

Part G: Cultural Heritage Resources

Synopsis of Proposed Amendment: *This part of the 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, or destruction of, cultural heritage resources (e.g., artifacts from ancient civilizations found in national parks, or property from national landmarks). The proposal was devised partly in response to concerns raised by the Department of the Interior and others that the guidelines inadequately address such offenses. According to INTERPOL, “[t]he annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking.” However, 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 perpetual 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. However, today, the guidelines do not adequately address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Thus a separate guideline amendment is proposed that takes account the transcendent value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of heritage resource crimes.*

The proposed guideline contains a number of provisions geared toward providing adequate treatment of these offenses. First, the amendment proposes a base offense level of level [6][8], which is [two levels higher than] the base offense level proposed in the economic crime package for theft and property destruction offenses that do not involve cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the proposed loss table for theft, property destruction, and fraud cases, that measures the economic value of the cultural heritage resources involved in the offense. The amendment places a monetary “value” on cultural heritage resources for the limited purpose of determining the monetary costs to return, the cultural heritage resource to its pre-offense condition. Value in this context does not take into consideration that damage and destruction to cultural heritage resources can never be restored to pre-offense condition. In great part, the purpose of creating a separate guideline is to disassociate the unique and irreplaceable nature of cultural heritage resources from the use of “loss” as a measure of harm. Use of the standard economic crime concept of “loss” in the context of heritage resource crimes implies in some respects, a fungible and compensatory system of value which is inadequate to measure the harm caused by heritage resources offenses. Accordingly, staff recommends a base offense level two levels greater than that in property offenses in order to recognize the important social, the non-monetary value of cultural heritage resources.

This amendment proposes to adopt the determinations of value already codified in various federal laws and regulations dealing with cultural heritage resources. The law recognizes two categories of cultural heritage resources consisting of (1) archeological

resources and (2) all other cultural heritage resources. Thus, the value of cultural heritage resources are defined either as "archaeological value" when determining the value of archeological resources or "commercial value" when determining the value of all other cultural heritage resources or when "archaeological value" cannot be determined. Included in the value of the cultural heritage resource are the costs of restoration, repair, curation, consultation, disposition, and reburial, which may be necessary to return the cultural heritage resource to its pre-offense condition.

Third, the amendment proposes a two-level enhancement if the offense involved commercial advantage or private financial gain, in order to distinguish between offenders who are motivated by financial gain or commercial purposes from offenders who are motivated by their interest in the past and personal desire to possess archeological and cultural resources.

Fourth, the amendment proposes a tiered system of enhancements that increase the offense level depending on the recognized relative rarity and irreplaceability of specific cultural heritage resources. Both the location and nature of the cultural heritage resources affect this determination, and the staff proposes a set of cumulative specific offense characteristics to address this aspect of heritage resource crimes. Cultural heritage resources located in properties listed in the World Heritage List, a list of the world's most significant cultural and national heritage sites, receive a four-level increase. Because of their national significance, cultural heritage resources located at National Historic Landmarks, national monuments, or within the national park system receive a two-level increase. An additional two-level increase attaches to those cultural heritage resources, that by their nature, Congress has determined are worthy of special consideration, e.g., human remains, funerary objects, cemetery property, designated archeological or ethnological materials, or pre-Columbian monumental or architectural sculptures or murals.

Fifth, the amendment proposes a two-level enhancement and a minimum offense level of level 13 are provided if a firearm was possessed or a dangerous weapon (including a firearm) was brandished, that reflect the increased danger of violence and risk to law enforcement officers and others.

Sixth, a two-level enhancement is provided if the offense involved sophisticated means, and examples are provided to illustrate conduct that may constitute sophisticated means in such cases.

Seventh, a cross reference to the new guideline is proposed to be added to the proposed consolidated theft, fraud, and property destruction guideline.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline.

Proposed Amendment:

Chapter Two, Part B, Subpart 1, as amended by Parts A through F of this amendment, is further amended by adding at the end the following:

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources

(a) Base Offense Level: **[6][8]**

(b) Specific Offense Characteristics

- (1) If the value of the cultural heritage resources (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 a property included on the World Heritage List, increase by **4** levels.
- (3) If the offense involved a cultural heritage resource (A) from the national park system; or (B) from or constituting (i) a National Historic Landmark, or (ii) a national monument, increase by **2** levels.
- (4) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cemetery property; (D) designated archeological or ethnological material; or (E) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.
- (5) If the offense was committed for commercial advantage or private financial gain, increase by **2** levels.
- (6) If the offense involved sophisticated means, increase by **2** levels.
- (7) If (A) a dangerous weapon (including a firearm) was brandished; or (B) a firearm was possessed, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541-546, 641, 666, 668, 1151-1153, 1163, 1170, 1361, 2314-2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Brandished", "dangerous weapon", and "firearm" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Cemetery property" (A) means any property reasonably related to a cemetery; and (B) does not include human remains and funerary objects.

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including money, goods, or services.

"Cultural heritage resource" means any of the following: (A) a historic property, as defined in 16 U.S.C. § 470w(5); (B) a historic resource, as defined in 16 U.S.C. § 470w(5); (C) an archeological 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 sacred object, as defined in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. 10.2(d)(3)); (E) cultural patrimony, as defined in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)); and (F) object of cultural heritage, as defined in 18 U.S.C. § 668(a).

"Designated archeological or ethnological material" has the meaning given that term in 19 U.S.C. § 2601(7).

"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.

"Human remains" (A) means the physical remains of the body of an individual; and (B) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the individual from whose body the remains were obtained, such as hair made into ropes or nets.

"National Historic Landmark" has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).

"National monument" has the meaning given that term in 16 U.S.C. § 431.

"National park system" has the meaning given that term in 16 U.S.C. § 1c(a).

"Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).

"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.

2. *Value of the Cultural Heritage Resources.—This note applies to the determination of the value of the cultural heritage resources for purposes of subsection (b)(1).*

(A) *Archeological Resources.—The value of the cultural heritage resource, in the case of an archeological resource, is—*

(i) *either (I) its archeological value, if its archeological value can be determined and is greater than its commercial value; or (II) its commercial value, otherwise; and*

(ii) *the cost of restoration and repair of the archeological resource.*

(B) *Other Cultural Heritage Resources.—The value of the cultural heritage resource, in the case of a cultural heritage resource other than an archeological resource, is—*

- (i) *its commercial value; and*
- (ii) *the cost of restoration and repair of the cultural heritage resource.*

(C) *Definitions.—For purposes of this application note:*

- (i) *"Archeological value" of an archeological resource means the value of the information associated with the archeological resource, as determined by 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, including an archeological resource, means the fair market value of the cultural heritage resource. In the case of a cultural heritage resource that has been damaged as a result of the offense, the fair market value shall be determined using the condition of the cultural heritage resource prior to commission of the offense, if the prior condition can be determined. (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 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; (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 both an archeological resource and a cultural heritage resource other than an archeological resource, the value of the cultural heritage resources is the sum of all calculations made for those resources under subdivisions (A) and (B) of this note.*

3. *Sophisticated Means.—For purposes of subsection (b)(6), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense, including: (A) relocating, or participating in relocating, the cultural heritage resource to another jurisdiction to evade law enforcement or regulatory officials; (B) the use of mechanical or electronic equipment (e.g., a metal detector, powered tool, global positioning system, communication device, or excavation machinery or equipment) to locate or excavate a cultural heritage resource; (C) complex or intricate efforts to conceal the offender, a mechanical or electronic device, or a cultural heritage resource; and (D) the use of a publication providing information on the location of, or on search techniques concerning, a cultural heritage resource.*

If the conduct that forms the basis for an enhancement under subsection (b)(4) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

§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 theft of 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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Application Notes:

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—. For purposes of subsection (c)(4), "cultural heritage resource" means any of the following: (A) a historic property, as defined in 16 U.S.C. § 470w(5); (B) a historic resource, as defined in 16 U.S.C. § 470w(5); (C) an archeological resource, as defined in 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 sacred object, as defined in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. 10.2(d)(3)); (E) cultural patrimony, as defined in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)); and (F) object of cultural heritage, as defined in 18 U.S.C. 668(a).

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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
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
18 U.S.C. § 666(a)(1)(A)	2B1.1, 2B1.5, 2F1.1

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18 U.S.C. § 668	2B1.1, 2B1.5			
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18 U.S.C. § 1151	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			
18 U.S.C. § 1163	2B1.1, 2B1.5			
18 U.S.C. § 1170	2B1.5			
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18 U.S.C. § 1361	2B1.3, 2B1.5			
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18 U.S.C. § 2314	2B1.1, 2B1.5, 2F1.1			
18 U.S.C. § 2315	2B1.1, 2B1.5, 2F1.1			