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March 29, 2001

MEMORANDUM

TO: Chair Murphy
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Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment

Attached for your reference are a few letters of public comment supplementing the public comment notebook. Of special note may be letters from the Department of the Interior, the Federal Public Defender's Office in New Mexico, and a December letter from the U.S. Attorney in Utah to DOJ that is referred to in some of our recent public comment.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Washington, D.C. 20240

IN REPLY REFER TO:

Environmental and Cultural
Resources Management

MAR 19 2001

The Honorable Diana E. Murphy
Judge, United States Sentencing
Commission
Suite 2-500, South Lobby
One Columbus Circle, NE
Washington, DC 20002

Dear Judge Murphy:

The Bureau of Indian Affairs (BIA) has received a copy of the December 7, 2000, letter (enclosed) from Paul M. Warner, United States Attorney for the District of Utah, to Laird Kirkpatrick, Commissioner Ex-Officio of the United States Sentencing Commission. Mr. Warner's letter requests that sentencing guidelines be established for violations of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm) (ARPA) and of the criminal provisions (18 U.S.C. 1170) of the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001-3013) (NAGPRA).

As the United States' primary agency for carrying out the federal trust responsibility for Native American Indians and with over 54 million acres of Indian trust land under our administration that are subject to the provisions of these two statutes, the BIA agrees and strongly supports the proposed solutions raised in Mr. Warner's letter.

The BIA is aware of the serious problems of looting and vandalism of archeological resources that take place on both Indian and public lands. We also are aware of the serious effect these types of crimes have on Native American Indian communities. We often hear such communities voice their distress over the destruction, for selfish and commercial gain, of archeological resources. Not only do Native American Indians consider such acts to be serious insults to themselves, but to their ancestors as well.

At present, ARPA and NAGPRA are our best weapons in combating the looting and vandalism of irreplaceable archeological resources. Without effective sentencing of violators, however, the protection afforded by the law is seriously impaired. From our perspective, appropriate sentencing guidelines would be a major asset in our efforts to protect archeological resources. Current sentencing guidelines do not reflect the actual harm caused by the thoughtless minority who engage in grave robbing activity.

The BIA would appreciate your consideration of our position on this important matter. If we can be of any assistance in your efforts to develop more effective sentencing guidelines, please contact Donald Sutherland at (202) 208-4791.

Sincerely,

Deputy Commissioner of Indian Affairs

Enclosure

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December 7, 2000

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Re: Heritage Resources Crimes and the Sentencing Guidelines

Dear Mr. Kirkpatrick:

As Commissioner Ex-Officio of the United States Sentencing Commission, you are well aware that the Commission is considering a group of important revisions to the Sentencing Guidelines known as the Economic Crime Package. The purpose of this letter is twofold: first, to inform the Commission and the Department of serious deficiencies in the Guidelines concerning heritage resource crimes; and second, to respectfully urge the Commission, with the full support of the Department of Justice, to incorporate into the Economic Crime Package essential Guidelines provisions to correct the problems.

As a preliminary matter, this office is uniquely qualified to address this issue. During the past decade, the District of Utah has led the nation in the enforcement of the Archaeological Resources Protection Act (ARPA), whose noble purpose "is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b). During this period 38 defendants in Utah were convicted of ARPA offenses (the 32 ARPA felonies may exceed the combined total from all other districts). We have successfully prosecuted the largest ARPA case (10 defendants convicted of 18 felonies, including 9 ARPA felonies). In another case, we obtained the longest ARPA prison sentence (63 months) for a notorious looter of archaeological resources. Assistant U. S. Attorney Wayne Dance of this office recently received the EOUSA Director's Award for Superior Performance for his exemplary ARPA prosecution record and his nation-wide training efforts.

Laird Kirkpatrick
December 7, 2000
Page Two

AUSA Dance has had numerous discussions with AUSAs, Department of the Interior officials, and federal land managers from around the country concerning the subject of this letter. There is unanimous agreement that the Sentencing Guidelines are wholly inadequate for ARPA and other heritage resources crimes. These crimes cause devastating and irreparable harm to the nation's cultural heritage, yet there is an utter dearth of recognition and specific treatment of them in the Guidelines.

The Solicitor General of the United States became familiar with this issue two years ago while considering whether to authorize appeal of the ARPA sentence in United States v. Hunter, 48 F.Supp.2d 1283 (D. Utah 1998) (discussed below). Although he ultimately decided against appeal for reasons applicable only to that specific case, Solicitor General Waxman personally informed AUSA Dance that he believes the Sentencing Guidelines to be inadequate for ARPA and other heritage resources crimes, and fully supports a Guidelines amendment.

The professional archaeological community also strongly supports amending the Sentencing Guidelines to give appropriate guidance to the federal courts in sentencing those who violate ARPA and other heritage resources statutes. The President of the Society for American Archaeology, the nation's largest body of professionals in this field, personally urged Solicitor General Waxman to appeal the Hunter case because of the importance and necessity of utilizing the ARPA statutory and regulatory concept of "archaeological value" in determining "loss" for ARPA offenses.

The Problems

Problem 1. There is no Sentencing Guidelines provision specifically addressing ARPA offenses and other heritage resources crimes. Appendix A, the Statutory Index for the Guidelines, does not even cite the ARPA criminal provision (16 U.S.C. § 470ee). Appendix A does list the Antiquities Act (16 U.S.C. § 433), and references USSG § 2B1.1 and § 2B1.3. However, since a violation of § 433 is a class B misdemeanor, the Guidelines are inapplicable (§ 2X5.1). In the absence of a specific Guidelines reference for ARPA offenses, the federal courts have been using §§ 2B1.1 and 2B1.3, "the most analogous offense guideline(s)" (§ 2X5.1). The problem with these two provisions is that they are grossly inadequate for ARPA and other heritage resources crimes because they contain no specific offense characteristic which references the unique and irreparable harm caused by these offenses.

Furthermore, the Base Offense Level (BOL) under § 2B1.1 and § 2B1.3 is four levels, the lowest BOL in the entire Guidelines. Even contraband cigarette offenses (§ 2E4.1), odometer offenses (§ 2N3.1), and possessing an alcoholic beverage in

Laird Kirkpatrick
December 7, 2000
Page Three

prison (§2P1.2(a)(3)) are accorded substantially higher BOLs by the Sentencing Guidelines than ARPA and other heritage resources crimes. In the theft guideline (§ 2B1.1), various items and property receive specific enhancement treatment, yet the only reference to the nation's cultural heritage is a rarely applicable enhancement for theft from a national cemetery (§ 2B1.1(b)(8); discussed below). The same limited enhancement is set out in the property damage/destruction guideline (§ 2B1.3(b)(4)).

Another important heritage resources crime receiving no Sentencing Guidelines recognition or treatment is the criminal provision of the Native American Graves Protection and Repatriation Act (NAGPRA) (18 U.S.C. § 1170). This statute prohibits illegal trafficking in Native American human remains and cultural items. Appendix A does not reference 18 U.S.C. § 1170. There is no "analogous offense guideline" (§ 2X5.1) to use for NAGPRA offenses. United States v. Corrow, 941 F.Supp. 1553, 1566-67 (D. N.M. 1996). Thus, the courts are guided only by the general sentencing provisions of 18 U.S.C. § 3553(b).

In addition to ARPA and NAGPRA offenses, there are other federal crimes involving precious and irreplaceable heritage resources (e.g. theft of major artwork; illegal trafficking in stolen cultural heritage). All of these federal offenses are Sentencing Guidelines "orphans." The significance of the Guidelines' inadequate treatment of heritage resources crimes is profound. It not only affects the administration of justice in this important area of federal law, but also is a major impediment to the heritage resources protection mandate of our federal land management agencies (National Park Service, Bureau of Land Management, Bureau of Indian Affairs, U. S. Forest Service, Tennessee Valley Authority, Corps of Engineers, Department of Defense, Department of Energy, etc.).

Problem 2. The lack of specific guidance in the Guidelines concerning "loss" determination for ARPA offenses has been problematic for federal courts. Application Note 2 under § 2B1.1 provides alternative definitions of "loss," depending on whether the property is "taken or destroyed" (fair market value), or "damaged" (cost of repairs, with a limitation). However, because of the unique and irreplaceable nature of archaeological resources, using either fair market value or costs of repairs, or both, to gauge "loss" for ARPA offenses would inadequately measure the irreparable harm caused by crimes of this nature.

Virtually every ARPA offense involves destruction of the archaeological resource, not simply "damage" to the resource. This concept requires brief explanation. Almost all ARPA offenses involve violation of 16 U.S.C. § 470ee(a), which provides: "No person may excavate, remove, damage, or otherwise alter or deface (or attempt to so

Laird Kirkpatrick
December 7, 2000
Page Four

act) any archaeological resource located on public lands or Indian lands. . . ." ARPA also prohibits illegal trafficking in archaeological resources, as provided in 16 U.S.C. § 470ee(b) and 470ee(c). Illegal excavation of an archaeological resource cannot occur without destruction of the archaeological context of that resource (context being the foundational principle of all archaeology). The removal of an archaeological resource from its original location also irrevocably changes the context of that resource (i.e. archaeological destruction), even if the object (artifact) itself is not physically damaged. Likewise, any damage, alteration or defacement of an archaeological resource cannot be fully restored or repaired due to the unique and irreplaceable nature of the resource.

Consequently, all ARPA offenses under § 470ee(a) involve some form of destruction of the archeological resource. Violations of the ARPA trafficking provisions, § 470ee(b) and § 470ee(c), are also very likely to involve a destruction component of "loss" at sentencing due to the Guidelines' relevant conduct mandate. USSG § 1B1.3. Since ARPA offenses involve destruction as well as damage of archaeological resources, the fair market value component of the "loss" definition in § 2B1.1, Application Note 2, is implicated. However, as previously stated, fair market value is wholly inadequate to measure the irreparable harm of ARPA offenses.

Application Note 2 unsuccessfully attempts to alleviate this problem by providing: "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. . . ." (emphasis added.) This vague suggestion is subject to varying, even conflicting interpretations. For example, compare the disparate "loss" determinations in two ARPA cases prosecuted by this office: United States v. Shumway, 112 F.3d 1413, 1424-26 (10th Cir. 1997), and United States v. Hunter, 48 F.Supp.2d 1283 (D. Utah 1998).

Based on the permissive rather than mandatory language in Application Note 2 quoted above, the district court in Hunter disparaged and disregarded the concept of "archaeological value" in determining "loss," even though the ARPA statute (16 U.S.C. § 470ee(d)) and the implementing uniform ARPA regulations (see 43 C.F.R. § 7.14(a)) explicitly establish and define "archaeological value" as a required measure of harm caused by an ARPA offense. Instead, the Hunter court created its own subjective measure of harm to the archaeological resources ("aesthetic diminishment") and assigned an arbitrary monetary value to it. Hunter, 48 F.Supp.2d at 1287-88.

In contrast to the Hunter decision, the U. S. Court of Appeals for the Tenth Circuit a year earlier upheld a district court's use of "archaeological value" (combined with costs of restoration and repair) as an appropriate method of determining "loss" for

Laird Kirkpatrick
December 7, 2000
Page Five

an ARPA offense, i.e. "to gauge the severity of a particular (ARPA) offense." Shumway, 112 F.3d at 1425. The Tenth Circuit also soundly rejected defendant's argument that the ARPA "loss" determination should be based solely on the costs of restoration and repair. Id. Unfortunately, the district court in Hunter did not deem itself bound by the Tenth Circuit's astute analysis and holding in Shumway due to the permissive language of Application Note 2 ("may measure loss in some other way").

Problem 3. There are no Guidelines provisions applicable to other serious aggravating factors in ARPA offenses and other heritage resources crimes, where the offense (a) "was committed for pecuniary gain or otherwise involved a commercial purpose" (compare USSG § 2Q2.1(b), or (b) "involved a pattern of similar violations" (compare same provision).

Problem 4. The Guidelines are silent on federal offenses involving human remains, except for the limited and rarely applicable enhancement for theft of "property" from a national cemetery (§ 2B1.1(b)(8), or damaging or destroying "property" of a national cemetery (§ 2B1.2(b)(4)).

Proposed Solutions

ARPA offenses and other heritage resources crimes should be appropriately recognized and specifically addressed in the Sentencing Guidelines. This can be accomplished with either a new guideline specific to these offenses, or amendments to existing guidelines and attendant Specific Offense Characteristics and Application Notes. The following proposals could be incorporated into the Guidelines by either means. For ease of reference, the latter method is used to discuss these proposals.

Proposal 1. Archaeological resources and other irreplaceable cultural heritage resources should be given due recognition and appropriate treatment in the Guidelines by adding a Specific Offense Characteristic (SOC) to § 2B1.1 (theft of government property), § 2B1.3 (damage or destruction of government property), and any other applicable guidelines (e.g. § 2F1.1), by requiring an increase in the offense level for ARPA and any other federal offense involving such resources.

The extent of this offense level increase, applicable to all ARPA and other heritage resources crimes, should be a sufficient number of levels to convey appropriate sentencing recognition to the uniquely harmful nature of these offenses to the nation's cultural heritage. This SOC should apply to every ARPA and heritage resources crime, regardless of the severity of the offense in a particular case.

Laird Kirkpatrick
December 7, 2000
Page Six

There are important reasons for this general SOC provision to be applicable to all relevant offenses. The "loss" determination for each individual offense (see Proposal 2 below) separately serves the important purpose of assessing that offense's severity. Shumway, 112 F.3d at 1425 ("Loss also serves to gauge the severity of a particular offense."). The unique and irreplaceable nature of heritage resources crimes cannot be fully gauged by only a monetary loss determination, as would be true for fungible goods and repairable property. In addition to the general enhancement, the separate "loss" enhancement appropriately measures the extent of harm caused by the particular ARPA offense or other heritage resources crime.

Proposal 2. The "loss" determination for ARPA and other heritage resources crimes should be specifically addressed in the Guidelines. A standardized "loss" determination could be easily accomplished by inserting a new Specific Offense Characteristic in the applicable guidelines (§§ 2B1.1, 2B1.3, 2F1.1, etc.). For ARPA offenses, the SOC would require the "loss" to be the total of the archaeological value of the resource (or commercial value as defined by the ARPA regulations, whichever is greater), plus the cost of restoration and repair relative to the offense. This SOC would simply incorporate into the Guidelines the Tenth Circuit's excellent analysis and resolution of this issue in the Shumway case. For other heritage resources crimes, a comparable method of "loss" determination will be necessary where the relevant heritage resource is other than an "archaeological resource" as defined by ARPA.

Proposal 3. A Special Offense Characteristic should be added to the Guidelines for ARPA offenses and other heritage resources crimes to appropriately account for two other serious aggravating factors present in some of these cases. The Guidelines already address these two aggravating factors by providing enhancements for offenses involving fish, wildlife, and plants, and set forth in USSG § 2Q2.1(b)(1):

If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by 2 levels.

This new SOC for ARPA offenses and other heritage resources crimes should conform to the language of § 2Q2.1(b)(1).

Proposal 4. USSG § 2B1.1(b)(8) and § 2B1.3(b)(4) should be amended to make the national cemetery property enhancement also applicable to (a) all offenses involving human remains and funerary objects located on public or Indian lands, and (b) any NAGPRA offense involving trafficking in Native American human remains or funerary objects.

Laird Kirkpatrick
December 7, 2000
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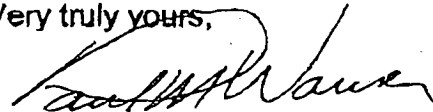
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Laird Kirkpatrick
December 7, 2000
Page Seven

CONCLUSION

I apologize for the length of this letter, but the subject matter is immensely important and requires more than a cursory review. Amending the Sentencing Guidelines to fully address the irreparable harm caused by ARPA offenses and other heritage resources crimes will truly manifest to "the present and future benefit of the American people," as Congress intended. 16 U.S.C. § 470aa(b). Few undertakings by the Sentencing Commission could be of greater significance to the nation.

Very truly yours,



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United States Attorney

PMW/sb

Licki ~~Portney~~ Portney

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