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Archeological Assistance

The Civil Prosecution Process of the Archaeological Resources Protection Act

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This Technical Brief details the procedure for pursuing a civil violation of ARPA through the administrative law process. Its purpose is to provide a succinct blueprint for use by land managing agencies when civil prosecution under the law is the desired option. Note that in the event of any discrepancy between this Technical Brief and applicable ARPA regulations, the regulations control. Citations in this brief will depart from the standard American Antiquity style in favor of the legal citation format used by lawyers and Administrative Law Judges.

Introduction

The Archaeological Resources Protection Act of 1979 (ARPA)¹, as amended, provides a means to assertively protect the ancient and historic remains of the cultures that have inhabited Federal and Indian lands. The Act provides for criminal and civil penalties against those who excavate, remove, damage, or otherwise alter or deface archeological resources, or attempt to do so, without a permit.² ARPA with its amendments and accompanying Uniform Regulations offer agencies flexible alternatives to employ in the preservation of resources under their protection.³

Criminal enforcement of ARPA has become an active part of the repertoire of agencies across the United States.⁴ It is not unusual for vehicles and the tools of the violation to be subjected to seizure in connection with the criminal prosecution.⁵ In contrast, civil prosecution under ARPA has been rarely and only recently pursued.⁶ The purpose of this technical brief is to provide a familiarity with the civil provisions of ARPA that may expand its future use.

Background of the Civil Process

Development of the Civil Law

ARPA provides for civil penalties and outlines a description of damage calculation to determine a penalty assessment.⁷ Criminal violations are specifically set

forth in statutes, whereas the civil process depends upon descriptive regulations. Although ARPA became law on October 31, 1979, the Uniform Regulations were not adopted until January 6, 1984. The Department of the Interior Supplemental Regulations, which are an integral part of the process, were promulgated in 1987.⁸ By the time the civil process was a completed package, agencies were actively training law enforcement personnel and archeologists to enforce the criminal aspects of the law. Priority was given to those cases that merited criminal prosecution and much time was spent preparing those cases to overcome reluctant prosecutors who were unfamiliar with the law. In 1988 ARPA was amended to establish a \$500 threshold for felony prosecution, in place of the previous \$5000 threshold, and ARPA criminal prosecutions grew in number rapidly.⁹ Since 1988, successful ARPA criminal prosecutions have been reported with some frequency throughout the country.¹⁰ Experienced ARPA prosecutors, while in great demand, are no longer rare.

It is now time to explore the use of the other ARPA prosecution, the civil prosecution. The use of the civil option will not replace criminal prosecution. Rather, those incidents that for one reason or another do not merit criminal prosecution will become the subject of the civil process. These are the incidents that have been overlooked although they are no less important in the effort to preserve and protect archeological resources.

Cooperative Agreements

In order for an agency to proceed in a civil matter it must have access to an Administrative Law Judge (ALJ). The Department of the Interior Office of Hearings and Appeals is ideally suited to the task, but not every agency is similarly staffed. The lack of an agency ALJ impeded active civil enforcement for agencies outside of the Department of the Interior. That problem has now been rectified with the issuance of Memoranda of Agreement with Interior executed by the Forest Service and the Tennessee Valley Authority.¹¹ One of

the first civil ARPA cases to utilize the Interior ALJ was brought by the Forest Service.¹²

The Civil Advantage

There are a number of reasons to favor civil prosecution over criminal. Some of these are inherent in civil procedure regardless of the particular substantive law.

Burden of Proof: In a criminal trial the prosecutor must prove the defendant guilty beyond a reasonable doubt. This is a substantial burden, which calls upon jurors to feel as comfortable about their decision as they would in making a decision in the more important affairs of their daily life. Punishment is not to be discussed in a criminal trial, but the jurors know that their verdict could impact the liberty of the defendant. The standard of proof in a civil case is one of a preponderance of the evidence. That is a tipping of the scales in favor of the claim being made.

Non-jury Trials: A criminal defendant who faces a significant loss of liberty (six months or more) is guaranteed a jury trial. This fundamental right is not an issue in civil matters, which are tried before an ALJ outside of the jury trial process, since the only loss is monetary. Civil penalties may include a prohibition from entering a Federal or Indian enclave or may require some constructive activity but will never include incarceration. Administrative proceedings are therefore less time-consuming, less expensive, and less formal.¹³ To convict a criminal defendant the twelve member jury must reach a unanimous verdict. To find that the civil defendant is responsible the agency must convince the ALJ that the facts are complete. ARPA criminal trials also may be interesting instructive sessions that educate the jury and instill in them an understanding for the law and reasons to care about archeological sites. Every jury trial, however, carries the ever-present possibility of error and a mistrial requiring a repeat of the process. In contrast the civil hearing is simple and direct.

Optional Use of Lawyers: Depending on its policy, the individual agency is not necessarily represented by an attorney at an ALJ hearing. A case may be presented by the law enforcement agent and the archeologist. Therefore, if criminal prosecution of ARPA is declined by the U.S. Attorney's office in the appropriate district, the agency is not foreclosed from taking action against an alleged violator. In a civil case the defendant is not entitled to representation by a lawyer as a matter of constitutional right. The defendant may obtain counsel or proceed *in proper persona*, on behalf of one's self,

but the agency does not bear the cost of the defendant's legal representation.

Civil Penalties Versus Fines: In a criminal prosecution, in addition to or in lieu of a period of confinement, the defendant may be ordered to pay a fine. The fine also may replace a prison term. Fines have two limitations: first, they may not exceed \$100,000 for a misdemeanor conviction and \$250,000 for a felony conviction, and second, they are paid not to the agency but to the general fund of the U.S. Treasury.¹⁴ Restitution may be paid to the agency in an amount deemed appropriate by the judge after considering everything else levied against a defendant and the ability of those held responsible to pay. Penalties in a civil proceeding are assessed based on the actual damages proven at the hearing.¹⁵ These assessments become judgments that may be collected directly by the agency or the Indian tribal authority affected by the violation.

Agency Discretion: A criminal case presented to the office of the local U.S. Attorney transfers decision making authority to that office. Depending on the policy of each district office the recommendations of the Assistant U.S. Attorney to whom the case is assigned will usually determine whether to prosecute, whom to prosecute, when, and for what offenses. That office will determine whether to forfeit items and what items to forfeit. Although the Assistant U.S. Attorney will consult with the agency through the law enforcement agent, the office of the U.S. Attorney makes decisions in plea bargaining and prosecution resolution. In a civil proceeding the agency never loses total control over the presentation of the case. Negotiations prior to judicial resolution are handled by the agency area manager, who has been delegated the authority by each respective Secretary or agency official.

Agency Policy Determination

The agency area manager, or equivalent officer, determines whether to maintain a case for civil prosecution or to refer the matter to the U.S. Attorney's office for criminal prosecution. The number of ARPA violation investigations has grown to a point that now may allow the agency area manager to establish policies for the referral of a case. This information will assist the agent in the field to properly direct their reports and to involve the appropriate lawyer, U.S. Attorney, Solicitor, Office of General Counsel or Judge Advocate General. It will also assist the first contact officer in the field in determining which option should be employed.

There are other options beyond criminal or civil prosecution under ARPA alone. It is possible to seize the tools and vehicles used in a violation without the prosecution of an individual.¹⁶ Each agency has published regulations in the Code of Federal Regulations (CFR) that prohibit various activities that apply to the protection of sites managed by that agency.¹⁷ All of the pre-ARPA options available to land managers still exist. ARPA merely adds to those options. However, if an individual is cited prematurely under a CFR section that protects archeological resources, and if the individual quickly enters a plea of guilty to that violation before the nearest magistrate, the agency will be prevented from proceeding further under ARPA, criminally or civilly. To do so would constitute double punishment. The agency may still bring an action to forfeit a vehicle or tools used in the commission of the offense.

Avoiding Double Punishment: Once the agency submits a case for criminal prosecution, the agency loses control of the case until and unless the U.S. Attorney issues a declination letter indicating a decision not to proceed. If the criminal case does proceed but the sentence does not include forfeiture, the agency may still seek forfeiture in a separate civil proceeding. Forfeiture is available under ARPA if the defendant is cited for a CFR violation rather than an ARPA violation.

It is important to realize that if a criminal case is negotiated by an Assistant U.S. Attorney and if the negotiations include financial considerations, either as a fine based on the damage amount or as restitution, the agency may not later assess a civil penalty against the defendant. This would amount to double punishment. When a defendant in a criminal case is sentenced to pay a fine in lieu of incarceration and the amount of the fine is based upon an amount calculated to deter future violations, civil prosecution remains an option.¹⁸

Issues in the Proof of a Civil Case

Jurisdiction

Civil and criminal prosecutions have the same jurisdictional basis. That is, for the law to apply, Federal or Indian lands must assertedly have been impacted by the alleged violator.¹⁹ Indian lands include lands of Alaska Native Village corporations and Native Hawaiian as well as trust lands subject to a restriction on alienation. Federal lands include those in Puerto Rico, Guam, and the Virgin Islands or any lands held in fee title by the United States.²⁰ The only exception to tying

the violation to Federal or Indian lands is when an otherwise protected item is obtained in violation of a State or local law and then transported in interstate commerce.²¹

Any person who commits a prohibited act on the lands under the jurisdiction of ARPA is liable under the law. Person is defined as "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."²² The description of person is important to note in the context of a potential civil action because the type of "person" will more often be broadly construed than in the typical criminal case. For example, a corporation that is not charged in a criminal ARPA indictment nonetheless may find itself facing civil ARPA charges. The reason for the difference may be found in the intent exhibited by the violator. Intent is discussed below.

Identification

In all cases, the "person" to be held accountable must be identified. This may be a direct identification, as in a criminal case, where the violator is observed at the scene. In a civil case the alleged violator may be identified as the "person" responsible for the care and control of a site such as the private contractor who allows a protected area to be bulldozed. The alleged violator also may be a business that allowed equipment to be rented if the firm knew or had reason to know the use planned for the equipment (see intent). More than one person may be held responsible, although each may have had a different level of involvement. Directors of corporations and even government employees are not immune from civil liability.

Protection of Archeological Resources

Under ARPA the protected items are the same in both civil and criminal prosecutions.²³ Archeological resources are those material remains of past *human* life where there is sufficient material remaining to extract scientific data.²⁴ The ability to gain information about past human life from the material remains is referenced in the law as "archeological interest." The items also must be over 100 years old.

Expressly excepted from the protection of ARPA is the collection of arrowheads found on the surface of the ground.²⁵ Although technically protected, as a practical matter "arrowhead" includes any object that would

appear to the common person to be an arrowhead even if it is actually a spear point or a scraper. To be protected the stone point must be totally subsurface. Generally, unworked minerals, rocks, and paleontological (fossil) specimens are not protected by ARPA unless they have evidence of human interaction.²⁶ However, where these items are found within an archeological site they are protected if they can render clues to the past human existence. The proof of this issue will rely on the expert testimony of an archeologist. Similarly, coins and bullets are not protected unless they are found in a direct physical relationship with an archeological site, such as in a battlefield.²⁷

Authority of a Permit

Where the person holds a valid ARPA or comparable permit and acts within the permit, there can be no violation.²⁸ Any lawful excavation will be overseen by an individual holding the permit. Government contracts and government employment status may take the place of an ARPA permit because they act as authority to undertake the activity obligated by the contract or within the scope of employment. Government contracts do not excuse the obligation to act responsibly, and all government contracts will or should contain ARPA language.²⁹ Government employees and volunteers working with the government do not need a permit. However, if their actions exceed the scope of the job they may face civil sanctions.

ARPA violations may still be perpetrated by the holder of a permit or government contract where the action taken exceeds the authority of the document.³⁰ This may occur if unnecessary excavation takes place or if the contractor or permittee strays from the designated area.

Calculating the Amount of Damage

Civil and criminal archeological site damage calculations are conducted in the same manner, but the application of the information varies. Damage calculations in civil actions become the penalty amount, whereas in criminal actions the amount of damage determines the severity of the crime, and the damage may be a factor in sentencing. A criminal defendant may be ordered to pay the damage amount as restitution to an agency.

Quantifying Damages: The amount of the penalty is determined by calculating the archeological damage to the area or the commercial value of the materials and adding either, but not both, to the cost of restoration and repair of the materials or the area that was

damaged.³¹ This is another aspect of case preparation that is dependent wholly upon the archeologist acting as an expert witness. Commercial value of an object may be determined by the price placed on the object by the alleged violator, the going price of similar objects offered for sale, or by research in collector catalogs. Archeological value is described in the Uniform Regulations as the cost of scientific data recovery that would have been attainable prior to the violation in an area that is adjacent to the violation site, and that is of comparable size.³² It assumes that the disturbance has created a situation of forced excavation even though no further data recovery may occur in the near future. It enables the agency to arrive at a dollar amount of damage even though the actual loss of a nonrenewable resource is priceless.

Added to the archeological damage or commercial value is the cost of restoration and repair. This includes the actual costs of reconstruction or stabilization of the archeological resource, surface stabilization, research to carry out stabilization, physical barriers or protective devices to guard against further disturbance, analysis of the remaining archeological materials, reinterment of human remains, curation, and the preparation of reports necessary to do any of the above activities.³³

Damages as Civil Penalties: In a civil ARPA case the damage amount becomes the actual amount that may be assessed to the person or persons found to be responsible. There is no minimum or maximum amount. When there are subsequent violations by a person, the amount of the damages assessed is doubled.³⁴ In no situation may the person be assessed more than double the actual damage amount. The land manager does have the discretion in the negotiation of a civil penalty amount prior to an administrative hearing to reduce the assessed penalty. When the violation is so egregious that the damage assessment as a sanction is insufficient, then criminal prosecution may be the more appropriate course of action. The criminal law provides for incarceration and penalties over and above the actual damage amount. However, the maximum fine in a criminal action against an individual is \$250,000 and against a corporation is \$500,000.³⁵ It is possible for civil penalties to exceed these limitations.

Forfeiture

As part of the civil proceeding, the ALJ may order that archeological resources in the possession of the person and all vehicles and equipment which were used in the violation be forfeited.³⁶ All items which were

forfeited by order of the ALJ and that involved violations that originated on Indian lands are to be turned over to the Indian or Indian tribe affected. Where Indian interests are not affected, the items are forfeited to the United States. Agencies receiving forfeited vehicles and tools place them into agency use. Native American human remains are subject to repatriation wherever they are found, and non-repatriated items are subject to curation under the Federal curation regulations.³⁷

Intent, a Non-Issue in Actions Based on Negligence

In every criminal action the intent of the defendant must be proven. The criminal statute will either call for the government to prove the specific intent of the alleged wrongdoer or show general intent. That is, the government must show that the defendants actually knew they were doing wrong and persisted in their actions, or that they knew what they were doing though they may have had no knowledge of the law. The ARPA criminal statute is a general intent law.³⁸ In a civil case intent is not an issue. A person may be liable civilly even if the person had no knowledge of the prohibited activity if the actions of the wrongdoers occurred while in the employ of that person or under that person's supervision. Negligence, which gives rise to civil liability, is:

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.³⁹

Inadvertence, carelessness, thoughtlessness, and inattention are all negligence. Where there is a duty to act or a contractual obligation to take action, the failure to act is negligence. Therefore a person may be negligent due to an action or failure to act. Negligence may exist even where there is no ill will or no desire that injury occur.

Civil penalties also may be assessed for any violation of a permit.⁴⁰ Intent is not an issue, and the alleged violation may be technical or inadvertent. In the case of technical violations of a permit, agencies must proceed cautiously in seeking sanctions. During the passage of ARPA, Congress expressed concern that penalties not be used to harass citizens in their normal use of public land.⁴¹

Procedural Component of a Civil Case

The decision whether or not to proceed in a civil ARPA case rests wholly within each individual agency and the designated divisions therein. ARPA gives the land manager, that is the designee of each Secretary or the head of a Federal land managing agency, the authority to initiate proceedings. Therefore, each Area or Park Superintendent, Forest Supervisor, or Base Commander may set policy to govern the option to proceed in house. Over time each division will develop policy that guides agents in the field so that they can determine whether the violation that confronts them should be handled civilly or criminally. Once a matter is submitted to the office of a U.S. Attorney the agency control is held in abeyance until the U.S. Attorney decides how the matter is to be handled and concludes its action. Those who investigate ARPA matters should not be overly concerned with what the land manager decides since the ARPA investigative work is the same regardless of how the case eventually will be handled.

The ARPA case begins with the determination by the land manager as to how to proceed. The following procedure applies when the decision is to proceed civilly and when forfeiture is a desired option. Also, after the conclusion of a criminal matter where actual monetary damages related to the disturbance of the site were not sought or negotiated in a plea agreement, or where forfeiture was not pursued, the land manager may proceed with the following civil process.

Report to the Land Manager

The agency law enforcement personnel, or investigative personnel in the case of the Corps of Engineers, will compile the ARPA case report. It will contain the information necessary to determine whether evidence exists for each of the issues of proof discussed above. The report also will contain a site damage analysis and the basis for archeological interest that places the site within the protection of ARPA. Photographs, maps, returns on search warrants, and descriptions of seized property will be included when they apply.

The use of legal support for the agencies varies. In most instances the land manager will decide how to proceed based on the report. In the Forest Service, policy now requires that the report be submitted to the Office of General Counsel when civil action is contemplated so that an attorney may advise the land manager at each stage of the proceedings. The law does not

require, and civil actions are not dependent upon, representation of the agency by counsel (see ALJ hearing below).

Notice of the Violation

Service: A civil action begins with the Notice of Violation which is served on each alleged violator. A corporation is served through a statutory agent who is listed with the Secretary of State. Personal service may be by a process server although the regulations allow service by registered mail, return receipt requested.⁴² All actions that follow will be predicated on the ability of the land manager to prove that actual service on the suspected violator has occurred.

Contents: The notice will be in letter form, signed by the land manager designee (Appendix A). It will contain a short statement of the facts that indicate what occurred, where, and how the alleged violator was involved.⁴³ This brief statement is not a recitation of everything in the report. The notice letter will indicate whether the asserted violation occurred without a permit or outside the scope of a contract or employment agreement.⁴⁴ The notice normally will state the amount of the proposed penalty, although the regulations allow the notice to be sent with an indication that the actual amount is to be ascertained and will follow in a separate notice.⁴⁵ Since the notice is not complete without a specific penalty amount stated, two separate letters may impact on the ability of the land manager to show proper service. There will be instances, however, when prompt notice will prevent further damage even though the site damage analysis is not complete.

The notice must advise the violator of the options (1) to discuss the matter informally with the land manager, (2) to file a Petition for Relief which will trigger the administrative law process, or (3) to take no action and receive a notice of final assessment.⁴⁶ The notice will advise the alleged violator of the option to remit payment which will close all further proceedings. Finally, the notice must advise the alleged violator of their right to seek judicial review of all administrative determinations.

Timing: The Notice of Assessment should be served in a reasonable time after the incident is investigated. While there are no specified time limits, general principles of timeliness do apply. If the matter languishes until the evidence of the violation becomes obscured, it may be no longer appropriate to pursue the action. It is reasonable for several months to elapse while investigative work is being completed, and it may take

time to find the alleged violators and to tie them to the scene. After four years an action may be prohibited.⁴⁷ The 45 day period within which the alleged violator must respond does not begin until the receipt of the notice letter which contains the assessed penalty amount. Therefore the suspected violator may be notified of the asserted violation, but the obligation to respond would not begin until receipt of the second notice letter with a specific penalty.

Respondent's Options

Once the suspect, who is termed the respondent in a civil action, receives the notice one of four courses of action must be taken within 45 days. The first and most desirable option for both sides is the scheduling of a meeting with the land manager to informally discuss the asserted violation and the amount of damages.⁴⁸ Such an informal discussion complies with the Presidential "Civil Justice Reform" order issued in October 1991.⁴⁹ The intent of the Executive Order is that no formal litigation commence without an attempt to informally resolve the matter.

The respondent may bypass the land manager by filing with the land manager a Petition for Relief.⁵⁰ This will place the matter before an ALJ to hear and decide. If the respondent accepts the damage amount and responsibility for the damages, the land manager may be paid in full or the respondent may notify the land manager in writing that the amount is acceptable.⁵¹ This acceptance of the civil penalty by the respondent, in writing, relieves the land manager of any obligation to send a second letter as a formal notice of assessment. If the respondent later reneges on the payment of the penalty, the land manager may obtain a court judgment and proceed to collect on the judgment (see judgment below). The respondent may take no action and await the notice of the final assessment from the land manager.⁵²

Informal Meeting

When a request is made for an informal meeting within the 45 day period, the land manager is obligated to comply. This discussion may be attended by the respondent with or without counsel. The land manager may have present any personnel deemed necessary, which may include the investigator and the archeologist. Whether counsel is present for the government will depend upon the policy of each agency.⁵³ The Office of Hearings and Appeals prefers the use of counsel at all times, since this furthers orderliness and due process.

During the informal discussion the respondent may try to impress the land manager that there is no responsibility or that the damages are too high. If a negotiated compromise is reached, it should be put in writing and signed by both the land manager and the respondent. This agreement will become the amount indicated in the notice of assessment. If no compromise is reached, the land manager still will prepare a Notice of Assessment.

If the land manager determines that no violation has occurred or that the respondent is not the responsible party, a written notice of that fact will be sent to the respondent indicating that no penalty shall be assessed.⁵⁴ The land manager may determine that additional information is necessary, which will continue the investigation.⁵⁵ When the additional information is received the land manager will then issue the Notice of Assessment. The regulations do not contemplate a second informal meeting after further investigation, but there is nothing in the regulations to preclude such action. If at the initial informal meeting the land manager determines that further investigation is warranted and if this further investigation reveals a good deal of new information that impacts the original Notice of Violation, the land manager could serve a second or amended Notice of Violation, and the process would begin anew.

Petition for Relief and Formal Hearing

The uniform regulations to ARPA provide for the respondent to request a formal hearing with the land manager.⁵⁶ The Petition for Relief is a letter, which responds specifically to the Notice of Violation (Appendix B). This petition must be in writing and must be signed by the individual respondent or an authorized officer of a corporate respondent. It must be filed with the land manager no later than 45 days from receipt of the notice of violation. Although the uniform regulations do not resolve the possible problem of the running of the 45 days while informal negotiations are pending, it would seem reasonable that the 45 days to file a petition for relief be extended in writing when the respondent has requested and scheduled an informal meeting within the 45 day period. The petition for relief must indicate specifically the factual or legal reasons for any relief requested by the respondent. This document gives the land manager another opportunity to consider all issues before the determination of an assessment. The filing of a petition for relief does not entitle the respondent to a hearing with the land manager.

Assessment of a Penalty

The land manager will issue a written Notice of Assessment which is to be served on the respondent(s) in the same manner as the Notice of Violation (Appendix C). The assessment will be sent after the 45 day period has lapsed or at the conclusion of any informal meetings and the receipt of a timely Petition for Relief.

Determination of the Penalty Amount: If the alleged violator does not respond, the assessment may repeat most of the initial Notice of Violation. If a hearing or meeting has taken place, the Notice of Assessment must discuss the information presented at the hearing or meeting or furnished in the petition for relief.⁵⁷ The penalty shall be assessed in accordance with the law and regulations discussed above.⁵⁸ Nonetheless, the land manager may assess an amount that is less than the maximum calculations for reasons enumerated in the regulations. The assessment may be reduced if:

1. the respondent agrees to return archeological resources taken from public or Indian lands, which agreement may extend beyond the items originally noticed;
2. the person agrees to assist in preservation, protection, and study of archeological resources on public and Indian lands;
3. the person will give information to assist in the detection, prevention, or prosecution of other violations of ARPA;
4. first time offenders show a demonstrated hardship and inability to pay;
5. there is no willful commission of the violation;
6. the proposed penalty is excessive;
7. the proposed penalty is unfair.⁵⁹

Content of the Notice of Assessment: The Notice of Assessment will contain the facts and conclusions that resulted in the determination that a violation occurred and that the respondent committed the violation.⁶⁰ It will indicate the basis for the assessment, including the site damage amount (doubled after the first offense), less any amounts due to mitigation for any reasons stated.⁶¹ The assessment shall advise the respondent of the right to an administrative hearing and provide the addresses of the appropriate administrative forum and the office of counsel for the agency. The notice shall state that the decision of the ALJ may be appealed administratively, and thereafter, judicial review of the final administrative decision may be sought in the appropriate United States District Court.⁶² Finally, the notice should

advise the person that failure to request a hearing, in writing within 45 days, will result in a waiver of the right to a hearing.

Administrative Hearings

Request for a Hearing: Within 45 days of the receipt of the Notice of Assessment the respondent must request a hearing or the right is deemed to be waived.⁶³ The request must be in writing and accompanied by a copy of the Notice of Assessment.⁶⁴ The regulations do not indicate specifically that a Petition for Relief be included with the request, but it would be appropriate for the respondent to indicate the specific aspects of the assessment with which exception is taken.⁶⁵ The request may be delivered in person or sent by registered or certified mail, return receipt requested. It is important for the respondent to show proof that a hearing request was timely. The regulations allow the person to deliver the request personally and thus save the cost of a process server. The addresses for delivery of the notice are given in the Notice of Assessment.

Administrative Law Judges: The ALJs function within and are part of the Executive Branch. They are not part of the Federal court system. Not every agency employs ALJs, and until recently a civil ARPA case may not have been an option. By Memorandum of Agreement the Forest Service and the Tennessee Valley Authority (TVA) have removed this impediment.⁶⁶ The following description will track the process before the Hearings Division, Office of Hearings and Appeals, Department of the Interior.

ALJ Process: The Department of the Interior ARPA Supplemental Regulations specify the documents to be mailed to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954, with the request for a hearing.⁶⁷ The request must be in writing and dated. It must include a copy of both the Notice of Assessment and the Notice of Violation. Further, "the request shall state the relief sought, the basis for challenging the facts used as the basis for charging the violation and fixing the assessment. . . ."⁶⁸ Therefore, the request establishes the issues for the hearing. In addition the respondent may indicate preferences as to the place and date for the hearing.

A copy of all documents sent to the ALJ must be sent to the legal counsel for the agency that initiated the procedure. For example, if the agency is within the Department of the Interior, the Solicitor of the Department must receive a copy personally or by registered

or certified mail, return receipt requested. Forest Service matters will be handled by its Office of General Counsel, and TVA matters will be handled by its General Counsel.⁶⁹ The respondent must serve notice to the office listed in the Notice of Assessment.

Once a specific ALJ is assigned to the case, all communications are sent directly to that judge. Copies of all documents sent to the ALJ must be sent to the other party.⁷⁰

Representation by Counsel and Appearance at a Hearing: Each Department's policy states when counsel will appear on its behalf at ALJ hearings. Currently the Offices of General Counsel for the Forest Service and the TVA prefer to be involved in ARPA civil proceedings at each stage of the process. This is strongly recommended by the ALJs. The Department of the Interior Supplemental Regulations provide that the departmental counsel designated by the Solicitor officially will enter the case once an assignment is made to a specific ALJ for hearing.⁷¹ Thus the land manager will receive the request for hearing from the respondent and the notice of the ALJ assignment and then forward the entire case file to the appropriate Solicitor's or General Counsel's office. Thereafter the attorney assigned the matter will be responsible for determining that all documents have been filed with the ALJ. The rules for the ALJ hearings do not require that either party be represented by an attorney.⁷² The Interior Supplemental Regulations allow for the appearance at a hearing of the party in person, by a representative, or by counsel.⁷³ If the respondent fails to appear at the hearing and there is no good cause for the absence, the ALJ then will make a decision without a hearing based on the documents provided.

Conduct of a Hearing: The rules for a hearing before an ALJ are more relaxed and abbreviated than the rules of procedure in a Federal district court.⁷⁴ Testimony under oath will be heard by the ALJ from the witnesses for each side. Each side will have an opportunity to question each witness. A transcript of the proceeding will be made. Exhibits such as maps, titles to vehicles, and archeological materials may be submitted to the ALJ. The ALJ will consider the evidence and the briefs filed and render a decision. There is no jury. The decision will be in writing and will specify findings of fact and conclusions of law upon which the decision is based. The ALJ is not limited to the determinations made by the land manager in the Notice of Assessment. Based on the evidence produced at the hearing, the ALJ may increase or decrease the assessment.⁷⁵

Final Order and Administrative Appeal: The decision of the ALJ becomes final 30 calendar days after the written ruling is sent to the parties, unless in the case of Department of the Interior land managers either the respondent or the land manager files a Notice of Appeal within 30 days.⁷⁶ A "Notice of Appeal" is a brief statement of intent to appeal, and it is mailed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954.⁷⁷ Copies must be mailed to the other party and to the judge who rendered the decision. The Notice of Appeal must have attached to it an affidavit that the copies were sent.⁷⁸ An Ad Hoc Board of Appeals will be appointed by the Director, Office of Hearings and Appeals, pursuant to 43 CFR Parts 4.1(b)(4) and 4.700, to decide the appeal. The appellate review is not a repeat of the first hearing.⁷⁹ The appeal panel will consider the matter on the record compiled by the ALJ and supplemented by briefs in support of the appeal and oral argument if necessary. The appeal panel will issue a written decision, which constitutes the final administrative determination of the matter.⁸⁰ It may be subject to judicial review in the appropriate Federal district court. If the administrative order is not appealed it will be final and collectable.

The administrative appeal panel will determine if there are facts to support the ALJ's decision, if all of the procedural aspects of the process were in compliance, and if the ALJ's decision complies with the law. A Federal district court judge presented with a Petition for Review of the administrative appeal panel will consider only the specific issues designated by the party who pursues the appeal. This judge will not substitute a new opinion for one supported by evidence. The predominant issue on appeal may be a claim by the respondent that he or she was not properly served or was denied due process.

Payment of the Penalty

Payment of an assessment is due:

1. when the respondent receives a Notice of Violation and opts to pay in full without further discussion;⁸¹
2. 45 days from the receipt of the Notice of Assessment from the land manager and the respondent does not request a hearing;⁸²
3. 30 days after the decision of the ALJ and the respondent does not file a Notice of Appeal with the Office of Hearings and Appeals;⁸³

4. 45 days after the appeals board issues a decision and a final assessment and the respondent does not appeal to a Federal district court⁸⁴; or

5. the Federal district court issues an order affirming the final administrative decision.

If at any point the respondent does not pursue the available process, the penalty is deemed to be accepted, and payment becomes due. Given the usual time delays, a respondent may postpone payment for a period of time. Although the civil process does not provide an instant remedy and fast payment, it is still less cumbersome than obtaining financial redress through the criminal process. During this time if it appears that the respondent may be dissipating assets or frustrating the possibility of collecting on a judgment, steps may be taken by the appropriate office of the U.S. Attorney who will handle collection.⁸⁵ Under normal circumstances the agency will refer the matter to the U.S. Attorney for collection when the penalty is not paid. In some cases, such as the TVA, agency counsel will pursue collection.

A final penalty becomes a judgment, which is a court-ordered demand for payment of a set amount. The judgment will accrue interest at the highest legal rate.⁸⁶ To obtain payment on the judgment from a respondent who does not voluntarily pay requires a second tier of legal actions. The office of each U.S. Attorney contains a collection division to pursue payment of judgments owed to agencies of the Federal Government. The collection attorney will file a copy of the judgment in the district in which the respondent lives, transacts business, or can be found and served.⁸⁷ Liens may be placed on properties owned by the respondent, and any income may be garnished. If there is no collection attorney available, civil collection actions may be initiated directly.⁸⁸ Some of the costs of collection will be added to the amount owed by the respondent.⁸⁹ In a collection action the debtor may not attack the amount of the judgment, the basis for the judgment, the calculation of the penalty, or ask that the judge go behind the judgment to examine the reasons for the judgment. If, however, the judgment is defective due to a procedural omission, the judgment may not be enforced.

Penalties collected from incidents occurring on Indian lands are paid to the appropriate tribal entity. All other funds collected above the costs of collection are paid to the agency bringing the action. How these funds are allocated within the agency is a matter of internal agency policy.

Forfeiture of Vehicles and Tools

Items Subject to Forfeiture: Materials excavated or taken from Indian and Federal lands will be seized, as they are the property of the Indian or Federal landowner.⁹⁰ The person from whom the materials are seized may be given a receipt for these items as a matter of record keeping. Property, including vehicles and tools, that belongs to the alleged violator and is used in the commission of the asserted violation is subject to forfeiture.⁹¹ These items may be seized and held at the time of the asserted violation. They are to be released either to the owner or to the seizing agency depending on the outcome of the forfeiture action.

Each agency and the land manager determine whether to pursue forfeiture. Even though forfeiture may be a legal option, the condition of the item or the lien on the item may make forfeiture undesirable. Forfeiture may be negotiated by the land manager in the informal meeting or hearing process.

Forfeiture Procedure: Items may be forfeited civilly by inclusion in the Notice of Violation as part of the demand or as an action against the item itself.⁹² If the Notice of Violation served on a respondent contains the appropriate language, the forfeiture becomes an integral part of the civil penalty process (Appendices A & C). If at any time the forfeiture is not appealed or preserved in the civil process outlined above, the item becomes the property of the agency or the Indian tribal entity if the violation occurred on Indian lands.⁹³ If the items to be forfeited are not associated with a person, the government may file an *in rem* judicial action, which is an action against the thing. Notice is published in a newspaper that the described items are subject to forfeiture, and any interested persons must come forth or lose their ability to claim the items. The *in rem* action is filed in the Federal district court where the items were found. The determination by the court that the items were used in an ARPA violation is sufficient to award the property to the government or tribal entity. If someone appears to contest forfeiture, the individual has the burden of proving lawful ownership, and connection with or knowledge of the violation must be dispelled. Even if the lawful owner had no actual part in the ARPA violation, the item still will be forfeited if the owner knew or should have known how the item was to be used.

Prognosis for Use

If there is a correlation to be drawn to the growth of ARPA criminal actions, once the civil prosecution process is known, its use could expand significantly.

Civil actions will not replace all criminal prosecutions for ARPA violations that have become commonplace nationwide. Similarly, citations issued under the various agency CFRs still will be appropriate. However, where financial recoupment of damages is the desired result, the civil process is waiting to be used.

This brief is intended to assist in the use of the civil law. To keep updated on civil ARPA matters, copies of decisions in civil penalty proceedings may be obtained by a written request to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22303-1954. There may be a fee for this service.⁹⁴

Endnotes

1. P.L. 96-95, as amended by P.L. 100-555 and 100-588, 16 USC 470aa-mm (1988).
2. 16 USC 470ee.
3. 43 CFR Part 7, Department of the Interior; 36 CFR Part 296, Department of Agriculture; 18 CFR Part 1312, Tennessee Valley Authority; 32 CFR Part 229, Department of Defense.
4. LOOT Clearinghouse, reports of cases under ARPA and related laws, compiled by the NPS Departmental Consulting Archeologist, Archeological Assistance Division, Washington, D.C.
5. 16 USC 470gg.
6. In 1990, 20 individuals were charged with a total of 52 counts of civil and criminal violations of ARPA and other Federal and state laws, including National Oceanic and Atmospheric Administration regulations, at the Channel Islands National Marine Sanctuary. Extensive property was seized and \$132,000 in fines was imposed. The first civil matter to utilize the ARPA civil process, as outlined in this document, was *Eel River Sawmills, et al. v. U.S.*, Docket nos. ARPA 90-1 and 90-2, before the United States Department of the Interior Office of Hearings and Appeals, Hearings Division, Salt Lake City, Utah. The ALJ decision imposed a civil penalty of \$43,500, against two of the three alleged violators. After initially filing an appeal of the ALJ's decision, the violators subsequently reached a settlement of the judgement with the Forest Service.
7. 16 USC 470ff.
8. 43 CFR Part 7(7) [52 FR 9165; 1987].
9. P.L. 100-555 and 100-588 (1988).
10. LOOT, *supra*, note 4. See also Technical Brief no. 11, June 1991.
11. TVA: Feb. 22, 1990; Dept. of Agriculture: Feb. 10, 1988.
12. *Supra*, note 6.
13. Administrative Procedures Act, P.L. 89-554 (1966), 80 Stat. 378, 5 USC 500-559; Administrative Hearings, 18 USC 556.
14. Criminal Fines Improvements Act of 1987, P.L. 100-185, 18 USC 3623, 101 Stat. 1279.
15. 16 USC 470ff; fines may be double the damage assessment amount for a subsequent offense (criminal or civil), see sec. 470ff(1)(B).
16. 16 USC 470gg(b)(3). (470gg(b)(1) & (2) require conviction by a court for an ARPA violation for a forfeiture while 470gg(b)(3) does not).
17. 36 CFR Part 296 (Forest Service); 50 CFR Part 27 (Fish and Wildlife Service); 43 CFR Part 7 (Interior); 32 CFR Part 229 (Defense); 18 CFR Part 1312 (TVA); 36 CFR Part 2 (NPS).
18. Criminal fines, unlike civil penalties, are deterrence or retribution, and a criminal defendant assessed a fine also may be subject to a civil penalty judgment. *U.S. v. Ward*, 448 U.S. 242, 250, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980). If a fine is assessed strictly as an alternative to incarceration, in the true sense of "punishment," and is not linked by the judge's order or the negotiations of counsel to the amount of the damage assessment, civil remedies are still available. If forfeiture is not considered in the criminal indictment or in a plea agreement, civil forfeiture remains an option.
19. 16 USC 470bb(3).
20. 16 USC 470bb(3) & (7).
21. 16 USC 470ee(c). See also *U.S. v. Gerber*, 999 F2d 1112 (7th Cir. 1993), affirming the conviction. Gerber and others were criminally charged under ARPA for removing archeological resources from private land and transporting the items across State lines. The defendants questioned the validity of 16 USC 470ee(c).
22. 16 USC 470bb(6).
23. 16 USC 470ff(a)(2)(civil) and 470ee(d)(criminal).
24. 16 USC 470bb(1).
25. 16 USC 470ff(3) and 470ee(g).

26. 16 USC 470kk(b) and 470bb(1).

27. *Id.*

28. 16 USC 470ee(a).

29. The contract will contain a paragraph within the document or as an addendum stating that Federal law prohibits the excavation, removal, damage, alteration or defacement of any archeological resource on Federal or Indian lands, that the contractor shall control the action of its employees and subcontractors at the job site to ensure that any protected sites will not be disturbed or damaged, and that it is the obligation of the contractor to ensure that employees and subcontractors cease work in the event of a newly discovered site until further authorization is obtained.

30. In *Eel River Sawmills* (*supra*, note 6), a contractor to the Forest Service was alleged to have damaged an archeological site when a road was built through a protected area to develop a water source. Eel River Sawmills claimed that its actions were inadvertent and that its agents did not see the flags marking the area. It also disputed jurisdiction and the method of calculating damages. The Forest Service contended that the contractor acted outside the scope of its contract because it is customary to develop water sources only with prior consultation with the contracting agency. Inadvertence is not a defense to a civil matter. No machinery was seized, and the land manager offered to resolve the matter at the initial hearing for an amount of damages that was less than the full damage assessment. A decision was issued on August 10, 1992. The parties agreed to a settlement of the judgement on January 19, 1993.

31. 16 USC 470ff(a)(2).

32. Title 18 CFR Part 1312.14(a).

33. *Id.*, at 14(c).

34. 16 USC 470ff(a), and 18 CFR Part 1312.16.

35. 18 USC sec. 3623.

36. 16 USC 470gg(b).

37. 36 CFR Part 79, (effective Oct. 12, 1990).

38. H.R. Rep. No. 96-311, 96th Cong., 1st Sess. (1979), reprinted in 1979 *U.S. Code Cong. & Ad. News*, 1709,

1714; *United States v. Kohl*, no. 85-10044 (D. Idaho, Feb. 13, 1986), memorandum opinion.

39. Black, Henry Campbell, 1968, *Black's Law Dictionary*, 4th revised edition, West Publishing Co., St. Paul, MN, p. 1184.

40. 16 USC 470ff(a)(1).

41. H.R. Rep. No. 96-311, 96th Cong., 1st Sess., reprinted in 1979 *U.S. Code Cong. Admin. News*, 1709, 1714.

42. 43 CFR Part 7.15(b).

43. 43 CFR Part 7.15(b)(1).

44. 43 CFR Part 7.15(b)(2).

45. 43 CFR Part 7.15(b)(3).

46. 43 CFR Part 7.15(b)(4).

47. Title 28 USC sec. 1658, sets four years as the time to bring an action arising under an Act of Congress. The statute is effective on incidents occurring after the date of the Act, Dec. 1, 1990. The application of the statute of limitations is a matter to be discussed with counsel.

48. 43 CFR Part 7.15(c)(1).

49. 56 FR 55195 (Oct. 25, 1991).

50. 43 CFR Part 7.15(c)(2).

51. 43 CFR Part 7.15(c)(4).

52. 43 CFR Part 7.15(c)(3).

53. The Forest Service and the TVA request that counsel be involved at all stages.

54. 43 CFR Part 7.15(e)(3).

55. 43 CFR Part 7.15(e)(2).

56. 43 CFR Part 7.15(d).

57. 43 CFR Part 7.15(e)(2).

58. *Supra*, note 32, calculating damages.

59. 43 CFR Part 7.16(b)(1)(i-vii).

60. 43 CFR Part 7.15(f)(1).
61. 43 CFR Part 7.15(f)(2).
62. 43 CFR Part 7.15(f)(3).
63. 43 CFR Part 7.15(g).
64. 43 CFR Part 7.15(g)(2).
65. Department of the Interior Supplemental Regulations, 43 CFR Part 7.37(a) requires that a written statement of the basis for the relief accompany the request for hearing. All agencies with Memoranda of Agreement to use the Interior ALJs must follow the Supplemental Regulation procedures.
66. TVA, Memorandum of Agreement approved Feb. 1990. Service of notice on the TVA is to be made to: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tenn. 37902-1499. Forest Service notice shall be given to the Office of General Counsel, Department of Agriculture.
67. 43 CFR Part 7.37(a).
68. *Id.*
69. *Supra*, note 64.
70. 43 CFR Part 7.37(c).
71. 43 CFR Part 7.37(d)(2).
72. *Supra*, note 66.
73. 43 CFR Part 7.37(d).
74. 5 USC 554-557, Rules of Procedure for Administrative Hearings.
75. 43 CFR Part 7.15(g)(3).
76. 43 CFR Part 7.37(e)(3).
77. 43 CFR Part 7.37(f).
78. *Id.*
79. 43 CFR Part 4 A, B & G.
80. 43 CFR Part 7.37(h).
81. 43 CFR Part 7.15(c)(4).
82. 43 CFR Part 7.15(c)(3).
83. 43 CFR Part 7.37(e)(3).
84. 43 CFR Part 7.37(f).
85. Prejudgment actions to preserve assets pending future judgments are part of an aggressive collection process. Individual State laws will control the available remedies.
86. The amount of interest on the judgment will be determined by the law of the State in which the judgment is ordered.
87. 43 CFR Part 7.15(i)(2).
88. *Id.*
89. The sum varies, depending on State law.
90. 16 USC 470gg(b).
91. *Id.*
92. 16 USC 470gg(b)(2 & 3).
93. 16 USC 470gg(c).
94. 43 CFR Part 7.37(g).

APPENDIX A Notice of Violation

Date:

Addressed to:

An investigation has revealed that you are responsible for damage to an archeological site on (*location and popular name of site, if any*). The damage occurred (*between dates*)(*on or about*) during an activity that was conducted outside of the permit or contract authority or without a permit or a contract, that is (*describe*). The specific location of the damaged site is (*describe*).

You have damaged an archeological resource located on (*Federal or Indian*) lands in violation of the Archaeological Resources Protection Act of 1979 (ARPA, 16 USC 470aa-mm) and (*agency regs. that apply*). The total damages have been ascertained pursuant to the law and are in the amount of (\$). The proposed penalty amount is (\$).

Archeological resources removed from the site are the property of the United States Government and are to be returned (*or if seized, are to be maintained in government custody for appropriate disposition*). Certain tools and vehicles were used in the commission of the violation of ARPA, and those are (*fully describe*). These tools and vehicles are subject to forfeiture, and, if seized, will remain in the custody of the (*agency*) until the final disposition of this matter.

You have 45 days from the service of this notice to take one of the following actions: seek informal discussions with the (*identify the agency authority, address and telephone*); file a petition for relief, stating the basis for your request, to be sent to (*person and the address*); pay the amount indicated above; or take no action and await the issuance of the Notice of Assessment. Any Petition for Relief must comply with the requirements of (*agency regulations*).

Upon completion of the review of any petition, at the conclusion of the informal discussions, or upon passage of 45 days if you take no action, I will, if appropriate, issue a Notice of Assessment. If one is issued, you will have the right to a hearing before an Administrative Law Judge of the (*hearing body*), if you wish to appeal. I will advise you of the proper procedures for appealing the Notice of Assessment in any Notice of Assessment that I issue.

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

Signature and Title

Date

(*address if not apparent and telephone*)

APPENDIX B Petition for Relief

To: *(person issuing notice of violation)*

Date: *(served within 45 days of notice)*

(I) (we)(accept)(take issue with the Notice of Assessment dated __) for the following reasons: (I am not the violator, explain)(I did not create the damage as indicated, explain) (I did not use the vehicle or tools now in your possession, explain) (the damage is overstated, explain). The factual and legal reasons that I feel that I should not be assessed a penalty are: _____.

Signed by the recipient of the notice
or an officer of a corporate respondent

Date

APPENDIX C Notice of Assessment

To: *(respondent)(s)*

Date:

After an investigation *(and after considering the facts you brought forth in the informal hearing and/or the petition for relief)* it has been determined that you are responsible for damage to an archeological site *(describe)* on the *(site location)*. The damage occurred when you took action without a permit or contract, or in excess of your permit or contract authority, that is: *(describe)*.

During the course of the investigation *(brief statement of the facts that indicate there was a violation of ARPA, that the respondent was the violator, and that vehicles or tools were used in the commission of the offense)*.

During the meeting you requested on *(date)* you indicated *(pertinent discussed facts and land manager's response thereto)*. Therefore you acted without authority and damaged the archeological site.

I have determined the amount of the penalty to be *(\$)*, which includes the *(archeological value of the resource or the commercial value of the items, plus the cost of restoration and repair in either case)*. *(In the case of a contractor with a receivable pending)* If the awarded contract is more than the penalty amount, the remaining monies will be refunded. If the penalty amount exceeds the amount of the contract, the *(agency)* will *(absorb the remainder and/or request collection of the balance)*. The administrative costs will be *(billed or absorbed by the agency)*.

In accordance with a Memorandum of Agreement between the *(petitioning agency)* and the Department of the Interior for implementing administrative procedures under the Archaeological Resources Protection Act, you may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954, within 45 days of service of this Notice of Assessment. You should enclose a copy of the Notice of Violation previously sent to you and a copy of this Notice of Assessment. Your request will state the relief requested and your basis for challenging the facts alleged by *(agency)*. You also should include your preferences as to the place and date for a hearing.

A copy of the request for a hearing should be served upon *(agency counsel)* personally or by registered or certified mail, return receipt requested, at *(address of counsel)*.

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

Signature and Title

(may attach a copy of the site damage assessment)

BRIEF No. 16, February 1994

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
P.O. BOX 37127
WASHINGTON, DC 20013-7127

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