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United States Sentencing Commission
Attention: Public Information
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Dear Commissioners:

As an attorney and an archeologist whose responsibilities include, among other things, training Federal attorneys on archeological and heritage resources protection laws, I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that the U.S. Sentencing Guidelines are deficient as applied to crimes affecting the archeological resources, historic properties, and other cultural items that are part of our heritage, and I respectfully urge the Commission to incorporate Guidelines provisions in the Economic Crimes Package that redress those deficiencies. Although I serve as a consultant to the Department of the Interior's Consulting Archeologist, my opinions do not necessarily reflect the position of the Department of the Interior.

In the United States, we recognize the importance of heritage resources, as well as the role of government in protecting them. As Attorney General Janet Reno wrote in the foreword to Heritage Resources Law (Hutt, Blanco, and Varner (1999)), heritage resources

. . . are important to us on many different levels: providing our scientists with information which is both fascinating and important to us all; and giving ordinary modern peoples a sense of respect and kinship with ancient peoples. . . Our heritage resources serve as the ultimate model of what we are capable of accomplishing. . . .

The universal fascination with traces of our past is evident in every community in the nation. Americans from all walks of contemporary life agree that we must defend our heritage resources as fiercely as we defend our natural resources. The law is one of our most powerful tools.

Heritage resources crime is serious because it deprives people of things that satisfy their emotional and spiritual needs, and intellectual curiosities, but it also is serious in terms of economics and the Government's ability to exercise its legal responsibilities. In terms of economic impact, 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" (INTERPOL-USNCB, Cultural Property Program, About the Cultural Property Program, < www.usdoj.gov/usncb/cultprop/about/cultureabout.htm > (accessed Jan. 25, 2001)). In terms of legal responsibilities, heritage resources crime adversely affects property and other items for which the United States 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. Unfortunately, the Sentencing

Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes in at least five ways.

First, the courts use the Guidelines to constructively treat defined archeological resources (16 U.S.C. 470bb(1)) and historic properties (16 U.S.C. 470w(5)) as mere fungible property. In the absence of a specific guideline addressing crimes that affect archeological resources and historic properties, they have chosen to use the theft of property guideline as the most analogous guideline. However, with no specific enhancement for archeological resources and historic properties in the theft guideline, the resulting base offense level for heritage resources crimes is the lowest in the entire Guidelines. Moreover, the Guidelines do not provide sentence enhancements even when crimes affect what the Legislative and Executive branches of government have determined to be resources possessing enhanced significance, such as National Historic Landmarks (16 U.S.C. 470a(a)(1)(B)), national monuments (16 U.S.C. 432), historic properties included in the World Heritage List (pursuant to the Convention concerning the Protection of the World Cultural and Natural Heritage), "designated archaeological or ethnological material" (19 U.S.C. 2601(7)), or "pre-Columbian monumental or architectural sculpture or mural." Thus, as applied, today the Guidelines stand for the proposition that offenses involving odometers and contraband cigarettes are more repugnant than crimes affecting World Heritage sites.

Second, the courts are split regarding use of the Guidelines for sentencing criminal violations of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). NAGPRA protects defined Native American cultural items (25 U.S.C. 3001(3)). In U.S. v. Corrow (941 F. Supp. 1553, 1566-67 (D.N.M. 1996), *aff'd*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998)), the sentencing court found that, beside there being no specific guideline addressing NAGPRA crimes, no analogous offense guideline existed for use to determine the base offense level. Consequently, the court was guided by the general sentencing provisions of 18 U.S.C. 3553(b). Other courts, however, have applied the Guidelines by analogy to NAGPRA crimes (see U.S. v. Garcia, No. 92-515-LFG (D.N.M. 1993); U.S. v. Stephenson, No. CR 95-82-LH (D.N.M. 1995); U.S. v. Kramer, No. CR-96-337-BB (D.N.M. 1997); U.S. v. Tidwell, No. CR-97-00093-02-EAC (D. Ariz. 1998), *aff'd*, 191 F.3d 976 (9th Cir. 1999); U.S. v. Fragua, No. 1:97 CR 00482-001 (D.N.M. 1998); U.S. v. Tosa, No. 1:97 CR 00482-002 (D.N.M. 1998)). To compound the issue of the split of authority as to whether the Guidelines are applicable to NAGPRA crimes, some Native American cultural items subject to NAGPRA also are archeological resources subject to the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm), and in sentencing defendants convicted of violating ARPA, the Guidelines are used analogously. Thus, the same item(s) might fall inside or outside the Guidelines, depending on the court and the statute used to convict. This confusion regarding the applicability of the Guidelines for crimes involving Native American cultural items that also are archeological resources appears to frustrate the underlying rationale of the Guidelines, namely reasonable uniformity in sentencing.

Third, the Guidelines, as applied, give disparate treatment to national cemeteries, on the one hand, and other human remains, funerary objects, and cemeteries on "public lands" (16 U.S.C. 470bb(3)), "Federal lands" (25 U.S.C. 3001(5)), "Indian lands" (16 U.S.C. 470bb(4)), "tribal land" (25 U.S.C. 3001(15)), and wherever else Federal law applies (see 16 U.S.C. 470ee(c)). The Guidelines provide an enhancement for crimes affecting national cemeteries, but not other interments. Consequently, to the extent that this enhancement applies to human remains or funerary objects, the Guidelines do not stand for the equal protection of dead bodies coming within the scope of Federal law, nor do they satisfy the objective of reasonably uniform sentences for similar criminal offenses.

Fourth, the Guidelines, as applied, do not distinguish between heritage resources crimes committed for non-pecuniary gain and offenses committed for pecuniary gain or commercial purpose, as they do for other crimes. Commercial looters, who earn all or part of their income from looting and the subsequent sale of what they find, might make substantial sums of money from their activities, whereas non-commercial looters engage in these activities because of their interest in the past and their desire to possess archeological, historic, and other cultural items. When the courts apply the Guidelines uniformly to commercial and non-commercial looters, they risk imposing the same sentence for criminal conduct of different severity. Consequently, as they are used for heritage resources crimes, the Guidelines could be undermining some of the basic purposes of criminal punishment, namely just punishment and rehabilitation.

Fifth, the Sentencing Guideline application notes omit the statutorily prescribed measure of "archaeological value" to determine loss for offenses committed in violation of the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470ee), and this omission has resulted in at least one court refusing to follow the will of Congress. In 1979, Congress, believing that archeological resources and sites are an accessible and irreplaceable part of the Nation's heritage, that they were increasingly endangered because of their commercial attractiveness, and that existing Federal laws did not provide adequate protection to prevent their loss and destruction, enacted the Archaeological Resources Protection Act to secure the protection of archeological resources and sites (16 U.S.C. 470aa). At that time, Congress realized that any disturbance of an archeological site always results in archeological destruction because removing an archeological resource from its original location always destroys the context of the artifact. Recognizing that fair market value and the costs of repair and restoration, or both, to gauge loss would be inadequate to measure this irreparable harm, Congress provided a means to determine the value of the loss to humanistic science caused by an ARPA offense. That measure of loss, called "archaeological value" (16 U.S.C. 470ee(d) & ff(2)(A)), is defined in the uniform regulations that Congress required the Executive Branch to promulgate and submit to Congressional committees (see 16 U.S.C. 470ii). Archaeological value is

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.

43 C.F.R. 7.14(a); 36 C.F.R. 296.14(a); 18 C.F.R. 1312.14(a); 32 C.F.R. 229.14(a).

The definition of archeological value in the ARPA uniform regulations is a reasonable interpretation of the Act, and is consistent with the purpose of the statute and the authority given by Congress to the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Tennessee Valley Authority to promulgate regulations. Moreover, archeological value (combined with costs of restoration and repair) has been held to be an appropriate method of determining loss for an offense involving an archeological resource (see U.S. v. Shumway, 112 F.3d 1413, 1425-26 (10th Cir. 1997)). Nevertheless, at least one court constructively rejected categorically the use of archeological value to measure loss. In U.S. v. Hunter (48 F. Supp.2d 1283 (D. Utah 1998)), the court accepted the Government's valuation of damage to archeological sites managed by the Bureau of Land Management and the Forest Service, based on the cost of repair and restoration. However, the court rejected the archeological value offered by the United States for the destroyed resources at all the sites as a "speculative assessment", "fictional scholarship", and "absurd." Instead, the court assigned an admittedly subjective and arbitrary measure of loss to the

destroyed resources that it called "aesthetic diminishment."

The holding in U.S. v. Hunter, namely, that, in almost all cases, the commercial value of archeological resources destroyed or injured must be used to determine loss, has a chilling effect on the deterrent value of ARPA. Also, it raises further legal issues about the use of archeological value. For example, courts might rely on Hunter to hold that they have discretion to use commercial value or archeological value for purposes of determining whether a violation is a misdemeanor or a felony. Similarly, administrative law judges might rely on Hunter to find that they have discretion to use archeological value or commercial value to determine the amount of a civil penalty.

Contrary to the court in Hunter, I believe that when it enacted ARPA, Congress mandated that, for purposes of sentencing, the value of the destroyed or injured archeological resources is either the commercial value or the archeological value of the resources, and that Congress gave the Executive Branch the authority to choose which of those value to use to determine loss. Although it is absurd to use archeological value when determining whether an ARPA offense is a felony (or the actual damages recoverable in a civil penalty), and yet ignore the statute when assessing loss for purposes of sentencing, Hunter, nevertheless, stands for the proposition that the Sentencing Guidelines can be used to deny the Executive Branch the authority it derives from Congress, through ARPA, to decide how archeological resources are to be valued when they are destroyed in violation of the Act.

I offer five suggestions for remediation of the deficiencies I have presented. As part of the Economic Crime Package, I respectfully urge the Commission to address them, either through a new guideline, or amendments to existing guidelines, specific offense characteristics, and application notes.

First, the Commission should remedy the split of authority over whether the Guidelines apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170), and the problem of inconsistent outcomes, where the same offenses committed against the same resources result in different sentences, just because some offenses were charged under ARPA (and were sentenced under the Guidelines), and other offenses were charged under NAGPRA (and, thus, were sentenced under 18 U.S.C. 3553(b)). I believe that the Guidelines should be made to apply to violations of 18 U.S.C. 1170.

Second, the Commission should remedy the Guidelines' disparate treatment of dead bodies, where an enhancement exists for crimes committed in a national cemetery, but no enhancement exists for crimes committed against other human remains or funerary objects that come within the scope of Federal law. I believe that if sentencing enhancements exist for crimes involving national cemeteries, that offenses against any human remains or funerary property deserve an enhancement, wherever Federal law applies.

Third, the Commission should remedy the equal treatment by the Guidelines of commercial and non-commercial looters, which risks thwarting the purposes of criminal punishment by providing the same sentence for criminal conduct of differing severity. I believe the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses.

Fourth, because heritage resources crime affects important interests such as social identity, spiritual and emotional well-being, academic pursuit, economics, and the fiduciary responsibilities of the Government to the public, in general, and native peoples, in particular, the Commission should disavow the policy

engendered by the Guidelines, that crimes against heritage resources are among the least repugnant for our nation. I believe the base offense level should be raised for crimes involving defined "archaeological resources" (16 U.S.C. 470bb(1)), "historic properties or resources" (16 U.S.C. 470w(5)), "sacred objects" (25 U.S.C. 3001(3)(C)), "cultural patrimony" (25 U.S.C. 3001(3)(D)), and "objects of cultural heritage" (18 U.S.C. 668(a)), regardless of the statute used to convict, or, alternatively, that there should be an enhancement. I also believe the sentence should be further enhanced when the resources have enhanced significance, either because they come from National Historic Landmarks or national monuments, or because they constitute "designated archaeological or ethnological material" or "pre-Columbian monumental or architectural sculptures or murals." Furthermore, if the resources come from a World Heritage Site, the sentence should include an even greater enhancement.

Fifth, the Commission should include "archaeological value", as defined by the ARPA uniform regulations, in the application notes. The inclusion of "archaeological value" would overrule the refusal of some courts to apply this statutory measure in determining loss for purposes of sentencing, it would obviate the risk of creating disparity in sentences for similar criminal offenses, committed by similar offenders, through the use of arbitrary loss determinations, and it would remedy the absurdity of using archeological value to determine whether an offense is a felony, but ignoring it at sentencing. I believe that archeological value should be the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

The looting of, and injury to, heritage resources harms our citizens' well-being, and significantly affects illegal markets and important fiduciary responsibilities. Recognizing these threats, each Secretary of the Interior, since 1991, has followed a policy, called "A National Strategy for Federal Archeology", whose objectives include education, efforts to fight looting and preserve the archeological record in place, and interagency cooperation in information exchange at the Federal, State, and local levels. Because the issues concerning sentencing for crimes involving heritage resources are so important to the Federal archeology program, I respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package.

Sincerely,



David Tarler

