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The Federal Cave Resources Protection Act of 1988 Statutory Overview

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STATUTORY OVERVIEW

THE FEDERAL CAVE RESOURCES PROTECTION ACT OF 1988

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I. INTRODUCTION

In the late 1980s, it was estimated that there were approximately 40,000 caves in the United States, a significant number of which were located on Federal lands.¹ In 1988, concerned that many of these caves were sustaining irreparable damage as a result of commercial exploitation, vandalism, and recreational abuse, and that existing laws were not adequately protecting cave resources,² Congress enacted the Federal Cave Resources Protection Act ("FCRPA" or the "Act").³

This article, which analyzes the Act and is designed to serve as a foundation piece, is divided into two parts. First, the article examines those provisions of the FCRPA and its implementing regulations addressing the management of significant caves, the

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1. S. Rep. No. 100-559, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5938, 5938. Over 4,200 caves are located on the lands of the Forest Service and Bureau of Land Management. *Id.*

2. *Id.* ("Concerns have been raised that vandalism, commercial exploitation and recreational abuse are causing damage and the loss of natural and cultural cave resources, and that present Federal law may be inadequate to comprehensively provide for the protection of cave resources.")

3. Federal Cave Resources Protection Act of 1988, Pub. L. No. 100-691, 102 Stat. 4546 (1988) (codified as amended at 16 U.S.C. §§ 4301-4310 (2000)).

disclosure of their locations, and the collection and removal of cave resources. The article then explores the criminal and civil penalty provisions of the Act.

II. MANAGEMENT AND DISCLOSURE OF SIGNIFICANT CAVES AND COLLECTION OF CAVE RESOURCES

The FCRPA has two stated purposes. One is “to secure, protect, and preserve significant caves⁴ on Federal lands for the perpetual use, enjoyment, and benefit of all people.”⁵ A second designated

4. 16 U.S.C. § 4301(b)(1). Although the Act does not define a “significant cave,” it defines a “cave” as:

any naturally occurring void, cavity, recess, or system of interconnected passages which occurs beneath the surface of the earth or within a cliff or ledge (including any cave resource therein, but not including any vug, mine, tunnel, aqueduct, or other manmade excavation) and which is large enough to permit an individual to enter, whether or not the entrance is naturally formed or manmade. Such term shall include any natural pit, sinkhole, or other feature which is an extension of the entrance.

Id. § 4302(5). The phrase “cave resource” is defined as “any material or substance occurring naturally in caves on Federal lands, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens and speleothems.” *Id.* § 4302(5). *See generally* Robert W. Malmsheimer & Alisa S.H. Hilfinger, *In Search of a Paleontological Resources Policy for Federal Lands*, 43 NAT. RESOURCES J. 587, 593-94 (2003) (noting that the FCRPA is one of three federal statutes which protect paleontological resources in certain conditions). A “speleothem” is “any natural mineral formation or deposit occurring in a cave or lava tube, including but not limited to any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.” *Id.* § 4302(7). A “speleogen” consists of “relief features on the walls, ceiling, and floor of any cave or lava tube which are part of the surrounding bedrock, including but not limited to anastomoses, scallops, meander niches, petromorphs and rock pendants in solution caves and similar features unique to volcanic caves.” *Id.* § 4302(8).

5. 16 U.S.C. § 4301(b)(1).

purpose is “to foster increased cooperation and exchange of information between governmental authorities and those who utilize caves located on Federal lands for scientific, education, or recreational purposes.”⁶ The Act further provides that it is the government’s policy that “Federal lands be managed in a manner which protects and maintains, to the extent practical, significant caves.”⁷ To assist in implementing its provisions, the Act also directed the Departments of the Interior and Agriculture to create regulations consistent with FCRPA’s purpose.⁸

The FCRPA gives the Secretaries of the Interior and Agriculture the authority to manage significant caves and cave resources within their respective jurisdictions.⁹ The Act directs that they identify significant caves on lands owned by the United States.¹⁰ Regulations subsequently promulgated by the Departments of Agriculture and the Interior¹¹ provide that for a cave to qualify as “significant,” it must possess at least one of the following characteristics, values or features: (i) biota; (ii) cultural; (iii) geologic/mineralogic/paleontologic; (iv) hydrologic; (v) recreational; or (vi) educational or scientific.¹² Caves located in special

6. *Id.* § 4301(b)(2).

7. *Id.* § 4301(c); *see also* Jacob A. Kramer, Note, *Preventing the Destruction of America’s Cave Resources: Enforcing Cave Protection Legislation Against Vandals and Other Profiteers*, 9 ENVTL. LAW. 725, 729 (2003) (“The Act . . . endeavors to provide regulated access to caves for scientific, educational, or recreational purposes, while protecting the integrity of significant cave resources from these and other threats.”) (footnote omitted).

8. 16 U.S.C. § 4303(a); *see also* Kramer, *supra* note 7, at 731 (discussing issuance of regulations by the Department of the Interior in 1993 and the Department of Agriculture in 1994)

9. *Id.* §§ 4302(6), 4303.

10. *Id.* §§ 4303(a), 4303(b)(1).

11. Consistent with the Congressional directive, the regulatory criteria of the Departments of Agriculture and the Interior for designating a significant cave do not differ. *See* 16 U.S.C. § 4303(a) (“The secretaries shall cooperate and consult with one another in preparation of the regulations. To the extent practical, regulations promulgated by the respective Secretaries should be similar.”).

12. 43 C.F.R. § 37.11(c)(2004); 36 C.F.R. § 290.3(c)(2005).

management areas are also deemed significant for purposes of the Act.¹³

In managing significant caves, the Secretaries may restrict or regulate their use as appropriate, enter into volunteer management agreements with members of the recreational and scientific community, and appoint advisory committees.¹⁴ In addition, they must consider any significant cave in the implementation or preparation of any land management plan began after enactment of the Act and “foster communication, cooperation, and exchange of information between land managers, those who utilize caves, and the public.”¹⁵

With respect to the location of significant caves, the Act and its implementing regulations provide that such information should generally not be made available to the public under the Freedom of Information Act unless disclosure “would further the purposes of [the Act] and would not create a substantial risk of harm, theft, or destruction of such cave.”¹⁶ Accordingly, the Secretaries may provide identifying information regarding significant caves to bona fide research and educational institutions, as well as state or federal governmental agencies, provided that the requester, at a minimum, describes the area or site for which the information is sought, explains why the information is needed, and provides satisfactory assurances that adequate measures will be undertaken to protect the confidentiality of the information and the security of the significant cave from destruction.¹⁷ Administrative decisions regarding

13. 43 C.F.R. § 37.11(e) (“Within special management areas that are designated wholly or in part due to cave resources found therein, all caves within the so-designated special management area shall be determined to be significant.”); 36 C.F.R. § 290.3(d) (“All caves located within special management areas . . . that are designated wholly or in part due to cave resources found therein are determined to be significant.”). The Department of the Interior’s regulations further provide that “all caves on National Park Service-administered lands are deemed to fall within the definition of ‘significant cave.’” 43 C.F.R. § 37.11(d).

14. 16 U.S.C. § 4303(b)(2)-(4).

15. *Id.* § 4303(c)(1)-(2).

16. *Id.* § 4304(a). *See* 43 C.F.R. § 37.12(a); 36 C.F.R. § 290.4(a).

17. 16 U.S.C. § 4304(b)(1)-(3). *See* 43 C.F.R. § 37.12(b); 36 C.F.R. § 290.4(b).

confidential cave information are final and not subject to appeal under the Freedom of Information Act.¹⁸

Lastly, the Secretaries are authorized to issue permits for the removal and collection of cave resources, provided that such action is "consistent with the purposes of [the Act,] and with other applicable provisions of law."¹⁹ Any permit that is issued must be revoked if the permittee violates the Act or any condition under which the permit was issued.²⁰ The imposition of criminal or civil penalties under the Act, discussed below, will also result in the revocation of a permit.²¹

In the case of cave resources located on Indian lands, upon application by the tribe, the Secretaries are authorized to delegate all authority relating to the issuance and enforcement of permits to the tribe.²² Permits sought for collection and removal of cave resources that are located on Indian lands, and for which the affected tribe has not sought delegation of authority, "may be issued only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands."²³

In 1990, Congress directed the Secretary of the Interior to establish a "Cave Research Program" and also to examine the feasibility of a centralized research institute.²⁴ Part of the mission of the program

18. 43 C.F.R. § 37.12(c); 36 C.F.R. § 290.4(c).

19. 16 U.S.C. § 4305(a)(2).

20. *Id.* § 4305(b).

21. *Id.* The Secretaries may refuse to issue a permit to anyone who has violated the Act, "or who has failed to comply with any condition of a prior permit." *Id.* § 4305(b). Any monies collected as a result of permit fees, the revocation of a permit, or the imposition of criminal or civil penalties are to be segregated in a special fund and be available for the management and repair of significant caves as provided for in appropriation acts. *Id.* § 4308(c).

22. *Id.* § 4305(d)(1)(A).

23. *Id.* § 4305(d)(1)(B). The FCRPA also makes clear that it does not affect any water rights, responsibilities, or jurisdiction of states, with respect to fish and wildlife. *Id.* §§ 4309(a), 4309(b).

24. An Act to Conduct Certain Studies in the State of New Mexico, Pub. L. No. 101-578, 104 Stat. 2859 (1990) (codified at 16 U.S.C. §§ 4310(a), 4310 note); National Park Service Cave and Karst Program, Federal Acts & Regulations, available at http://www2.nature.nps.gov/geology/caves/acts_regs..

entailed the undertaking of “a comprehensive evaluation of cave resources and measures needed for their protection.”²⁵ Work on an institute began in earnest in 1992 with experts from the government, the private sector, and academe in the fields of karst,²⁶ cave, and related natural sciences getting together.²⁷ A feasibility study was completed in December 1994, and in 1998, Congress authorized the establishment of the National Cave and Karst Research Institute in New Mexico (the “Institute”).²⁸

The National Park Service (NPS) has the lead role in establishing the Institute.²⁹ The purpose of the Institute, to be located in Carlsbad, New Mexico, is to advance the science of speleology, standardize and centralize speleological information, promote public education in the field, and develop and promote interdisciplinary cooperation in cave and karst research programs, as well as sound environmental resource management practices.³⁰ In carrying out this mission, the Institute may seek to promote international cooperation

25. *Id.* § 4310(b).

26. “Karst” has been defined “as a landform typified by sinkholes, caves, dry valleys, fluted rocks, enclosed depressions, underground stream-ways, and spring resurgences.” National Cave and Karst Research Institute Study Report to Congress, at 5 (Dec. 1994) [hereinafter “Report to Congress”]. Common land form features include springs, caves, underground water courses, and sinkholes, “all of which are formed as rainwater seeps downward through cracks and between layers of limestone, combining with carbon dioxide (from the atmosphere, and from decaying plant matter) to create a weak solution of carbonic acid that dissolves the limestone.” *Id.*

27. 16 U.S.C. § 4305(a)(2).

28. *See* National Cave and Karst Research Institute Act of 1998, Pub. L. No. 105-325, 112 Stat. 3038-39 (1998) (codified in 16 U.S.C. §4310 note); Zelda Chapman Bailey, National Cave and Karst Research Institute – History, Status, and Future, in U.S. Geological Survey Water-Resources Investigations Report 01-4011 (Feb. 13-16, 2001) available at http://water.usgs.gov/ogw/karst/kigconference/zcb_nationalcave.htm.

29. *See* National Cave and Karst Research Institute, 2003 Annual Report, at 10.

30. National Cave and Karst Research Institute Act of 1998, §§ 2(1)-(4), (6), 3(c).

in protecting the environment so as to benefit karst and cave landforms.³¹ In December 2002, the Institute appointed its first director.³² In February 2003, NPS signed a memorandum of understanding with the New Mexico Institute of Mining and Technology and the City of Carlsbad establishing a basis for cooperation among the parties with respect to the development and management of the Institute.³³

III. THE CRIMINAL AND CIVIL PENALTY PROVISIONS

The FCRPA subjects a criminal defendant to a possible fine and imprisonment in the event of conviction.³⁴ Three types of conduct are criminally proscribed under the Act.³⁵ First, the FCRPA generally prohibits the destruction, disturbance, or alteration of any significant cave, the alteration of the free movement of any plant or animal life into or out of a significant cave, or the attempt to do the same.³⁶ The Act next prohibits the possession, sale, barter, exchange

31. *Id.* § 2(5).

32. See Press Release, National Park Service, National Cave and Karst Research Institute Gets First Permanent Director (Dec. 23, 2002), available at <http://data2.itc.nps.gov/release/Detail.cfm?ID=348> (last visited Dec. 6, 2005).

33. See National Cave and Karst Research Institute, 2003 Annual Report, at 10.

34. FCRPA's criminal provisions do not explicitly provide for restitution. The Victim and Witness Protection Act ("VWPA"), however, grants a district court discretion to order restitution in the case of certain specified offenses. Although offenses under FCRPA are not identified under that act, VWPA grants district courts the discretion to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3) (1982) (emphasis added). Therefore, when a *plea* involving a violation under the FCRPA is at issue, a court may order restitution to the extent that it is agreed to by the parties.

35. 16 U.S.C. § 4306 (1988). With respect to the prohibition against possession of a cave resource from a significant cave, the Act exempts any lawful possession occurring prior to November 18, 1988. *Id.* § 4306(a)(4).

36. *Id.* § 4306(a)(1).

(or the offer to do the same), of any cave resource.³⁷ Lastly, counseling, procuring, soliciting, or employing any person to violate any of the aforementioned prohibitions is also a violation under the Act.³⁸

To affix criminal liability, these offenses must be undertaken "knowingly."³⁹ The maximum penalty under the FCRPA, in the case of a first violation, is a \$100,000 fine and one year in jail.⁴⁰ The maximum penalty for a subsequent offense is a \$250,000 fine and three-years' imprisonment.⁴¹

Other federal statutes may come into play in a prosecution involving the FCRPA. For example, charges may also be brought under the theft and/or destruction of government property statutes.⁴² If "found in an archaeological context," damages to paleontological specimens in a cave also could lead to criminal liability under the Archaeological Resources Protection Act.⁴³

In the regulatory context, Department of Agriculture regulations also provide for criminal penalties for certain offenses relating to caves or cave resources.⁴⁴ The maximum penalty for these regulatory violations for an individual is six-months' imprisonment and a \$5,000 fine, or a fine based upon twice the pecuniary loss or gain from the offense.⁴⁵ The Bureau of Land Management also may issue closure and restriction orders with respect to cave resources within its jurisdiction.⁴⁶ The maximum penalty for a violation of

37. *Id.* § 4306(a)(2).

38. *Id.* § 4306(a)(3).

39. *See id.* § 4306(a).

40. 16 U.S.C. § 4306(b); 18 U.S.C. § 3571(b)(5) (2000).

41. 16 U.S.C. § 4306(b); 18 U.S.C. § 3571(b)(3). In certain circumstances, restitution may also be available. *See supra* note 34.

42. *See* 18 U.S.C. §§ 641, 1361 (2000).

43. 16 U.S.C. §§ 470bb(1), 470ee(a). This means that the specimens must be at least one hundred years old and have been worked on by humans. *Id.* § 470bb(1).

44. 36 C.F.R. §§ 261.8(e), 261.9(j), 261.10(d)(3), 261.10(o) (2005).

45. 18 U.S.C. §§ 3559(a)(7), 3571(b)(6), 3571(d); 36 C.F.R. § 261.1(b).

46. *See* EMS Information Bulletin No. ID-99-210 (Sept. 30, 1999), available at <http://www.blm.gov/nhp/efoia/id/data/99-210.htm>.

such an order or restriction for an individual is one year in jail and a \$100,000 fine, or a fine based upon twice the pecuniary loss or gain from the offense.⁴⁷ If paleontological resources are involved, violators also may be subject to criminal penalties under the National Park Service's regulations.⁴⁸ Generally, the maximum penalty for an individual will be a \$5,000 fine, or a fine based on twice the pecuniary loss or gain from the offense, and a six month sentence.⁴⁹

The FCRPA also provides for the imposition of civil penalties for violations of the Act, its implementing regulations, or any duly issued permit.⁵⁰ The maximum penalty is \$10,000 per violation.⁵¹ Prior to the imposition of a penalty, a putative violator must be served with a written notice of the violation and advised of his right to request a hearing.⁵² Furthermore, in connection with such proceedings, the Secretaries may issue subpoenas to secure the attendance of witnesses and the production of records.⁵³ In assessing a penalty, the Secretaries must take into account all appropriate factors, including any economic benefit from the violation, the seriousness of the violation, and any history of prior violations.⁵⁴

A person aggrieved by the assessment of a civil penalty may seek judicial review in the United States District Court for the District of

47. 18 U.S.C. §§ 3559(a)(6), 3571(b)(5), 3571(d); 43 C.F.R. §§ 8360.0-7, 8364.1 (2004). *See generally* Kramer, *supra* note 7, at 750 (“Cave vandals can also be prosecuted for violating Bureau of Land Management . . . closure orders.”)

48. 36 C.F.R. §§ 2.1(a)(1)(iii), 2.1(a)(1)(iv) (2005) (making it unlawful to destroy, injure, remove deface, dig or otherwise disturb from its natural state “paleontological specimens” or a “cave formation or the parts thereof.”)

49. 18 U.S.C. §§ 3559(a)(7), 3571(b)(6), 3571(d); 36 C.F.R. §§ 1.3(a) (2005), 36 C.F.R. §§ 2.1(a)(1)(iii)-(iv).

50. 16 U.S.C. § 4307(a).

51. *Id.* §§ 4307(a)(1)-(2).

52. *Id.* § 4307(a)(1). Unlike the Archaeological Resources Protection Act or the Bald and Golden Eagle Protection Act, there are no regulations governing the imposition of civil penalties under FCRPA. *See* 43 C.F.R. §§ 7.15-16 (2005); 50 C.F.R. § 11 (2005).

53. 16 U.S.C. § 4307(d).

54. *Id.* § 4307(a)(2).

Columbia or the district where the violation occurred.⁵⁵ If the putative violator does not appeal and does not pay the assessed civil penalty within 30 days of the issuance of the order, the Secretaries may request the Attorney General to institute a civil action to collect the penalty (plus costs and attorney's fees).⁵⁶ In such an action, neither the amount nor the validity of the penalty assessed is subject to judicial review.⁵⁷

Lastly, in discussing the civil penalty provision, it bears noting that, unlike the criminal penalty provision, "knowledge" is irrelevant in establishing a violation under Section 4307.⁵⁸ Secondly, with respect to timing, 28 U.S.C. § 2462,⁵⁹ which governs actions, suits, or proceedings for the enforcement of civil penalties, may also provide a time limitation for the commencement of administrative proceedings seeking to impose civil penalties under the FCRPA.⁶⁰

55. *Id.* § 4307(b). A petition seeking judicial review must be filed within 30 days of the date of the order assessing the penalty. *Id.* § 4307(b).

56. *Id.* § 4307(c).

57. *Id.* § 4307(c).

58. *But cf.* *United States v. Lynch*, 233 F.3d 1139, 1145 (9th Cir. 2000) (contrasting the statutory "knowing" requirement in the criminal prohibition, found in the Archaeological Resources Protection Act, with the civil prohibition, which did not contain such a requirement).

59. 28 U.S.C. §2462 (1948) states:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

60. Some courts have construed Section 2462's limitations period to apply to the initiation of administrative proceedings that seek to impose civil penalties. *See, e.g., Arch Mineral Corp. v. Babbitt*, 104 F.3d 660 (4th Cir. 1997) (reviewing administrative action by Office of Surface Mining Reclamation and Enforcement ("OSM") linking a corporation to a company which owed delinquent abandoned mine land penalties and fees to OSM and denying OSM's enforcement

If a cave or cave resource within the National Park system is damaged or destroyed, the Secretary of the Interior also may request the Attorney General to file a civil action against the responsible party for “response costs and damages.”⁶¹ In doing so, the Secretary also is directed to take all “actions necessary to prevent or minimize the destruction, loss of, or injury” to the resource.⁶²

IV. CONCLUSION

Cave and karst structures and systems are important natural resources.⁶³ In the United States, twenty-two percent of freshwater

action on statute of limitation grounds); *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (involving a review of Environmental Protection Agency’s assessment of civil penalties for violations of Toxic Substances Control Act and barring the imposition of those penalties in light of the limitations period in Section 2462). Although Section 2462 does not define the term “penalty,” it has been interpreted judicially to mean “a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant’s action.” *Johnson v. S.E.C.*, 87 F.3d 484, 488 (D.C. Cir. 1996); *accord Proffitt v. F.D.I.C.*, 200 F.3d 855, 860 (D.C. Cir. 2000); *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998). However, if the amount recoverable under the FCRPA’s civil penalty provision is considered remedial in nature, rather than penal, the limitations period under Section 2462 may not control. *Cf. SEC v. Lorin*, 869 F. Supp. 1117, 1122-23 (S.D.N.Y. 1994) (holding that disgorgement is not a “fine, penalty, or forfeiture” within the meaning of Section 2462, because such a sanction is “strictly remedial”); *see also Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) (discussing the meaning of “penalty” under Section 2462’s predecessor).

61. 16 U.S.C. §§ 19jj-1, 19jj-2 (2004). *See NPS Digest, First Civil Park System Resource Protection Act Case Tried in Court* (Nov. 18, 2005) available at <http://data2.itc.nps.gov/digest/printheadline.cfm?type=Incident&id=2340>.

62. 16 U.S.C. § 19jj-2(b)(1).

63. *See Report to Congress, supra note 26*, at 1 (“Cave and karst systems are vital to humankind in myriad ways.”); *Federal Cave Resources Protection Act and Restriction of Dams in Parks and*

resources are connected in groundwater karst and cave regions.⁶⁴ In addition, caves provide invaluable information about human history, evolution, and global climate change.⁶⁵ Some caves are also home to endangered species.⁶⁶ While there are no reported cases addressing the FCRPA's criminal or civil penalty provisions, its enactment is a clear indication that Congress is concerned about the preservation of cave resources. In conjunction with other laws, the Act can be used to accomplish that goal.

Monuments: Hearing Before the Subcomm. on Public Lands, Nat'l Parks and Forests of the S. Comm. on Energy and Natural Res., 100th Cong. 119 (1988) (statement of Dr. George N. Hubbert, President, American Cave Conservation Association (“[C]aves are extremely fragile and valuable natural resources. They can be hydrologically significant to the quality of ground water. They are a mirror of the regional surface geology.”)).

64. See Report to Congress, *supra* note 26, at 1.

65. *Id.* (“Caves also serve as rich storehouses of information about . . . human history, evolution, and global climate change – not to mention such current concerns as waste disposal, petroleum recovery, and biomedical investigations.”).

66. *Federal Cave Resources Protection Act and Restriction of Dams in Parks and Monuments: Hearing Before the Subcomm. on Public Lands, Nat'l Parks and Forests of the S. Comm. on Energy and Natural Res., 100th Cong. 119 (1988) (statement of John Scheltens, President-Elect, National Speleological Society, Inc. (“Some caves house sensitive and endangered life forms, endangered species and very sensitive types of life forms that can only grow and live in a dark environment.”)).*