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Robert Z. Selden Jr. and C. Britt Boussard

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 character of the cultural resources themselves demands some degree of flexible legal treatment.

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 ruling. 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 case law organized by statute and Federal Circuit Court district.

The trends in major cultural resource laws indicate disparate application of legislation associated with cultural resources. While a single piece of legislation—a federal Act—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.

Knowing that these laws exist to protect the past is not enough. Only by following the evolutionary progression revealed in part by this study may we begin to truly comprehend the impact of cultural resource laws upon the practice of archaeology. This analysis ends not only with a plea for additional analyses, but for the education of our legal counterparts regarding legislation that protects cultural resources, and the consistent prosecution and enforcement of cultural resource laws since, to a large degree, the nature of research focused upon cultural resources in the United States is influenced by the enforcement of these statutes.

CONCLUSION

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 from fees to wrongful termination of mineral leases and illegal fishing activities to importation of bone-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 minor 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 Medicaid 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.

DISCUSSION

Those cases that joined the union after the signing of the Antiquities Act were Antonia (1912), Alaska (1959), Hawaii (1993), 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 number of displaced tribes 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 Mirabeau B. Lamar, the President of the Republic of Texas at that time.