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Spatial Dynamics of U.S. Cultural Resource Law

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ABSTRACT

The unequal distribution of cultural resources in the U.S. suggests that some bias should be expected in law applications. The spatial nature of archaeology requires consideration of varying artifact densities across broad cultural landscapes. For example, the archaeological record of the Southeast U.S. encompasses large and complex Mississippian ceremonial sites, mound complexes, and extensive prehistoric mortuaries that differ greatly from the dense distribution of well-preserved farming communities of the American Southwest or the widely dispersed rock shelters associated with hunter-gatherers in the Great Basin. Thus, the characteristic of the cultural resources themselves demands some degree of flexible legal treatment.

INTRODUCTION

The American Antiquities Act, Historic Sites Act, Archaeological and Historic Preservation Act, National Historic Preservation Act, American Indian Religious Freedom Act, Archaeological Resources Protection Act, Abandoned Shipwreck Act, and the Native American Graves Protection and Repatriation Act comprise the basis of our exploration of cultural resource legislation in the United States. Since the passage of the American Antiquities Act in 1906, 1,086 cases have been evaluated for these statutes in U.S. courts. We investigate temporal and regional patterns of the case law to establish whether these laws are sufficiently protected throughout the U.S. Our findings suggest that case law is complex and controlled by many factors, including equitable application.

METHODS

Relevant cultural resource management laws were identified, and then a listing of individual cases was created through the use of LexisNexis Academic and Westlaw. Data fields include case name, date, disposition of the resource (i.e., archaeology, architecture, landscape, and other), reason for legal action (i.e., compliance, taking, and other), State, case summary and holdings, U.S. Circuit Court district, and final ruling1. This database comprises the foundation of the resulting analysis. Temporal distributions for each statute were plotted alongside the total number of cases. The contingency table was created utilizing the numerical distribution of cases organized by statute and Federal Circuit Court district.

CONCLUSION

The trends in major cultural resource laws indicate disparate application of legislation associated with cultural resources. While a single piece of legislation—the ASA—appears to offer protection to a single type of cultural resource, the remaining seven statutes have been employed within each of the resource categories, indicating the multifaceted nature of legal challenges. The flexible nature of these statutes and endless attempts by lawyers to apply them to widely ranging problems regarding cultural resources provides unique litigation-based signatures for each of the U.S. Circuit Courts. This study demonstrates the diverse practical application of these eight statutes.

LITIGATION OF CULTURAL RESOURCES

In reviewing the history of litigation, resource-specific trends illustrate the highly variable use of these eight statutes. Legislation was correlated using the highest frequency of challenges by resource (Archaeology, Architecture, Landscape, Shipwreck, and Other) to demonstrate the resource most frequently protected by each statute. In sum, two statutes were found to correlate with archaeology (ARPA and NAGPRA), three with architecture (HSA, ARPA, and NHPA), one with landscapes (ASHA), one with shipwrecks (ASAR), and one with other (ARPA). In the case of the ARPA, other is most frequently correlated with religion.

DISCUSSION

The application of ARPA and NAGPRA correlates well with archaeology and landscape, but the number of cases in the category of other was unexpected. For ARPA, this category is comprised of litigation ranging in any use, including wrongful termination of mineral leases and illegal fishing activities to importation of osteo-depleting substances. For NAGPRA, the same category ranges from a Supreme Court case focused upon voter qualification for trustees at the Office of Hawaiian Affairs to a challenge by a non-native Hawaiian man alleging that the admissions policy of a private school violated civil rights law.

ARCHAEOLOGY

It was not unexpected that architecture and landscape would be the primary recipient of legal protections under the NHPA, and that compliance-based litigation comprised the bulk of the case law. For the NHPA, the other category contains three Supreme Court cases that include the suspension of deportation, recovery of attorney’s fees, and recovery of hospital fees related to Medicare reimbursement. The other category of the HSA contains cases ranging from the appealed conviction of traffic regulations within a national seashore to a sheriff’s department employee seeking judicial review of her termination based upon misconduct involving pay vouchers.

ARCHITECTURE

Those states that joined the union after the signing of the Antiquities Act were Arizona (1912), Alaska (1959), Hawaii (1959), New Mexico (1912), and Oklahoma (1907), all five of which were—and still are—host to large populations of Native Americans. In Arizona, Alaska, Hawaii, and New Mexico, Native American populations remain within or close to their traditional cultural landscapes, while Oklahoma represents a large portion of displaced lands due mostly to Andrew Jackson’s Indian Removal Act of 1838, and in part by the forced removal of Native Texans from Texas in 1839 by Mirabou B. Lamar, the President of the Republic of Texas at that time.

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The rising star of Texas

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