

REVISED PROPOSED AMENDMENT: CULTURAL HERITAGE

Synopsis of Proposed Amendment: *This amendment proposes to add to Chapter Two, Part B, a new guideline, §2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. The proposal was developed in response to concerns initially raised by the Departments of Justice and Interior, and supported by many Native American tribes and communities, that the current guidelines inadequately address such offenses.*

Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect this intrinsic difference.

The effect of cultural heritage resource crimes transcends monetary considerations. Individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects. For much of this cultural heritage in the United States, the federal government has a duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations. The current guidelines, however, do not specifically address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Therefore, a separate guideline amendment is proposed that takes into account the transcendent and irreplaceable, e.g., the non-pecuniary, value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural heritage resource crimes.

First, the amendment proposes a base offense level of level 8, which is two levels higher than the base offense level for general property destruction. The higher base offense level represents the intangible and non-pecuniary harm caused by the theft of, damage to, or destruction of, essentially irreplaceable cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the loss table at §2B1.1, that assesses the monetary value of the harm caused. Use of the standard economic crime concept of “loss” is not used, however, because it implies a fungible and compensatory system of value which is inappropriate for measuring the harm caused by cultural heritage resources offenses. Instead, the calculation is based on commercial value, archaeological value, and the cost of restoration and repair, as appropriate to the particular resource. These values are adopted from existing federal statutes on cultural heritage resources and the Code of Federal Regulations.

Third, the amendment proposes separate, two-level enhancements that increase the offense level if the offense involves specially protected resources and resources from specially protected places. A two-level enhancement will attach if the offense involves a resource from

one of seven locations particularly designated by Congress for the preservation of cultural heritage resources and further education of the public. A two-level increase also will attach to seven specific types of cultural heritage resources that have merited special treatment and heightened protection under federal law.

Fourth, the amendment proposes a two-level enhancement if the offense was committed for pecuniary gain or otherwise involved a commercial purpose. This enhancement is included in order to distinguish between offenders who are motivated by financial gain or commercial incentives and thus contribute to illicit trafficking and offenders who are motivated solely by their interest in the past and personal desire to possess cultural heritage resources. This enhancement is consistent with similar provisions elsewhere in the guidelines. See, e.g., §§2Q2.1(b)(1) and 2B5.3(b)(3).

Fifth, a two-level enhancement is also proposed if the offense involved a pattern of misconduct, which is defined as “two or more separate instances of offense conduct involving a cultural heritage resource that occurred prior to the instant offense.” Prior offense conduct involving a cultural heritage resource may be considered regardless of whether the defendant was convicted of that conduct.

Sixth, the amendment proposes a two-level enhancement and a minimum offense level of level 14 if a dangerous weapon (including a firearm) is brandished or its use threatened. This enhancement reflects the harm caused by the increased danger of violence and risk to law enforcement officers and innocent passers-by in vast expanses of public land, and is consistent with similar provisions elsewhere in the guidelines. See, e.g., §2A2.2 (b)(2)(C).

Seventh, a cross-reference to §2K1.4 is proposed if the offense involved arson or property damage by the use of any explosive, explosive material, or destructive devices, when the resulting offense level is greater than the offense level under this proposed guideline.

Eighth, a special rule is proposed in the commentary to address multiple counts of cultural heritage resource offenses, and to address multiple counts of conviction involving offenses under this and other guidelines.

Ninth, an invited upward departure provision is proposed when the offense level substantially understates the seriousness of the offense, and illustrations are provided.

Tenth, a cross-reference is proposed at §2B1.1 so that property damage, destruction, and theft offenses which also involve cultural heritage resources are cross-referenced to §2B1.5, if the resulting offense level under §2B1.5 is greater than under §2B1.1.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline and cross-references to related guidelines are provided.

Proposed Amendment:

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

- (a) Base Offense Level: [8]
- (b) Specific Offense Characteristics
 - (1) If the value of the cultural heritage resource (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by **2** levels.
 - (3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; (G) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.
 - (4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by **2** levels.
 - (5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by **2** levels.
 - (6) If a dangerous weapon was brandished or its use was threatened, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (c) Cross Reference
 - (1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541-546, 641, 661, 666, 668, 1152-1153, 1163, 1170, 1361, 2314-2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Meaning of "Cultural Heritage Resource".—For purposes of this guideline, "cultural heritage resource" means any of the following:
 - (A) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. Part 800).
 - (B) A historic resource, as defined in 16 U.S.C. § 470w(5).
 - (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312).
 - (D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3)(see also 43 C.F.R. 10.2(d)).
 - (E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.
 - (F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a).
 - (G) "Designated ethnological material", as defined in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

2. (A) Determination of Value of the Cultural Heritage Resource.—For purposes of subsection (b)(1), the value of the cultural heritage resource shall include, as applicable to the particular resource involved, the following:
 - (i) The archaeological value (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.).
 - (ii) The commercial value.
 - (iii) The cost of restoration and repair.

- (B) Estimation of Value.—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the cultural heritage resource based on available information.

- (C) Definitions.—For purposes of this application note:
 - (i) "Archaeological value" of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36

C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)

- (ii) *"Commercial value" of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)*
- (iii) *"Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)*

(D) *Determination of Value in Cases Involving A Variety of Cultural Heritage Resources.*—*In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this application note.*

3. *Enhancement in Subsection (b)(2).*—*For purposes of subsection (b)(2):*

- (A) *"Museum" has the meaning given that term in 18 U.S.C. § 668(1) except that the museum may be situated outside the United States.*
- (B) *"National cemetery" has the meaning given that term in Application Note 1 of §2B1.1 (Theft, Property Destruction, and Fraud).*
- (C) *"National Historic Landmark" has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).*
- (D) *"National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.*
- (E) *"National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).*
- (F) *"National park system" has the meaning given that term in 16 U.S.C. § 1c(a).*
- (G) *"World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.*

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):
- (A) "Cultural patrimony" has the meaning given that term in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)).
 - (B) "Cultural property" has the meaning given that term in 19 U.S.C. §2607.
 - (C) "Designated archaeological or ethnological material" has the meaning given that term in 19 U.S.C. § 2601(7) (see also 19 U.S.C. §§ 2601(2) and 2604).
 - (D) "Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.
 - (E) "Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.
 - (F) "Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).
 - (G) "Sacred object" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. 10.2(d)(3)).
5. Pecuniary Gain and Commerical Purpose.—For purposes of subsection (b)(4):
- (A) "For pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.
 - (B) The acquisition of cultural heritage resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose".
6. Pattern of Misconduct.—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources" means two or more separate instances of offense conduct involving a cultural heritage resource that occurred prior to the commission of the instant offense. Offense conduct involving a cultural heritage resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.
7. Dangerous Weapons Enhancement.—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

8. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving cultural heritage offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving cultural heritage offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).

9. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if, (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources), or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell)).

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§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(c) Cross References

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(4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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Commentary

Application Notes:

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The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 12 through 15 as Notes 13 through 16; and by inserting after Note 11 the following:

12. Cross Reference for Offenses Involving Cultural Heritage Resources.—For purposes of subsection (c)(4) and this Application Note, "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

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(c) Cross Reference

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- (1) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), if the resulting offense level is greater.

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Commentary

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Application Notes:

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- 6. For purposes of subsection (c)(1), "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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§3D1.2 Groups of Closely Related Counts

(d)

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Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, **2B1.5**, 2B4.1, 2B5.1, 2B6.1;

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APPENDIX A - STATUTORY INDEX

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16 U.S.C. § 433	2B1.1, 2B1.3
16 U.S.C. § 470ee	2B1.5

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16 U.S.C. § 668(a)	2B1.5, 2Q2.1
16 U.S.C. § 707(b)	2B1.5, 2Q2.1

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18 U.S.C. § 541	2B1.5, 2T3.1
18 U.S.C. § 542	2B1.5, 2T3.1
18 U.S.C. § 543	2B1.5, 2T3.1
18 U.S.C. § 544	2B1.5, 2T3.1

18 U.S.C. § 545	2B1.5, 2Q2.1, 2T3.1			
18 U.S.C. § 546	2B1.5		*	*
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18 U.S.C. § 641	2B1.1, 2B1.5		*	*
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18 U.S.C. § 661	2B1.1, 2B1.5			
18 U.S.C. § 662	2B1.1, 2B1.5		*	*
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18 U.S.C. § 666(a)(1)(A)	2B1.1, 2B1.5		*	*
			*	*
18 U.S.C. § 668	2B1.1 2B1.5		*	*
			*	*
18 U.S.C. § 1152	2B1.5			
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4		*	*
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18 U.S.C. § 1163	2B1.1, 2B1.5			
18 U.S.C. § 1168	2B1.1			
18 U.S.C. § 1170	2B1.5		*	*
			*	*
18 U.S.C. § 1361	2B1.1, 2B1.5		*	*
			*	*
18 U.S.C. § 2232	2B1.5, 2J1.2		*	*
			*	*
18 U.S.C. § 2314	2B1.1, 2B1.5			
18 U.S.C. § 2315	2B1.1, 2B1.5		*	*
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