

## **ARPA Transcript**

Hello my name is Stan McDonald. I am the State Archaeologist and Cultural Resources Program Lead for Oregon-Washington BLM. Prior to my current position, I served for nine years as the Idaho BLM State Archaeologist and 13 years as the Forest Archaeologist for Manti-La Sal National Forest in Utah.

In each of these positions, I have been involved in Archaeological Resource Protection Act otherwise known as "ARPA" violation cases. I got involved in my first ARPA case in 1990-- prior to receiving any formal ARPA training; I quickly enrolled in a week long ARPA training course. I have since taken and/or been involved in hosting and/or as a presenter at training courses including Damage Assessment for Archaeologists and Archaeological Resource Protection Act for Law Enforcement personnel. I also served on the Society for American Archaeology's (SAA) task force in developing the SAA's Professional Standards for Archaeological Damage Assessment.

I stress that this distance learning module is designed to introduce you to ARPA; however, it is not a substitute for more in depth training courses.

As a BLM archaeologist, if you become involved in a BLM or interagency team investigating an ARPA violation, your professional services and expertise could be required in a variety of ARPA case tasks. These tasks might include: documentation of site looting, collection of archaeological materials and crime scene evidence, preparing damage assessment reports, writing affidavits for search warrants, examining stolen artifact collections, serving as an expert witness for the U.S. Government during felony prosecutions-including testifying at grand jury hearings, trials, and sentencing hearings, preparing seized-surrendered artifact collections for curation and other related tasks.

Having been involved in most of these tasks, I strongly recommend that you consider obtaining more in depth training if you anticipate that you will become involved in an ARPA case. For archaeologists, I strongly recommend obtaining training in archaeological damage assessment. If you have not been involved in an ARPA case yet-there is a reasonable likelihood that you will in the future. Thus, I recommend you discuss this with your supervisor and identify ARPA training needs on your Individual Development (training) Plan.

With these introductory remarks, I am pleased and honored to have been asked to present this brief distance learning module on ARPA.

Not only do I find the archaeologist's work on ARPA cases fascinating and intriguing, I believe it is immensely important for the preservation of this nation's heritage.

ARPA is undoubtedly the most powerful and important piece of legislation that the U.S. has at its disposal to deal with archaeological looting and vandalism.

This module is focused on providing BLM archaeologists with a basic introduction to the Archaeological Resources Protection Act and their roles in ARPA investigations and prosecutions when a suspected/documentated violation has occurred. First, we will provide you with a general overview of the Act and its provisions.

Next, we will focus on what constitutes a "prohibited act" under the ARPA and thus what BLM needs to prove in order to warrant someone being charged with committing an ARPA offense.

As this course is particularly aimed at BLM archaeologists, we will spend some time examining the Act's definition of archaeological resources and the Act's proscribed procedures for assessing damages and determining the value of the damages and cost of repairing the damages.

Our objective here will be to briefly describe the archaeologist's role and tasks in in ARPA investigations. Finally, I want to (1) spend a few moments discussing BLM's "ARPA Team" and the role of others in ARPA investigations and prosecutions and (2) provide some of my own recommendations for successful ARPA investigations and prosecutions.

Before we examine the ARPA in more detail, let's take a look at some of the events that led to its passage.

The history of protection for CRs in the US extends back over 100 years--most notably to the passage of the Antiquities Act in 1906.

In response to public pressure for the federal government to protect archaeological and historic sites in the latter part of the nineteenth century, the Antiquities Act was designed to protect "any historic or prehistoric ruin or monument or object of antiquity" located on federal lands.

The Act has three primary provisions. First there are criminal sanctions for the destruction of antiquities. Next the Act allowed for the creation of National Monuments of scientific or historic interest. And finally the Act created a system to permit archaeological excavation.

However, as a deterrent to the looting of archaeological and historic sites, the Antiquities Act was not a major deterrent to between its passage and 1973.

Under the Antiquities Act a person found guilty of violating the Act could be incarcerated for up to 90 days and/or fined up to \$500. Financial penalties which could be levied under the Antiquities Act were not to exceed \$500.

So, how serious of a deterrent do you think these penalties were in stemming the looting problem?

This is difficult to assess but in 1906, when these penalties were enacted, they might have been a significant deterrent as the average annual family income was \$520. However, by 1973 when individual artifacts fetched considerably more than in 1906 and when the average family income had increased significantly over the 1906 levels, the \$500 fine was not a significant deterrent.

Case law statistics also indicate that enforcement of the Antiquities Act was not a serious deterrent. Between 1906 and 1973, there were only 10 convictions for violations of the Antiquities Act. Four of the cases involved the theft of petrified wood. The imposed penalties for all of these cases combined consisted of \$2600 in fines and forfeiture of the items taken. None of the convicted individuals received jail sentences.

However in 1972, a pivotal legal case involving the Antiquities Act came before the federal court. This is the U.S. vs. Diaz case.

A man by the name of Ben Diaz located what he thought was the cave of an Apache Indian man on the San Carlos Apache Indian Reservation in Arizona.

Mr. Diaz removed approximately 22 face masks, headdresses and other religious items and then placed them under consignment for sale at a shop in Scottsdale, Arizona. A collector then contacted Diaz and offered to purchase the masks for \$1200. Diaz refused the offer believing he could obtain a significantly higher price.

Diaz was then contacted by federal agents who confiscated the masks and arrested Diaz. While the masks were less than five years old it was contended that because the items had been used in ancient ceremonies that they were covered as "objects of antiquity" under the Antiquities Act.

While Diaz was initially convicted, he eventually appealed to the Ninth Circuit Court of Appeals who ruled that the term "object of antiquity" as used in the Antiquities Act defied precise definition since it failed to specify the age of items to be protected. Diaz' conviction was thus overturned.

Importantly, this ruling complicated and considerably so-the use of the Antiquities Act in the Ninth Circuit which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

Issues related to the Diaz case, other court rulings involving archaeological site looting, and public awareness of the growing looting problem, ultimately led groups such as the Society for American Archaeology to lobby for stronger legislation to protect archaeological resources.

Arizona Congressman Morris Udall and others including senators Barry Goldwater (AZ) and Pete Domenici (NM) and congressman Manuel Lujan (NM) sponsored the Archaeological Resources Protection Act. The bill was signed into law by President Jimmy Carter in 1979. Uniform federal regulations for implementing ARPA were finalized in 1984.

While statistics on ARPA crime are not extensive and it frequently difficult to assess the magnitude of the current looting problem and thus the measure of agency's success in prosecutions, current statistics indicate:

- Looting remains a significant problem
- By far, BLM lands contain the highest number of estimated archaeological sites managed by any agency in the U.S.
- Between 1996 and 2005, BLM reported an average of 133 documented ARPA incidents per year; 6% of these cases were solved.

While these figures can seem daunting at first glance, keep in mind that prosecution of antiquities violations under ARPA is a vastly significant improvement over enforcement under the Antiquities Act.

A full copy of the ARPA is attached to your course materials. The Act contains several sections.

We are going to focus primarily on Sections 4-6 of the law. But before getting deeper into those sections, let's summarize the highpoints of the various sections of ARPA.

- o Section 3 provides some key definitions. The definitions are further expanded in the regulations. These include definitions for terms like federal manager, public lands, archaeological resource, person and others. We are going to be examining some of these terms and their definition in a few moments. By the end of this module, you will be familiar with some of the key definitions.

Section 4 addresses permits. Under the ARPA "any person may apply to the Federal land manager for a permit to excavate or remove archaeological resources located on public lands." However, the ARPA regulations require that ARPA permits be issued only to qualified individuals and organizations and be subject to appropriate terms and conditions.

BLM has developed further directions for its permitting in BLM Manual section 8150. BLM issues three types of archaeological permits. One is for survey and recordation issued under the authority of FLPMA; the other two are for archaeological test excavation and excavation and removal. These latter two are issued under the authority of ARPA. BLM permits including ARPA permits are issued by the State Office as the authority for issuance of permits cannot be delegated below the level of the State Director.

Section 5 directed the Secretary of Interior to promulgate regulations dealing with the custody of archaeological resources; these regulations specifically state that archaeological resources excavated or removed from public lands remain the "property of the United States." under the uniform regulations. These are dealt with in 43 CFR Part 7.13.

Keep in mind that items obtained during ARPA investigations may be covered under the Native American Graves Protection and Repatriation Act (NAGPRA). These items must be dealt with through the NAGPRA process.

Under the ARPA, prosecution of violations of ARPA can be pursued either as criminal or civil proceedings. While most ARPA violations have been pursued as criminal violations, Section 7 of the ARPA allows for prosecution of violations using a civil process. We will talk about the differences between the two processes a bit later on.

Section 8 addresses rewards and forfeiture. The forfeiture provision of the ARPA is an important one and stipulates that all archaeological resources obtained from a violation of the ARPA and all vehicles and equipment of any person used in connection with the violation may be subject to forfeiture. Thus, it is possible that attorneys and legal staff of the U.S. Attorney's Office who specialize in forfeitures and assets may be directly involved in the prosecution effort.

Section 9 states that information regarding the nature and location of any archaeological resource may be withheld if the land manager determines that disclosure to the public could cause a risk of harm or threat to the resource. Such determinations which often arise outside of ARPA violations usually involve the expertise of BLM's professional archaeologists and Freedom of Information Act specialists.

Among other things, Section 10 directs federal agencies to establish programs to increase public awareness of the significance of archaeological resources located on public lands. BLM can and does accomplish these objectives in a variety of ways; but the thrust of this section clearly indicates the need for other efforts other than law enforcement to reduce the threats of looting and vandalism.

Section 11 directs agencies to foster communication with private individuals having collections prior to the enactment of the ARPA and to enhance communication with professional and archaeological organizations to further the purposes of the Act.

Section 13 requires federal agencies to report annually on agency activities efforts to implement the Act. This is the reason why in August of each year, field offices are asked to prepare an annual report of certain activities such as acres inventoried, the number of sites recorded, ARPA enforcement actions and others. This information is consolidated into statewide reports, then into the Bureaus' report to DOI and eventually in a comprehensive "Federal Archaeology Report to Congress."

Finally, Section 14 directs agencies to develop plans for surveying lands to locate and identify significant archaeological resources.

Passage of the ARPA was a watershed change for the protection of archaeological and historic sites in the U.S. Very significant in this regard were changes to the penalties that could be imposed when one was found guilty of violating the ARPA.

These are important for BLM and archaeologists to understand as the penalties that can be imposed under ARPA have serious consequences for persons who are charged and convicted of

an ARPA violation. ARPA penalties can rise to the level of felony level violations and if sentencing involves incarceration result in the loss of an individual's personal liberty. Thus, it is important that our work on ARPA be done professionally, accurately and objectively.

For archaeologists, it is important that we maintain our focus on the archaeological sites and damages involved in an ARPA violation. Our expertise and training is needed for interpretation of the resources involved, the importance of these resources, and the damages that have been incurred to them. While you will probably have some knowledge of persons who may be involved, the job of investigating who committed the violation lies with law enforcement. While it may be tempting to try to learn more about potential perpetrators, please leave this work to law enforcement. Demonstrating that you have no bias for or against the accused individual helps to give you a high level of credibility as an expert witness for the United States Government.

So, let's look at the penalties a bit closer: Where damages are determined to be less than \$500, persons convicted of ARPA could be fined up to \$10,000 and/or imprisoned for up to one year. Where damages are determined to be greater than \$500, a person could be fined up to \$20,000, 2 years in prison or both.

A second conviction could result in even more significant penalties. During the mid 1990s along with investigators, other archaeologists and the Assistant U.S Attorney from the District of Utah in an ARPA case resulting in the second ARPA conviction of Earl Shumway-the first such case under the ARPA. Mr. Shumway received a five and one-half year prison sentence for his conviction related to the looting of archaeological resources located in Canyonlands National Park and the Manti-La Sal National Forest in southeast Utah.

As we noted earlier Section 8 of the ARPA contains a forfeiture provision stipulating that all archaeological resources in the possession of the convicted person and all vehicles and equipment used in the commission of the crime can be subject to forfeiture.

Also in 2002, the U.S. Court system passed the Federal Sentencing Guidelines for Cultural Heritage Crimes. These guidelines provide for consistent court rulings when handing down sentences for violations of ARPA.

So what constitutes a "prohibited act" under the ARPA? Here is the definition found in Section 6a of the Act. What do you see as the key words?

There are several and we are going to come back to these. First the illegal activities can include: excavation, removal, alteration or defacement. Second, these actions need to have occurred to an archaeological resource. Third, the archaeological resource needs to be located on public lands or Indian lands unless-a permit has been issued by the federal agency. However, there are other ways that one can violate ARPA.

Prohibited acts can also involve the sale, exchange, and transport of Arch Resources. Determining that this has occurred can be a little more tricky and will most likely involve the U.S. Attorney. As one example a person who removed a prehistoric ceramic bowl in 1975 from federal lands could not be charged with violating ARPA. However, if that same item was sold, purchased, exchanged (even if no \$\$ change hands) and sold to another person after 1979 both seller and buyer could be charged with violations of ARPA.

Generally, the archaeologist's involvement in this aspect of ARPA will probably be related to examination of the items sold, purchased etc. to determine if they meet the definitions of cultural materials covered under the ARPA. Interpretation of the sale, exchange and/or transport provisions will be undertaken by the Assistant U.S. Attorney.

ARPA's Section 6c contains an Interstate Transport Prohibition. This provision makes it a violation to transport archaeological resources across state lines when such resources have been obtained in violation of state or local law.

ARPA's Section 6d contains a Conspiracy Provision where a person can violate ARPA if they counsel, solicits, procures or employs another person to violate ARPA.

Again, investigation of these aspects of ARPA is handled by BLM's investigators and the government's attorneys.

So, just so we are all clear on the primary elements of an ARPA violation let's look once more at the definition in Section 6a.

So a person or persons acting without a permit must excavate, remove, alter or deface----an archaeological resource----which must be located on public or Indian lands.

A question that frequently comes up here is whether or not the violator needs to know they were at an archaeological resource, that the site is 100 years old, that they were on public lands and so forth. In other words, does the person need to know that they are violating ARPA to be charged and convicted for violating ARPA?

The answer is no. ARPA is a general intent crime. This means that the person just needs to know what they were doing-for instance-digging or selling. To violate ARPA, the Act requires only that the person or persons acted of their own free will--but not they knew that it was wrong to proceed with their actions.

This is me in 1990. You are already further along in your ARPA knowledge than I was in 1990 when I got handed my first ARPA Case.

Since that time, I've worked on 5 other ARPA cases. I have been very fortunate to have worked with outstanding investigators and an exceptional prosecutor who was a stickler for detail and who set the bar very high for me.

This is Polar Cave. After a five year investigation, ten individuals were convicted on a variety of violations including ARPA related to the looting of this large and incredibly important dry cave site that contained evidence of human occupation from the Early Archaic to the Formative period. Salvage excavation by Dr. Bill Fawcett of Utah State University revealed evidence of corn agriculture at one of the highest elevations in southeast Utah over 7,400 feet.

Here's another site in southern Idaho. Looking at the photo, can you tell if ARPA has been violated?

Has there been excavation, removal, alteration?

Certainly we can see that excavation has been on-going. That's pretty easy to tell. But as BLM archaeologists we have to determine whether or not all of the elements of a violation are present.

Is it an archaeological resource?

Is it located on public lands?

Was it done with or without a permit?

Remember the difficulties that courts had with the Antiquities Act' definition of "object of antiquity?"

The ARPA remedies this providing a much more precise definition for "archeological resource". This is how archeological resource is defined in Section 3 of the Act. Archeological resource means any material remains of past human life/activities or archaeological interest and at least 100 years of age.

Please note that I have not included in the slide the entire list of "material remains" detailed in ARPA's regulations. The list of artifacts and material items covered under ARPA is extensive and generally covers the full range of cultural materials encountered in archaeological sites in the country. This is sometimes referred to as the "ARPA laundry list."

When you are investigating potential violations of ARPA and examining archaeological sites and materials I recommend that you refer to this list. Documenting that these items have been excavated, removed, altered or defaced is corroborating evidence of an ARPA violation.

Next, the definitions include the term "Of Archaeological Interest." Please note that this term is not synonymous with archaeological significance as used in the National Historic Preservation Act.

As you read this definition from uniform regulations, I would ask our BLM land managers in attendance, who on your staff is best qualified to make this determination? As a state archaeologist my answer is unequivocally-a professional archaeologist.

This is what our BLM archaeologists have been schooled and trained in. ARPA also requires that the archaeological resource involved is at least 100 years of age. Again, this determination needs to be made by a trained, professional archaeologist.

Does ARPA say that the items have to be of American Indian origin? While ARPA violations may frequently involve sites affiliated with American Indian use and occupation, ARPA applies to all archaeological resources as defined in the ARPA and its regulations--regardless of ethnic affiliation. Thus an ARPA violation could also involve ethnic Chinese sites, homesteading sites and sites affiliated with other groups as long as the resource and violations involved contain the required elements of an ARPA prohibited act.

The definition of public lands is relatively straightforward with the lands administered by BLM falling in the last category shown on this slide.

Review BLM Permit files. While it may seem obvious that the prohibited act occurred without a permit, BLM will likely need to demonstrate that no permit has been issued for the activities in question by reviewing our permit files. Contact your State BLM Archaeologist to have this review done so you can document these facts in your case files.

So let's quickly summarize: do we have a violation? What is our key definition? No person may excavate, remove, alter or deface any archaeological resource located on public lands unless such activities are being conducted under a valid permit.

Now that we have documented that a violation has occurred, let's take a look at the government's team who will be involved in the investigation and prosecution.

BLM's law enforcement personnel play a central role in ARPA cases for BLM. Law enforcement personnel are responsible for directing all activity at the disturbed archaeological site in consultation with the team's archaeologist. It is important to remember that the archaeological site under investigation is also a crime scene. While custody of some evidence such as artifacts may be turned over to the archaeologist for further examination and care, law enforcement is responsible for each case's evidence preservation and chain of custody. Law enforcement personnel will also serve as BLM's liaison with the U.S. Attorney's Office.

The archaeologist's duties can be many. But overall, these duties are focused on the victim of the ARPA crime-the archaeological resource. We will discuss the archaeologist's role in more detail in just a few moments.

Next, prosecution of criminal cases is handled by the U.S Attorney's Office-usually an Assistant United States Attorney. The U.S. Attorney's Office has sole responsibility for determining to prosecute a case and what charges will be filed. Some of the considerations in charging a violation may involve consideration of other non-ARPA related statutes and policy established within the district's court system. As the site under investigation is also a crime scene, the US

Attorney may have some say in how the site is treated-such as in cases where the site in its damaged condition must be preserved for examination by defense counsel.

Finally in my recommended ARPA team, BLM's managers are critical players. While not directly involved in the investigation and prosecution, I believe it essential that the line manager be informed about general aspects of the case. As this involves archaeologists, managers need to be informed of anticipated workloads associated with the field office's archaeologist's ARPA work and potential impacts/conflicts with other work priorities and schedules. Management support of their archaeologist's work on ARPA cases is pivotal.

In general, the archaeologist is likely to be involved in four general areas of ARPA case work. These are crime scene investigation, field documentation of damages, preparing damage assessment reports and case preparation. Rules of evidence collection apply.

Your involvement as an archaeologist is likely to begin with a report of a suspected violation and a request to examine the damaged archaeological site.

In a general sense, the goals of crime scene investigation are to discover and document all available facts about the suspected violation. As you are now dealing with a potential crime scene, your examination--even an initial one should be performed under the direction of BLM's law enforcement.

I would also be remiss if I did not offer this caution: Should you encounter persons actively engaged in excavation or damaging activities, do not approach these individuals no matter how safe it may seem to you. Assume that these individuals may be dangerous. Observe and record what you can safely about these persons and their activities including vehicle descriptions and license numbers. Leave the area as quickly, quietly and safely as possible. Then report this information to your BLM law enforcement immediately. Your safety comes first.

With that caution in place, field documenting damages to archaeological sites is a task that archaeologists are well suited for. This is essentially an extension of site survey and recording. However, I suggest that when you begin the process of field documenting damages, you begin orienting your thinking and documentation strategy to the ARPA elements.

What prohibited acts have occurred? Is there evidence of surface collection and removal? Is there evidence of excavation? Alteration? Defacement?

Where are the damages located? What does the evidence of damages look like? Are their excavated holes? Do these have shovel impressions or tool marks?

Does the site contain the material remains listed in ARPA's laundry list of items in Section 3 of ARPA's uniform regulations?

Where are these items located? In looter holes? Sifted back dirt? Collector's piles? Federal Lands? You know and your investigator may know the site is located on public lands---but what is the evidence? Signs on roads marking as federal lands? Document this evidence.

Evidence of permits? Check with your State Archaeologist.

Locate the damaged areas-areas of excavation, removal, alteration and defacement.

Describe specific damages in text, photos and maps. Photos can be black and white or color prints or digital. I would suggest that you carefully compose photos so that laypersons examining the photos can clearly identify the damages and be persuaded that a violation has occurred.

Quantify damages done-this becomes the basis for determining specific financial values. Thus you will need to measure and document the damages.

Maintain clear, accurate and legible records of your documentation.

Both professional standards of preservation and chain of custody apply in ARPA cases.

Law enforcement will provide guidance regarding evidence collection and chain of custody.

However, in this regard, as a BLM archaeologist who may become involved in managing archaeological collections obtained during law enforcement investigations including search and seizure, these items may eventually need to be curated at an appropriate museum. This is an area where BLM archaeologists and museum specialists can aid law enforcement. Thus, handling and packaging these items with an eye to future museum packaging and long-term curation and creating an accurate catalog-inventory of these items is highly recommended from the very beginning of an ARPA investigation. This should be discussed with law enforcement as early as possible in case investigation. Doing so may save BLM hundreds of hours of curation prep time later on.

Evidence may include NAGPRA objects. Thus, there can be a NAGPRA compliance element to your ARPA case. As noted earlier, these items require compliance and handling in accordance with the NAGPRA.

Now that Field Assessment is completed, your BLM agent and the Assistant United States Attorney may request that you prepare a formal damage assessment report.

We will only summarize the primary components of ARPA Damage Assessment Reports. As noted earlier, week long training courses in archaeological damage assessment are offered; this is highly recommended training for BLM archaeologists especially those who are assigned or who are likely to be assigned to ARPA cases.

Assessing damages for violations of ARPA involves three primary cost determinations: These are

- Restoration and Repair
- Archaeological Value
- Commercial Value

Let's examine these a bit closer:

The ARPA regulations define two types of restoration and repair. These are emergency and projected restoration and repair

Emergency restoration and repair includes those measures to stabilize the site from immediate and imminent damages including the costs of conducting the initial field damage assessment. Only legitimate costs for conducting emergency measures should be included. For example if the sidewalls of a looter's pit are in imminent danger of collapsing and additional archaeological materials may be dislodged from their in-situ context, the cost of lining the pit with a geo-textile fabric and backfilling the pit are legitimate emergency restoration and repair actions.

In contrast, projected restoration and repair costs are those that are not immediately needed to deal with imminent threats but can be implemented later.

In its listing of appropriate types of restoration and repair activities, ARPA and the uniform regulations includes such measures as reconstruction, site stabilization, ground re-contouring, pre-stabilization research, construction of physical barriers, salvage of threatened archaeological materials, re-interment and report preparation.

In preparing a damage assessment report, determining archaeological value may be one of the more time consuming tasks.

The uniform regulations state that the archaeological value of the resource involved in a violation shall be appraised in terms of the costs of retrieving the scientific information which would have been obtainable prior to the violation.

The regulations go on to delineate the types of activities that can be included in the determination of archaeological value.

In short, the determination of archaeological value asks the archaeologist to examine the site as it would have existed prior to the damages, to develop a plan and a budget for recovering archaeological data from the archaeological resource.

As delineated in the regulations, these activities can include tasks beginning with the preparation of a research plan, fieldwork, lab work, reporting and curation of collections and data.

In developing this determination it is important that the determination of archaeological value be tied to an accurate field assessment and calculation of damages. These determinations need to quantify the amount of damages and a line item budget for the data recovery or retrieval operations. Such costs also include associated analyses and reporting and curation.

The Society for American Archaeology has adopted further guidance for preparing damage assessments in its "Professional Standards for Damage Assessment." The SAA's standards are included as attachments or weblinks as part of this presentation.

In determining archaeological value, it is important that the archaeologist feel confident in these assessments and have credible experience in developing proposals and budgets for data recovery projects. Collaborating with other agency archaeologists and seeking their assistance may be very useful. In addition, consulting with archaeological consulting firms who have worked in the area conducting work similar to that being proposed for the damaged site may be advisable. Obtaining additional assistance needs to be discussed and closely coordinated with your BLM investigator and the Assistant U.S. Attorney.

Finally, archaeological damage assessments may require that the commercial value be determined for archaeological materials which have been recovered during an investigation. Artifact collections may come into BLM's custody as part of search warrants and seizures executed by law enforcement.

When these items have been determined to have come from an archaeological resource on public lands, these items may have to be appraised in terms of their fair market value. In general, archaeologists are not trained in this area.

While archaeologists can make some of these assessments utilizing artifact cost guides, there are other sources for obtaining an assessment of the fair market value of material remains which are the subject of commercial value determinations.

Some of these sources are listed here.

The contents of an archaeological damage assessment reports are dealt with in much more detail in other training courses.

But a few general comments are in order. First, these reports are prepared in close consultation with the Assistant US Attorney.

As for content, damage assessment reports should provide a clear description of the archaeological resource and its archaeological importance (or in ARPA terms its "archaeological interest") that can be understood by lay persons.

The report needs to include a discussion of the archaeologist's methods and procedures which were used to examine the site and to assess the damages.

This is normally followed by a description of the observed and documented damages noting the specific locations, types and extent of damages. Well-composed photographs which clearly display the damages and impacts on the archaeological resources can be immensely valuable and will go far to support your written assessment.

It is important that these preceding sections clearly demonstrate the all of the elements of an ARPA violation are present---that is, the site is an archaeological resource as defined in ARPA in that the site contains the material remains listed in the uniform regulations, that these remains are older than 100 years, that the site is located on public lands, and that the prohibited acts such as excavation took place without a permit issued by BLM.

The report will also include a detailed assessment of the actual cost determinations. These determinations will accurately and objectively specify the costs of conducting restoration and repair actions, data recovery actions to realize the archaeological values of the site prior to it being damaged, and the commercial or fair market value of material remains.

In presenting this information keep in mind that your report needs to be as objective and persuasive as possible. Your report will be critically reviewed and likely challenged by defense attorneys. This is where an Assistant US Attorney with experience in ARPA cases will be invaluable to you as you prepare your report.

Again in consultation with your BLM investigator and the Assistant US Attorney, it may be useful to request another experienced archaeologist to review and critique your report.

As we discussed earlier, ARPA provides for criminal punishment when the prohibited acts are committed "knowingly." This is largely what we have been discussing up to this point.

But what about a situation say where someone or some organization violates ARPA inadvertently or as a result of negligence?

In these situations, ARPA provides for a monetary penalty to be assessed and recovered when a violation has been committed-- regardless of intent.

Pursuit of a civil violation of ARPA can also be used in cases where the US Attorney's Office declines to prosecute criminally, but where the agency still seeks to recover monetary compensation for the damages.

As Elise Foster an attorney for the USDA-Forest Service Office of the General Counsel points out, use of ARPA's civil procedures has not been frequently used by agencies perhaps largely due to lack of familiarity with ARPA's civil provisions.

Where a civil violation is being considered, it is strongly advised that this be discussed with BLM's Solicitors.

There are a number of compelling reasons why BLM might pursue civil enforcement of ARPA.

As Elise Foster notes, a civil ARPA prosecution deters people from using public lands as they please and without permission by making an ARPA violator liable for the damages to archaeological resources caused by their unpermitted behavior.

Second, there is no requirement to prove intent in a civil violation. Civil ARPA is a "strict liability offense" meaning that the agency need only prove that the suspect committed the offense and that the damages caused by their unpermitted behavior are in the amount specified in the charges.

Next use of the civil process may reduce the amount of labor and expense vs. criminal prosecutions. Unlike criminal ARPA proceedings which require the government to prove their charges beyond a reasonable doubt, civil ARPA proceedings require a finding based on a preponderance of the evidence.

There are some very key procedural differences between how civil and criminal ARPA prosecutions are processed. There are also many similarities.

Most notably, civil prosecutions do not involve the U.S. Attorney's Office.

A civil ARPA enforcement case, like a criminal case, begins with the discovery of a violation. Both require BLM law enforcement and archaeologist to examine and assess the damaged resource. If the agency wishes to pursue the violation criminally, the case is submitted by BLM law enforcement to the US Attorney.

Should the US Attorney decline the case, the federal land manager still has the authority to initiate a civil ARPA proceeding. OR, the agency could pursue civil ARPA enforcement from the start. This might be the case where law enforcement determines sufficient evidence does not exist to demonstrate that the prohibited acts were committed intentionally.

Regardless of the situation, a wise course of action would be for the agency to discuss these options with agency counsel.

Whether or not the case is pursued as a civil or criminal matter, the archaeologist's tasks remain much the same. The archaeologist is still required to conduct a field assessment of the damages and to prepare a damage assessment report when needed--using the same procedures we discussed previously.

But now some key differences. Whereas the US Attorney's Office is responsible for filing charges and leading the prosecution of criminal ARPA cases, the Federal Land Manager assumes a lead role in pursuing enforcement of civil ARPA proceedings.

Here we will only summarize the process. Included in your course materials are some excellent sources of guidance on the Civil ARPA enforcement process.

In consultation with agency counsel, BLM's law enforcement agent and the archaeologist, the

Federal Land Manager makes the decision to pursue a civil ARPA penalty.

Next, the agency prepares a Notice of Violation and Proposed Penalty summarizing the facts of the case, the amount of the proposed penalty, and notification of the right of the charged person to petition for relief and to seek judicial review.

The manager signs this and sends the notice to the individual(s) charged with violating ARPA.

The individuals have 45 days to respond to this notice.

During this time, the individual can:

- seek informal discussions with the manager,
- take no action,
- accept the proposed penalty,
- await the manager's final decision or
- petition for relief.

Should agreement be reached in the 45 day period, a settlement document is drafted that includes the agreed upon penalty.

This document then becomes the basis for a Notice of Assessment

For a first violation the assessment may be the cost of restoration and repair plus either the commercial value or the archaeological value of the archaeological resources involved. Based on specified factors in the ARPA regulations, the federal land manager may assess the full value of these costs or lower the penalty amount.

The penalty is then delineated in a written Notice of Assessment.

The respondent may file a petition for relief and request a hearing before an Administrative Law Judge.

The ALJ then renders a ruling. An ALJ's decision may be appealed to a higher level.

This is just a brief summary of the Civil ARPA process. An excellent guidebook on the use of Civil ARPA has been written by Elise Foster, Attorney for the USDA's Office of the General Counsel. The book contains an in-depth discussion of the Civil ARPA process and examples of a Notice of Violation, a Notice of Assessment, Settlement Agreements and other Civil ARPA case documents that can be used as templates. I recommend each BLM Office obtain a copy of this publication.

So let's summarize.

I believe you are all now familiar with the basic elements that are required to demonstrate that an ARPA violation has occurred.

Again what are the required elements of a prohibited act? A person needs to have excavated, removed, altered or defaced----an archaeological resource----100 years of age or older----- located on public lands----without a permit.

Also keep in mind that a person can violate the Act in other ways including selling, exchanging, transporting items obtained in violation of the act or attempting to do these acts or conspiring to have others commit ARPA offenses.

We've introduced you to the role of the archaeologist and the role of other key players in ARPA enforcement. By design, I've attempted to focus most of our attention on the roles and responsibilities of BLM archaeologists in ARPA investigations and prosecutions.

However, this is only an introduction and as we noted at the beginning of this module, there are other references and more in depth training courses available to help prepare you to work on ARPA cases when your services are needed.

Finally, I'd like to offer some closing thoughts.

We don't know when or where the next looting incident or rock art vandalism will take place or how serious it may be-- but they will occur.

ARPA violations can be very serious crimes rising to the level of felony level offenses resulting in a person's incarceration.

Thus, reports of ARPA violations should be investigated quickly.

Consider threats from looting and vandalism as key factors in your unit's annual site monitoring efforts, site steward and site protection programs. It is my experience that many incidents of ARPA violations are first detected by monitoring visits. Additionally, having up to date monitoring is not only important for understanding trends in site preservation and threats---but your monitoring data could be a key element to a successful prosecution involving a recently violated site.

Hopefully I've been able to portray that successful ARPA investigations are based on a team approach involving the archaeologist, law enforcement, prosecutors and importantly-BLM managers.

During this module we have focused our attention on ARPA enforcement. But as stewards of public lands our mission is much broader. In this regard, the preservation of the rich archaeological heritage found on public lands demands more than enforcement actions. We must also enlist the support of the public through education and awareness of the importance of the nation's archaeological heritage and the need to preserve this heritage for future generations.

Thank you for your time, I hope you found this module useful. I wish you success in your next ARPA case.

Links and references:

- ARPA statute (1979 as amended) [ARPA Statute 1979](#)
- ARPA implementing regulations (43CFR Part 7) [ARPA Regulations \(43 CFR 7\)](#)
- NPS Technical Archaeology Program Technical Brief #20: Archaeological Resource Damage Assessment-Legal Basis and Methods [NPS Archeology Program Technical Brief 20](#)
- SAA Professional Standards for Archaeological Damage Assessments [SAA Professional Standards - Damage Assessment](#)
- NPS Technical Brief #16: Civil Prosecution Process under ARPA [NPS Archeology Program Technical Brief 16](#)
- Federal Sentencing Guidelines for Cultural Heritage Crimes (2010) [destruction, theft, damage and unlawful sale, transport, sale, exchange, receipt of heritage resources] [2010 Fed. Sentencing Guidelines](#)

In addition to these, we have provided a list of Other Useful References and Sources of Information at the end of this presentation. These publications can be obtained through inter-library loan or purchase through book vendors.

- Using ARPA Civil Penalties to Protect Archaeological Resources on Public and Indian Land by Elise Foster (2007). United States Department of Agriculture, Forest Service Intermountain Region and National Park Service-U.S. Department of the Interior.
- Archaeological Resources Protection by Sherry Hutt, Elwood W. Jones and Martin McAllister (2002). The Preservation Press-National Trust for Historic Preservation.
- Presenting Archaeology in Court: Legal Strategies for Protecting Cultural Resources by Sherry Hutt, Marion P. Forsyth and David Tarlar (2005). Altamira Press.
- Protecting the Past edited by George S. Smith and John E. Ehrenhard (1991). CRC Press.
- Yearbook of Cultural Property Law 2007 edited by Sherry Hutt and David Tarlar (2007). Left Coast Press.