

**Native Hawaiian Community Electronic Consultation Report
Legislative Options – International Trafficking of Native American Cultural Items**

April 16, 2020

Overview

To support greater self-determination by the Native Hawaiian Community and to improve the legislative options document, on February 24, 2020, the Office of Native Hawaiian Relations (ONHR) distributed a message to Native Hawaiian Community leaders and members of the Community through the Department’s Native Hawaiian Organization List and the Homestead & Beneficiary Association List seeking input on a draft summary of legislative options for consideration by Congress on how best to amend U.S. laws to prevent the international trafficking of Native American cultural items. On March 23, 2020, the Office also held a listening session to receive input from the Native Hawaiian Community on the same subject document. The period for all comments closed on March 28, 2020.

This report provides an overview of the comments received from the Native Hawaiian Community.

Background

For many decades, Native American cultural items (under current U.S. law the term Native American includes Native Hawaiian) have appeared, and continue to appear, at auctions outside of the United States. The theft and trafficking of Native American cultural items is unacceptable, and yet the limited scope of existing federal laws pose challenges to addressing the issue.

The Department of the Interior, in coordination with an interagency working group, which includes representatives from the Departments of State, Justice, and Homeland Security, have developed a draft summary of legislative options. This draft summary responds to a finding and corresponding recommendations in the August 2018 GAO Report to Congress entitled “Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions” that U.S. Federal laws do not explicitly prohibit exporting Native American cultural items, and those laws that address theft and trafficking are limited in scope. The goal in drafting the legislative options document and seeking comments from Native American communities is to determine whether or how to amend the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items to facilitate the repatriation of these items.

Specific Input to the Six Options – *Input from the Native Hawaiian Community Denoted in Italics*

1. Option 1: Prohibit export of items “obtained in violation” of existing domestic cultural property laws (e.g., NAGPRA/ARPA)
 - a. New legislation could criminalize the knowing export or transport of Native American items “obtained in violation” of NAGPRA, ARPA, and/or the Antiquities Act. Items subject to this legislation would be defined by reference to the definitions in the existing statutes.
 - b. Legislation also could prohibit exports of cultural items obtained in violation of tribal law, analogous to the ARPA prohibition on trafficking of archaeological objects obtained in violation of state or local law. This would recognize the authority of each tribe to determine access to cultural resources.
2. Option 2: Prohibit export of Native American items except in compliance with permit
 - a. Under this approach, a designated U.S. federal agency or commission would identify the types items protected under the statute.
 - b. Items subject to the export prohibition without a permit could either be limited to the existing NAGPRA and ARPA definitions of cultural heritage or include a broader list. Export of such protected items would generally be prohibited, although Tribes (and possibly museums) could get a permit to export the property for ceremonial purposes or for (temporary) exhibition in a museum or other cultural or educational use.
 - c. **Native Hawaiian Community input**
 - i. *A U.S. citizen or resident who is prohibited under current U.S. law from selling Native American human remains and funerary objects (cultural items) should not be allowed to transport those cultural items to another country and sell those items with no penalty. This is happening now and must stop.*
3. Option 3: Require a declaration to export Native American cultural items
 - a. Under this approach, anyone seeking to export a Native American cultural item from the United States would have to submit a written declaration in advance of the planned export describing the item and its provenance. It should be noted that this requirement is embodied in the STOP Act of 2019, though it has not, at this point, become law.
 - b. **Native Hawaiian Community input:**
 - i. *Anyone selling or exporting Native American cultural items must provide proof that they obtained the subject item(s) through lawful means.*
4. Option 4: Strengthen existing domestic laws
 - a. Rather than developing legislation focused on explicit export controls, another option would be to amend and strengthen existing domestic laws, for example, by increasing resources available for enforcement of domestic prohibitions and/or by increasing civil and/or criminal penalties, increasing statute of limitations, e.g. those in NAGPRA, ARPA, and the Indian Arts and Crafts Act.

b. Native Hawaiian Community input:

i. It is unclear whether laws like NAGPRA need to be strengthened. The current regulations are somewhat confusing and should be revised.

5. Option 5: Support Tribes in strengthening their laws

a. This option could be addressed through administrative actions, through separate legislation, or in combination with other legislative options. Tribal cultural property laws may go beyond the protections of NAGPRA and ARPA, and could be incorporated into a new system of export controls.

6. Option 6: Support for legitimate trade of Native American arts and crafts

a. This option could be pursued in conjunction with any new legislation that introduces export controls. Additional resources could provide support for Native American artists and craftspeople seeking to increase their access to international markets. This approach could include additional outreach to foreign governments, art dealers, auction houses, etc., about the legitimate trade of Native American arts and crafts, and how to identify authentic Native American arts and crafts. In addition, it could provide an opportunity to generally educate international audiences about Native American cultures.

b. Native Hawaiian Community input

i. Legitimate trade of Native American arts and crafts is important. The issue with many early sales of Native American cultural items is that those who sold the cultural items often had no claim of ownership over those items. There must be a way to verify that any cultural items being sold are in fact being sold by persons who own those cultural items.

ii. The human remains of our ancestors must never be sold.

Additional Commenter Recommendations

- **Information repository** – *There needs to be a repository of information about where Native American cultural items are being held by international entities (both public and private entities).*
- **Statute of limitations** – *There can be no statute of limitations on claims for the human remains of our ancestors.*
- **Proof of consent** – *Burden of proof must be on the possessor to show the cultural item was acquired legitimately.*
 - *Does a museum have evidence of proper consent for any of the items?*
 - *Did the families of the deceased give permission to remove the cultural items? Deceased Native American family members buried in a cave should have no less protection under the law than western Europeans buried in a conventional graveyard.*
 - *Safer assumption is that the items were acquired without consent – a purchase or trade does not prove consent but only that an exchange occurred for the cultural item.*