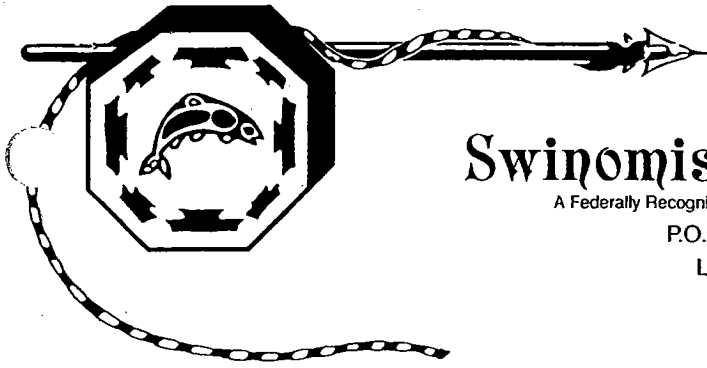




Phone (360) 466-3163
Fax (360) 466-5309

Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

P.O. Box 817 • 11404 Moorage Way
LaConner, Washington 98257

Via Facsimile and First-Class Mail
March 12, 2001

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Commissioners:

The Swinomish Indian Tribal Community (the "Tribe") is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476 *et seq.*, and derives its organization and authority from its Constitution and Bylaws, as amended, originally approved by the Secretary of the Interior on January 27, 1936, which is the successor in interest to the groups known as Lower Skagit, Kikiallus, Swinomish, and Samish signatories to the Point Elliot Treaty of 1855. The Swinomish Indian Reservation (the "Reservation") is the permanent homeland of the Swinomish Indian Tribal Community. Members of the Swinomish Indian Tribal Community are descendants of the indigenous peoples who used and occupied territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River system, and on the adjacent islands, such as Whidbey, Camano, Fidalgo, Guemes, Samish, and Cypress.

The Swinomish Indian Reservation is the permanent homeland of the Swinomish Indian Tribal Community. The Tribe has governing powers over those Reservation lands and resources reserved to themselves. The Swinomish Indian Tribal Community actively protects, conserves and restores the total environment of the lands, air, waters, flora and fauna, and other resources traditional to their culture and by treaty reserved whether on the Swinomish Indian Reservation, in tribal ceded areas or usual and accustomed sites. The Tribe is also a natural resource trustee under applicable federal law.

The Tribe writes to respond to your request for public comments on the 2001 Proposed Amendments to the Federal Sentencing Guidelines. Federal Register Vol. 66, No. 18, from Friday, January 26, 2001 at page 7991-2 noted the following issue for comment:

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The Commission also requests comment on whether, and if so, to what extent it should provide an enhancement for the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archaeological, or historical significance. As one means of providing an enhancement, should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair? See, e.g., *United States v. Shumway*, 47 F.3d 1413, 1424 (10th Cir. 1997). Alternatively, should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision? Should the Commission also consider amending the current enhancement for damage to, or destruction of, property of a national cemetery in Secs. 2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?

Because the Swinomish Tribe believes strongly that the damages caused by the violations of the Archaeological Resources Protection Act, 16 U.S.C. § 470ee(a) ("ARPA"), and other crimes related to the removal or damaging of Native American remains or artifacts are not adequately addressed in the current sentencing guidelines, we support the Commission's interest in revising the sentencing guidelines. We address your questions in turn.

- 1. Should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair?**

For violations of Archaeological Resources Protection Act, courts look to USSG § 2B1.1 for guidance on determining loss. Application note 2 states that "loss is the fair market value" of the property taken, and when property is damaged, "loss is the cost of repairs, not to exceed the loss had the property been destroyed." Application note 2 also provides: "Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way."

In some cases related to the excavation and removal of Native American remains or artifacts, defendants are charged for violations of the ARPA. The ARPA regulations recognize the commercial component of these losses but also acknowledge one sub-category of loss, i.e. archeological value, contemplated, but not specified, by the sentencing guidelines. 43 C.F.R. § 7.14 states:

Determination of archaeological or commercial value and cost of restoration and repair.

(a) Archaeological value.

For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in Sec. 7.4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) Commercial value.

For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in Sec. 7.4 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) Cost of restoration and repair.

For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

- (1) Reconstruction of the archaeological resource;
- (2) Stabilization of the archaeological resource;
- (3) Ground contour reconstruction and surface stabilization;
- (4) Research necessary to carry out reconstruction or stabilization;
- (5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;
- (6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values

- which cannot be otherwise conserved;
- (7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.
- (8) Preparation of reports relating to any of the above activities.

In addition to these categories, the Commission should recognize expressly an additional category of loss for damage to cultural heritage. Courts have relied upon §7.14(a) and (c) of this regulation when the fair market value calculations contemplated under USSG § 2B1.1 and § 7.14(b) responded inadequately to the seriousness of the harm. *See, for example, United States v. Shumway*, 112 F.3d 1413 (1997). By recognizing that commercial value rarely reflects the significance of the loss suffered by Native communities as a result of grave looting and artifact theft, these subsections improve upon the more limited analysis currently permitted under the sentencing guidelines. They continue, however, to account for only part of the picture of harm that the sentencing guideline amendments should address.

When a Native American gravesite is damaged, excavated and/or sacked a series of harms are worked: aside from the associated trespass upon and theft of federal government property that may be involved, at the most general level the public at large is harmed by the loss of these priceless pieces of the historical record as preserved in their undisturbed condition. More particularly, that part of the public that has familial, cultural or geographic affiliation with the damaged or stolen remains or artifacts suffers a unique and difficult-to-quantify harm. Neither the existing sentencing guidelines nor the archeological value section of 43 C.F.R. § 7.14 adequately address that harm.

Many scholars have written vividly and well on the scope and nature of the harm suffered by Native communities through these atrocities. *See, e.g., Sarah Harding, Value, Obligation & Cultural Heritage*, 31 Ariz. St. L. J. 291 (1999) and Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains & Contemporary Cultural Values*, 31 Ariz. St. L. J. 583 (1999). As the *Shumway* court recognized, the harm to cultural heritage to Native American communities is separate from and in addition to the harm experienced by the non-Native community's interest in *inter alia* archaeological value. The *Shumway* court got part of the analysis right. It recognized that fair market value was an inadequate measure of the full harm worked by the damage to or theft of human remains or cultural artifacts. It also understood the important cultural or spiritual dimension of these harms. The Commission needs to provide express guidance to courts to recognize the significance of the loss and nature of the damage to cultural heritage. That guidance should follow a tiered approach that incorporates consultation

with the Native American community or communities most injured by the crime.

First, the sentencing guidelines should allow for a methodology through which a sentencing court could appropriately analyze the extent of harm done to a Native community through damage to or theft of their ancestral remains or artifacts. Second, the methodology employed in the sentencing guidelines must, at a minimum, require that the pre-sentencing investigation has included: 1) an attempt to identify the most closely associated Native community, 2) consultation with that community regarding the facts underlying the charges, and 3) a conclusion reached through that consultation regarding the significance of the fact-specific harm suffered and, if appropriate, required remedies.

2. Should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision?

As discussed above, an alternative measure of loss is imperative, if the Commission wants the guidelines to provide a methodology through which an appropriate measure of harm can be determined. In addition, both a base level enhancement to sentencing and an upward departure are appropriate for violations of the ARPA or other crimes related to the damage to or theft of Native American remains or artifacts.

An initial and important point must be mentioned. Although every Native American community is distinct, with unique perspectives on and reactions to the harms resulting from damage to or theft of ancestral remains or artifacts, it is true of all Native communities that they are uniquely targeted for this most intimate and devastating of communal harms. No other ethnic or political group suffers from the violating appropriation of their family remains or historic artifacts. The Commission should begin its analysis of alternative remedies to the failure of the sentencing guidelines to allow courts to redress these wrongs.

Whether through a "vulnerable victim" analysis or an assessment of the likelihood of recidivism or seriousness of offense, courts have struggled to address adequately the unique nature of these crimes through base level enhancements. Courts have worried that to include skeletal remains within the category of "vulnerable victims" would stretch the imagination. See, *Shumway, supra*. There are two goals to the "vulnerable victim" enhancement. The first is to protect victims who cannot defend themselves from criminal attack. The second is to protect victims who are more likely because of certain characteristics to become targets of crime in the first place. USSG

§3A1.1(b). These characteristics include race, religion or membership in an ethno-cultural group. See, Alon Harel & Gideon Parchomovsky, *On Hate & Equality* 109 Yale L. J. 507 (1999). By focusing on only the first of these justifications, the *Shumway* court found itself engaging the question of whether a skeleton could defend itself from criminal attacks and allowed it to pursue absurd possibilities that need not be a focus of concern. The Commission should emphasize that USSG §3A1.1 supports the second justification's focus upon the vulnerability of the remains and artifacts to attack and the resulting harms upon the members of the Native American ethno-cultural group. Whether these crimes happen through racial animus, cultural prejudice or enhanced risk because of Native American funerary practices, the guidelines should acknowledge the greater likelihood of injury to Native American communities through the damage to human remains and artifacts which are the target of these attacks.

An upward departure provision, specifically acknowledging that damage to or theft of human remains or Native American artifacts harms brings irreparable harm to Native American communities, is also necessary for exceptional cases. Courts have noted that looters of historic Native American burial or living sites are repeat offenders and that the typical apprehended grave thief has likely engaged in this activity many times prior to being apprehended. Although necessary, the ability to augment penalties due to the repetitious character of most cultural resource offenders is not sufficient because it inadequately responds to the seriousness of the harm suffered by Native communities who are the victims of these attacks on their history and families.

3. **Should the Commission also consider amending the current enhancement for damages to, or destruction of, property of a national cemetery in §§2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?**

In light of the cultural disaster that is worked on Native American communities by these offenses and considering how common are the assaults on Native American grave sites, the enhancement contemplated in §§ 2B1.1 and 2B1.3 seem long over due in application to these offenses. Because most crimes against Native American grave sites occur on federal land or land held in trust for Indian Tribes by the United States, extending these enhancements to any human remains or funerary objects would address many instances of these offenses.

The Swinomish Tribe appreciates your willingness to consider these comments and eagerly anticipates the results of your deliberations. If you have any comments, questions or concerns regarding this submission, please do not hesitate to contact

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March 12, 2001
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either myself or the Swinomish Tribal Chairman, Mr. Brian Cladoosby, at the above address.

Very truly yours,

Martin C. Loesch

Martin C. Loesch
Office of Tribal Attorey

by S. Preston

