

## DRAFT FOR NATIVE HAWAIIAN COMMUNITY CONSULTATION

### Preventing International Trafficking of Native American Cultural Items: Draft Assessment of Legislative Options

#### **I. Introduction**

The U.S. Government Accountability Office (GAO) report, “[Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions](#),” issued on September 5, 2018, examined (1) federal agencies’ actions to assist tribes in repatriating cultural items being auctioned overseas, (2) the laws that address the export, theft, and trafficking of cultural items, and (3) any challenges in proving violations of these laws.

In its report, the GAO concluded, “federal laws that address the theft and trafficking of Native American cultural items are limited in scope, making it challenging for tribes to provide sufficient evidence of violations.” In light of this finding, the GAO issued recommendations to four U.S. agencies (the U.S. Departments of State (DOS), Justice (DOJ), Interior (DOI), and Homeland Security (DHS)) engaged in supporting tribal efforts to repatriate Native American cultural items from abroad. GAO called on each agency to direct its “members of the interagency working group for protection of Native American cultural property to collaborate with the interagency working group members from other agencies to assess, in consultation with Indian tribes, whether and how amending the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items would facilitate the repatriation of these items from auctions overseas and report its findings to Congress.”

In response to the GAO recommendation, this paper provides a draft summary of legislative options identified by DOI, with substantial input from members of the interagency working group for protection of Native American cultural property. DOI intends to hold tribal consultations on this draft assessment, and will incorporate comments and input from tribal representatives, as appropriate, before submission to the GAO.

#### **II. Background**

DOI is committed to helping protect Native American cultural heritage. We recognize that cultural heritage is an essential element for tribal self-determination and for the identity of Native American Communities. Native Americans were the first people to call this land home, and Native American cultural roots give spirit and direction to Native American Communities and to our nation as a whole.

Several U.S. tribes have appealed to the U.S. Government, foreign authorities (e.g. France), and directly to foreign auction houses to delay the potential sales of items of Native American cultural heritage so that a thorough discussion with tribal authorities and experts might determine the provenance of specific items. To date, these efforts have been largely unsuccessful. One reason is that foreign auction houses typically publish the catalogue of items only a few weeks in advance of the auction, leaving little time for potentially interested parties and U.S. government agencies to identify specific objects of concern and engage in further inquiries about the objects.

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Additionally, efforts by tribes to stop the auctions through litigation in foreign courts have not succeeded.

As the GAO found, the current U.S. legal framework requires strengthening to prevent future illegal takings and exportation of items of Native American cultural heritage, to encourage repatriation of such items from abroad to tribes with cultural affiliation, and to facilitate foreign governmental cooperation. (See the September 2018 [GAO report](#) for a comprehensive summary and analysis of the existing U.S. legal framework.)

### III. Assessment of Legislative Options

In addition to leveraging existing Federal laws and enhancing protections through the U.S. legal framework, it may also be necessary to amend those laws, or explore development of new legislation. Congress is actively considering new legislation that addresses this issue (e.g. the [Safeguard Tribal Objects of Patrimony Act \(STOP Act\) of 2019](#)). In response to the GAO's recommendation, we offer general considerations that would apply to any new legislative proposal (**Section A**), as well as a summary of possible legislative options, some of which already have been introduced by Congress, along with relevant considerations (**Section B**). The options offered here are not mutually exclusive, and could be used effectively in combination.

#### A. General considerations

- For new legislation, it would be helpful to have clearly defined goals, e.g.:
  - Prevent future wrongful taking of items;
  - Prevent future export of wrongfully taken items (e.g. through enhanced export controls);
  - Encourage repatriation of items from abroad;
  - Facilitate foreign governmental cooperation to prevent export and/or encourage repatriation.
- A critical but challenging aspect of developing any system of export controls is defining what items would be covered by the law. A definition of covered items could include, in consultation with Indian tribes, Native American items:
  - Defined under the Native American Graves Protection and Repatriation Act (NAGPRA), the Archaeological Resources Protection Act (ARPA), and the Antiquities Act;
  - Defined by tribal or State laws;
    - If including tribal laws, note that many tribes may not codify their laws governing the protection of cultural items. Congress could consider including only tribal laws that are publicly available.
  - Other types of items (e.g., items of historic, cultural, spiritual or religious significance, whether the item was communally or individually held and by whom, etc...)
  - A new standalone list of types of items
- When addressing technical aspects to be covered by the statute, it may be advantageous to provide for specifically delegated rulemaking authority to the appropriate agency. (Any deadline for rulemaking must include sufficient time for consultation.)

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- In tribal consultations conducted by DOI in 2016, and in ongoing discussions with tribal representatives, many tribes are concerned about maintaining confidentiality of information supplied by tribal authorities about sacred objects and other cultural items. Tribes may supply such information for the purposes of law enforcement, to obtain federal assistance with repatriation, for training and workshops, or for the development or implementation of rules. Protecting such information from disclosure (e.g., a FOIA exemption) is an important consideration for new legislation.
- A clear description of federal agency and tribal roles and responsibilities for implementation and enforcement would be helpful.
- Legislation could address the tools to facilitate the return of items to tribes (e.g., seizure and forfeiture, tax incentives).
- Legislation could address incentives to encourage voluntary return of items and could complement other measures (e.g. tax incentives).
- Legislation could identify methods and resources to ensure effective compliance and enforcement (e.g. border inspections, training for inspectors, customs officials, etc.). Ease of enforcement at the border is especially important.
- Any new legislation should consider and address the additional resources required (e.g. personnel, information systems, access to relevant expertise) by federal agencies and tribal governments for implementation. Additional resources required to implement new export controls, such as a national permitting system and additional enforcement expenses, could be significant.
- Compatibility with the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 Convention”), existing implementing U.S. legislation, and the implementation of that Convention by other countries, is an important consideration. This could significantly affect the ability of other countries such as France apply their laws to control the importation of Native America items.
  - Under Article 6 of the 1970 Convention, cultural property should be subject to an export certification (specifying that the export is authorized); without such a certification, exportation should be prohibited. (Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 6, Nov. 14, 1970, 823 U.N.T.S. 231.)
  - Article 7 (b)(ii) allows State Parties to seek recovery and return of illegally exported cultural property. The requesting party, however, has to provide documentation to establish a claim for recovery and return. (*Id.* art. 7 b.ii..)
  - Avoidance of potential 5<sup>th</sup> Amendment takings issues is important in drafting new legislation, taking into account relevant jurisprudence such as Andrus v. Allard, in which the Supreme Court found that regulations which prohibited the sale of lawfully obtained eagle and migratory birds, bird parts, nests, and eggs did not amount to a taking under the Fifth Amendment. (444 U.S. 51, 65, 1979). The Court reasoned that the sale prohibition eliminated only one “strand” of an entire “bundle” of property rights available to an owner (albeit the most profitable property right).
- New legislation could seek to mitigate potential impact on legitimate commerce in art markets. Legislation could encourage sale of legally and ethically acquired Native

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American arts and crafts to enhance economic opportunities for Native American artists, including by developing foreign markets for American goods.

- New legislation could seek to improve collaboration with state and local governments to strengthen their laws to protect Native American cultural items.
- Lessons learned from analogous experiences in areas such as regulation of wildlife trade, control of arms and technology exports, and enforcement (including civil proceedings) of intellectual property rights such as trademarks and trade secrets, could inform new legislation.

### B. Summary of Legislative Options

#### **Option 1: Prohibit export of items “obtained in violation” of existing domestic cultural property laws (e.g., NAGPRA/ARPA)**

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.

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. Additionally, the legislation could prohibit the export of goods taken from tribes in violation of 18 U.S.C. §1163, which provides criminal penalties for willful embezzlement and theft from Indian tribal organizations.

#### *Considerations*

- Existing definitions of the categories of property protected under NAGPRA and ARPA are well known by the regulated parties. Generally, however, whether an object is protected under NAGPRA is determined in consultation with Tribes, which may be impractical when a border agent is faced with an exporter, and difficult to explain to foreign governments.
- While NAGPRA and ARPA already prohibit the “transport” of items obtained in violation of the statutes, for the most part, the laws do not explicitly prohibit “export.” There is a concern about a presumption against applying laws extraterritorially unless the statute is explicit about Congress’ intent to do so. This legislation could clarify the circumstances under which export is prohibited.
- This approach would not include an export certificate or permit requirement. Consequently, other countries’ national laws to implement the 1970 Convention are unlikely to prohibit import of items prohibited from export from the United States using this approach.
- It often is difficult to prove that items were “obtained in violation” of NAGPRA and ARPA. For example, it often is difficult to prove that the items were removed from public or tribal lands as opposed to other lands (as required by ARPA), and that the objects at issue meet the respective definitions of archaeological resource (as required by ARPA to be over 100 years old) or qualify as sacred objects or objects of cultural patrimony (as required by NAGPRA). Further, some courts

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have found that objects removed from federal or tribal land prior to the date of enactment of the applicable statute are not subject to the statute's requirements.

### **Option 2: Prohibit export of Native American items except in compliance with permit**

Under this approach, a designated U.S. federal agency or commission would identify the types items protected under the statute. 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. The list could serve to designate cultural heritage of importance to the United States in the terms of Article 1 of the 1970 Convention. The permit could serve as the export certificate provided for under Article 6 of that Convention, provided it is drafted in accordance with the requirements of the Article. Additional criminal penalties would only apply to knowing exports of (or attempts to export) such items without a permit. Note that this is the general approach included in the 2019 STOP Act, as introduced.

#### *Considerations*

- An export license or certificate scheme, consistent with the expectations of the 1970 Convention, would make it much more likely that other countries such as France would provide assistance with the repatriation of unlawfully exported items. Additionally, under a mandatory permitting scheme, a failure to obtain a required permit would in itself constitute a violation of law sufficient to trigger action by either the U.S. or the importing country, without the need to demonstrate a violation under another existing cultural protection law.
- Information provided through the permit application could improve governmental and public understanding of such things as the nature of the problem and patterns of trade in cultural heritage.
- If a commission were established to administer the permit system, membership could include representatives of federally recognized Tribes and individuals with an expertise in Native American culture, archaeology, and legal matters related to the trafficking of cultural items.
- A permit system based solely on an attestation from the shipper that the item was not taken in violation of NAGPRA/ARPA could pose challenges for law enforcement if new information comes to their attention. That fact that the item was issued an export permit could hamper or negate future criminal investigations and/seizures of the item.
- This approach would require a new permit system, which would impose significant administrative burden on the implementing agencies, as well as compliance costs on those seeking to export.
- Tribes living along U.S. borders may have members living in Mexico or Canada, and may routinely move cultural heritage across the border and back for ceremonial purposes. An export permit or certificate requirement could unduly burden those Tribes.

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- A new export prohibition and permit requirement could inadvertently impact the legitimate trade of Native American arts and crafts. This underscores the importance of clearly defining protected types of items.
- Examples of permit programs that could serve as models include:
  - *Domestic*: Eagles/Eagle Parts (50 C.F.R. Part 22); USDA Plant Export ([https://www.aphis.usda.gov/aphis/ourfocus/planthealth/sa\\_export/sa\\_for\\_ms/ct\\_export\\_certificates\\_forms](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/sa_export/sa_for_ms/ct_export_certificates_forms)); USDA Animal Export ([https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/veterinary-biologics/ct\\_vb\\_import\\_export\\_products](https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/veterinary-biologics/ct_vb_import_export_products))
  - *International models*: **New Zealand** [[Projected Objects Act of 1975](#)], **Canada** [[Cultural Property Export and Import Act of 1985](#) (R.S.C., 1985, c. C-51) and the corresponding [Regulations](#) (C.R.C., c. 449) and [List](#) (C.R.C., c. 448)], and **Australia** [[Protection of Movable Cultural Heritage Act of 1986](#) (Fed. Reg. of Leg., C2016C00608) and the [Protection of Movable Cultural Heritage Regulations](#)].

### **Option 3: Require a declaration to export Native American cultural items**

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. The declaration could be added to a database accessible to agencies and Tribes, which could potentially stop illegal transports. Any effort or attempt to export or an item without submitting a declaration, would be a violation in and of itself that could trigger return of the object to the United States or inspection and seizure at the U.S. border. This requirement could potentially complement Option 1 and/or 2 described above. The declaration potentially could be drafted to comply with the certificate requirements of Article 6 of the 1970 Convention.

#### *Considerations*

- As with Option 2, an important consideration is the definition of the types of items requiring declaration, and whether the types go beyond NAGPRA and ARPA.
- While this approach would require extra effort from the regulated community, and significant government and tribal resources to administer, it could be less burdensome to implement than a permitting program.
- Similar to a permitting program, the United States would not necessarily have to prove a violation of an existing law to repatriate an item. However, any legislation would need to consider that failure to declare may not be willful.
- Knowingly and willfully making a false statement in a declaration would also be an independent violation of existing law. (18 U.S.C. § 1001).
- A declaration requirement could have a deterrent effect on illicit trafficking.
- As with the permit approach, a requirement to disclose the nature and provenance of the item could also improve governmental and public understanding of the nature of the problem.

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### **Option 4: Strengthen existing domestic laws**

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.

#### *Considerations:*

- Could be achieved by passing new legislation, amending existing legislation, and/or administrative actions.
- Amendments also could update existing statutory definitions of cultural heritage; address burden of proof issues; and include Tribal cultural property laws for purposes of enforcement and imposition of criminal penalties.
- Could include assistance to Tribes to strengthen efforts to inventory, document, safeguard, and prevent theft of cultural resources, and to enhance enforcement of NAGPRA and ARPA on Federal and Indian lands.
- Could include resources to improve interagency law enforcement coordination and information-sharing
- Amendments could affirm NAGPRA and ARPA as general intent statutes.
- Less resource-intensive approach.
- May require amendments to multiple laws.
- Would not fully address limits identified in GAO report, and would not be consistent with the 1970 Convention.

### **Option 5: Support Tribes in strengthening their laws**

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.

DOI, including the Bureau of Indian Affairs and the Office of the Solicitor, working in conjunction with the National NAGPRA program within the National Park Service, as well as the DOJ, DHS, and DOS, could provide technical assistance to tribes in promulgating these laws. Federally sponsored workshops could bring together tribal leaders, lawyers, and resource protection staff to share information and experiences developing and implementing tribal cultural property laws.

#### *Considerations:*

- This approach would support the empowerment of tribes to be directly involved in the protection of their cultural heritage.
- Allows tribal cultural experts to assist in identifying what items do and do not require protection
- Promotes tribal sovereignty and self-determination.
- Tribes could address any concerns about sensitive cultural items that they routinely move across the border, and back, for cultural or ceremonial activities.

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- Could potentially increase Tribal involvement with foreign countries to improve repatriation efforts.
- Would require additional resources from federal agencies and tribes to put on workshops and trainings, and provide technical expertise, as well as to implement the new tribal laws.
- Could be challenging for federal officials to maintain knowledge and awareness of all tribal laws protecting cultural heritage and the various definitions of cultural heritage under each of those laws.
- May be complicated to communicate to the trade and foreign governments what items are protected.

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

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.

#### *Considerations:*

- This option would require additional funding and personnel, and would require significant support from U.S. Department of Commerce (DOC), and U.S. Department of State (DOS). It may also require amendments to the Indian Arts and Crafts Act. The Indian Arts and Crafts Board could potentially advise DOC and DOS on authentic Indian art issues and resources for Indian arts and crafts exportation.
- The U.S. Fish and Wildlife Service (FWS) is responsible for enforcement of the Indian Arts and Crafts Act. With additional resources, FWS could create and deliver training through the International Law Enforcement Academy on the Act, and on identification of authentic Indian arts and crafts.
- Promotes benefits and economic opportunities for all key stakeholders--Native Americans and art market businesses.