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# 2011 FEDERAL SENTENCING GUIDELINES MANUAL

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## CHAPTER TWO - OFFENSE CONDUCT

### PART B - BASIC ECONOMIC OFFENSES

#### 1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, PROPERTY DESTRUCTION, AND OFFENSES INVOLVING FRAUD OR DECEIT

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the value of the cultural heritage resource or paleontological 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 or paleontological 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 or veterans' memorial; (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; or (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 or paleontological 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. §§ 470aaa—5, 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

Application Notes:

1. Definitions.—For purposes of this guideline:

(A) "Cultural heritage resource" means any of the following:

- (i) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).
- (ii) A historic resource, as defined in 16 U.S.C. § 470w(5).
- (iii) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 229; 18 C.F.R. pt. 1312).
- (iv) 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)).
- (v) A commemorative work. "Commemorative work" (I) has the meaning given that term in 40 U.S.C. § 8902(a)(1); and (II) includes any national monument or national memorial.
- (vi) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).
- (vii) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

(B) "Paleontological resource" has the meaning given such term in 16 U.S.C. § 470aaa.

2. Value of the Resource Under Subsection (b)(1).—This application note applies to the determination of the value of the resource under subsection (b)(1).

(A) General Rule.—For purposes of subsection (b)(1), the value of the 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 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 resource based on available information.

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

- (i) "Archaeological value" of a 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, e.g., 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 resource means the fair market value of the resource at the time of the offense. (See, e.g., 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 resource; and any other actual and projected costs to

*complete restoration and repair of the 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 resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See, e.g., 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 Resources.—In a case involving a variety of resources, the value of the 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(a)(1) except that the museum may be situated outside the United States.*

*(B) "National cemetery" and "veterans' memorial" have the meaning given those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).*

*(C) "National Historic Landmark" means a property designated as such pursuant to 16 U.S.C. § 470a(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. § 2601(6).*

*(C) "Designated archaeological or ethnological material" means archaeological or ethnological material described 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 Commercial Purpose Enhancement Under Subsection (b)(4).—

*(A) "For Pecuniary Gain."—For purposes of subsection (b)(4), "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) Commercial Purpose.—The acquisition of 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" for purposes of subsection (b)(4).

6. Pattern of Misconduct Enhancement Under Subsection (b)(5).—

(A) Definition.—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources or paleontological resources" means two or more separate instances of offense conduct involving a resource that did not occur during the course of the offense (*i.e.*, that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

(B) Computation of Criminal History Points.—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Dangerous Weapons Enhancement Under Subsection (b)(6).—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

8. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving 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 or paleontological 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 paleontological 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).

Historical Note: Effective November 1, 2002 (see Appendix C, amendment 638). Amended effective November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 700); November 1, 2010 (see Appendix C, amendments 745 and 746).