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CONSTITUTIONAL LAW: PRESERVING NATIVE AMERICAN CULTURAL AND ARCHEOLOGICAL ARTIFACTS

Robert L. Cooper

"An Act for the Preservation of American Antiquities" became law on June 8, 1906.¹ This act made it illegal for anyone to appropriate, excavate, or otherwise harm any "... historic or prehistoric ruin or monument, or any object of antiquity situated on Government lands . . ."² without the requisite permission granted by the designated Cabinet-level Secretary.³ Although this law, which is now Section 433 of Title 16 of the United States Code, has been on the books for seventy years, *United States v. Diaz*⁴ is the only case which has been reported in federal courts concerning this statute. In that case, Ben Diaz was initially convicted before a United States magistrate of appropriating an "object of antiquity" from government lands without permission. The land involved was the San Carlos Apache Reservation in Arizona, and the "objects of antiquity" were several ceremonial masks apparently made by reservation Native Americans. These masks had been hidden in a cave and had substantial religious significance to the Apaches.

The issue presented on appeal⁵ was whether the objects taken were in reality "objects of antiquity." In the first appeal⁶ (herein referred to as *Diaz I*), it was pointed out that the objects had been made in 1969 or 1970.⁷ This, the defense argued, precluded the objects from being "antiquities." However, the court accepted the testimony of a professor of anthropology at the University of Arizona that age should not be the sole determinant of whether something is an object of antiquity. Rather, the court stated, the use to which an item is put, its socio-religious importance, and its place in a people's cultural heritage are as much determinants of antiquity as age.⁸ In affirming the conviction in *Diaz I*, the court stated, "In such a case as this there can be no specific definite time limit as to when an object becomes an antiquity."⁹

Diaz appealed the district court decision to the Ninth Circuit Court of Appeals (*Diaz II*)¹⁰ on the issue of the district court's conception and definition of "object of antiquity." In a short opinion the circuit court reversed the district court on the grounds that the statute relied upon was unconstitutionally vague¹¹ and stated, "Nowhere do we find any definition of such terms as 'ruin' or 'monument' (whether historic or prehistoric) or 'object of antiquity.'"¹² How-

ever, in declaring the statute unconstitutional, the circuit court offered no guidance in arriving at a proper definition. The court (in *Diaz II*) obviously decided that a ceremonial mask made in 1969 or 1970 would not fit under the definition of "object of antiquity" as that term is commonly perceived. Apparently, to allow a mask of recent vintage to be declared an object of antiquity due to its socio-religious importance or its place in a people's cultural heritage would create a situation similar to that which the circuit court envisioned when they stated, "Hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles would arguably find themselves within the Act's proscriptions."¹³ The court presumed that bottles and other such items were not intended to be covered by the Act.

The intent of Congress in passing the Act is not clear. There was no debate in the Senate on the bill,¹⁴ and the only debated issue in the House was whether this Act would prevent public lands from being sold.¹⁵ In the House debate, however, it was stated that the bill was intended to cover cliff dwellers and cave dwellers of the Southwest and their ruins, monuments, objects of antiquity, and "other objects of special importance."¹⁶ The rules and regulations proscribed to carry out the provisions of the Act refer to ruins, archeological sites, monuments, structures, objects of antiquity, and ". . . other objects of historic or scientific interest."¹⁷ Clearly the masks involved in the *Diaz* case would fall within the definition of "other objects of historic or scientific interest." The problem is that these words, which would have given the statute broader coverage, were omitted from the literal language of the statute. The statute is literally limited to ruins, monuments, and objects of antiquity.¹⁸

It is possible, however, that the statute would still be unconstitutionally vague even with the inclusion of such language. Antique bottles and arrowheads would still qualify as objects of scientific or historical interest. A real need exists for statutory protection of Native American ruins, structures, objects of antiquity, and other objects or artifacts of archeological and/or cultural significance, but the difficulty lies in distinguishing between those objects which are of sufficient interest to deserve protection and those which are not or are of little real significance.

Several states have attempted to draw this line by statutory means. Colorado,¹⁹ New Mexico,²⁰ Arizona,²¹ Oklahoma,²² and other states have statutes which purport to have the same effect as Section 433 of Title 16 of the United States Code. The Oklahoma law, for example, states that

No person shall wilfully or knowingly break, break off, crack, carve upon, write, or otherwise mark upon, or in any manner damage, destroy, mutilate, deface, mar or harm any historic or prehistoric site, building, object, artifact or material in, around or upon any historic site owned, operated, managed or under the control of the Oklahoma Historical Society, and any person violating any of the provisions hereof shall be guilty of a misdemeanor and shall be punished by a fine of not to exceed Two Hundred Dollars (\$200.00) or by confinement in the county jail for not to exceed thirty (30) days or by both such fine and confinement.²³

Historic and prehistoric sites, buildings, objects, artifacts, and materials are protected by the terms of this law; surely Apache ceremonial masks would fall within this definition. The term "artifact" is a very useful word in this context. It connotes objects and materials, whether ancient or not, and is broad enough to encompass all man-made objects worthy of protection. The term "artifact" should certainly be included in any new law passed by Congress to remedy the unenforceability of this Act.

The passage of a new bill is imperative to insure the proper maintenance and preservation of Native American cultural and archeological items. If it is true that a people's present and future can best be understood by careful analysis of its past, then the preservation of items such as Apache ceremonial masks is vitally important. Just as important is the deterrence of "pot-hunting,"²⁴ which ruins thousands of archeological sites. Wanton excavation and appropriation of artifacts from a site results in the loss of valuable information concerning the lives of the makers of the artifacts. Archeological reconstruction of the past depends, to a great extent, on the finding and study of artifacts "in situ" or in place and their comparison with other artifacts in various levels of the dig and with artifacts from other sites. The archeologist builds a time sequence by digging through layers of earth;²⁵ amateur excavators disturb the location of artifacts and remove them from their place so that accurate time schedules are very difficult to create. Nothing is more disconcerting to an archeologist than to painstakingly study various levels of a site excavation, formulate theories, and then discover a beer can in the bottom layer. All the information acquired to that point would suddenly be very suspect if not completely worthless.²⁶

Pot-hunters are often proud of the fact that they may have a piece of Pre-Colombian statuary or a piece of ancient Native American pottery in their home or in a museum with their name on a plaque underneath.²⁷ The object may be extremely beautiful, but if it was

obtained without employing the proper archeological information-gathering procedure, the importance of that object as a useful tool with which to study man's past is practically worthless.

Thus, a new law replacing Section 433 is urgently needed to insure the protection of Native American and other archeological or anthropological items, whether ruins, monuments, objects of antiquity, modern ceremonial masks, or even antique bottles. The scope of the law must necessarily be broad for maximum protection²⁸—antique bottles may also provide valuable information. Oklahoma's statute or those of a few other states would provide excellent models for a new federal statute pertaining to American antiquities.

NOTES

1. June 8, 1906, c. 3060, § 1, 34 Stat. 225.
2. 16 U.S.C. § 433: "Any person who shall appropriate, excavate injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."
3. 16 U.S.C. § 432.
4. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973).
5. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).
6. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973). The appeal here was to the district court because Diaz elected to be tried before a magistrate. Appeal was to district court pursuant to 18 U.S.C. § 3401.
7. *Id.* at 856, 858.
8. *Id.*
9. *Id.*
10. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).
11. *Id.* at 113, 114.
12. *Id.*
13. *Id.*
14. 40 CONG. REC. 7331 (1906).
15. *Id.* at 7888.
16. *Id.*
17. "Uniform Rules and Regulations prescribed by the Secretaries of the Interior, Agriculture, and War to carry out the provisions of the 'Act for the Preservation of American Antiquities' approved June 8, 1906." Interior Dep't Rules and Regulations S. Doc. No. 396, pt. 1, p. 297-322, 59th Cong., 2d Sess., 1906-1907, v. 18, at 5085.
18. 16 U.S.C. § 433.
19. COLO. REV. STAT. ANN. § 24-80-409. (1973).
20. N.M. STAT. ANN. § 4-27-11 (1974).
21. 41 ARIZ. REV. STAT. ANN. §§ 841-46 (1974).
22. 53 OKLA. STAT. § 2A (1971).

23. 53 OKLA. STAT. § 2A(3) (1971).
24. Pot hunting is the excavation of archeological sites or parts thereof by persons untrained in the archeological discipline who do so merely for fun or profit.
25. F. HOLE & R. HEIZER, AN INTRODUCTION TO PREHISTORICAL ARCHAEOLOGY (1973).
26. *Id.*
27. Beals, *Traffic in Antiquities*, 36 AM. ANTIQUITIES 374-75 (1971) (deploring past museum practices of purchasing looted artifacts).
28. Ford, *Looting the Past: An International Scandal*, 174 SCIENCE 727 (1971) (deploring scope and effect of archeological looting worldwide).