

Tulsa Law Review

Volume 30 | Number 1

Fall 1994

Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters

David G. Bercaw

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

David G. Bercaw, *Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters*, 30 Tulsa L. J. 213 (1994).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol30/iss1/8>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

REQUIEM FOR INDIANA JONES¹: FEDERAL LAW, NATIVE AMERICANS, AND THE TREASURE HUNTERS

Again, the kingdom of heaven is like unto treasure hid in a field; the which when a man hath found, he hideth, and for joy thereof goeth and selleth all that he hath, and buyeth that field.²

I. INTRODUCTION

We come now to more tales of avarice, treachery, and ignorance. Lore of buried treasure and treasure trove are a part of our culture. Most of us, at one time, have been told a secretive tale of treasure by an old-timer. This lore is part of our literature. Most have read Robert Louis Stevenson's *Treasure Island* or Edgar Allan Poe's *The Gold Bug* and few can fail to be effected by these tales of greed. While this is great entertainment for all, there are some who venture out of the armchair to seek their fortune pursuing an old legend. Most only find an afternoon of frustration and chigger bites. A blessed few find their dreams, but only after great effort, and sometimes at terrible cost.

Improvements in technology have made the search for treasure somewhat easier. Metal detectors, pulse induction detectors, magnetometers, side scan sonar, resistivity methods, geophysical diffraction tomography, and ground penetrating radar are additions to the treasure hunter's arsenal. Development of long range scanning technology may occur in the near future. If so, there will be a marked increase in the recovery of treasure. Whenever there is a sudden ascension to wealth under such circumstances, litigation is bound to follow as the greedy and governments attempt to wrestle the treasure from the finder.

This paper will examine the common law of treasure trove and modern federal statutes which impact on its status. Specifically, the

1. Indiana Jones was the main character in a trilogy of films, *Raiders of the Lost Ark*, *Indiana Jones and the Temple of Doom*, and *Indiana Jones and the Last Crusade*, all by Lucasfilms, Ltd. The character of Jones was an academic archaeologist cum pothunter in the 1930s.

2. *Matthew 13:44* (King James).

federal statutes are the Antiquities Act of 1906,³ the Archaeological Resources Protection Act of 1979 (the ARPA),⁴ and the Native American Graves Protection and Repatriation Act of 1990 (the NAG-PRA).⁵ Additionally, two recent cases shall be examined in depth, since they cast new light on federal statutes governing antiquities.

While the federal statutes, on their face, deal with the protection of archaeological and Native American remains and artifacts, it appears they will be applied against almost any recovery of treasure trove in order to vest title in the federal government. Only within a narrow exception can a recovery escape these statutes. This paper will analyze known, and as yet unrecovered, treasure to highlight the action of both federal and state antiquities laws. Finally, policy matters will be examined from the treasure hunter's perspective.

II. THE LAW OF TREASURE TROVE

A. Common Law

The law of finds under the doctrine of *animus revertendi*⁶ states that a finder who takes possession of lost or abandoned property or treasure trove, and exercises control over it, acquires title.⁷ Determination of the finder's right to the property is unaffected by the ownership of the land on which the property is found.⁸ In cases where more than one party disputes the ownership of property, the first party to exercise dominion over it acquires title.⁹

Two exceptions to this doctrine swallow the rule. First, when property which is not treasure trove is found embedded in the soil, the property belongs to the owner of the *locus in quo*.¹⁰ The requirement

3. 16 U.S.C. §§ 431, 432, 433 (1988).

4. 16 U.S.C. §§ 470aa-470mm (1988 & Supp. II 1990).

5. 18 U.S.C. § 1170, 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

6. "The intention of returning." BLACK'S LAW DICTIONARY 88 (6th ed. 1990).

7. *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562, 1565 (S.D. Fla. 1983), *aff'd*, 758 F.2d 1511 (11th Cir. 1985). *See also* *Chance v. Certain Artifacts Found and Salvaged From the Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984).

8. *Klein*, 568 F. Supp. at 1565; *Chance*, 606 F. Supp. at 805. *See also* *Groover v. Tippins*, 179 S.E. 634, 635 (Ga. Ct. App. 1935).

9. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978), *aff'g* 408 F. Supp. 907 (S.D. Fla. 1976).

10. *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d at 1514; *Chance*, 606 F. Supp. at 805-06.

Locus in quo means "the place in which." BLACK'S LAW DICTIONARY 941 (6th ed. 1990).

of "embedded in the soil" is satisfied if the property is merely attached to the land in some way.¹¹ The property does not have to be completely, or even partially, buried to be embedded.¹²

Second, when the owner of the locus in quo is found to have constructive possession of the property, the property is not considered lost, and the locus in quo owner has a right of possession to the property as against the finder.¹³ Whether the locus in quo owner is aware of the existence of the property is not material to this determination.¹⁴ Constructive possession is generally found where the owner knowingly has both the power and the intention at a given time to exercise dominion or control over the property.¹⁵

The law of finds, as used in this country, is an amalgamation of two theories. The first theory is the Finders Rule, under which the finder keeps what he finds.¹⁶ This is best exemplified by the old homily, "finders keepers, losers weepers." The other is the Receptacle or Locus in Quo Theory, which states that possession of the land carries with it possession of everything attached to or under the land.¹⁷ It makes no difference that the possessor of the land is unaware of the object's existence. The possessor has the right to possess the object in the absence of better title lying in another.¹⁸

The law of finds makes it obvious that American courts have eliminated the distinctions between lost property and treasure trove relating to the rights of the finder.¹⁹ It is instructive to examine the distinctions between lost, mislaid, abandoned property, and treasure trove in creating a dispositive rule to deal with all situations of this nature.

An object is *lost* when the property is unintentionally separated from the control of the owner.²⁰ An object is *mislaid* when property is intentionally placed in a certain location and then forgotten by the

11. *Klein*, 568 F. Supp. at 1565.

12. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 9 (1993).

13. *Klein*, 758 F.2d at 1514.

14. *Klein*, 568 F. Supp. at 1566.

15. *Id.*

16. See Leeanna Izuel, *Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule*, 38 UCLA L. REV. 1659, 1659-70 (1991).

17. See generally R. H. Helmholz, *Equitable Division and the Law of Finders*, 52 FORDHAM L. REV. 313 (1983).

18. Comment, *Lost, Mislaid, and Abandoned Property*, 8 FORDHAM L. REV. 222, 227-28 (1939).

19. *Morgan v. Wiser*, 711 S.W.2d 220 (Tenn. Ct. App. 1985); 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 26 (1993).

20. Comment, *supra* note 18, at 224.

owner.²¹ An object is *abandoned* when the owner places the property with the intention of relinquishing all rights to it.²² A found object is classified by determining whether the object was voluntarily placed in the location in which it was found.²³ If so, the property was mislaid. If not, the property was lost. The presumption is against the true owner voluntarily giving up his rights in the property.²⁴ Therefore, an abandonment requires a showing that the true owner placed the property with the intention of surrendering all rights in it.²⁵ In any of these three situations, the owner of the locus in quo will take title to the property unless the true owner can reassert control over it.

Treasure trove, on the other hand, is neither lost, mislaid, nor abandoned. The definition of treasure trove consists of four elements. The first element is the composition of treasure trove, which is generally considered to be gold or silver in the form of coin, plate, or bullion.²⁶ Some definitions may include currency, but this depends on the jurisdiction.²⁷ Second, the trove must be concealed in a house, in the earth, or in some private place.²⁸ Third, and most importantly, the trove must have been intentionally concealed by the owner for safekeeping.²⁹ Finally, the owner must be unknown and not subject to identification.³⁰

The requirement that treasure trove be gold or silver is strict. Caches of platinum, palladium, or jewels are not treasure trove.³¹ Consequently, anything not made of gold or silver may be considered an artifact and the status of the artifact may be determined by state and federal statutory law. In addition, objects made of gold or silver may be considered artifacts under state or federal law if they are not in coin, plate, or bullion form. In some contexts, strong arguments can be made that ancient coins or bullion are archaeological artifacts,

21. *Id.* at 233.

22. *Id.* at 235.

23. *Id.* at 224.

24. Comment, *supra* note 18, at 224.

25. *Id.* at 235.

26. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 7 (1993).

27. *Id.*

28. *Id.*

29. *Id.* § 10.

30. *Id.* §§ 7-10; Izuel, *supra* note 16, at 1665-66; Comment, *supra* note 18, at 228-29, n.49. See generally Roman Kryz, *Treasure Trove Under Anglo-American Law*, 11 ANGLO-AM. L. REV. 214, 221, 223 (1982).

31. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 9 (1993) (commenting that "[p]roperty embedded in the earth" includes *anything other than gold or silver* which is so buried, and is distinguished, in this respect, from 'treasure trove') (emphasis added).

rather than treasure trove,³² based on the value of their artistic or historic characteristics.³³

The concealment of the trove by the owner for safekeeping is the factor which distinguishes treasure trove from lost, mislaid, or abandoned property. The true owner has intentionally concealed his tangible wealth for one purpose only, to prevent the theft or confiscation of his assets by other individuals or the government.³⁴

Finally, the status of the owner must be that he is unknown and cannot reasonably be ascertained. This is perhaps the weakest requirement and is not always adhered to in countries that legally distinguish treasure trove from other types of property.³⁵ If the original owner is still alive or has issue, then those parties may make a claim on the treasure trove as either lost or mislaid property, depending on the factual circumstances. Under these conditions, the requirement of an unascertained owner is appropriate. However, if the treasure trove is ancient, the true owner has died without issue, or the true owner or his heirs cannot reenter the jurisdiction and have standing to make a

32. Christopher Chippendale, *The Snettisham Treasure: A Case of Uncommon Law*, *ARCHAEOLOGY*, Mar.-Apr. 1993, at 40-43 (discussing the Snettisham Treasure, a cache of 65 pounds of gold and silver objects and other artifacts found in England between 1948 and 1990. The objects were dated to the 1st Century, B.C. An inquest found the gold and silver objects to be treasure trove and the copper and bronze objects to be archaeological artifacts. Chippendale argued that this was little more than a lottery and felt that the whole lot should have been considered archaeological artifacts.)

33. For example, a cave located in extreme northwest Arkansas is alleged to contain Spanish gold bullion that was deposited when a Spanish convoy succumbed to attack approximately three hundred years ago. When the cave was opened, several relics of Spanish manufacture were found at the entrance, where the conquistadors are believed to have made their last stand. If the deposit is found, it could be argued that this is a site of immense historical importance, as no other similar site has been uncovered in the area. Presumably, Spanish colonial artifacts, and possibly human remains, would be found along with the gold bullion at the site. W. C. JAMESON, *BURIED TREASURES OF THE OZARKS* 33-39 (1990).

34. The original owners of treasure trove generally are forced to bury their wealth because of some social upheaval—either due to invasion by a hostile government, civil war, lack of government, or merely the owner's insecurity. *But cf.* *Morrison v. United States*, 492 F.2d 1219 (1974) (finding that a currency cache recovered in South Vietnam by an infantry squad during a search and destroy mission was captured or abandoned property under the Uniform Code of Military Justice).

35. Norman Hammond, *Roman Find is "Treasure Trove,"* *ARCHAEOLOGY*, Jan.-Feb. 1994, at 22 (discussing the Hoxne Treasure, found in November 1992, near Hoxne, Suffolk, England. The hoard consisted of 14,780 gold and silver Roman coins, 200 pieces of gold and silver jewelry and tableware, and a wooden chest, dating to the 4th Century, A.D. The coins were declared to be treasure trove and the finder was compensated. He was not compensated for the remaining pieces.); James Russell, *From the President*, *ARCHAEOLOGY*, Mar.-Apr. 1993, at 6 (reporting that the purported owner of the Hoxne Treasure was believed to be Aurelius Ursicinus, since this name was engraved on the spoons); R. M. Callender, *Roman Treasure: The British Connection*, *GOLD & TREASURE HUNTER*, Aug. 1993, at 23, 26 (advancing the theory that the Hoxne Treasure may have belonged to the Faustinus family, who during the 4th Century owned a villa three miles from the burial site).

claim, then the requirement that the owner be unknown is not relevant to the disposition or ultimate ownership of the treasure.³⁶

Federal statutes and regulations are in accord with the law of finds with regard to any buried object found on federal or Indian lands, bringing any object found on federal lands within the second exception to the rule. The United States government has absolute power to exercise dominion over any object found on public lands under the Property Clause of the United States Constitution.³⁷ The intention of the United States government to exercise dominion over any object found on public lands is evidenced by federal statutes such as the Antiquities Act of 1906,³⁸ the ARPA,³⁹ and the NAGPRA⁴⁰ and the regulations issued to implement these statutes. Consequently, any property found on public lands⁴¹ does not need to be embedded in the soil for the United States government to lay claim to it and acquire title.

B. *Antiquities Act of 1906*

The federal government's first attempt at putting limits on treasure hunters was the Antiquities Act of 1906.⁴² The Antiquities Act was roundly criticized for lack of enforcement and for prescribing such a minimal penalty as not to deter the proscribed activities.⁴³ In *United States v. Diaz*,⁴⁴ the Act's use of "ruin," "monument," and "object of antiquity" was found to be unconstitutionally vague.⁴⁵ The court decided that the Antiquities Act did not give notice of what objects could be recovered and what should be left alone. There were no known instances of a conviction being sought under the Antiquities Act prior to *Diaz*.⁴⁶ The unconstitutionality of the Antiquities Act

36. Note that some states have never recognized the distinction between treasure trove and lost property or property embedded within the earth. As it will soon become apparent, the federal government does not recognize this distinction. See 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 7 (1993).

37. *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562, 1567 (S.D. Fla. 1983), *aff'd*, 758 F.2d 1511 (11th Cir. 1985).

38. *Id.*; the Antiquities Act of 1906 is codified at 16 U.S.C. §§ 431, 432, 433 (1988).

39. 16 U.S.C. §§ 470aa-470mm (1988 & Supp. II 1990).

40. 25 U.S.C. §§ 3001-3013 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990).

41. *Klein*, 568 F. Supp. at 1567.

42. 16 U.S.C. §§ 431, 432, 433 (1988). Section 433 prohibits the taking, excavation, damage, or destruction of any historic or prehistoric ruin or "object of antiquity" located on federal lands. The Act prescribes a penalty of up to a five hundred dollar fine and/or ninety days in jail. *Id.*

43. See, e.g., Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LITIG. 47 (1987).

44. 499 F.2d 113 (1974), *rev'g* 368 F. Supp. 856 (1973).

45. *Id.*

46. *Id.* at 114.

after its first attempted prosecution indicates that this provision was ignored, apparently with good reason.

What is useful in the Antiquities Act of 1906 is an early form of permit system that served as a model for the permit systems used in the ARPA and the NAGPRA. The system provided for the Secretary of the federal department having management authority over the land in question to have discretionary powers to determine who is qualified to undertake the collection and excavation of artifacts. In addition, the excavation and collection is to be undertaken for the exclusive benefit of "museums, universities, colleges, or other recognized scientific or educational institutions."⁴⁷

C. *Archaeological Resources Protection Act of 1979*

The ARPA was originally written to protect archaeological resources on public and Indian lands from unrestrained looting, and to draw archaeological material out of private collections for the benefit of the public.⁴⁸ The ARPA defined an "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest" and more than 100 years old.⁴⁹ The ARPA specifically excludes arrowheads found on the surface of the ground, paleontological specimens, rocks, coins, bullets, or minerals from coverage under the Act, so long as these objects do not appear in an archaeological context.⁵⁰ Of course, the definition of what is an "archaeological context" or "of archaeological interest" is the critical question. The statutory language itself is silent on this point.⁵¹

47. 16 U.S.C. § 432 (1988).

48. 16 U.S.C. § 470aa (1988). *See also* H.R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710.

49. 16 U.S.C. § 470bb(1) (1988).

50. *Id.* The House report states:

[c]oncern was expressed during full Committee deliberation that the definition of "archaeological resource" could be construed to include virtually any object found on the public lands. Amendments were adopted to ensure that only artifacts of true archaeological interest, at least 100 years of age, will be considered to be "archaeological resources" for the purposes of this legislation. Such items as coins, [sic] and bottles are clearly not intended to come under the purview of this Act unless found within an archaeological site.

H.R. REP. NO. 311, 96th Cong., 1st Sess. 8 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1711.

51. William L. Rice, Deputy Chief of the Forest Service, recommended striking the phrase "which are of archaeological interest" from § 470bb(1). He felt that this was a problematic and subjective test due to widely differing opinions as to what is of "archaeological interest." S. REP. NO. 569, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3625, 3630.

The ARPA utilizes an expanded form of a permit system for archaeological work on public or Indian land.⁵² While any person may apply with the appropriate federal land manager, the ARPA specifies that the permit will be issued only if the applicant is "qualified;"⁵³ the activity is carried out for the purpose of furthering archaeological knowledge in the public interest; any object excavated or removed from public lands remains the property of the United States government; and the activity is not inconsistent with any management plan for the public land affected.⁵⁴ The ARPA permits the setting of conditions by the appropriate tribe or Native American having jurisdiction over land on which a permit is issued.⁵⁵ This enables the tribe to retain use of any artifacts, religious or otherwise, even if title to the object has passed from the tribe to the United States government in the course of federally sanctioned excavations on Indian lands.⁵⁶ The Act requires giving notice to the tribe if a permit is requested affecting any site of religious or cultural importance to the tribe.⁵⁷ The governor of a state in which an archaeological site is located is given the authority to request a permit for research, excavation, removal, and curation for state purposes.⁵⁸

Section 470ee of the ARPA is the key provision of interest to the treasure hunter. The section prohibits anyone not holding a federal permit from doing anything to an archaeological site or resource located on public or Indian land.⁵⁹ In addition, the sale, purchase, exchange, transport, receipt, or offer to do any of these, of any archaeological resource which was "excavated, removed, sold, purchased, exchanged, transported, or received," in interstate or foreign commerce in violation of any federal, state, or local law is prohibited.⁶⁰

52. 16 U.S.C. § 470cc (1988).

53. H.R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1712 (clarifying "qualified" as "individuals with adequate professional expertise (education, experience, or both) in archaeology").

54. *Id.* at 1711 (stating that "[n]o privately owned lands within the exterior boundaries of a Federal land holding would be included"). See also 16 U.S.C. § 470bb(3) (1988 & Supp. II 1990) (defining "public lands").

55. 16 U.S.C. § 470cc(g)(2) (1988).

56. This may only apply to Native American artifacts excavated before November 16, 1990. 25 U.S.C. § 3002(a) (Supp. II 1990) places ownership or control of Native American cultural items excavated on Federal or tribal lands after November 16, 1990, in a prioritized list repatriating the artifacts with the appropriate Native American group.

57. 16 U.S.C. § 470cc(c) (1988).

58. 16 U.S.C. § 470cc(j) (1988).

59. 16 U.S.C. § 470ee(a) (1988).

60. 16 U.S.C. § 470ee(c) (1988). This subsection did not include the reference to public or Indian lands that is found in subsections (a) and (b). The legislative history and subsequent

In addition to criminal penalties,⁶¹ the ARPA also provides for the assessment of civil penalties by the federal land manager for the cost of repair and restoration of an archaeological site resulting from the violation of the Act.⁶² Subsequent violations result in a doubling of the assessment.⁶³

Section 470hh authorizes the retention of any confidential information in the possession of the federal government concerning the nature and location of archaeological resources.⁶⁴ The ARPA authorizes disclosure of this information only where the disclosure would further federal purposes under the ARPA, not create a risk of harm to the resource, or when the governor of the state in which the resource is located makes a written request for the information.⁶⁵ When a state makes a request for the information, it must give assurance that it will protect the information's confidentiality.⁶⁶

Finally, the Act authorizes the Secretary of Interior to take steps necessary to foster and improve communications between federal authorities and private individuals having collections of archaeological resources which were obtained before the effective date of the Act.⁶⁷ The purpose of the provision is to "make efforts to expand the

commentary do not contain any statements indicating that this subsection was to apply to private lands as well as public and Indian lands. *See, e.g.*, H.R. REP. NO. 311, 96th Cong., 1st Sess. 11 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1713-14; Rogers, *supra* note 43, at 47; Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135 (1992).

61. The penalty for violation of this section is a \$10,000 fine and/or imprisonment for one year. If the cost of restoration and repair of the archaeological resource exceeds \$500, the penalty is a maximum fine of \$20,000 and/or up to two years imprisonment for the first violation. Those convicted of subsequent violations incur a maximum fine of \$100,000 and/or up to five years in federal prison. 16 U.S.C. § 470ee(d) (Supp. II 1990).

62. 16 U.S.C. § 470ff(a) (1988).

63. 16 U.S.C. § 470gg(a)-(c) (1988) (authorizing the Secretary of the Treasury, through certification by the federal land manager, to pay rewards of up to \$500 to individuals for furnishing information leading to the imposition of a civil penalty. When a conviction occurs under section 470ee or a civil penalty is assessed under section 470ff, any archaeological resources in the possession of the violator, as well as any vehicles or equipment used in the violation, are subject to forfeiture to the United States. If the archaeological resource is removed from Indian land, any penalties collected, and any items forfeited, may be transferred to the Indian or Indian tribe from whose land the items were removed.)

64. 16 U.S.C. § 470hh(a) (1988).

During consideration of ARPA, the Department of Interior expressed concern over government disclosures under the Freedom of Information Act of information in the government's possession regarding archaeological sites not on Federal land. Interior expressed a belief that only sites on Federal land would be protected under this provision and that the ARPA should be redrafted to include any archaeological site. H.R. REP. NO. 311, 96th Cong., 1st Sess. 16 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1718-19.

65. 16 U.S.C. § 470hh(b) (1988).

66. *Id.*

67. 16 U.S.C. § 470jj (1988).

archaeological data base for the archaeological resources of the United States"⁶⁸

The vagueness problems in the Antiquities Act of 1906 were overcome with the ARPA. In *United States v. Austin*,⁶⁹ the court held that the Act provided sufficient notice to the defendant.⁷⁰ The defendant argued that his motivation in collecting 2,800 Native American artifacts was curiosity; hence, his activity was protected as a form of academic freedom.⁷¹ The court dismissed his argument, finding that he was not connected with an academic institution.

1. *United States v. Gerber*

While the wording, legislative history, and commentary on the ARPA indicate that only public and Indian lands are implicated by the Act, subsequent case law has extended the reach of the ARPA to private lands. In *United States v. Gerber*,⁷² it was held that section 470ee(c)⁷³ of the ARPA also applied to private land.

Gerber arose when highway construction in Indiana divided a large Hopewell burial mound⁷⁴ that was unknown until the division was made and exposed some artifacts. Gerber was a collector and trader of Indian artifacts who purchased artifacts from a construction worker. Gerber returned to the mound after dark and dug on land owned by General Electric. After several visits, he was caught by a General Electric security guard and ejected, but not before he had excavated and removed several hundred artifacts. Gerber admitted committing criminal trespass and conversion in violation of Indiana law and transporting the goods in interstate commerce.⁷⁵

The court found Section 470ee(c) to be a catch-all provision to supplement state and local laws protecting archaeological sites and objects.⁷⁶ The court felt the section was added by Congress as an afterthought, and that Congress did not intend to solely limit the ARPA

68. *Id.*

69. 902 F.2d 743 (9th Cir. 1990), *cert. denied*, 498 U.S. 874 (1990).

70. *Id.* at 745.

71. *Id.* at 744.

72. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

73. 16 U.S.C. § 470ee(c) (1988).

74. *Gerber*, 999 F.2d at 1114. The Hopewell were mound-builders who lived in the upper midwest of the United States approximately 1,500 years ago.

75. *Id.*

76. *Id.* at 1115.

to protection of sites on public and Indian lands.⁷⁷ The decision limited the application of the section to cases where the violation of state or local law is related to the protection of archaeological sites or objects.⁷⁸ However, the applicable law does not have to be limited to that protection.⁷⁹ Therefore, Indiana's trespass and conversion law applied to the case, since the law of trespass protects the owner of land from unauthorized incursions onto the land, spoliation, and theft.⁸⁰

Application of the ARPA to private lands may have serious implications for those who find treasure or any other buried object. Consider the case of someone finding objects while digging a foundation for a garage that is inadvertently outside the local municipality's setback limitations. Subsequently, the property owner gives the objects to a friend in another state. Setback and zoning ordinances are limitations on the use of land and can be used for the protection of archaeological sites. If the objects are more than one hundred years old and a government-employed archaeologist declares that the site is of interest (whether or not he has any basis for this), the simple act of digging and picking up the objects and passing them across a state boundary brings the property owner under the provisions of section 470ee(c). The hapless property owner may find himself subject to prosecution under the ARPA, and subject to forfeiture of the artifacts and any equipment used on the job site. Whether the property owner would also forfeit his land is unclear.⁸¹

It may be argued that such examples are unrealistic. However, the ARPA could be used by federal and state agencies, museums, or universities to take undocumented, legally-obtained artifacts without

77. *Id.* at 1116. The court reasoned that:

[i]t is also unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations . . . would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands merely because that is where most of them are.

Id.

78. *Gerber*, 999 F.2d at 1116.

79. *Id.*

80. *Id.*

81. 16 U.S.C. § 470gg(b) (1988) speaks only of "vehicles and equipment." This is reasonable, since Congress probably intended that all of the possessions of pothunters on public land be forfeited to the government. If the Seventh Circuit can find that Congress would not be "so parochial" as to only include public lands within the provisions of ARPA, it does not seem to be much more of a stretch to find that Congress intended those private lands to be forfeited as well.

compensation. Another use of the Act is to simply prosecute individuals, such as metal detectorists, who government employees or professional archaeologists consider to be a nuisance.

While the foregoing may seem extreme, the treasure hunter, at least in Indiana, is in far more serious jeopardy. The *Gerber* court implied that Gerber's acts were prohibited under Indiana law, not for trespass, but for the disturbance of the artifacts.⁸² While the court's decision only affected the Seventh Circuit, both the U.S. Supreme Court's denial of certiorari and the national prominence and respect accorded Judge Posner, who wrote the opinion, lead to the expectation that other circuits and states will follow this precedent.

2. *Whitacre v. State*

A month after the *Gerber* decision, the Indiana Court of Appeals followed Judge Posner's approach. The court in *Whitacre v. State*⁸³ held that any disturbance of the ground for the purpose of discovering artifacts, without approval through Indiana's permit system, is prohibited—even on one's own property.

The Whitacres are amateur archaeologists who found and began excavating a Hopewell mound with permission of the landowner. Subsequently, they purchased the farm and continued excavating. After being told by an Indiana archaeologist that a permit is required even to dig on one's own land, Whitacre filed for a declaratory judgment. The court felt this regulation to be well within the power of the State. The court followed *Gerber* by interpreting the Act "as applying to artifacts found on privately owned property as well as property owned by the federal government . . . even though the Act explicitly refers only to property owned by the federal government"⁸⁴

After 1989, if Gerber had committed the same acts on his *own* property, rather than General Electric's property, his conviction under the ARPA would be sustained and he would be subject to prosecution under the Indiana statute.⁸⁵

82. *Gerber*, 999 F.2d at 1117. "Granted, all fifty states have laws expressly protecting their archaeological sites; and in 1989, too late for this case, Indiana amended its law to forbid—redundantly—what Gerber had done." *Id.*

83. 619 N.E.2d 605 (Ind. Ct. App. 1993), *aff'd*, 629 N.E.2d 1236 (Ind. 1994).

84. *Id.* at 608.

85. If Gerber had not sold the objects into interstate commerce, but had instead sold them intrastate or kept them, he would have only violated the Indiana statute, but not section 470ee of ARPA.

D. *Native American Graves Protection and Repatriation Act of 1990*

While excavating human remains is normally well beyond the desire of most treasure hunters, a full review of the NAGPRA should be given here, since the possibility always exists that human remains will be buried with treasure.⁸⁶ The intent of Congress in enacting the NAGPRA was to provide a mechanism to return Native American remains and sacred objects to the appropriate tribes.⁸⁷ Further, it appears that Congress wrote the Act broadly, in order to supplement the effect of the ARPA in relation to treasure hunters.⁸⁸ The emphasis in the ARPA is on preservation and the expansion of federally-controlled archaeological collections; whereas the NAGPRA is concerned with repatriating those very collections, as well as the collections held by state institutions and private individuals, with the descendants of the creators of the artifacts. Many of the issues raised in the NAGPRA are beyond the scope of the issue addressed here.⁸⁹ The bulk of the Act deals with the inventory and repatriation of Native American human remains and artifacts held by federal agencies and museums.⁹⁰

Until 160 years ago, Native Americans controlled large sections of the eastern United States, and until approximately 100 years ago, they controlled significant portions of the middle and western United States. Consequently, any treasure—except that hidden in modern times—will likely have some involvement with Native Americans. Three sections of the NAGPRA are of particular interest to the treasure hunter. The NAGPRA forbids the sale, purchase, use for profit, or transportation for sale or profit of Native American cultural

Indiana requires anyone conducting a field investigation to obtain a permit from the Indiana Department of Natural Resources, Division of Historic Preservation and Archaeology. IND. CODE ANN. §§ 14-3-3.4-7, 14-3-3.4-14 to 14-3-3.4-16 (Burns 1990 & Supp. 1994).

86. For example, the legend of Opothleyahola's Treasure involves four slaves being buried with the treasure. STEVE WILSON, OKLAHOMA TREASURES AND TREASURE TALES 290 (1976).

87. H.R. REP. NO. 877, 101st Cong., 2d Sess. 8-9 (1990), reprinted in 1990 U.S.C.C.A.N. 4367-69.

88. 25 U.S.C. § 3002(c)(1) (Supp. II 1990).

89. See generally Hutt, *supra* note 60 (discussing the use of the NAGPRA to prosecute looters and the effect of the NAGPRA on private land holding and for profit museums); Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151 (1992) (discussing whether the NAGPRA provisions could result in takings without compensation in violation of the Fifth Amendment); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992) (giving the Native American viewpoint of relations with the federal government and the future under the NAGPRA).

90. 25 U.S.C. §§ 3003-3008 (Supp. II 1990).

items.⁹¹ "Cultural items," as defined in the Act, encompasses a broad range of categories, including: "human remains;"⁹² "associated funerary objects;"⁹³ "unassociated funerary objects;"⁹⁴ "sacred objects;"⁹⁵ and "cultural patrimony."⁹⁶ The NAGPRA also defines "burial site."⁹⁷

Section 3001(13) limits the right of possession of any Native American artifact to those "obtained with the voluntary consent of an individual or group that had authority of alienation."⁹⁸ This section provides for ownership of remains or artifacts under three circumstances. First, the right of possession of an artifact is given when the artifact was obtained from an individual or tribe who voluntarily gave or sold the artifact to the possessor.⁹⁹ Second, the right of possession is awarded where repatriation of the object would result in an uncompensated taking in violation of the Fifth Amendment of the United States Constitution.¹⁰⁰ Finally, possession of remains and artifacts directly associated with a burial is given if those were obtained with the knowledge and consent of the next of kin or the appropriate tribal officials of the deceased.¹⁰¹ When section 3001(13) is read together with section 3002, it becomes clear that Congress did not intend that title to any artifact¹⁰² should ever pass from the Native American tribe or individual who created or used the object. Only the "right to possession" can be granted to one who is not a Native American.

Section 3002(c) permits the intentional excavation of Native American remains and artifacts only if four elements are met. First,

91. 18 U.S.C. § 1170 (Supp. II 1990). Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, § 4(a), 104 Stat. 3052 was codified separately from the remainder of the Act, which appears at 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

92. 25 U.S.C. § 3001(3) (Supp. II 1990). The Act merely states "human remains." Whether a court would hold that human remains under the Act have to be Native American or could be any human remains has not been litigated.

93. 25 U.S.C. § 3001(3)(A) (Supp. II 1990).

94. 25 U.S.C. § 3001(3)(B) (Supp. II 1990).

95. 25 U.S.C. § 3001(3)(C) (Supp. II 1990).

96. 25 U.S.C. § 3001(3)(D) (Supp. II 1990).

97. 25 U.S.C. § 3001(1) (Supp. II 1990).

98. 25 U.S.C. § 3001(13) (Supp. II 1990).

99. *Id.*

100. *Id.*

101. *Id.*

102. See H.R. REP. NO. 877, 101st Cong., 2d Sess. 30 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4389 ("[a]lthough the Federal government legally owns human remains, it is our position that the government should have only stewardship responsibilities for human remains and other cultural items . . ."). See generally C. Dean Higginbotham, *Native Americans Versus Archaeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91 (1982) (examining the United States Constitution and the protection of Native American remains under the Equal Protection Clause of the Fourteenth Amendment, archaeology as desecration, and the rights of archaeologists).

the permit requirements of section 470cc of the ARPA¹⁰³ must be met.¹⁰⁴ Second, consultation with the appropriate tribe is required.¹⁰⁵ This requirement overlaps, and operates in conjunction with, sections 470cc(c) and (g) of the ARPA.¹⁰⁶ If the first requirement is properly fulfilled, then this second requirement will also be satisfied. The third element makes explicit the underlying theme of the NAGPRA, that ownership and control of remains and artifacts should never pass from the Native Americans, but remain subject to the prioritizing provisions of subsections (a) and (b).¹⁰⁷ Finally, proof of consultation or consent of the appropriate tribe must be maintained.¹⁰⁸ The NAGPRA is not clear to whom this proof must be shown. Presumably, the proof is shown to whomever challenges the possession of an artifact. In a sense, these become authentication documents and could lead to some interesting problems concerning standing.¹⁰⁹

Subsection (d) of section 3002 deals with the contingency of the accidental discovery of remains and artifacts on federal or tribal lands. This is probably a much more serious situation than intentional excavation, and is undoubtedly a far more frequent occurrence. The NAGPRA requires that the activity immediately stop and notice be given to the federal agency having jurisdiction over the area where the find is made.¹¹⁰ The activity is allowed to resume after thirty days if no further action, such as an injunction or an order for salvage archaeology, is taken.¹¹¹

It should be noted that prosecution under the ARPA and the NAGPRA can occur concurrently for the same incident. Under most

103. 16 U.S.C. § 470cc(a) (1988).

104. 25 U.S.C. § 3002(c)(1) (Supp. II 1990).

105. 25 U.S.C. § 3002(c)(2) (Supp. II 1990).

106. 25 U.S.C. § 3002(c)(1) (Supp. II 1990) specifically provides that a permit must be issued under 16 U.S.C. § 470cc. 16 U.S.C. § 470cc(c) requires notice to any Indian tribe which might regard the site as having cultural or religious significance before a permit can issue. 16 U.S.C. § 470cc(g)(2) requires the consent of any Indian tribe or individual Native American having jurisdiction or ownership of Indian land before a permit may be issued by the federal land manager for excavation or removal of an archaeological resource. These provisions compliment and reinforce 25 U.S.C. § 3002(c)(2).

107. 25 U.S.C. § 3002(c)(3) (Supp. II 1990).

108. 25 U.S.C. § 3002(c)(4) (Supp. II 1990).

109. Would only the federal or state government or the appropriate Native American tribe have standing to challenge the possession of an artifact? Or would any tribe, or even any inquiring individual, have standing? If anyone could have standing, this would be a museum's worst nightmare next to having to repatriate its entire collection.

110. 25 U.S.C. § 3002(d)(1) (Supp. II 1990).

111. *Id.*

circumstances, a violation of one¹¹² would also result in a violation of the other.¹¹³

III. TYING THE LAW TOGETHER

A. *What is an Archaeological Artifact?*

The key issue regarding treasure trove is whether the definition of an archaeological artifact under federal and state statutory law includes treasure trove as defined under the common law. As was previously discussed, treasure trove often carries the thought of antiquity and an unascertainable owner. Likewise, speaking of archaeological artifacts conjures the image of antiquity or great age. However, in *Diaz*,¹¹⁴ a professor of anthropology from the University of Arizona testified that an object created in the present could immediately become an "antiquity."¹¹⁵ The court interpreted his statement to mean that the object's significance in the heritage and culture of a people—rather than the chronological age of the object—is the determining factor.¹¹⁶ Hence, three to five year old Apache artifacts stolen from a medicine man's cave were found to be "objects of antiquity" within the meaning of the Antiquities Act of 1906.¹¹⁷

North Carolina also considered this problem in *State v. Armistead*,¹¹⁸ holding that cannons rolled off a bluff into the Roanoke River in 1865 were "archaeological artifacts."¹¹⁹ The defense argued that

112. 18 U.S.C. § 1170 (Supp. II 1990).

113. 16 U.S.C. § 470ee (1988).

114. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

115. *Id.* at 858. In speaking of Apache artifacts, he stated:

"They are not of the present. They are very much of the past and they are decided and viewed by Apaches as articles which are, if left alone, able to return to nature, to their former state, to disintegrate slowly according to the natural processes of time, and to that extent to return to the past from whence they came. This too, is a religious tenant of the people involved."

Id.

116. *Id.*

117. *Id.* *Diaz* was reversed by the Court of Appeals on grounds of vagueness—not for failure to meet the statutory elements. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

118. 200 S.E.2d 226 (N.C. Ct. App. 1973), *appeal dismissed*, 201 S.E.2d 690 (N.C. 1974).

119. *Id.* at 230. Defendants recovered three cannons near Fort Branch, North Carolina. They executed a contract with the State of North Carolina to loan the cannons to the Fort Branch Battlefield Commission. The State claimed ownership of the cannons. The defendants claimed the cannons as abandoned property. The court held that the State was the owner under N.C. GEN. STAT. § 121-22 which provides that all shipwrecks and artifacts which have been underwater for more than ten years and are unclaimed are subject to the exclusive dominion and control of the State.

The United States could have made a claim on the cannons under the Abandoned Property Act. See *infra* note 134.

items of antiquity should refer in time to the fall of the Roman Empire.¹²⁰ The court refused to go so far.¹²¹

Indiana statutorily defines an “[a]rtifact” as “an object made or shaped by human workmanship before December 11, 1816.”¹²² Virginia’s statute defines “[o]bject of antiquity,” as “any relic, artifact, remain, including human skeletal remains, specimen, or other archaeological article that may be found on, in or below the surface of the earth which has historic, scientific, archaeological or educational value.”¹²³ Oklahoma’s parallel provision, on the other hand, does not explore the definition beyond “prehistoric ruins, ancient burial grounds, pictographs, petroglyphs, prehistoric specimens, utensils, and trinkets, and all other archaeological discoveries.”¹²⁴

Neither statutory nor case law is satisfactory in defining an archaeological artifact. With the exception of definitions such as Indiana’s, most merely beg the question. The legislatures cannot be wholly faulted for this, since they are responding to powerful pressures from constituencies such as federal and state agencies, universities, museums, Native American groups, art dealers, and environmental groups. Probably the most underrepresented and underfunded group are the treasure hunters.¹²⁵ Further, legislators do not have the expertise or the interest to formulate a sound definition, or they may not see the need for one beyond defeating constitutional overbreadth or vagueness challenges. Despite his obscure statement, the University of Arizona anthropologist may have struck the heart of the issue. Whether objects traditionally defined as treasure trove are considered treasure trove or archaeological artifacts under the law depends upon the context in which they are found and who applies the label.

For example, a gold coin found in isolation may be treasure trove, but a gold coin found with other gold coins or some object of human manufacture is an archaeological artifact. Further, a gold coin found in isolation, but in a place of historical interest (a ruin, perhaps), is an

120. *Circa, the Fifth Century, A.D. Armistead*, 200 S.E.2d at 230.

121. *Id.*

122. IND. CODE ANN. § 14-3-3.4-1 (Burns 1990).

123. VA. CODE ANN. § 10.1-2300 (Michie 1993).

124. OKLA. STAT. ANN. tit. 53, § 361(A) (West 1991). Note that the statute allows an object which is on the surface of the ground and removed from its original context to be considered an antiquity. *Id.*

125. Treasure hunters tend to be individualistic and not organized into lobbying groups. There are only two lobbying groups of which the author is aware: Federation of Metal and Archaeological Clubs, 1614-0 Union Valley Road, Suite 131, West Milford, N.J. 07480-2222; and the National Society of Metal Detectorists, 715 White Spar Road, Prescott, AZ 86303.

archaeological artifact and not treasure trove.¹²⁶ If a federal or state official with discretionary authority, or an archaeologist, anthropologist, or even a historian who is recognized as authoritative by the court declares the gold coin to be of interest or significant, irrespective of the place of finding or its context, the coin is an archaeological artifact rather than treasure trove.¹²⁷ The nature of the object (gold or silver coin versus modern paper currency), the location of the find, other objects found with the artifact of interest, the size of the find, and the value of the find, intermesh to determine if the federal or state government, university, or museum is sufficiently interested in the recovery to make the effort to confiscate it from the treasure hunter.¹²⁸

B. *The Death of the Common Law of Finds*

The question remains whether the law of finds still has application, since federal or state statutory provisions have effectively narrowed the field of treasure hunting activities. The law of finds has application when (1) the treasure meets the traditional definition of treasure trove, (2) no government claim on the treasure is involved,

126. This was the United States' initial approach in the *Treasure Salvors* cases. The United States counterclaimed in *Treasure Salvors'* action for confirmation of title, claiming ownership under the Antiquities Act of 1906. The counterclaim failed, since the wreck lay on the outer continental shelf, outside of United States territorial waters, and because the Act was found unconstitutionally vague in *Diaz* two years earlier. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 408 F. Supp. 907, 909-11 (S.D. Fla. 1976), *aff'd and modified*, 569 F.2d 330 (5th Cir. 1978). If Fisher's group found the *Atocha* in the early 1980s, after ARPA took effect, and if the wreck had lain inside United States territorial waters, the United States would have gained title to the entire treasure.

127. During the recovery of the *Atocha*, *Treasure Salvors, Inc.* recovered an eight-real piece which was minted in Nuevo Reino de Granada, located in today's Columbia. Since this was the first coin ever recovered from this mint for this period (*circa* 1622), the find was considered priceless. Eugene Lyon, *The Trouble with Treasure*, 149 NAT'L GEOGRAPHIC 780, 804 (1976).

128. During the search for the *Atocha*, the State of Florida did nothing while Fisher's group spent sixteen years searching for the wreck at a cost of four lives, including Fisher's son and daughter-in-law, and approximately two million dollars. When the treasure was finally brought up, under the watchful eye of agents of the State, it was confiscated. The Florida Division of Archives forced *Treasure Salvors* to accept a purported salvage contract, erroneously claiming the wreck to be on state land, stating that the salvage would be divided with seventy-five percent going to *Treasure Salvors* and twenty-five percent to the State. Once the Division of Archives seized the treasure, they refused to divide the salvage. After oral arguments in the Supreme Court, the Division of Archives realized that its claim was invalid and tried to divide the treasure. *Treasure Salvors* refused, based on the decision of the United States Supreme Court. The Florida Division of Archives then encouraged the United States to claim the entire treasure under a scheme which would allow the State of Florida and the United States to divide the treasure, to the exclusion of *Treasure Salvors*. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 511-13 (S.D. Fla. 1978), *aff'd sub nom.*, *Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *and aff'd in part and rev'd in part*, 458 U.S. 670 (1982).

(3) no federal or state official or archaeologist, recognized as authoritative, has declared the treasure trove to be archaeological artifacts, (4) the treasure is found on private property which is exempt from state statutes dealing with archaeological artifacts, (5) the locus in quo owner or his agent¹²⁹ makes the recovery, (6) no artifacts, Native American or otherwise, are found in conjunction with the trove, and (7) no human remains are recovered with the treasure trove.

The common law of treasure trove was applied in two post-ARPA federal cases. In *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*,¹³⁰ the court applied the common law to find the United States to be the owner of an 18th Century English shipwreck located by the plaintiff in Biscayne National Park, Florida.¹³¹ It is noteworthy that this suit was filed in October of 1979, and the ARPA became effective October 31, 1979. However, the court cited the ARPA and other statutes as providing support for the government's intention to exercise dominion over the wreck.

In *Chance v. Certain Artifacts Found and Salvaged From the Nashville*,¹³² the court awarded title of a Confederate wreck in the Ogeechee River to the State of Georgia. The plaintiff recovered artifacts from 1979 until 1983, after having been denied a state permit. Georgia discovered his activities and forced him to stop. The court found that the river bottom on which the ship rested was land belonging to the State.¹³³ Since this case took place ten years before *Gerber*, and almost ten years after *Diaz*, Chance did not risk prosecution under federal law, since the wreck was not on federal property. Had the federal government been interested in the wreck, it could have stepped in and taken title from both Chance and the State of Georgia under the Abandoned Property Act.¹³⁴

129. See *Turley v. State*, 633 P.2d 687 (N.M. 1981) (holding that an excavator working under written contract with a private landowner did not need a state permit under a statute which provided that archaeological artifacts collected are the property of the person owning the land on which the artifacts are recovered).

130. 758 F.2d 1511 (11th Cir. 1985).

131. *Id.* at 1514. Klein sued to obtain a declaration of ownership of the wreck. The court applied the law of finds rather than maritime law, since legally the wreck was never lost. The wreck was found to be embedded in the soil and the United States government to have constructive possession of it. Accordingly, the wreck was the property of the United States government. *Id.*

132. 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985).

133. *Id.* at 809.

134. 40 U.S.C. § 310 (1988).

C. *Conflicting Interests*

The law of finds, and the federal and state statutory provisions, seem to target different groups of individuals with differing agendas. To understand the game, one must look to the players. They can be divided into two groups—the “pothunters” and the “treasure hunters.” Generally, federal and state antiquities laws attempt to protect archaeological artifacts within their respective jurisdictions from the pothunters. Nowhere in the statutory scheme are the treasure hunters addressed. However, the archaeological community, which has had the greatest input into the development of antiquities laws, does not differentiate between pothunters and treasure hunters. These are two separate groups which should be distinguished.

The pothunters are classified by their activities and goals. The first subgroup, and probably the most common, are the “amateur archaeologists.” These individuals lack the credentials of the standard academic archaeologist, but may have received some training by academicians. These people are characterized by an abiding interest in the past and the ambition to pursue their interest in the field. In a sense, they are the advance scouts for the academicians, making and reporting the site discoveries the academicians have neither the time nor resources to make.¹³⁵ Next are the dealers and art collectors. These individuals seek and excavate sites for the retrieval of artifacts and remains that are sold at a profit, often to museums and art collectors who will not ask questions. The people may also keep pieces for themselves or sell them to other private collectors.¹³⁶ Finally, there are the individuals who know their locale and dig for the purpose of supplementing their incomes, but know nothing of archaeological theory or techniques and have no substantive contacts with the art world. Their excavation technique is to “loot and scoot,” usually destroying the site in the process. The last two groups are, ostensibly, the targets of the ARPA, the NAGPRA, and state archaeological statutes.

Treasure hunters, on the other hand, can be divided into two subgroups. The first subgroup are the “cache hunters,” a small, but occasionally highly visible, group. These are individuals or teams who seek to recover large and valuable troves of treasure. These people run the gamut from highly organized and well-financed teams who

135. This group is characterized as “casual looters” by the Federal government. U.S. GEN. ACCOUNTING OFFICE, CULTURAL RESOURCES, PROBLEMS PROTECTING AND PRESERVING FEDERAL ARCHAEOLOGICAL RESOURCES 3 (Dec. 1987).

136. These are also known as “commercial looters.” *Id.*

perform quality research and search efforts, to rank amateurs who gain notoriety through obnoxious and destructive behavior. The other subgroup are the "coinshooters," who are, by far, the most numerous of any group. Coinshooters are metal detector enthusiasts who can be seen swinging their detectors in schoolyards, on beaches, playgrounds, and other places where the public congregates. Coinshooters target lost coins and any other interesting articles which lie within the nine to ten inch range of their detectors. As with any classification scheme, individuals may fall into one or more of these groups. The distinguishing factor between the pothunters and the treasure hunters is the object of their desire and affection. The pothunters pursue cultural artifacts and, possibly, human remains. Treasure hunters seek gold, silver, jewels, and other alienable forms of tangible wealth.

IV. *THESAURUS ABSCONDITUS*: ANALYSIS OF TWO EXAMPLES

A. *Opothleyahola's Treasure (Lake Eufaula, Oklahoma)*

At the beginning of the Civil War, the Creek Indian tribe divided its loyalties between the Union and the Confederate States. The Unionist faction, known as the Upper Creeks, was led by the Creek Speaker Opothleyahola. During the fall and winter of 1861, Opothleyahola led a band of approximately five thousand men, women, and children into Kansas seeking refuge at the Union Agency. During the flight into Kansas, three battles were fought with Confederate troops.¹³⁷

Prior to the departure of the Upper Creeks from their homes, Opothleyahola was seen loading a large quantity of gold coins into either a chest or a barrel. The container was heavy enough to require four slaves to carry it. Opothleyahola and a close friend led the slaves to a site not far from Opothleyahola's cabin, where the slaves dug a hole and placed the chest inside. The friend then shot the slaves, dumped their bodies into the hole with the chest, and covered the hole. The friend is believed to have died during one of the battles.

137. The first two, the Battles of Round Mountain and Chusto-Talasha, were not decisive. However, the third battle, Chustenahlah, resulted in the rout of the Upper Creeks and a disorganized flight into Kansas by the survivors. The defeat of the Upper Creeks at Chustenahlah was critical, since hundreds died during the battle and the flight into Kansas, including many who were keepers of the old traditions. Charles Bahos, *On Opothleyahola's Trail*, 63 *CHRONICLES OF OKLAHOMA* 58 (1985); John Bartlett Meserve, *Chief Opothleyahola*, 9 *CHRONICLES OF OKLAHOMA* 439-448 (1931).

Opothleyahola survived the flight into Kansas and lived as a refugee until he died in 1863.¹³⁸

The refugees were prevented from reentering the area of the burial site for ten years after their flight. Once they returned, they settled an area some distance to the west, and the tale passed into legend. Since Opothleyahola was the wealthiest Creek at this juncture, it is probable that the gold coins were his property, accumulated over a forty year period from federal annuity payments.

Several problems confront the treasure hunter attempting to recover this cache of coins. First, the coins are probably buried on land now owned by the Army Corps of Engineers which has now been flooded by the construction of a man-made lake, Lake Eufaula. Because federal land is involved, the ARPA is implicated in a recovery. Second, the NAGPRA may be implicated, since four slaves are believed buried with the treasure.¹³⁹ Any disturbance of the treasure could result in the disturbance of what may be Native American remains. Third, the Creek Nation would probably make a claim on the treasure under the NAGPRA. Finally, the descendants of Opothleyahola¹⁴⁰ could also make a claim under the law of finds.

B. *The Beale Treasure (Montvale, Virginia)*

The Beale Treasure is allegedly a cache of 2,921 pounds of gold, 5,100 pounds of silver, and jewels of unknown value, buried four miles from the site of Buford's tavern in Montvale, Bedford County, Virginia.¹⁴¹ According to the story, Thomas Jefferson Beale and approximately thirty others left Virginia in 1817 to travel the western prairies in search of adventure. The group wintered in Santa Fe, and the following March a portion of the party traveled north, chasing a buffalo herd. During the chase, the group discovered an outcropping of gold

138. Mary Grayson Interview (July 22, 1937), in 35 INDIAN PIONEER PAPERS, 1860-1935, at 455, 462-63 (W. Hist. Collection, U. Okla. 1937); Joe M. Grayson Interview (Sept. 24, 1937), in 35 INDIAN PIONEER PAPERS, 1860-1935, at 411-14 (W. Hist. Collection, U. Okla. 1937).

139. Former slaves were enrolled as members of the Creek Tribe, and allotted land, in 1902 and 1903. See ANGIE DEBO, AND STILL THE WATERS RUN 49-50, 98, 128, 135-36, 149-51 (1940). These former slaves were classified as "Freedmen" on the Dawes Commission rolls. *Id.* See also COMM'N TO FIVE CIVILIZED TRIBES, FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES IN INDIAN TERRITORY 497-635 (1907) (listing the Creek and Seminole rolls). Conceivably, the burial site of these slaves would come under the provisions of the NAGPRA as being Native American remains.

140. *Around Oklahoma*, 25 MISTLETOE LEAVES, No. 3, Mar. 1994, at 3 (Okla. Hist. Soc'y) (containing photograph of man claiming to be the great-grandson of Opothleyahola).

141. THE BEALE PAPERS 21 (Beale Cypher Ass'n 1988) (Lynchburg, Virginian Book and Job Print, 1885).

ore. Collecting the companions that remained behind, they began mining operations. After accumulating a significant amount of gold and silver, the group became fearful of attacks by bandits and Indians. Part of the group returned to Virginia in 1819 and buried the proceeds of their efforts. The group returned again in 1821, adding to the original amount. On the second trip, Beale gave an iron box to an innkeeper with whom he had become acquainted, instructing him to open the box in ten years if Beale did not return to claim it.¹⁴²

The innkeeper waited twenty-three years to open the box. Inside were two letters and three documents, each containing a set of numbers. The two letters explained the history of the expedition and described the three sheets of numbers as a code giving the location and contents of the vault containing the gold, silver, and jewels, and a listing of the members of the expedition and their addresses. The innkeeper was to decode the cipher and distribute the vault contents to the next of kin of the expedition members, keeping an equal share for himself. The key to the cipher was to have been sent to the innkeeper by another party after ten years. Naturally, the letter containing the key was never received. Ultimately, the second cipher was decoded, revealing the inventory of the treasure vault.¹⁴³

Over the years, Bedford County, Virginia has suffered a veritable plague of treasure hunters, each with their own decoded version of the cipher.¹⁴⁴ The remarkable aspect of this massive treasure hunt is that most of the searchers are under the mistaken impression that they may keep what they find, because of a letter written in 1972 from the Virginia Department of the Treasury.¹⁴⁵ The letter included a copy of *Groover v. Tippins*¹⁴⁶ and mentioned that the third cipher could not

142. *Id.* at 13-16.

143. *Id.* at 5-10. The second set of numbers are a random homophonic cipher for which the key is the Declaration of Independence. The known key does not decode the ciphers containing the location of the vault or the list of names of the expedition.

144. Even Treasure Salvors, Inc. diverted themselves from searching for Spanish galleons to hunt for Beale's treasure vaults. Another party was arrested digging up an old graveyard on the theory that the treasure vaults were disguised as graves. Based upon what is known of the ciphers, and what has been developed by the Beale Cypher Association, no one has developed a successful solution.

145. Letter from A. M. Rucker, Jr., Administrator, Unclaimed Property Act, Commonwealth of Virginia Department of the Treasury, to Carl W. Nelson, Jr. (Dec. 19, 1972) (on file with author). The letter quoted a section from the American Jurisprudence 2d section on Abandoned, Lost and Unclaimed Property, stating the law of finds. *Id.* At the time the letter was written, the Virginia statutes did not have any provision requiring the finder of treasure trove or archaeological artifacts to notify the State.

146. 179 S.E. 634 (Ga. Ct. App. 1935).

be considered a will.¹⁴⁷ The letter closed with an admonition that it was not legal advice, and that entering private land without permission could result in prosecution for trespass.¹⁴⁸

The entire treasure site, with artifacts such as iron pots, and with an age of at least 173 years, could well qualify as an archaeological site.¹⁴⁹ It would, at the very least, be of "historic, scientific, archaeological or educational value"¹⁵⁰ as well as substantial monetary value. If the treasure is found on state land, possession goes to the state and a permit for the removal is required.¹⁵¹ However, if the treasure is removed from state land without a permit, and the treasure subsequently enters interstate commerce, an ARPA violation has also occurred.¹⁵² If the treasure is found on private property, the treasure belongs to the landowner, unless he has contracted to share with the treasure hunter. If the treasure is removed from private land in trespass, a *Gerber*-like situation exists, and a potential ARPA violation will occur. If the treasure is found on federal land, any attempt to remove the treasure will result in an ARPA violation¹⁵³ unless a permit¹⁵⁴ is obtained in advance. It is unlikely that the treasure hunter would get a permit, unless he or she happens to be a professional or academic archaeologist.¹⁵⁵

147. Rucker, *supra* note 145. Mr. Rucker, the author of the letter for the Virginia Department of the Treasury, commented that he knew of no way that a numerical code could be admitted to probate. The code is not in the handwriting of Beale, so it cannot satisfy that element of a holographic will. The original of the code was allegedly destroyed in a printing plant fire in the 1880s, so all that remains of the original documents is what is reproduced in the Beale Papers. Mr. Rucker also stated that the code cannot serve as a will, since it is neither signed by the testator nor witnessed. VA. CODE ANN. § 64.1-49 (Michie 1991).

148. Rucker, *supra* note 145.

149. The treasure itself is supposed to be buried in iron pots in a rock lined vault, six feet underground. THE BEALE PAPERS 20-21 (Beale Cypher Ass'n 1988) (1885). While the gold and silver meet the definition of treasure trove, the jewels do not. See discussion in text, *supra* section II(A) discussing the common law of treasure trove.

150. VA. CODE ANN. § 10.1-2300 (Michie 1993).

151. VA. CODE ANN. § 10.1-2302 (Michie 1993) (requiring a permit for any field investigation on state land in Virginia). The statute authorizes the issuance of a permit to either a professional archaeologist or an amateur, in the State's discretion. Objects found on state land are state property, whereas objects found on private land belong to the landowner. *Id.*

152. 16 U.S.C. § 470ee(c) (1988).

153. 16 U.S.C. § 470ee(a) (1988).

154. 16 U.S.C. § 470cc (1988).

155. The NAGPRA is not implicated in this case, since Native Americans do not appear to have been involved in the burial of the treasure.

V. POLICY MATTERS

The traditional argument for the locus in quo theory of treasure trove is that it discourages trespass and conversion through the removal of economic incentives to trespass.¹⁵⁶ It does so through awarding possession of the find to the landowner. As such, it is a correct rule of law. If the landowner lacks the skill to search for potential treasure on his property, or is approached by a treasure hunter seeking treasure which he believes to be on the property, the rule does not interfere with their right to contract for the search or for a subsequent sharing of the recovery.

The ARPA, the NAGPRA, and state cultural resources statutes overturn this rule by drawing treasure trove into the definition of archaeological artifacts. As states view Indiana's success in drawing private property within its statute, it is likely that more will adopt similar statutes or that courts will begin to interpret existing statutes in light of the rulings in *Gerber*¹⁵⁷ and *Whitacre*.¹⁵⁸ The archaeological community can be expected to argue that this is how it should be, without considering the deeper ramifications of what is occurring. What is disturbing is that prohibiting landowners access to material on their own property, or confiscating that material once found, may constitute an uncompensated taking in violation of the 5th Amendment of the United States Constitution.¹⁵⁹

Correct excavation of archaeological sites is necessary for three reasons. First, a correctly performed excavation extracts the maximum amount of information that can be gained. Second, artifacts decompose more rapidly after extraction than they do when left in situ.¹⁶⁰ Finally, an excavation should leave part of the site untouched on the theory that when technology has improved sufficiently, more information can be discovered through further excavation.

The purposes of cultural resources statutes are the protection and proper management of the nation's cultural resources and to act as a solution to the problem of world-wide artifact trafficking. The ability

156. Izuel, *supra* note 16, at 1698-700.

157. *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

158. *Whitacre v. State*, 619 N.E.2d 605 (Ind. Ct. App. 1993), *aff'd*, 629 N.E.2d 1236 (Ind. 1994).

159. The fact that this type of taking was upheld in *Whitacre* indicates this option may be available for other political causes, such as the confiscation of all firearms.

160. Artifacts reach a state of equilibrium with the surrounding soil after being deposited for a number of years. The equilibrium is destroyed after removal.

of a government to control the resources on its own property is undisputed; this is the same right any landowner has. However, the debate over whether collecting is inappropriate is characterized by hyperbole. One archaeologist has stated that "if the unchecked looting continues to increase, there will be no archaeology to do by the turn of the century."¹⁶¹ A General Accounting Office (GAO) study examined the unchecked looting on federal land and found 1,200 looting incidents between October 1980 and March 1986 on 104.4 million acres of public land containing 2 million archaeological sites controlled by the Bureau of Land Management, National Park Service, and the Forest Service.¹⁶² Additionally, the GAO found that one-third of the sites had been looted at some time in the past.¹⁶³ These findings should be considered suspect, however, since only 136,000 sites, or seven percent of the alleged total, have actually been surveyed.¹⁶⁴ There are believed to be between 200 and 500 full-time commercial looters (with 50 to 100 of them located in the Southwest), and approximately 1,000 part-time looters (with 200 located in the Southwest).¹⁶⁵

Pothunting is not considered a serious problem in Oklahoma. One source, in referring to Oklahoma's statute, stated "[t]he substantial penalties imposed for violations are also reported to have discouraged pothunting in the state and may serve to 'export' looters to neighboring states."¹⁶⁶ It is doubtful that Oklahoma's law is more effective than any other state's law. Lack of pothunting activity, at least in northeastern Oklahoma, is more likely a result of the lack of items left to easily loot. The dam building program of the Army Corps of Engineers in northeastern Oklahoma destroyed hundreds of archaeological sites, since most of the sites were clustered along rivers and

161. George E. Stuart, *The Battle to Save Our Past*, 175 NAT'L GEOGRAPHIC 393 (1989).

162. John Neary, *A Legacy of Wanton Thievery*, ARCHAEOLOGY, Sept.-Oct. 1993, at 57; GEN. ACCOUNTING OFFICE, *supra* note 135.

163. S. REP. NO. 569, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 3625.

It is difficult at times to tell the difference between a site that has been looted by pothunters and one that has been excavated by archaeologists. This raises the question of how many of the sites credited as being looted had actually been properly excavated at some time in the past. The author viewed several sites at Lake Eufaula, McIntosh County, Oklahoma eleven years after a Department of Defense archaeological survey of the sites. The sites were characterized by large, randomly dug pits, which were still plainly visible, and were indistinguishable from a looted site. See Harvey Arden, *Indian Burial Grounds: Who Owns Our Past?*, 175 NAT'L GEOGRAPHIC 376, 378-79 (1989) (including photographs of the Slack Farm site). See generally GREGORY PERINO ET AL., *THE EUFAULA LAKE PROJECT, A CULTURAL RESOURCE SURVEY AND ASSESSMENT* 6-10 (Corps. of Engineers, Tulsa Dist. eds. 1980).

164. Neary, *supra* note 162, at 58.

165. Neary, *supra* note 162, at 59.

166. H. MARCUS PRICE III, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* 98 (1991).

creeks which were subsequently inundated. One lake, Lake Eufaula, dammed three rivers, destroyed hundreds of Creek Indian archaeological sites in a four county area, and apparently resulted in the remains of many Native Americans being washed into the lake by erosional forces.¹⁶⁷

Professional and academic archaeologists must share in the responsibility for site loss. The value system of the archaeologist puts the highest priority on research, excavation, new discoveries, publication, and funding. Cultural resource management issues are considered marginal at best.¹⁶⁸ As a result, the archaeological community sits by and complains of looting while doing nothing.¹⁶⁹ If the public is to believe that a relative handful of uneducated and untrained looters, rather than highly trained professional archaeologists, are finding all of the quality artifacts, then the only conclusion that can be reached is that the archaeological community is being dilatory and is not taking the problem as seriously as their comments indicate.

Collecting, on the other hand, may not be the evil the public is led to believe. Collecting, or looting, historically is responsible for a large part of museum collections,¹⁷⁰ and this public education tool would not exist if not for the activities of the looters of the past.¹⁷¹ Illustrations and photographs do not teach as well as handling the actual artifact.

The confidentiality provision of the ARPA, and the limitations on the right of possession in the NAGPRA, are official censorship and

167. This unfortunate circumstance came about because the normal power pool level of the lake is the same height as the terraces where the Creek Indians were most likely to live. A study found that hundreds of sites were "not worth further study." The study was confined to the waterline of the lake. An unknown number of sites were completely inundated, including North Fork Town, which was a major crossroads of the Texas and California Military Roads on the North Fork of the Canadian River. Interestingly, the study utilized a team of six "collectors" (looters) to assist the archaeologists in analyzing the results of the study. PERINO, *supra* note 163, at 6-10.

168. Brian Fagan, *The Arrogant Archaeologist*, *ARCHAEOLOGY*, Nov.-Dec. 1993, at 15-16.

169. John Neary, *Project Sting*, *ARCHAEOLOGY*, Sept.-Oct. 1993, at 56 (quoting a National Park Service officer, while packing a tiny woven cotton sandal found in Utah, as saying "Archaeologists never find these. We find little bits of cloth. Now I know why. Somebody's already been there.").

170. Colin Renfrew, *Collectors are the Real Looters*, *ARCHAEOLOGY*, May-June 1993, at 17 (commenting that all Early Cycladic sculptures in museums outside of Greece are believed to be stolen or obtained illegally, including the pieces in museums such as the British Museum, the Louvre, the Metropolitan, Berlin, Karlsruhe, Oxford, and Copenhagen).

171. This is in large part the purpose of the NAGPRA. The NAGPRA is targeted towards private individuals, rather than the federal government—which did the vast majority of looting of relics and remains in the past. See generally Trope & Echo-Hawk, *supra* note 89.

suppression of information. Many archaeological finds are never written about, and even fewer are published.¹⁷² When not published, the information is useless.¹⁷³ If geographic information (site location) is not allowed to be published with those reports that find their way into print, even that information will be useless. In addition, branding all artifacts not officially excavated—or even those that are and which lack proper documentation—as suspect, and prohibiting their use in scholarship, is likewise suppression of information.¹⁷⁴

With those artifacts traditionally considered treasure trove under the common law, given the behavior of the State of Florida and the federal government in *Treasure Salvors*, it is likely that governments are far more interested in the revenue-raising possibilities created by treasure trove than in public education. As such, they are no less greedy than the treasure hunters themselves, and possibly more so. Most treasure hunters, when faced with a confrontation with the government, will abandon their find and try to escape. Those who choose to confront the government get published in case reporters.

If the government wishes to protect those cultural resources which it deems worthy of protection, while fully exploiting the wealth-generating potential of treasure trove, and maximizing its return from artifacts and treasure trove, it should closely follow the British model.¹⁷⁵ Rather than persecuting amateur archaeologists and treasure hunters, driving them further underground, the government should seek to utilize these resources, which are available for the asking, provided a relationship of trust can be established. A licensing system and minimum training requirements can be established that

172. Publishing is a resource consuming activity. Eighty-seven percent of site reports in Israel for the period of 1980 to 1989 are unpublished. One Middle Eastern archaeologist suggested three ways to deal with the problem: "1) pray for a technological breakthrough; 2) die and let someone else worry about it; or 3) refuse to issue a permit to excavate until the archaeologist has fully published his or her previous dig." *Archaeology's Dirty Secret*, BIBLICAL ARCHAEOLOGY REVIEW, Sept.-Oct. 1994, at 63-64.

173. *Id.* See generally Trope & Echo-Hawk, *supra* note 89.

174. See generally Trope & Echo-Hawk, *supra* note 89.

175. Under English law, relics are turned over to the local coroner who conducts an inquest. A jury decides whether the relics are treasure, who owns the treasure, and its disposition. Ownership is established by making a determination of why the relics were buried. If they were hidden by someone with the intent to return and recover them, they are treasure trove and become the property of the Crown. If no intent to return is found, the items are not treasure trove, and either the finder or the landowner takes title. Determination of the intent of the original owner is necessarily a difficult question, and little more than guesswork may be involved, especially when the objects were buried many centuries ago. Finders of treasure trove are compensated by the Crown with a reward equal to the value of the relics. Christopher Chippendale, *The Snettisham Treasure: A Case of Uncommon Law*, ARCHAEOLOGY, Mar.-Apr. 1993, at 40-43.

would open either field for any interested individual, rather than limiting the participants to an elite group of "qualified" academic archaeologists. Further, appropriate procedures can be established when artifacts, treasure trove, or any human remains are found. A special provision should also be included making all modern Native American artifacts forbidden from exploitation. These procedures can define appropriate targets and create specific target areas in which activities are forbidden.

No method of compensating the amateur archaeologists would be necessary for archaeological artifacts found on federal lands. This would have the double advantage of hastening the survey and protecting the millions of archaeological sites alleged to exist on government property. The treasure hunter should be able to contract with the federal government for a predetermined share of the proceeds of treasure trove. Considering that the hunter's share would be taxable as ordinary income,¹⁷⁶ the government would come away with the bulk of the treasure, while providing the treasure hunter with an economic incentive to pursue the treasure.

If the federal and state governments insist on taking possession of all archaeological artifacts and treasure trove found on private lands, then the British model should be followed. Whenever a recovery is made, an inquest or hearing should be held to determine the status of the articles recovered. The finder should be compensated at the fair market value for the portion of the find deemed treasure trove under the traditional definition. The portion of the recovery found to be archaeological artifacts would escheat to the government.

VI. CONCLUSION

The common law of treasure trove has been superseded by the action of federal and state laws governing antiquities and archaeological artifacts. Any future recovery of treasure trove will be considered an archaeological find and will likely be brought within the proscriptions of the ARPA, the NAGPRA, if applicable, and the state law protecting antiquities in the state where the treasure is recovered. In

176. *Cesarini v. United States*, 428 F.2d 812 (6th Cir. 1970), *aff'g* 296 F. Supp. 3 (N.D. Ohio 1969) (holding that treasure trove is taxable as ordinary income in the year of discovery).

Indiana, even following the Biblical injunction quoted at the beginning of this paper will not save the hapless treasure hunter. Any contest over possession of the entire treasure will probably be between a state government and the federal government.

David G. Bercaw