.C.A.8 (Mo.) 1939, 101 F.2d 295.

## § 463. National Park System Advisory Board

### (a) Establishment; composition; duties

There is hereby established a National Park System Advisory Board, whose purpose shall be to advise the Director of the National Park Service on matters relating to the National Park Service, the National Park System, and programs administered by the National Park Service. The Board shall advise the Director on matters submitted to the Board by the Director as well as any other issues identified by the Board. Members of the Board shall be appointed on a staggered term basis by the Secretary for a term not to exceed 4

years and shall serve at the pleasure of the Secretary. The Board shall be comprised of no more than 12 persons, appointed from among citizens of the United States having a demonstrated commitment to the mission of the National Park Service. Board members shall be selected to represent various geographic regions, including each of the administrative regions of the National Park Service. At least 6 of the members shall have outstanding expertise in 1 or more of the following fields: history, archeology, anthropology, historical or landscape architecture, biology, ecology, geology, marine science, or social science. At least 4 of the members shall have outstanding expertise and prior experience in the management of national or State parks or protected areas, or national or cultural resources management. The remaining members shall have outstanding expertise in 1 or more of the areas described above or in another professional or scientific discipline, such as financial management, recreation use management, land use planning or business management, important to the mission of the National Park Service. At least 1 individual shall be a locally elected official from an area adjacent to a park. The Board shall hold its first meeting by no later than 60 days after the date on which all members of the Advisory Board who are to be appointed have been appointed. Any vacancy in the Board shall not affect its powers, but shall be filled in the same manner in which the original appointment was made. The Board may adopt such rules as may be necessary to establish its procedures and to govern the manner of its operations, organization, and personnel. All members of the Board shall be reimbursed for travel and per diem in lieu of subsistence expenses during the performance of duties of the Board while away from home or their regular place of business, in accordance with subchapter 1 of chapter 57 of Title 5. With the exception of travel and per diem as noted above, a member of the Board who is otherwise an officer or employee of the United States Government shall serve on the Board without additional compensation. It shall be the duty of such board to advise the Secretary on matters relating to the National Park System, to other related areas, and to the administration of sections 461 to 467 of this title, including but not limited to matters submitted to it for consideration by the Secretary, but it shall not be required to recommend as to the suitability or desirability of surplus real and related personal property for use as an historic monument. Such board shall also provide recommendations on the designation of national historic landmarks and national natural landmarks. Such board is strongly encouraged to consult with the major scholarly and professional organizations in the appropriate disciplines in making such recommendations.



# App. C

**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 16**

**Conservation**

**§§ 460k to 470mm**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts



**LIBRARY REFERENCES**

**American Digest System**

United States ⇌40.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 38 to 40.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 468e.** Repealed. Pub.L. 86-533, § 1(19), June 29, 1960, 74 Stat. 248

**HISTORICAL AND STATUTORY NOTES**

Section, Act Oct. 26, 1949, c. 755, § 6, to report to the Congress its proceedings  
63 Stat. 929, required the National Trust and activities.

**§ 469.** Preservation of historical and archeological data threatened by dam construction or alterations of terrain

It is the purpose of sections 469 to 469c-1 of this title to further the policy set forth in sections 461 to 467 of this title, by specifically providing for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen's communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.

(Pub.L. 86-523, § 1, June 27, 1960, 74 Stat. 220; Pub.L. 93-291, § 1(1), May 24, 1974, 88 Stat. 174.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

**1960 Acts.** House Report No. 1392, see 1960 U.S. Code Cong. and Adm. News, p. 2403.

**1974 Acts.** House Report No. 93-992, see 1974 U.S. Code Cong. and Adm. News, p. 3168.

**Amendments**

**1974 Amendments.** Pub.L. 93-291 designated existing provisions as cl. (1) and added cl. (2).

**LIBRARY REFERENCES**

**Administrative Law**

Compliance with National Environmental Policy Act, see 7 CFR § 650.1 et seq.  
Protection of archaeological resources: uniform regulations—  
Forest Service, Department of Agriculture, see 36 CFR § 296.1 et seq.

Protection of archaeological resources: uniform regulations—Cont'd  
 Office of Secretary of Defense, see 32 CFR § 229.1 et seq.  
 Office of Secretary of the Interior, see 43 CFR § 7.1 et seq.  
 Tennessee Valley Authority, see 18 CFR § 1312.1 et seq.

#### American Digest System

United States ⇄3.  
 Key Number System Topic No. 393.

#### Encyclopedias

United States, see C.J.S. § 7.

#### Law Review and Journal Commentaries

A synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).  
 Protection of the ethnobiological knowledge of indigenous peoples. Lester I. Yano, 41 UCLA L.Rev. 443 (1993).

### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

#### Notes of Decisions

##### Dam construction 1

##### 1. Dam construction

In light of testimony that recovery of archeological data had been completed at seven of nine sites located in project area, that completion of studies at two sites would exhaust recovery work on project, that data gathered had not called for utilization of any preservation techniques,

and that if site eligible for inclusion in National Register of Historical Sites was discovered, work would be stopped in order to allow necessary salvage to proceed, plaintiffs failed to establish that construction of dam and reservoir had or would violate this section which calls for preservation of historical and archeological data. *Sierra Club v. Morton*, S.D.Tex. 1975, 431 F.Supp. 11.

### § 469a. Notice of dam construction to be given Secretary of the Interior by United States agencies

Before any agency of the United States shall undertake the construction of a dam, or issue a license to any private individual or corporation for the construction of a dam, it shall give written notice to the Secretary of the Interior (hereafter referred to as the Secretary) setting forth the site of the proposed dam and the approximate area to be flooded and otherwise changed if such construction is undertaken: *Provided*, That with respect to any floodwater retarding dam which provides less than five thousand acre-feet of detention capacity and with respect to any other type of dam which creates a reservoir of less than forty surface acres the provisions of this section shall apply only when the constructing agency, in its preliminary surveys, finds, or is presented with evidence that historical or archeological materials exist or may be present in the proposed reservoir area.

(Pub.L. 86-523, § 2, formerly § 2(a), June 27, 1960, 74 Stat. 220, renumbered and amended Pub.L. 93-291, § 1(2), (5), May 24, 1974, 88 Stat. 174, 175.)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**

**1960 Acts.** House Report No. 1392, see 1960 U.S. Code Cong. and Adm. News, p. 2403.

**1974 Acts.** House Report No. 93-992, see 1974 U.S. Code Cong. and Adm. News, p. 3168.

**Amendments**

**1974 Amendments.** Pub.L. 93-291 struck out designation "(a)" preceding existing subsec. (a) and, in the resulting unlettered provisions, inserted "(hereafter referred to as the Secretary)" after "Secretary of the Interior". Former subsecs. (b) to (e) were disposed of as follows: former subsec. (b) was transferred and amended, and as so transferred and amended, is set out as sections 469a-1 and 469a-2 of this title, former subsecs. (c) and (e) were redesignated as subsecs. (a) and (b), respectively, of section 469a-3 of this title, and former subsec. (d) was deleted.

**Transfer of Functions**

Enforcement functions of Secretary or other official in Department of Interior related to compliance with system activities requiring coordination and approval under sections 469 to 469c of this title and such functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with sections 469 to 469c of this title with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in Appendix 1 to Title 5, Government Organization and Employees.

## LIBRARY REFERENCES

**American Digest System**

United States ☞ 3, 40.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. §§ 7, 38 to 40.

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

**§ 469a-1. Threat of irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data by Federal construction projects; notice to Secretary of the Interior; survey; recovery, preservation, and protection of data**

**(a) Notification and request for preservation of data**

Whenever any Federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary, in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity. Such agency may request

the Secretary to undertake the recovery, protection, and preservation of such data (including preliminary survey, or other investigation as needed, and analysis and publication of the reports resulting from such investigation), or it may, with funds appropriated for such project, program, or activity, undertake such activities. Copies of reports of any investigations made pursuant to this section shall be submitted to the Secretary, who shall make them available to the public for inspection and review.

**(b) Survey of site; preservation of data; compensation**

Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archeological data might be irrevocably lost or destroyed, may with funds appropriated expressly for this purpose conduct, with the consent of all persons, associations, or public entities having a legal interest in the property involved, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands.

(Pub.L. 86-523, § 3, as added Pub.L. 93-291, § 1(3), May 24, 1974, 88 Stat. 174.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1974 Acts. House Report No. 93-992, see 1974 U.S. Code Cong. and Adm. News, p. 3168.

**Transfer of Functions**

For transfer of certain enforcement functions of Secretary or other official in Department of Interior and Secretary or other official in Department of Agriculture to Federal Inspector, Office of Feder-

al Inspector for the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 469a of this title.

**Prior Provisions**

A prior section 3 of Pub.L. 86-523 which was redesignated section 6 of Pub.L. 86-523 and amended by Pub.L. 93-291, is classified to section 469b of this title.

**LIBRARY REFERENCES**

**American Digest System**

United States ⇨40, 41.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. §§ 38 to 41.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

# App. D

**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 16**

**Conservation**

**§§ 460k to 470mm**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts





**LIBRARY REFERENCES****American Digest System**

United States 3, 41, 85.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. §§ 7, 41, 123.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**SUBCHAPTER II—NATIONAL HISTORIC PRESERVATION****CROSS REFERENCES**

Jemez National Recreational Area cultural resources administration in furtherance of Act, see 16 USCA § 460jjj-1.  
National Maritime Heritage savings provision, see 16 USCA § 5408.  
Native Hawaiian education and Congressional findings and rights and privileges, see 20 USCA § 7902.  
Snake River Birds of Prey National Conservation Area, prohibition upon limiting construction of laws, see 16 USCA § 460iii-5.  
Spring Mountain National Recreation Area, management plan preservation priority, see 16 USCA § 460hhh-4.

**LIBRARY REFERENCES****Law Review and Journal Commentaries**

Disputes regarding the possession of Native American religious and cultural objects and human remains: A discussion of the applicable law and proposed legislation. Thomas H. Boyd, 55 Mo.L.Rev. 883 (1990).

**§ 470. Short title; Congressional finding and declaration of policy**

(a) This subchapter may be cited as the "National Historic Preservation Act".

(b) The Congress finds and declares that—

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

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

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

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

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

(Pub.L. 89-665, § 1, Oct. 15, 1966, 80 Stat. 915; Pub.L. 96-515, Title I, § 101(a), Dec. 12, 1980, 94 Stat. 2987.)

### HISTORICAL AND STATUTORY NOTES

#### Revision Notes and Legislative Reports

**1966 Acts.** House Report No. 2067, see 1966 U.S. Code Cong. and Adm. News, p. 3320.

**1980 Acts.** House Report No. 96-1457, see 1980 U.S. Code Cong. and Adm. News, p. 6378.

#### Amendments

**1992 Amendments.** Pub.L. 102-575, Title XL, § 4001, Oct. 30, 1992, 106 Stat. 4753, provided that: "This title [enacting sections 470h-4, 470h-5, and 470x to 470x-6 of this title, amending sections 466, 470-1, 470a to 470c, 470h, 470h-2, 470h-3, 470i, 470s, 470t, 470w, and 470w-3 of this title, enacting provisions set out as notes under section 470a of this title and amending provisions set out as notes under section 461 of this title] may be cited as the 'National Historic Preservation Act Amendments of 1992'."

**1980 Amendments.** Pub.L. 96-515 added subsec. (a), designated existing provision as subsec. (b), and in subsec. (b) as so designated, redesignated pars. (a) to

(d) as (1), (2), (5), and (7), respectively, in par. (1) as so redesignated, substituted "heritage" for "past", and added pars. (3), (4), and (6).

#### Short Title

**2000 Amendments.** Pub.L. 106-208, § 1, May 26, 2000, 114 Stat. 318, provided that: "This Act [amending sections 470a to 470c, 470h, 470h-2, 470h-4, 470n, 470t, 470w, 470w-6, and 470x-3 of this title] may be cited as the 'National Historic Preservation Act Amendments of 2000'."

**1980 Amendments.** Pub.L. 96-515, Dec. 12, 1980, 94 Stat. 2987, provided in the matter preceding Title I: "That this Act [adding sections 469c-2, 470-1, 470a-1, 470a-2, 470h-2, 470h-3, 470u, 470v and 470w to 470w-6 of this title, amending this section and sections 470a, 470b, 470c, 470d, 470h, 470i, 470j, 470l, 470m, 470r, 470s and 470t of this title and enacting provisions set out as notes under sections 470a, 470j and 470h of this title and section 874 of Title 40, Pub-

# App. E

**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 16**

**Conservation**

**§§ 460k to 470mm**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts



## CHAPTER 1B—ARCHAEOLOGICAL RESOURCES PROTECTION

### Sec.

- 470aa. Congressional findings and declaration of purpose.
- 470bb. Definitions.
- 470cc. Excavation and removal.
- 470dd. Custody of archaeological resources.
- 470ee. Prohibited acts and criminal penalties.
- 470ff. Civil penalties.
- 470gg. Enforcement.
- 470hh. Confidentiality of information concerning nature and location of archaeological resources.
- 470ii. Rules and regulations; intergovernmental coordination.
- 470jj. Cooperation with private individuals.
- 470kk. Savings provisions.
- 470ll. Annual report to Congress.
- 470mm. Surveying of lands; reporting of violations.

### CROSS REFERENCES

- Jemez National Recreational Area cultural resources administration furtherance of Act, see 16 USCA § 460jjj-1.
- Spring Mountain National Recreation Area, management plan preservation priority, see 16 USCA § 460hhh-4.
- Snake River Birds of Prey National Conservation Area, prohibition upon limiting construction of laws, see 16 USCA § 460iii-5.

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### § 470aa. 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.

(Pub.L. 96-95, § 2, Oct. 31, 1979, 93 Stat. 721.)

#### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports** Act [this chapter] may be cited as the  
1979 Acts. House Report No. 96-311, 'Archaeological Resources Protection Act  
see 1979 U.S. Code Cong. and Adm. of 1979.'  
News, p. 1709.

**Short Title**  
1979 Acts. Pub.L. 96-95, § 1, Oct. 31,  
1979, 93 Stat. 721, provided that: "This

#### LIBRARY REFERENCES

##### Administrative Law

Protection of archaeological resources: uniform regulations—  
Forest Service, Department of Agriculture, see 36 CFR § 296.1 et seq.  
Office of Secretary of Defense, see 32 CFR § 229.1 et seq.  
Office of Secretary of Interior, see 43 CFR § 7.1 et seq.  
Tennessee Valley Authority, see 18 CFR § 1312.1 et seq.

##### American Digest System

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Key Number System Topic No. 393.

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Archaeological Resources Protection Act: A new application in the private property context. 44 Cath.U.L.Rev. 599 (1995).  
Bones of contention: Regulation of paleontological resources on the federal public lands. Note, 69 Ind.L.J. 601 (1994).  
Preserving Utah's cultural resources: A proposal for new legislation. Comment, 10 J.Energy L. & Pol'y 93 (1989).  
Protection of the ethnobiological knowledge of indigenous peoples. Lester I. Yano, 41 UCLA L.Rev. 443 (1993).

Synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).

### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

#### Notes of Decisions

Activities prohibited 1  
Property rights 2

state or local law is not limited to objects removed from federal and Indian lands. U.S. v. Gerber, C.A.7 (Ind.) 1993, 999 F.2d 1112, certiorari denied 114 S.Ct. 878, 510 U.S. 1071, 127 L.Ed.2d 74.

#### 1. Activities prohibited

Provision of Archaeological Resources Protection Act forbidding transactions in interstate or foreign commerce involving archaeological resources excavated, removed, sold, purchased, exchanged, transported, or received in violation of

#### 2. Property rights

Archaeological Resources Protection Act (ARPA) conveys no property rights. Matter of Shivers, E.D.Tex.1995, 900 F.Supp. 60.

### § 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 an 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 Secre-

tary 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.A. § 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.

(Pub.L. 96-95, § 3, Oct. 31, 1979, 93 Stat. 721; Pub.L. 100-588, § 1(a), Nov. 3, 1988, 102 Stat. 2983.)

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

**1979 Acts.** House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

**1988 Acts.** Senate Report No. 100-566, see 1988 U.S. Code Cong. and Adm. News, p. 3983.

##### References in Text

The Alaska Native Claims Settlement Act, referred to in par. (5), is Pub.L.

92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (section 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.



**Amendments**

**1988 Amendments.** Par. (3). Pub.L. 100-588 substituted at the end a period for a semicolon.

**CROSS REFERENCES**

"Cultural resource" defined as in this section for purposes of cooperative agreements for management of on military installations, see 10 USCA § 2684.

**LIBRARY REFERENCES****American Digest System**

United States ☞3.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 7.  
Public Lands, 63A Am Jur 2d § 1.

**Law Review and Journal Commentaries**

Archaeological Resources Protection Act: A new application in the private property context. 44 Cath.U.L.Rev. 599 (1995).  
Tribal voices in historic preservation: Sacred landscapes, cross-cultural bridges, and common ground. Dean B. Suagee, 21 Vt.L.Rev. 145 (1996).

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**Notes of Decisions**

**Constructive possession** 3  
**Public land** 1  
**Shipwrecks** 4  
**Title to property** 2

**1. Public land**

Archaeological Resources Protection Act (ARPA) applied to residential construction project on land owned by United States for inclusion in national park and listed in National Register of Historic Places, and therefore project proponent was required to exhaust permit procedures under ARPA before bringing action against government for injunctive relief allowing project to proceed; subject land was "public land" with scope of ARPA despite fact project proponent held possessory interest for term of years, and project proponent's conduct could be characterized as purposeful excavation and removal of archaeological resources. *Fein v. Peltier*, D.Virgin Islands 1996, 949 F.Supp. 374, reconsideration denied.

**2. Title to property**

In defining what items constitute "archaeological resources" subject to special protection by regulation under the Ar-

chaeological Resources Protection Act (ARPA), Congress did not relinquish all of government title to unregulated items owned by the sovereign. *Matter of Shivers*, E.D.Tex.1995, 900 F.Supp. 60.

**3. Constructive possession**

Alleged finder of shipwreck embedded in submerged land owned by United States and administered and controlled by National Park System was not entitled to salvage award where government was in constructive possession of the shipwreck. *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, S.D.Fla. 1983, 568 F.Supp. 1562, affirmed 758 F.2d 1511.

**4. Shipwrecks**

United States had title to shipwreck embedded in submerged land owned by United States and administered and controlled by National Park System by constructive possession such that property could not be considered legally lost and subject to finder's claim where government knew of shipwreck before finder, had power to exercise dominion and control over shipwreck, and intended to exercise dominion and control over ship-

wreck by enactment of this chapter indicating continuing interest in protecting archeological resources from commercial excavation and pillage. *Klein v. Uniden-*

*tified, Wrecked and Abandoned Sailing Vessel*, S.D.Fla.1983, 568 F.Supp. 1562, affirmed 758 F.2d 1511.

## § 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.A. §§ 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.

(Pub.L. 96-95, § 4, Oct. 31, 1979, 93 Stat. 722.)

#### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

**References in Text**

The Act of June 8, 1906, referred to in subsecs. (g)(1) and (h), is Act June 8, 1906, c. 3060, 34 Stat. 225, known as the Antiquities Act of 1906, which is classi-

fied generally to sections 431, 432 and 433 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 431 of this title and Tables.

Following the enactment of this chapter, referred to in subsec. (h)(2), means following the enactment of Pub.L. 96-95, approved Oct. 31, 1979.

#### CROSS REFERENCES

Assessment of civil penalties, see 16 USCA § 470ff.

Consideration of effect of Federal undertakings upon property listed in National Register, see 16 USCA § 470f.

Disclosure of information concerning nature and location of archaeological resources, see 16 USCA § 470hh.

Prohibited acts, see 16 USCA § 470ee.

#### LIBRARY REFERENCES

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Key Number System Topic No. 393.

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United States, see C.J.S. § 7.  
Public Lands, 63A Am Jur 2d § 1.

**Law Review and Journal Commentaries**

Archaeological Resources Protection Act: A new application in the private property context. 44 Cath.U.L.Rev. 599 (1995).

Identity and cultural property: The protection of cultural property in the United States. Patty Gerstenblith, 75 B.U.L.Rev. 559 (1995).  
Synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).

#### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

#### Notes of Decisions

##### Activities within section 1

##### 1. Activities within section

Archaeological Resources Protection Act applied only to purposeful excavation and removal of archaeological resources, rather than excavations inadvertently un-

covering such resources, and did not apply to construction of fences and livestock watering facilities on portions of Hopi Indian Reservation as part of range restoration and management program. *Attakai v. U.S.*, D.Ariz.1990, 746 F.Supp. 1395.

### § 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.A. §§ 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.

(Pub.L. 96-95, § 5, Oct. 31, 1979, 93 Stat. 724.)

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

1979 Acts. House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

220, as amended, which is classified generally to sections 469 to 469c-1 of this title. For complete classification of this Act to the Code, see Tables.

##### References in Text

The Act of June 27, 1960 (16 U.S.C. 469-469c), referred to in par. (2), is Act June 27, 1960, Pub.L. 86-523, 74 Stat.

The Act of June 8, 1906 (16 U.S.C. 431-433), referred to in par. (2) is Act June 8, 1906, c. 3060, 34 Stat. 225, known as the Antiquities Act of 1906,

which is classified generally to sections 431, 432 and 433 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 431 of this title and Tables volume.

#### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

### § 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.

(Pub.L. 96-95, § 6, Oct. 31, 1979, 93 Stat. 724; Pub.L. 100-588, § 1(b), (c), Nov. 3, 1988, 102 Stat. 2983.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

**1979 Acts.** House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

**1988 Acts.** Senate Report No. 100-566, see 1988 U.S. Code Cong. and Adm. News, p. 3983.

**Amendments**

**1988 Amendments.** Subsec. (a). Pub.L. 100-588, § 1(b), extended prohibi-

tion against defacement of archaeological resources to include any attempt to excavate, remove, damage, or otherwise alter or deface any such resources.

Subsec. (d). Pub.L. 100-588, § 1(c), decreased requirement relating to value of archaeological resources and cost of restoration and repair of such resources to \$500 from \$5,000.

**CROSS REFERENCES**

Permits for excavation and removal, see 16 USCA § 470cc.  
Rewards for informers, see 16 USCA § 470gg.

**LIBRARY REFERENCES**

**American Digest System**

United States 3.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 7.

**Law Review and Journal Commentaries**

Archaeological Resources Protection Act: A new application in the private property context. 44 Cath.U.L.Rev. 599 (1995).

Requiem for Indiana Jones: Federal law, Native Americans, and the treasure hunters. Comment, 30 Tulsa L.J. 213 (1994).  
Synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).

### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

#### Notes of Decisions

Accrual of cause of action	3
Constitutionality	1
Evidence	4
Injunctive relief	5
Privately owned land	2
Sentence and punishment	6

#### 1. Constitutionality

Archaeological Resources Protection Act was not unconstitutionally overbroad or vague with respect to defendant who was convicted of excavating scrapers and arrow points that were clearly weapons and tools; although defendant claimed that curiosity motivated him and academic freedom protected him, he was not affiliated with academic institution and did not claim that First Amendment protected any activity prohibited by Act; and statute provided fair notice. U.S. v. Austin, C.A.9 (Or.) 1990, 902 F.2d 743, certiorari denied 111 S.Ct. 200, 498 U.S. 874, 112 L.Ed.2d 161.

#### 2. Privately owned land

Defendant who transported in interstate commerce Indian artifacts that he had stolen from burial mound on privately owned land in violation of state criminal laws of trespass and conversion could be convicted under provision of Archaeological Resources Protection Act forbidding transactions involving archaeological resources excavated, removed, sold, purchased, exchanged, transported, or received in violation of state or local law, even though state or local law that he had violated was not limited to protection of archaeological sites or objects. U.S. v. Gerber, C.A.7 (Ind.) 1993, 999 F.2d 1112, certiorari denied 114 S.Ct. 878, 510 U.S. 1071, 127 L.Ed.2d 74.

#### 3. Accrual of cause of action

Inasmuch as mining had not actually commenced on surface mining project proposed for federally approved leasehold on Navajo Reservation land, there could be no cause of action based upon

this subchapter. National Indian Youth Council v. Andrus, D.C.N.M.1980, 501 F.Supp. 649, affirmed 664 F.2d 220.

#### 4. Evidence

Prior acts evidence that defendant unlawfully excavated artifacts from same site seven years ago was relevant and admissible in prosecution for violation of Archaeological Resources Protection Act to show defendant knew objects he was excavating were archaeological resources. U.S. v. Shumway, C.A.10 (Utah) 1997, 112 F.3d 1413.

#### 5. Injunctive relief

Archaeological Resources Protection Act (ARPA) applied to residential construction project on land owned by United States for inclusion in national park and listed in National Register of Historic Places, and therefore project proponent was required to exhaust permit procedures under ARPA before bringing action against government for injunctive relief allowing project to proceed; subject land was "public land" with scope of ARPA despite fact project proponent held possessory interest for term of years, and project proponent's conduct could be characterized as purposeful excavation and removal of archaeological resources. Fein v. Peltier, D.Virgin Islands 1996, 949 F.Supp. 374, reconsideration denied.

#### 6. Sentence and punishment

Defendant was not leader or organizer of illegal excavations of archaeological sites, for purposes of sentencing defendant for violating Archaeological Resources Protection Act (ARPA) and damaging United States property, despite evidence that defendant was member of group who knew how to find sites; there was no evidence that excavations were organized by defendant or that defendant had greater participatory role in offenses than other members. U.S. v. Hunter, D.Utah 1998, 48 F.Supp.2d 1283.



**§ 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 subpoenas 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 subpoena 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.

(Pub.L. 96-95, § 7, Oct. 31, 1979, 93 Stat. 725.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311,  
see 1979 U.S. Code Cong. and Adm.  
News, p. 1709.

**CROSS REFERENCES**

Adjudications for agencies, see 5 USCA § 554.  
Forfeiture of archaeological resources, vehicles and equipment, see 16 USCA § 470gg.  
Suspension or revocation of permits, see 16 USCA § 470cc.

## LIBRARY REFERENCES

**American Digest System**

United States ☞77.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 119.  
Public Lands, 63A Am Jur 2d § 1.

**Forms**

Contempt proceedings, see West's Federal Practice Forms § 5651 et seq.  
Production of documents, motions and orders pertaining to, see West's Federal Practice Forms § 3551 et seq.

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

## Notes of Decisions

**Arrowhead exception 1****1. Arrowhead exception**

"Arrowhead exception" to Archaeological Resources Protection Act (ARPA) did not support collector's contention that, by inference, he was entitled to return of tokens which he had excavated from national forest, and which had been seized from him by federal government; arrowhead exception was not intended to en-

courage removal of arrowheads from public lands, but rather to exempt such removal from ARPA's civil and criminal penalty provisions, arrowhead exception was limited to those found on surface of public lands, unlike tokens excavated by collector, and ARPA expressly provided that removal of arrowheads could be penalized under other regulations or statutes. U.S. v. Shivers, C.A.5 (Tex.) 1996, 96 F.3d 120.

**§ 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.

(Pub.L. 96-95, § 8, Oct. 31, 1979, 93 Stat. 726.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311,  
see 1979 U.S. Code Cong. and Adm.  
News, p. 1709.

**CROSS REFERENCES**

Civil penalties, see 16 USCA § 470ff.

Prohibited acts and criminal penalties, see 16 USCA § 470ee.

**LIBRARY REFERENCES**

**American Digest System**

United States 67.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 119.  
Public Lands, 63A Am jur 2d § 1.  
Rewards, 67 Am jur 2d § 11.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 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.A. §§ 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.

(Pub.L. 96-95, § 9, Oct. 31, 1979, 93 Stat. 727.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

**References in Text**

The Act of June 27, 1960 (16 U.S.C. 469-469c), referred to in subsec. (a)(1), is

Act June 27, 1960, Pub.L. 86-523, 74 Stat. 220, as amended, which is classified generally to sections 469 to 469c-1 of this title. For complete classification of this Act to the Code, see Tables.

**CROSS REFERENCES**

Disclosure of agency records, see 5 USCA § 552.

Notification to Indian tribes of possible harm to sites of religious or cultural importance not deemed disclosure to public, see 16 USCA § 470cc.

**LIBRARY REFERENCES**

**American Digest System**

United States ☞3.

Key Number System Topic No. 393.

## Encyclopedias

United States, see C.J.S. § 7.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 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). 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.

(Pub.L. 96-95, § 10, Oct. 31, 1979, 93 Stat. 727; Pub.L. 100-588, § 1(d), Nov. 3, 1988, 102 Stat. 2983; Pub.L. 103-437, § 6(d)(30), Nov. 2, 1994, 108 Stat. 4584; Pub.L. 104-333, Div. I, Title VIII, § 814(d)(2)(A), Nov. 12, 1996, 110 Stat. 4196.)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**

**1979 Acts.** House Report No. 96-311, see 1979 U.S. Code Cong. and Adm. News, p. 1709.

**1988 Acts.** Senate Report No. 100-566, see 1988 U.S. Code Cong. and Adm. News, p. 3983.

**1994 Acts.** House Report No. 103-779, see 1994 U.S. Code Cong. and Adm. News, p. 3639.

**References in Text**

The American Indian Religious Freedom Act, referred to in subsec. (a), is Pub.L. 95-342, Aug. 11, 1978, 92 Stat. 471, which enacted section 1996 of Title 42, The Public Health and Welfare, and provision set out as a note under section 1996 of Title 42. For complete classification of this Act to the Code, see Tables.

**Amendments**

**1996 Amendments.** Subsec. (c). Pub.L. 104-333, § 814(d)(2)(A), struck

out provision requiring annual report to Committees by land manager.

**1994 Amendments.** Subsecs. (a), (c). Pub.L. 103-437, § 6(d)(30), substituted reference to Committee on Natural Resources of the House of Representatives for reference to Committee on Interior and Insular Affairs of the House of Representatives, wherever appearing.

**1988 Amendments.** Subsec. (c). Pub.L. 100-588 added subsec. (c).

**Change of Name**

Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Natural Resources of the House of Representatives treated as referring to the Committee on Resources of the House of Representatives, see section 1(a)(8) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

## LIBRARY REFERENCES

**American Digest System**

United States ☞3.

Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. § 7.

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

**§ 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 October 31, 1979, 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 re-

sources of the United States through increased cooperation between private individuals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

(Pub.L. 96-95, § 11, Oct. 31, 1979, 93 Stat. 727.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311,  
see 1979 U.S. Code Cong. and Adm.  
News, p. 1709.

**LIBRARY REFERENCES**

**American Digest System**

United States ¶3, 41.  
Key Number System Topic No. 393.

**Encyclopedias**

United States, see C.J.S. §§ 7, 41.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 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.

(Pub.L. 96-95, § 12, Oct. 31, 1979, 93 Stat. 728.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1979 Acts. House Report No. 96-311,  
see 1979 U.S. Code Cong. and Adm.  
News, p. 1709.



# App. F

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**UNITED  
STATES  
CODE  
ANNOTATED**

**TITLE 25**

**Indians**

**§§ 1901 to End**

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal and State Courts



**WEST GROUP**

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## CHAPTER 32—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION

### Sec.

- 3001. Definitions.
- 3002. Ownership.
- 3003. Inventory for human remains and associated funerary objects.
- 3004. Summary for unassociated funerary objects, sacred objects, and cultural patrimony.
- 3005. Repatriation.
- 3006. Review Committee.
- 3007. Penalty.
- 3008. Grants.
- 3009. Savings provisions.
- 3010. Special relationship between Federal government and Indian tribes and Native Hawaiian organizations.
- 3011. Regulations.
- 3012. Authorization of appropriations.
- 3013. Enforcement.

### CROSS REFERENCES

Snake River Birds of Prey National Conservation Area, prohibition upon limiting construction of laws, see 16 USCA § 460iii-5.

### LIBRARY REFERENCES

#### Law Review and Journal Commentaries

American Indians seek religious freedom. Steve Russell, 58 Tex.B.J. 362 (1995).

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### WESTLAW COMPUTER ASSISTED LEGAL RESEARCH

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### § 3001. Definitions

For purposes of this chapter, the term—

- (1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the

earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" means human remains and—

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C.A. § 1601 et seq.].

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unas-

sociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

(Pub.L. 101-601, § 2, Nov. 16, 1990, 104 Stat. 3048; Pub.L. 102-572, Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

### HISTORICAL AND STATUTORY NOTES

#### Revision Notes and Legislative Reports

**1990 Acts.** House Report No. 101-877, see 1990 U.S. Code Cong. and Adm. News, p. 4367.

**1992 Acts.** House Report No. 102-1006 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 3921.

#### References in Text

This chapter, referred to in text, was in the original "this Act", meaning Pub.L. 101-601, Nov. 16, 1991, 104 Stat. 3048, known as the Native American Graves Protection and Repatriation Act, which enacted this chapter and enacted section 1170 of Title 18, Crimes and Criminal Procedure.

The Alaska Native Claims Settlement Act, referred to in pars. (5) and (7), is Pub.L. 92-203, Dec. 18, 1971, 85 Stat.

688, as amended, which is classified generally to chapter 33 (section 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

Section 4 of Public Law 86-3, referred to in par. (15)(C), is section 4 of Pub.L. 86-3, which is set out as a note preceding section 491 of Title 48.

Hawaiian Homes Commission Act, 1920, referred to in par. (15)(C), is Act July 9, 1921, c. 42, 42 Stat. 108, which was classified to former sections 691 to 718 of Title 48, Territories and Insular Possession, prior to omission of those sections upon admission of Hawaii into the Union.

#### Effective and Applicability Provisions

**1992 Acts.** Amendment by Title IX of Pub.L. 102-572 effective Oct. 29, 1992,

# App. G

**UNITED  
STATES  
CODE  
ANNOTATED**

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**TITLE 43**

**Public Lands**

**§§ 1501 to End**

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## CHAPTER 39—ABANDONED SHIPWRECKS

### Sec.

- 2101. Congressional statement of findings.
- 2102. Definitions.
- 2103. Rights of access.
- 2104. Preparation of guidelines.
- 2105. Rights of ownership.
- 2106. Relationship to other laws.

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### § 2101. Congressional statement of findings

The Congress finds that—

- (a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and
- (b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

(Pub.L. 100-298, § 2, Apr. 28, 1988, 102 Stat. 432.)

### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports** chapter] may be cited as the 'Abandoned Shipwreck Act of 1987'." 1988 Acts. House Report No. 100-514(Parts I and II), see 1988 U.S. Code Cong. and Adm. News, p. 365.

#### Short Title

1988 Acts. Section 1 of Pub.L. 100-298 provided that: "This Act [enacting this

### LAW REVIEW AND JOURNAL COMMENTARIES

Abandoned Shipwreck Act of 1987: Finding the proper ballast for the states. Timothy T. Stevens, 37 Vill.L.Rev. 573 (1992).  
Identity and cultural property: The protection of cultural property in the United States. Patty Gerstenblith, 75 B.U.L.Rev. 559 (1995).

- Regulating the business of culture: The Abandoned Shipwreck Act - Can preservationists, salvors, and divers sail in calmer waters? Comment, 51 DePaul L.Rev. 569 (2001).
- Roots, relics and recovery: What went wrong with the Abandoned Shipwreck Act of 1987. Sabrina L. McLaughlin, 19 Colum.-VLA J.L. & Arts 149 (1995).
- Synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).
- The Abandoned Shipwreck Act of 1987. Roberto Iraola, 25 Whittier L. Rev. 787 (2004).
- The Abandoned Shipwreck Act of 1987 in the new millennium: Incentives to high tech piracy? Russell G. Murphy, 8 Ocean & Coastal L.J. 167(2003).

### LIBRARY REFERENCES

#### American Digest System

- Shipping ☞213.  
Key Number System Topic No. 354.

#### Corpus Juris Secundum

- CJS Salvage § 102, Jurisdiction.

### Research References

#### ALR Library

- 163 ALR, Fed. 421, Validity, Construction, and Application of Abandoned Shipwreck Act of 1987 (43 U.S.C.A. §§ 2101 et seq.).
- 124 ALR, Fed. 593, Validity, Construction, and Application of Marine Mammal Protection Act of 1972 (16 U.S.C.A. §§ 1361 et seq.).
- 63 ALR 2nd 1369, Rights in and Ownership of Wrecked or Derelict Vessels and Their Contents Not Cast Upon the Shore.

#### Encyclopedias

- Am. Jur. 2d Boats and Boating § 4, Federal Regulation, Generally.
- Am. Jur. 2d Salvage § 53, Derelict Vessels or Property.
- Am. Jur. 2d Salvage § 63, Jurisdiction--Effect of Eleventh Amendment.

#### Forms

- 1AA West's Federal Forms § 434, Motion for Leave to File Brief Amicus Curiae.

#### Treatises and Practice Aids

- Federal Procedure, Lawyers Edition § 53:675, Jurisdiction.
- 13 Wright & Miller: Federal Prac. & Proc. § 3524, Actions in Which a State Is a Defendant.
- 14A Wright & Miller: Federal Prac. & Proc. § 3671, Sources and Scope of Admiralty Jurisdiction.

### WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

### Notes of Decisions

#### Abandoned vessels 1

##### 1. Abandoned vessels

Mere fact that insurance company which paid claim on vessel and on portion of vessel's cargo after vessel was shipwrecked had not undertaken any salvage efforts in more than 100 years since shipwreck would not support finding that vessel was legally "abandoned," within

meaning of Abandoned Shipwreck Act (ASA), where any salvage efforts undertaken by insurance company prior to recent improvements in sonar technology would have had only minimal chance of success. *Deep Sea Research, Inc. v. Brother Jonathan*, N.D.Cal.1995, 883 F.Supp. 1343, affirmed 89 F.3d 680, amended and superseded on denial of rehearing 102 F.3d 379, certiorari granted 117 S.Ct. 2430, 520 U.S. 1263, 138

L.Ed.2d 192, stay denied 117 S.Ct. 2537, 1464, 523 U.S. 491, 140 L.Ed.2d 626, on 521 U.S. 1131, 138 L.Ed.2d 1036, affirmed in part, vacated in part 118 S.Ct. remand 143 F.3d 1299. Shipping ⇌ 213

## § 2102. Definitions

For purposes of this chapter—

(a) the term “embedded” means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term “National Register” means the National Register of Historic Places maintained by the Secretary of the Interior under section 470a of Title 16;

(c) the terms “public lands”, “Indian lands”, and “Indian tribe” have the same meaning given the terms in the Archaeological Resource<sup>1</sup> Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term “shipwreck” means a vessel or wreck, its cargo, and other contents;

(e) the term “State” means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term “submerged lands” means the lands—

(1) that are “lands beneath navigable waters,” as defined in section 1301 of this title;

(2) of Puerto Rico, as described in section 749 of Title 48;

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1705 of Title 48; and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241.

(Pub.L. 100-298, § 3, Apr. 28, 1988, 102 Stat. 432.)

<sup>1</sup> So in original. Probably should be “Resources”.

### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1988 Acts. House Report No. 100-514(Parts I and II), see 1988 U.S. Code Cong. and Adm. News, p. 365.

#### References in Text

The Archaeological Resources Protection Act of 1979, referred to in subsec. (c), is Pub.L. 96-95, Oct. 31, 1979, 93 Stat. 721, which is classified generally to chapter 1B (section 470aa et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short

Title note set out under section 470aa of Title 16 and Tables.

Section 801 of Public Law 94-241, referred to in subsec. (f)(4), probably means section 801 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as contained in section 1 of Pub.L. 94-241, Mar. 24, 1976, 90 Stat. 263, which is set out as a note under section 1801 of Title 48, Territories and Insular Possessions.

## Research References

## ALR Library

163 ALR, Fed. 421, Validity, Construction, and Application of Abandoned Shipwreck Act of 1987 (43 U.S.C.A. §§ 2101 et seq.).

## WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

## Notes of Decisions

## Embedded vessels 1

## 1. Embedded vessels

Even assuming that vessel or its cargo, which were lost more than 100 years earlier in shipwreck off the California coast, had been abandoned by owners, State of California failed to show that shipwreck was "embedded" in submerged lands of state, so as to give the State an interest therein under provisions of the Abandoned Shipwreck Act (ASA), given evidence that at least three-quarters of ship's hull, including all of its surviving superstructure, floors, galley, cabins and

other portions of vessel, were clearly visible above surface of ocean floor and lack of evidence as to consistency of ocean floor in area where vessel was resting, i.e., whether it was loose or hard sediment. *Deep Sea Research, Inc. v. Brother Jonathan*, N.D.Cal.1995, 883 F.Supp. 1343, affirmed 89 F.3d 680, amended and superseded on denial of rehearing 102 F.3d 379, certiorari granted 117 S.Ct. 2430, 520 U.S. 1263, 138 L.Ed.2d 192, stay denied 117 S.Ct. 2537, 521 U.S. 1131, 138 L.Ed.2d 1036, affirmed in part, vacated in part 118 S.Ct. 1464, 523 U.S. 491, 140 L.Ed.2d 626, on remand 143 F.3d 1299. Shipping ⇌ 213

## § 2103. Rights of access

## (a) Access rights

In order to—

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 2105 of this title,

it is the declared policy of the Congress that States carry out their responsibilities under this chapter to develop appropriate and consistent policies so as to—

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

## (b) Parks and protected areas

In managing the resources subject to the provisions of this chapter, States are encouraged to create underwater parks or areas to provide

additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

(Pub.L. 100-298, § 4, Apr. 28, 1988, 102 Stat. 433.)

#### HISTORICAL AND STATUTORY NOTES

<p><b>Revision Notes and Legislative Reports</b>  <b>1988 Acts.</b> House Report No. 100-514(Parts I and II), see 1988 U.S. Code Cong. and Adm. News, p. 365.</p> <p><b>References in Text</b>          Title I of the National Historic Preservation Act, referred to in subsec. (b), is</p>	<p>title I of Pub.L. 89-665, Oct. 15, 1966, 80 Stat. 915, as amended, which enacted sections 470a, 470b, 470c, 470d, 470e, 470f, 470g, 470h, 470h-1, 470h-2, and 470h-3 of Title 16, Conservation.</p>
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#### LIBRARY REFERENCES

**American Digest System**  
 Shipping Ⓒ213.  
 Key Number System Topic No. 354.

#### Research References

##### Forms

1 West's Federal Forms § 82, Petition for Certiorari--Reasons for Granting the Writ--Admiralty Case.

#### WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

## § 2104. Preparation of guidelines

### (a) Purposes of guidelines; publication in Federal Register

In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after April 28, 1988, prepare and publish guidelines in the Federal Register which shall seek to:

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

**(b) Consultation**

Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

**(c) Use of guidelines in developing legislation and regulations**

Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.

(Pub.L. 100-298, § 5, Apr. 28, 1988, 102 Stat. 433.)

**HISTORICAL AND STATUTORY NOTES****Revision Notes and Legislative Reports**

1988 Acts. House Report No.  
100-514(Parts I and II), see 1988 U.S.  
Code Cong. and Adm. News, p. 365.

**Research References****Forms**

1 West's Federal Forms § 82, Petition for Certiorari--Reasons for Granting the Writ--Admiralty Case.

**WESTLAW ELECTRONIC RESEARCH**

See Westlaw guide following the Explanation pages of this volume.

**§ 2105. Rights of ownership****(a) United States title**

The United States asserts title to any abandoned shipwreck that is—

- (1) embedded in submerged lands of a State;
- (2) embedded in coralline formations protected by a State on submerged lands of a State; or
- (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

**(b) Notice of shipwreck location; eligibility determination for inclusion in National Register of Historic Places**

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for

inclusion in the National Register of Historic Places under clause<sup>1</sup> (a)(3) of this section.

**(c) Transfer of title to States**

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

**(d) Exception**

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

**(e) Reservation of rights**

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

- (1) section 1311, 1313, or 1314 of this title; or
- (2) section 414 or 415 of Title 33.

(Pub.L. 100-298, § 6, Apr. 28, 1988, 102 Stat. 433.)

<sup>1</sup> So in original. Probably should be "subsection".

### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**

1988 Acts. House Report No. 100-514  
(Parts I and II), see 1988 U.S. Code  
Cong. and Adm. News, p. 365.

### LAW REVIEW AND JOURNAL COMMENTARIES

- A synopsis of the laws protecting our cultural heritage. Marilyn Phelan, 28 New Eng.L.Rev. 63 (1993).  
Abandoned Shipwreck Act of 1987: Finding the proper ballast for the states. Timothy T. Stevens, 37 Vill.L.Rev. 573 (1992).  
The protection of sunken warships as gravesites at sea. Jason R. Harris, 7 Ocean & Coastal L.J. 75 (2001).

### LIBRARY REFERENCES

**American Digest System**

Shipping Ⓒ=213.  
Key Number System Topic No. 354.

**Corpus Juris Secundum**

CJS Shipping § 521, Right of Property.

### Research References

**ALR Library**

163 ALR, Fed. 421, Validity, Construction, and Application of Abandoned Shipwreck Act of 1987 (43 U.S.C.A. §§ 2101 et seq.).

# App. H



- 157 ALR 881, Exemption of Retail Establishment from Fair Labor Standards Act, as Extending to Employer's Warehouse or Other Agency Which Serves Its Retail Outlets.
- 155 ALR 936, Breaking Continuity of Passage or Shipment as Affecting Its Interstate Character, as Regards Rates or Other Incidents of the Relation Between Carrier and Shipper or Passenger.
- 152 ALR 1078, Collateral Business Activities Incident to, or in Aid of, Interstate Transportation, as Related to Interstate Commerce.
- 149 ALR 1118, Consignee's Refusal to Accept Delivery at Place Specified in the Contract, or Carrier's Inability to Make Delivery at That Place, as Terminating Liability as Carrier.
- 141 ALR 919, Status, Rights, and Obligations of Freight Forwarders.
- 135 ALR 934, Jurisdiction of Declaratory Action as Affected by Pendency of Another Action or Proceeding.
- 135 ALR 1358, State Regulation of Carriers by Motor Vehicles as Affected by Interstate Commerce Clause or Federal Legislation Thereunder.
- 132 ALR 1443, Judicial Questions Regarding Federal Fair Labor Standards Act (Wage and Hours Act) and State Acts in Conformity Therewith.
- 128 ALR 1447, Federal Venue Statute Providing That Where Jurisdiction Is Founded on Diversity of Citizenship Suit Shall Be Brought Only in the District of the Residence of Either the Plaintiff or Defendant as Affected by Fact That Party Is Corporation Doing Business or Subject to Service of Process in State Other than That of Its Incorporation.
- 115 ALR 1105, License Tax or Fee on Automobiles as Affected by Interstate Commerce.
- 109 ALR 550, Validity and Applicability of Statutes Relating to Use of Highway by Private Motor Carriers and Contract Motor Carriers for Hire.
- 94 ALR 539, Right Under or in View of Statute to Join in Tort Action at Law Parties Who Are Severally But Not Jointly Liable to Plaintiff.
- 67 ALR 957, When Granting or Refusing Certificate of Necessity or Convenience for Operation of Motorbuses Justified.
- 29 ALR 356, Power of Public Service Commission to Increase Franchise Rates.
- Treatises and Practice Aids**
- West's Federal Administrative Practice § 5305, Office of the Secretary -- Duties.

#### WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

### § 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) **Approval of programs and projects.**—Subject to subsection (d), the Secretary may approve a transportation program or project

(other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

**(d) De minimis impacts.—**

**(1) Requirements.—**

**(A) Requirements for historic sites.—**The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

**(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.—**The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

**(C) Criteria.—**In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

**(2) Historic sites.—**With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

**(A)** the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that—

**(i)** the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) **Parks, recreation areas, and wildlife or waterfowl refuges.**—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(Added Pub.L. 97-449, Jan. 12, 1983, 96 Stat. 2419, and amended Pub.L. 100-17, Title I, § 133(d), Apr. 2, 1987, 101 Stat. 173; Pub.L. 109-59, Title VI, § 6009(a)(2), Aug. 10, 2005, 119 Stat. 1875.)

## HISTORICAL AND STATUTORY NOTES

### Revision Notes and Legislative Reports 1983 Acts.

Revised Section	Source (U.S.Code)	Source (Statutes at Large)
303(a) .....	49:1651(b)(2).	Oct. 15, 1966, Pub.L. 89-670, § 2(b)(2), 80 Stat. 931.
	49:1653(f) (1st sentence).	Oct. 15, 1966, Pub.L. 89-670, § 4(f), 80 Stat. 934; restated Aug. 23, 1968, Pub.L. 90-495, § 18(b), 82 Stat. 824.
303(b) .....	49:1653(f) (2d sentence).	
303(c) .....	49:1653(f) (less 1st, 2d sentences).	

In subsection (a), the words "hereby declared to be" before "the policy" are omitted as surplus. The words "of the United States Government" are substituted for "national" for clarity and consistency.

In subsection (b), the words "crossed by transportation activities or facilities" are substituted for "traversed" for clarity.

In subsection (c), before clause (1), the words "After August 23, 1968" after

# App. I

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**TITLE 42**

**The Public Health and Welfare**

**§§ 4321 to 4900**

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Wetland conservation projects; recommendations by North American Wetlands Conservation Council considered Federal actions subject to requirements of this chapter, see 16 USCA § 4404.

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## § 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

### HISTORICAL AND STATUTORY NOTES

#### Revision Notes and Legislative Reports

**1970 Acts.** House Report No. 91-378 and Conference Report No. 91-765, see 1969 U.S. Code Cong. and Adm. News, p. 2751.

#### Transfer of Functions

Enforcement functions of Secretary or other official in Department of Interior related to compliance with system activities requiring coordination and approval under this chapter, and enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas

Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in Appendix 1 to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub.L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade.

#### Short Title

**1970 Acts.** Section 1 of Pub.L. 91-190 provided: "That this Act [enacting this