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Cultural Properties Act - Turley v. State and the New Mexico Cultural Properties Act: A Matter of Interpretation

Paula Kavanagh

CULTURAL PROPERTIES ACT—Turley v. State and the New Mexico Cultural Properties Act: A Matter of Interpretation

I. INTRODUCTION

In *Turley v. State*,[1] a case of first impression in New Mexico, the New Mexico Supreme Court addressed the problem of the proper construction of N.M. Stat. Ann. § 18-6-11(A–D) (Repl. Pamp. 1980), which is a portion of the New Mexico Cultural Properties Act. The issue before the court was whether the statute requires a permit for the excavation, by means of mechanical earth-moving equipment, of archaeological sites on private lands when the owner of such lands hires another to do the excavation. The supreme court, overruling a court of appeals decision,[2] applied agency principles and held that the owner could hire another to excavate in his stead without an excavation permit.

The decision of the supreme court in *Turley,* although true to the principles of agency law, appears to be in direct conflict with the purpose of the Cultural Properties Act.[3] This Note first considers how the *Turley* case arose, and next discusses the opinions of the New Mexico Court of Appeals and the Supreme Court. In order to place the problem in a wider perspective, the author then provides some archaeological background. In conclusion, some suggestions are made which might resolve the problems that could arise because of the wording of the statute.

II. STATEMENT OF THE CASE

This case arose in response to the excavation, allegedly with mechanical earth-moving equipment[4] but without a permit, of an archaeological site on privately owned land. Jim and Eleanor Williams were owners of property located in Catron County, New Mexico. Clarence "Frank" Turley, the defendant, entered into a contract with the landowners to conduct excavations on their property.[5] The state brought charges against Mr.

1. 96 N.M. 579, 633 P.2d 687 (1981).

2. State v. Turley, 96 N.M. 592, 633 P.2d 700 (Ct. App. 1981).

3. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980) defines the purpose as the preservation of the historical and cultural heritage of the state.

4. Both sides stipulated that mechanical earth-moving equipment was at the excavation site. District Court Transcript of Proceedings at 73, lines 3–6 [hereinafter cited as Record] (Available at the University of New Mexico Law School library).

5. The contract signed by Mrs. Eleanor Williams, Mr. Jim Williams, Mr. Frank Turley, and Mrs. Helen Turley read:

> It is hereby agreed and understood that for Ten Dollars ($10.00) and other valuable

Turley under the New Mexico Cultural Properties Act,[6] alleging use of mechanical earth-moving equipment on an archaeological site without a permit. The Act requires any person who is not the owner of an archaeological site to obtain a permit prior to using mechanical earth-moving equipment on the site when the purpose of the excavation is to collect or remove archaeological artifacts.[7] Mr. Turley relied upon principles of agency law and alleged that as an agent of the landowner, the Act did not require him to obtain a permit because section 11(D) exempts the landowner from that requirement.[8]

III. PROCEDURAL HISTORY

The case came before Judge Marshall in Catron County District Court. The court never heard the case on its merits, although Judge Marshall listened to testimony from New Mexico State Senator I. M. Smalley.[9] This testimony focused on the senator's belief concerning the purpose of the New Mexico Legislature in enacting the Cultural Properties Act.[10]

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considerations, receipt of which is hereby acknowledged, Frank Turley shall perform certain excavation work, by hand and by mechanical earth moving equipment on the Eleanor Williams Ranch, South of Quemado, New Mexico. This work shall be performed for and under the personal supervision of Mrs. Eleanor Williams, and, or, Mr. Jim Williams, of Quemado, New Mexico.

. . . .

It is hereby expressly understood that all proceeds, artifacts and resultant material from the excavation shall be the sole property of the land owner, Mrs. Williams.

Copy of Williams–Turley contract as filed with New Mexico Court of Appeals.

6. N.M. Stat. Ann. §§ 18-6-1 to -17 (Repl. Pamp. 1980) [hereinafter sometimes cited as the Act].

7. N.M. Stat. Ann. § 18-6-11(A) (Repl. Pamp. 1980) reads as follows:

A. It is unlawful for any person to excavate with the use of mechanical earth moving equipment an archaeological site for the purpose of collecting or removing objects of antiquity when such archaeological site is located on private land in this state, unless such person has first obtained a permit issued pursuant to the provisions of this section for such excavation. As used in this section an "archaeological site" means a location where there exists material evidence of the past life and culture of human beings in this state and includes the sites of burial and habitats of human beings: Indians, Spanish, Mexican and other early inhabitants of this state.

8. N.M. Stat. Ann. § 18-6-11(D) (Repl. Pamp. 1980). See *infra* text accompanying note 30 for the substance of the statute.

9. Senator Smalley had been involved with the passage of the Cultural Properties Act: he had sponsored the Act and had been directly responsible for the addition of subsection (D) to N.M. Stat. Ann. § 18-6-11 (Repl. Pamp. 1980). Record at 39, lines 19–25.

10. Senator Smalley testified that "the whole intent of the amendment [subsection (D) of N.M. Stat. Ann. § 18-6-11] was to make the bill protective so far as the owner of the land was concerned." Record at 50, lines 11–13. In response to the question "Is it fair then to sum up your testimony that if a private owner of land wishes to have a cultural property excavated by anyone that section 18-6-11 does not apply as far as controls or attempting to determine whether that excavator is qualified and will do a workmanlike job?," Senator Smalley replied: "I—no, I don't think it goes that far. The use of equipment that would be destructive to the antiquities, of the pots, is still prohibited, in my opinion." Record at 52, lines 23–25; Record at 53, lines 1–5. Earlier, the court had asked Ms. Jill Cooper, one of the attorneys for the prosecution, if she, as a person who had

Although the state archaeologist was present and was prepared to testify, Judge Marshall did not allow him to do so. When Senator Smalley completed his testimony the judge ruled, as a matter of law, that the defendant had acted as an agent of the landowner and was exempt from prosecution for failure to obtain a permit. Judge Marshall dismissed the case following this decision.[11]

The state appealed the district court's ruling. The New Mexico Court of Appeals reversed the lower court's dismissal of the criminal information, remanded the case, and ordered that it be reinstated upon the trial docket.[12] The court held that the common law rule that the term "owner" included the owner's agent was inapplicable in this case. The court reasoned that because the statute expressly stated that the owner was not required to obtain a permit for "personal excavations,"[13] a permit must be required for excavations which the owner did not perform personally (that is, by means of an agent). Mr. Turley then brought the matter before the New Mexico Supreme Court which reversed the court of appeals, finding that Turley was "an agent of the land owner" who had acted "solely on his behalf and under his control."[14] The supreme court then held that because Turley acted as an agent of the landowner, he was not required to obtain a permit under the Cultural Properties Act.

IV. DISCUSSION AND ANALYSIS

A. The Cultural Properties Act

The New Mexico statutes are clear concerning the purpose for which the New Mexico Legislature enacted the Cultural Properties Act. The Act defines the purpose to be the preservation of the historical and cultural

helped draft the bill, believed the landowner was excluded from obtaining a permit if he engaged someone to do the digging. Her response was clear and unequivocable:

> In my opinion it doesn't. If it did, then the bill would be meaningless.
>
> The intent of the state, as you correctly put it from the bench, is that the state has an interest in making sure that excavating done should be done properly and the exceptions should be limited as much as possible to a man on his own land digging his own pots personally, himself, with nobody else interfering. If he engages someone to do it, a professional digger who is using earth-moving equipment, the state is then requiring that person to submit a plan, to prepare a report and to do the digging according to proper archaeological methods. Otherwise, there would be no—the intent of the statute would be subverted every time. In order for the state to be able to protect the archaeological site, it should be read as broadly as possible to require a permit excepting in the very narrow situation where the owner, himself, is personally—and I think that is why the "personally" might be in there, is digging themselves [sic] with his own equipment. Record at 41, lines 9–25; Record at 42, lines 1–2.

11. Record at 70, lines 10–22.
12. 96 N.M. at 598, 633 P.2d at 706.
13. *Id.* at 595, 633 P.2d at 703.
14. 96 N.M. at 581, 633 P.2d at 689.

heritage of the state.[15] The subsection at issue in *Turley,* section 18-6-11(D),[16] is an exception which the legislature inserted with the intention of protecting the rights of the property owner.[17]

The provisions of the Act place the greatest emphasis upon protecting significant sites on state land[18] or significant sites on private land that the cultural properties review committee has declared to be registered cultural properties. If the committee considers that a "cultural property is worthy of preservation and inclusion on the official register . . . ,"[19] the committee has a number of options available for the protection of the privately owned cultural property. The committee may recommend that the state acquire the property either by negotiated purchase, condemnation, or the right of eminent domain;[20] it may advise the community in which the site is located how to zone the area as a historic area or district; or the committee may advise the community to invoke the right of eminent domain to gain control of such property.[21]

Not all sites warrant the protection provided by inclusion on the official register of significant cultural properties. The Act, however, envisions the preservation of all "antiquities, historic and prehistoric ruins, sites, structures, objects and similar places and things for their scientific and

15. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980) provides as follows:

> The legislature hereby declares that the historical and cultural heritage of the state is one of the state's most valued and important assets; that the public has an interest in the preservation of all antiquities, historic and prehistoric ruins, sites, structures, objects and similar places and things for their scientific and historical information and value; that the neglect, desecration and destruction of historical and cultural sites, structures, places and objects results in an irreplaceable loss to the public; and that therefore it is the purpose of the Cultural Properties Act [§ 18-6-1 to § 18-6-17 N.M. Stat. Ann. 1978] to provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state, in a manner conforming with, but not limited by, the provisions of the National Historic Preservation Act of 1966 (P.L. 89-665).

16. *See infra* note 30 for the partial text of § 18-6-11(D).

17. Testimony of Senator I. M. Smalley, Record at 50, lines 11–13.

18. The Act establishes a "cultural properties review committee" whose primary concern is to review proposals for the preservation of cultural property. N.M. Stat. Ann. § 18-6-4(A), § 18-6-5 (Repl. Pamp. 1980). Among the enumerated powers of the committee is the option to issue permits which authorize the applicant to excavate archaeological sites on state land. The permits also allow the applicant to collect and remove items of antiquity or general scientific interest found there. The State archaeologist must agree to the issuance of these permits. N.M. Stat. Ann. § 18-6-5(O) (Repl. Pamp. 1980). The additional requirements under which the committee issues permits assure that only persons with the training and ability to excavate according to accepted standards are granted the permit and that such persons keep adequate records and properly preserve for future generations the artifacts collected. For those who ignore the prohibition against archaeological excavation on state property without a permit, the legislature has provided legal sanctions of a fine of not more than $500.00, imprisonment for not more than 90 days, or both, and forfeiture of all articles discovered. N.M. Stat. Ann. § 18-6-9(A), (B), (C) (Repl. Pamp. 1980).

19. N.M. Stat. Ann. § 18-6-10 (Repl. Pamp. 1980).

20. *Id.*

21. *Id.*

historical information and value."[22] This purpose is in agreement with the legislative declaration that an irreplaceable loss occurs when such sites are neglected, desecrated, or destroyed.[23] The legislature declared that its purpose was to discourage (not prohibit) field archaeology on private lands and to encourage reporting of such sites to the cultural properties review committee.[24] The same statute also allows the state to provide technical assistance to "the owner who is willing to restore, preserve and maintain the cultural property."[25]

The professional practice of field archaeology precludes the use of mechanical earth-moving equipment except in extreme cases to remove "overburden."[26] The legislature apparently intended to protect archaeological sites on private land from heavy equipment because the Act provides that:

> It is unlawful for any person to excavate with the use of mechanical earth moving equipment an archaeological site for the purpose of collecting or removing objects of antiquity when such archaeological site is located on private land in this state, unless such person has first obtained a permit issued pursuant to the provisions of this section for such excavation.[27]

The committee will approve the issuance of a permit to excavate private land when the applicant has: (1) the State archaeologist's approval; (2) the written consent of the landowner; (3) furnished acceptable evidence that he is qualified to "dig" in such a manner; (4) submitted a satisfactory plan of excavation and indicated the methods that he will use; and (5) guaranteed that at the completion of the project, he will provide the committee with a summary report containing relevant maps, drawings, photographs, and documents together with a description of all artifacts removed from the excavations.[28]

In the attempt to discourage field archaeology on private lands, the legislature has provided that anyone violating the provisions of the Act is guilty of a misdemeanor and may be punished by a fine of up to $1,000.

22. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).

23. *Id.*

24. N.M. Stat. Ann. § 18-6-10(A) (Repl. Pamp. 1980).

25. N.M. Stat. Ann. § 18-6-10(C)(1) (Repl. Pamp. 1980).

26. "Overburden" is an excessive depth of soil covering a deeply buried site. Even when an excavator uses heavy earth-moving equipment to remove overburden, he uses it with utmost care and shifts to manual labor to remove the balance of the overburden well before he reaches the soil layer containing cultural remains. Excavators also use mechanical earth-moving equipment in salvage archaeology where they must excavate a site in minimal time because of imminent destruction by other forces.

27. N.M. Stat. Ann. § 18-6-11(A) (Repl. Pamp. 1980). Although § 18-6-11(D) exempts the landowner from the need to obtain a permit, this exemption does not necessarily subvert the intent of the legislature to protect archaeological sites. *See infra* text accompanying note 78.

28. N.M. Stat. Ann. § 18-6-11(B) (Repl. Pamp. 1980).

In addition, anyone convicted of such violation shall forfeit to the state all equipment used in committing the violation.[29]

B. Section 18-6-11(D)

The possibility of divergent interpretations arises in two places in section 18-6-11(D).[30] First, the statement that "[N]othing in this section shall be deemed to limit or prohibit the use of the land . . . by the *owner* of such land" is ambiguous. It is unclear if "owner" means the "owner" *qua* owner or if it means the owner or his appointed agent. Second, the phrase "or to require such owner to obtain a permit for personal excavation on his own land" is also ambiguous. "Personal" in this instance may mean such excavation as is physically done by the owner himself or it may mean excavation initiated by him but done under his personal supervision.

The court of appeals looked to the statute and read the provisions that exempt the owner from obtaining a permit for his personal excavation as clearly indicative that the meaning of "owner" excluded "agent." Relying in part on Webster's Third New International Dictionary (1966), the court of appeals stated: "The common meaning of 'personal,' which we apply, is 'done in person without the intervention of another . . . relating to oneself.' [citation omitted] This statutory requirement of 'personal' excavation cannot be reconciled with the contention that 'owner' includes 'agent' and makes the asserted common-law rule inapplicable."[31]

Mr. Turley asserted that the result would be absurd if "owner" were not construed to include the owner's agent, because section 18-6-11(D) specifies that the owner is neither limited nor prohibited in the use of his land. The court of appeals rejected Mr. Turley's argument by referring to section 18-6-10(A), which provides that: "It is the declared intent of the legislature that field archaeology on privately owned lands should be discouraged except in accordance with the provisions and spirit of the Cultural Properties Act. . . ."[32] Additionally, the court interpreted this statement as consistent with section 18-6-2, which states that the purpose of the Act is to preserve and protect sites of historical significance.

29. *Id.* § 18-6-11(E).

30. *Id.* § 18-6-11(D).

31. 96 N.M. at 595, 633 P.2d at 703. *See infra* text accompanying note 78 for a discussion of why this interpretation of "personal" would minimize the destruction which mechanical earth-moving equipment can create.

32. N.M. Stat. Ann. § 18-6-10(A) (Repl. Pamp. 1980); 96 N.M. at 595, 633 P.2d at 703.

33. The New Mexico Supreme Court found that "[t]he State's interpretation would reject the application of the law of agency to these facts." The court said that "[i]t is an elementary principle of law that a person may do anything through an agent that he may lawfully do personally, unless public policy or some agreement requires personal performance." 96 N.M. at 581, 633 P.2d at 689.

34. Senator Smalley's testimony seemed to run counter to this position. *See supra* note 10. Further, the comments by Ms. Cooper, who aided in drafting the bill, also indicated that the drafters

The New Mexico Supreme Court, relying upon agency law[33] and Senator Smalley's testimony[34] as to the intent of the legislature, disagreed with the interpretation of the court of appeals and reversed the lower court's decision. The court reasoned that a right conferred by statute should be delegable to an agent unless the statute "expressly or by necessary implication prevents an agent from acting."[35] The court concluded that the statute as written neither implied nor expressed that an agent could not be appointed to excavate for the landowner.[36]

V. THE TURLEY DECISION

A. The Turley Decision Is Inconsistent With The Legislative Purpose

The supreme court holding in *Turley v. State* accomplished more than merely dismissing the case against Mr. Turley. The decision effectively eviscerated section 18-6-11. Much of the cultural heritage of the state was left without protection from persons who think only of their personal gain and care nothing about the state, its heritage, or the loss to the public.

The Cultural Properties Act, as interpreted by the New Mexico Supreme Court, contains an almost insurmountable conflict between section 18-6-11 and the legislative intent as declared in section 18-6-2. Section 18-6-2 clearly specifies that the purpose of the Act is to preserve "the historical and cultural heritage of the state."[37] Under the supreme court decision, it is possible for a professional pot-hunter to enter into a contract with a landowner which designates him as the agent of the landowner, in return for which the pot-hunter need only "let the landowner take a part of the find."[38] This possibility of exploitation leaves no site on private land in New Mexico safe from the destructive blade of the bulldozer.

B. Support For Governmental Control Of Private Property

The purpose of the legislature to preserve the heritage of the state through the preservation of its archaeological sites conflicts with the strong

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did intend to limit the exemption to the landowner and did not intend to include the agent of the landowner. *See supra* note 10. The court of appeals, after having analyzed case law and treatises relating to statutory construction, ruled that it was against precedent to rely upon the testimony of only one legislator to determine the intent of the full legislature. 96 N.M. at 597, 633 P.2d at 705.

35. 96 N.M. at 581, 633 P.2d at 678.

36. *Id.*

37. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).

38. *Grave Robbers in the Southwest,* Newsweek, June 23, 1980, at 31 (quoting C. Frank Turley). In contrast, N.M. Stat. Ann. § 18-6-11(C) (Repl. Pamp. 1980), specifies that "[a]ll archaeological specimens collected or removed from the archaeological site as a result of such excavation shall be the property of the person owning the land on which the site is located." The contract between Mr. and Mrs. Williams and Mr. and Mrs. Turley called for "all proceeds, artifacts and resultant materials from the excavation [to] be the sole property of the land owner, Mrs. Williams." See *supra* note 5 for the wording of the contract. But Mr. Turley's nationally publicized statement relating to his archaeological excavations raises questions concerning the reliability of this provision in the Williams contract. *Grave Robbers in the Southwest,* Newsweek, June 23, 1980, at 31.

national belief that private property should be under the complete control of the landowner. The tensions created when a government entity steps in and tries to limit what a landowner can or cannot do with his property are tremendous. Prudential considerations, however, sometimes necessitate governmental control of private property.

Zoning provides a well-known and clear example of governmental control over the unrestricted use of land by the landowner.[39] In the New Mexico case of *Miller v. City of Albuquerque*,[40] the supreme court, relying on some of the landmark decisions affecting zoning laws around the nation, stated that zoning is a justifiable and legitimate use of the police power of the state when it is used in the public interest. This use of the police power of the state is legitimate even when zoning results in "a substantial reduction in the value of property."[41] In *State ex rel. Anaya v. Select Western Lands, Inc.*,[42] Judge Hernandez of the New Mexico Court of Appeals in his dissenting opinion cited with approval a California case which held that the state "in the exercise of its police power may regulate the enjoyment of property rights whenever reasonably necessary to the protection of the health, safety, morals or general well-being of the people."[43] Zoning cases demonstrate that the regulation and restriction of private property is well within the powers of the state when the public interest or the general well-being of the public is at issue.

The Cultural Properties Act does not explicitly state that the Act is for the general well-being of the people but the inference seems clear from the words of N.M. Stat. Ann. §18-6-2.[44] As that section sets forth, the historical and cultural heritage of the state is a valued and important asset and any destruction results in an irreplaceable loss to the public. The

39. There are numerous instances of governmental control over private property. When one purchases property, one need not register the deed; however, if the purchaser wishes to assure that another cannot later claim title to the purchased property, he must register that property with the appropriate authority. Even a properly recorded deed does not prevent the property from being subject to an easement which allows a non-owner to come on to the land for specific purposes. *See* N.M. Stat. Ann. §42-2-3 (Cum. Supp. 1982). A government entity may condemn privately owned land and evict the owner because of a perceived public use. N.M. Stat. Ann. §42-2-3 (Cum. Supp. 1982). In many areas, a landowner must obtain a permit to build a house or add a room and there are certain things that the landowner must and must not do during such construction. City of Santa Fe v. Gamble-Skogmo, 73 N.M. 410, 389 P.2d 13 (1964). See *infra* text accompanying notes 48–55 for a discussion of *Gamble-Skogmo*.

40. 89 N.M. 503, 554 P.2d 665 (1970).

41. *Id.* at 505, 554 P.2d at 667. Furthermore, a Florida court has indicated that where zoning only deprives an owner of one beneficial use of his property, even though that use may be the highest economic use, the attack on the zoning classification will not be sufficient to overturn the regulation. Metropolitan Dade County v. Greenlee, 224 So. 2d 781, 782 (Fla. Dist. Ct. App. 1969).

42. 94 N.M. 555, 613 P.2d 425, (Ct. App. 1979), *cert. quashed,*, 94 N.M. 675, 615 P.2d 992 (1980).

43. 94 N.M. at 562, 613 P.2d at 432 (quoting People v. Mancha, 39 Cal. App. 3d 703, 114 Cal. Rptr. 392 (1974)).

44. N.M. Stat. Ann. §18-6-2 (Repl. Pamp. 1980).

same statutory section also states that the preservation of the historical and cultural heritage of the state is in the public interest. Every state in the nation has recognized the importance of these assets and has passed legislation protecting them.[45] The individual states are not alone in acknowledging the need to protect the heritage of the nation. Congress, by enacting the National Historic Preservation Act of 1966,[46] has also acknowledged the relationship between the well-being of the people and the preservation of their heritage.[47]

The New Mexico Supreme Court in *City of Santa Fe v. Gamble-Skogmo, Inc.*,[48] explained the relationship between the concepts of promoting the general welfare of the people with that of the preservation and protection of historic buildings and places. In *Gamble-Skogmo,* the defendants protested their criminal conviction for violation of the Santa Fe Uniform Building Code.[49] The New Mexico Supreme Court affirmed the conviction, holding that the city zoning ordinance which limited the size of windows in the alteration or construction of buildings within the Santa Fe historic area was a valid exercise of police power. The court noted that zoning ordinances are for the promotion of the public welfare.[50] This promotion of the public welfare was accomplished by means of "the preservation and protection of historic buildings, places and districts of historic interest. . . ."[51]

The purpose of the building code in *Gamble-Skogmo* is analogous to the purpose of N.M. Stat. Ann. § 18-6-2 to "provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state. . . ."[52] Numerous zoning cases have resolved the conflict between the private desires of the landowner and the public policy of protecting the public welfare.[53] The cases are virtually

45. Research by the author indicates that all fifty states have passed legislation to protect sites of the historical and/or cultural heritage of the state.

46. 16 U.S.C. § 470 (1976).

47. The Preamble to the National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1976) states,

> The Congress finds and declares—
> (a) that the spirit and direction of the nation are founded upon and reflected in its historic past;
> (b) that the historical and cultural foundations of the nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people. . . .

48. 73 N.M. 410, 389 P.2d 13 (1964).

49. The defendants were charged and found guilty of violation of a provision of the Santa Fe Uniform Building Code which requires all construction work to be performed according to previously approved plans and specifications.

50. 73 N.M. at 415, 389 P.2d at 16.

51. *Id.* at 414, 389 P.2d at 16 (quoting opinion of the Justices to the Senate, 333 Mass. 773, ___, 128 N.E.2d 557, 558–59 (1955).

52. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).

53. *See* Agins v. City of Tiberon, 447 U.S. 255 (1980); Euclid v. Amblar Co., 272 U.S. 365

unanimous in holding that the desires of the individual must stand aside when the welfare of the general public is at issue.[54]

In *Gamble-Skogmo,* the New Mexico Supreme Court held that a historical ordinance which preserves historic buildings or places is within the term "general welfare" and as such is an allowable exercise of the police power of the state.[55] The purpose of the Cultural Properties Act is no less a legislative declaration of intent to preserve historic buildings and places for the general welfare of the people of the state of New Mexico than was the city zoning ordinance considered in *Gamble-Skogmo.* Both the Cultural Properties Act and the zoning ordinance try to balance the general welfare of the people of New Mexico and the rights of the individual landowner.

C. The Turley Court's Construction of Section 18-6-11

In *Turley,* the courts addressed a problem of statutory construction of first impression. New Mexico case law states that courts are to interpret statutes to mean what the legislature intended them to mean.[56] A problem arises in determining what the legislature actually did intend a statute to mean. The New Mexico Supreme Court considered statutory construction in the 1970 case of *Rutledge v. Johnson.*[57] In *Rutledge,* relyling on an 1891 case,[58] the court said that "[s]trict construction of a statute does not contemplate arbitrary or unequitable meaning which would give third

(1926); Metropolitan Dade County v. Greenlee, 224 So. 2d 781 (Fla. Dist. Ct. App. 1969); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969); M & N Enterprizes v. City of Springfield, 111 Ill. App. 2d 444, 250 N.E.2d 289 (1969); Burroughs v. Board of County Commissioners, 88 N.M. 303, 540 P.2d 233 (1975); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); State *ex rel.* Anaya v. Select Western Lands, Inc., 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979), *cert. quashed,* 94 N.M. 675, 615 P.2d 992 (1980); Fifth Ave. Corp. v. Board of County Commissioners, 282 Or. 591, 581 P.2d 50 (1978).

54. Under the fifth amendment to the United States Constitution, "[p]rivate property . . . [shall not] . . . be taken for public use without just compensation." In deciding if zoning ordinances are a "taking for public use without just compensation," the United States Supreme Court has stated that the "application of a general zoning law to particular property effects [an unconstitutional] taking [of property] if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). In the earlier case of Village of Euclid v. Ambler Co., 272 U.S. 365 (1926), the Court held that zoning laws were facially constitutional where they bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner, even if the owner alleged a decrease in the value of his land. 272 U.S. at 395–97.

55. 73 N.M. at 415, 389 P.2d at 18.

56. In State *ex rel.* Newsome v. Alarid, 90 N.M. 790, 794, 558 P.2d 1236, 1240 (1977), the supreme court stated that: "[A] statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." In State v. Nance, 77 N.M. 39, 45–46, 419 P.2d 242, 248 (1966), the court noted that: "[W]e are committed to the acceptance of the intent of the language employed by the legislature rather than the precise definition of the words themselves."

57. 81 N.M. 217, 465 P.2d 274 (1970).

58. Minor v. Marshall, 6 N.M. 194, 27 P. 481 (1891).

parties an opportunity to take advantage of legal technicalities, but only such meaning as will require substantial compliance with the statute."[59]

The construction given to the Cultural Properties Act by the supreme court in *Turley* could give a third party "the opportunity to take advantage of legal technicalities."[60] The Williams-Turley contract specifies, on its face, that Turley will excavate at the direction of Mrs. Williams and all artifacts will belong to her. This is in full accord with New Mexico statutes.[61] But as C. Frank Turley himself has said: "We either buy the ruin outright, lease it, or let the landowner take part of the find."[62] All three of these alternatives are in contravention of the New Mexico statute. N.M. Stat. Ann. § 18-6-11(D) specifically excludes "transfer of ownership . . . made with the intent of excavating archaeological sites as prohibited in this section." Section 18-6-11(C) specifies that: "All archaeological specimens collected or moved from an archaeological site as a result of such excavation shall be the property of the person owning the land in which the site is located."

The *Turley* court, relying upon agency principles, held that the owner of land could do anything through an agent which he could do personally *"unless public policy* or some agreement *requires personal performance."*[63] The court also said that if the legislature meant to limit a person in exercising a statutory right personally, the statute must be written so that "either expressly *or by necessary implication*" it prevents an agent from acting.[64] The court then made the statement that this statute did neither. Therefore, according to the court, the legislature must have meant that an agent could be employed to do the proscribed digging.[65] The court of appeals and the supreme court expressed divergent opinions as to whether the statute in question impliedly prevents an agent from acting. Apparently the intent of the legislature with respect to the use of an agent is unclear. This lack of clarity concerning the use of an agent may be subverting the purpose of the legislature in enacting the Cultural Properties Act.

The opinions in the *Turley* cases raise questions regarding how a court should interpret an ambiguous statute. In *State ex rel. Newsome v. Alarid,*[66] the New Mexico Supreme Court said that in intrepreting statutes, "construction must be given which will not render the statute's application

59. 81 N.M. at 222, 465 P.2d at 279.
60. *Id.*
61. Because of the construction given N.M. Stat. Ann. § 18-6-11(D) (Repl. Pamp. 1980) by the New Mexico Supreme Court, a hearing on the merits probably would not have changed the decision in the *Turley* case.
62. *Grave Robbers in the Southwest,* Newsweek, June 23, 1980, at 31.
63. 96 N.M. at 581, 633 P.2d at 689 (emphasis added).
64. *Id.* (emphasis added).
65. *Id.*
66. 90 N.M. 790, 568 P.2d 1236 (1977).

absurd or unreasonable and which will not defeat the object of the Legislature."[67] In addition, prior to *Alarid,* the New Mexico Court of Appeals had provided a two-step test for statutory construction: "(1) statutes should be construed according to the purposes for which they were enacted, and (2) we are not to adopt constructions which lead to absurd or unreasonable results."[68] This two-part test suggests two questions: (1) whether the supreme court in *Turley* was correct in maintaining that the "statute here does not . . . imply that excavation by an agent is proscribed,"[69] and (2) whether the supreme court's construction "render[s] the statute's application absurd or unreasonable and . . . defeat[s] the object of the legislature. . . ."[70] To answer these questions properly some understanding of archaeology will be helpful.

First and foremost archaeology is not pot-hunting. Archaeology has been described as,

> the study of the human cultural and social past whose goals are *to narrate* the sequent story of that past and *to explain* the events that composed it. The discipline attempts to achieve these goals by excavating and analyzing the 'remains and monuments' of past cultures and the contexts in which they are found.[71]

A law review article which considered prehistoric preservation in the context of state statutory provisions[72] provides an excellent explanation of what could be done to achieve purposes similar to those enumerated in N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).

> First, an archaeological statute must prevent any alteration or destruction of any potentially significant sites until a course of action can be determined. Even minimal disturbance of the land could destroy the stratigraphy of the site or damage fragile artifacts. Second, if the site is deemed to be archaeologically significant, the statute must provide a means by which the state may physically enter the property for the purposes of survey, analysis, and excavation. Third, since archaeological preservation is primarily concerned with obtaining data from an analysis and interpretation of the site's stratigraphy and artifacts, the statute need not be concerned with requiring the state to acquire ownership of the property or any of its contents.[73]

As the previously quoted article points out, archaeology is not as concerned with the possession of artifacts as it is with the interpretation of

67. *Id.* at 794, 568 P.2d at 1240.
68. State v. Tapia, 89 N.M. 221, 222, 549 P.2d 636, 637 (Ct. App. 1976).
69. 96 N.M. at 581, 633 P.2d at 689.
70. State *ex rel.* Newsome v. Alarid, 90 N.M. at 794, 568 P.2d at 1240.
71. G. Willey & J. Sabloff, A History of American Archaeology 11 (1974).
72. Smith & Dryer, *Preserving Utah's Prehistoric Past: A Proposal for Legislative Reform,* 1976 Utah L. Rev. 143.
73. *Id.* at 154.

the combination of the artifacts and their physical position in the ground. It is the stratigraphy, the physical placement of one bit of evidence relative to another bit, that is vital to the archaeologist. The relative positioning of bones with respect to the pottery fragment, the bit of charcoal, and the weapon, is what permits the archaeologist to reconstruct the cultural and historical context of the prehistoric (or even early historic) man. Once the inexperienced amateur or the careless pot-hunter comes on to a site and moves artifacts, both the relative positions of the remnants of human existence at that spot and all chance of learning about the culture or history of the people who left those artifacts are forever destroyed.

Archaeological sites and the artifacts are the archives of those who have failed to leave a complete written history; those sites and artifacts are fragile links with the unrecorded past. People who record history, who maintain archives containing the records of the past, and who enact laws which provide for the protection of the records of our history, recognize the obligation to leave as complete a record as possible and to not destroy the fragile links with the unrecorded past. The New Mexico Cultural Properties Act recognizes this obligation.

The Cultural Properties Act begins with the averment that the public and the legislature of New Mexico have "an interest in the preservation of all antiquities, historic and prehistoric ruins, sites, structures, objects and similar places and things for their scientific and historical information and value."[74] The Act continues with the statement that "the neglect, desecration and destruction of historical and cultural sites, structures, places and objects results in an irreplaceable loss to the public."[75] If these statements are true, then the Cultural Properties Act must, by implication, proscribe excavation with mechanical earth-moving equipment by an agent of a landowner who does not have a permit. To do otherwise would leave New Mexico historical and cultural sites open to ravage by commercial pot-hunters. Thus, the New Mexico Supreme Court's conclusion that Turley did not need a permit appears to have been inaccurate, and the court's construction of section 18-6-11 has "rendered the statute's application absurd or unreasonable and [has] defeat[ed] the object of the legislature."[76]

D. Solution To The Conflict Between The Legislative Intent And The Turley Decision

The landowner who is interested in obtaining artifacts from his land probably will not use mechanical earth-moving equipment, except perhaps to remove heavy overburden, for fear of damage to the artifacts he wants

74. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).
75. *Id.*
76. State *ex rel.* Newsome v. Alarid, 90 N.M. at 794, 658 P.2d at 1240.

to recover. A damaged pot or two is not of great concern to the commercial pot-hunter, however, because he can find more artifacts elsewhere. The landowner will not go from place to place, nor destroy sites in order to finds pots to sell. The amount of destruction, to both artifacts and sites, created by the landowner will be minimal. The destruction created by the commercial pot-hunter as described in numerous articles[77] is far-reaching and hurts us all. The commerical pot-hunter cares little for his fellow citizens, for their concern for the cultural heritage of the state, or for the laws of the state which attempt to preserve the state's heritage.

The intent of the legislature in enacting the Cultural Property Act was to protect the heritage of the state.[78] The *Turley* decisions show that the Act as now written is ambiguous and subject to diverse construction concerning the use of an agent. Agency law does permit a person to authorize an agent to do those lawful acts which the person could do himself. Because there are people willing to take advantage of the law as it is now interpreted, it is possible that the intent of the legislature in enacting the Cultural Properties Act will continue to be subverted.

The landowner should have the right to hire someone to use mechanical earth-moving equipment on his land. At the same time, the public should be protected from unrestricted use of such machinery. There should be some method of preventing the commercial pot-hunter from abusing the landowner's privilege. As the statute is now written, much red-tape and a number of requirements must be met when the landowner requests a permit.[79] Some of these statutory requirements could prove to be relatively expensive to the landowner who applies for a permit. Perhaps what is needed is something between the present permit requirements and the court's interpretation, something similar to the suggestions made in the previously cited law review article.[80] The needs of both the public and the private landowner might best be served by a requirement that the landowner give the State archaeologist thirty or sixty days notice prior to having an agent use mechanical earth-moving equipment on his land. This simple requirement of advance notification would leave the landowner free to do what he wishes with his land and would also uphold his right to use an agent as established by the New Mexico Supreme Court in *Turley*. During the notification period the State archaeologist would have time to determine if the site was of interest to the general

77. *See Foiling the Raiders of N.M. Culture,* Impact, Albuquerque Journal Magazine, Feb. 2, 1982, at 4; Edelman, *Pot-Hunting: The Looting of History,* Police Magazine, Jan. 1981, at 23; *Grave Robbers in the Southwest,* Newsweek, June 23, 1980, at 31; *Federal Net Closing on Gravesite Looters,* Tucson Citizen, Mar. 18, 1980, at 1.

78. N.M. Stat. Ann. § 18-6-2 (Repl. Pamp. 1980).

79. N.M. Stat. Ann. § 18-6-11(B) (Repl. Pamp. 1980). See *supra* text accompanying note 28 for the statutory requirements.

80. *See supra* note 72.

public. If the site was of interest, the archaeologist would then be able to request an injuction to prevent the possible destruction of a valuable site. The injunction would give the state time to invoke the provisions of the Cultural Properties Act which would result in the preservation of the site. The costs incurred by the state to implement the advance notification requirement would be minimal. The possible benefits to the state in reducing the destruction of potentially valuable sites would be inestimable.

VI. CONCLUSION

The New Mexico Legislature intended to protect the cultural and historical heritage of the state by enacting the Cultural Properties Act. Because the choice of words has proven to be susceptible to diverse interpretation, it is possible that the intent of the legislature has been subverted. A relatively minor change in the wording of the statute by the legislature would help protect the heritage of the state while at the same time protect the rights of the individual property owner.

PAULA KAVANAGH