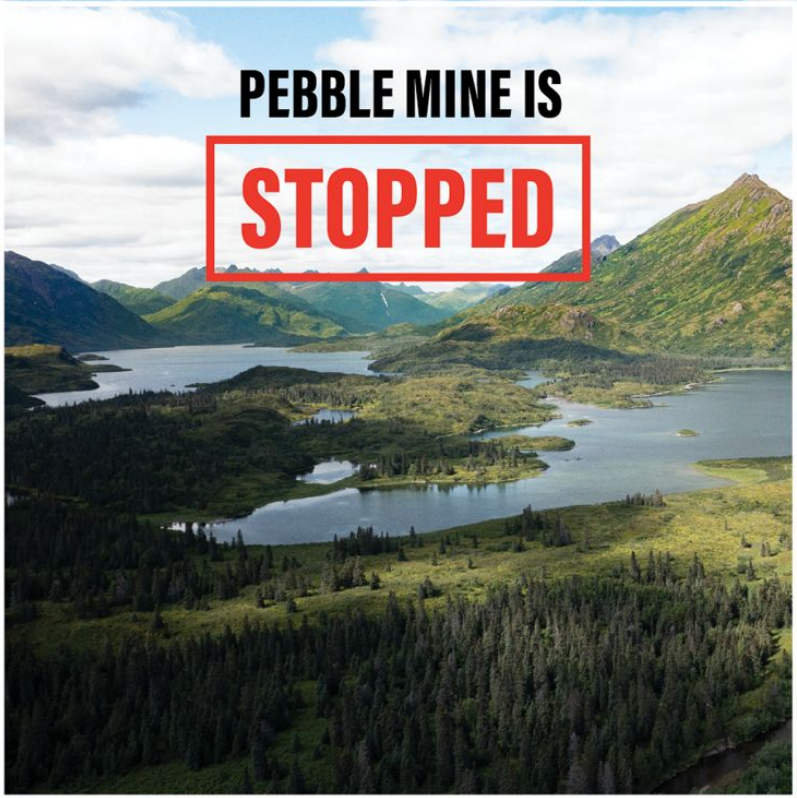


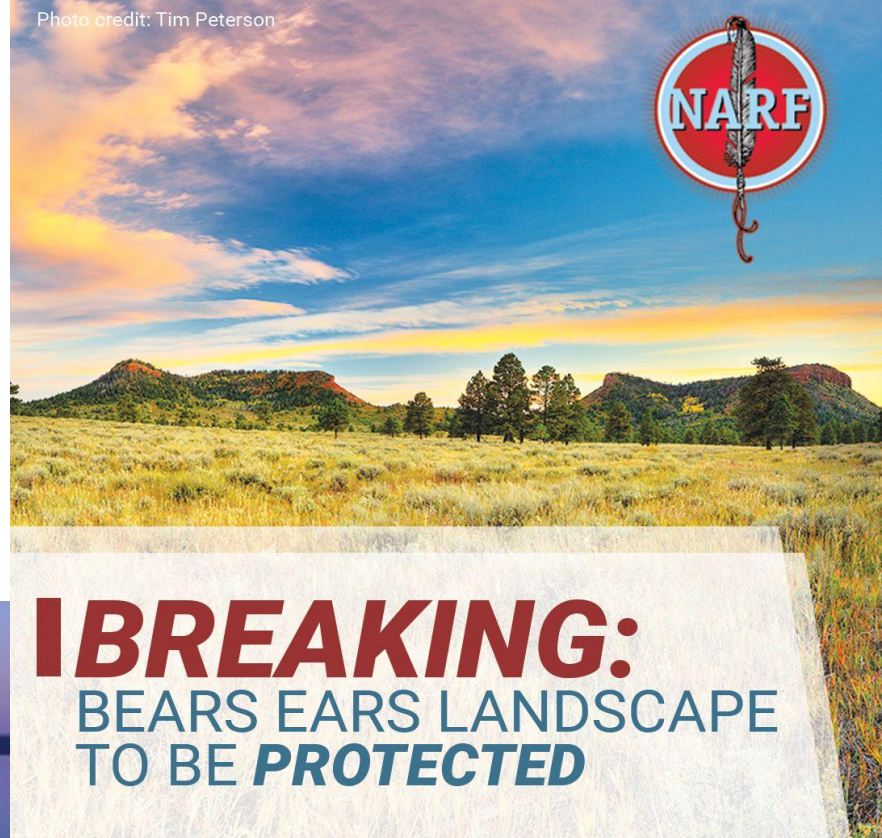
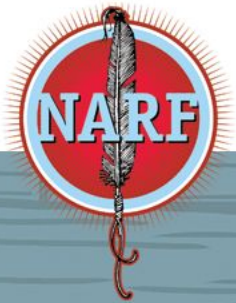
Protecting the Sacred – Tools for Protecting Sacred Sites and Cultural Heritage Items

Part I:

- Shortcomings and Available Tools



PEBBLE MINE IS
STOPPED



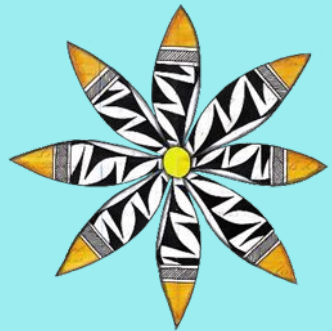
BREAKING:
BEARS EARS LANDSCAPE
TO BE **PROTECTED**





Available Tools to Protect Sacred Places

- Tribal Nation Law
- Treaties
- 1st Amendment
- RFRA
- NHPA
- NEPA
- NAGPRA
- CWA
- ARPA
- ESA
- Antiquities Act
- Breach of Trust (but not really)
- AIRFA
- EO 13007 and other Agency Guidance
- Co-Management
- New Federal/State Legislation
- International Law



Limits on Available Tools



- Tribal Nation Law (jurisdictional scope)
- Treaties (scope)
- Free Exercise/RFRA (governing test, e.g. *Lyng*, *Apache Stronghold*, judicial view of burden – square peg, round hole)
- NHPA/NEPA (primarily procedural, no requirement to avoid impacts/effects)
- NAGPRA (limited to remains and funerary objects on federal land)



Limits on Available Tools

- CWA (limited to waters of the United States and water in general)
- ESA (limited to protecting endangered species as listed)
- Antiquities Act (limited to historic and scientific objects as proclaimed by President)
- AIRFA (no teeth, *Lyng*, 485 U.S. at 455, but useful for advocacy)
- EO 13007 (no teeth, but useful for advocacy)
- Co-Management (limits on enforceability and strength)
- New Federal/State Legislation (Congress)



SUZANNE NEWMAN FRICKE

AS WE SEE IT



Conversations with Native American Photographers



Tribal Nation Law*

- Title 40, Lummi Code of Laws (Cultural Resource Preservation Code)
- Title 5, Muscogee Code Annotated (Ceremonial Grounds/Churches)
- 4 Navajo Code § 901 et seq. (Navajo Environmental Policy Act)
- RST Ordinance 2006-02 (Cultural Resource Management Code)

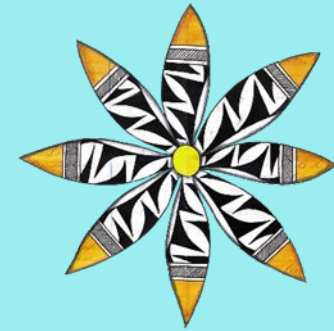


* These may be out of date or superseded.



Treaties

- Article 3 of 1851 Fort Laramie – anti-depredation provision
- Article 7 of 1855 Lame Bull Treaty – anti-depredation provision
- First Amended Complaint, *Rosebud Sioux Tribe and Fort Belknap Indian Community v. Donald Trump*, <https://www.narf.org/nill/documents/20190508kxl-amended-complaint.pdf>
- *But see Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006) (breach of trust case that analyzes treaty without using canons).



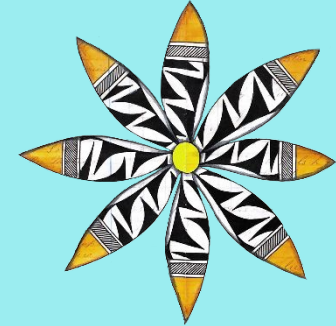
First Amendment

- Laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 876 (1990).
- But “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).
- And the Government fails to act neutrally when it proceeds in a manner “intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).
- A policy is “not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing ‘a mechanism for individualized exemptions.’” *Id.*



First Amendment

- Ninth Circuit, however, concluded that a disposition of government real property is not subject to strict scrutiny when it has “no tendency to coerce individuals into acting contrary to their religious beliefs,” does not “discriminate” against religious adherents, does not “penalize” them, and does not deny them “an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Apache Stronghold v. United States*, No. 21-15295, 2024 WL 884564, at *13 (9th Cir. Mar. 1, 2024) (citing *Lyng*); *but see id.* at *94 (Murguia, J., dissent) (concluding *Lyng* does not add anything to the *Smith* test, which RFRA overruled).



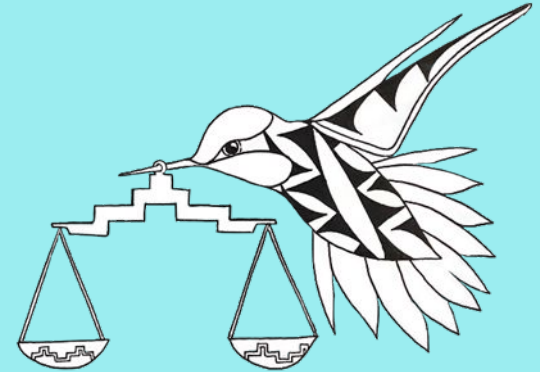
RFRA

- A prima facie claim is established when a plaintiff shows: (1) their activity is an exercise of religion and (2) the government action substantially burdens their religious exercise.
- Once the plaintiff establishes a prima facie case, the burden shifts to the government to prove that the restriction furthers a compelling government interest by the least restrictive means. 42 U.S.C. § 2000bb-1.



RFRA

- 9th Cir. also concluded that Apache Stronghold's RFRA claim failed because RFRA did not override *Lyng*, but rather must be interpreted consistent with *Lyng*. *Apache Stronghold v. United States*, No. 21-15295, 2024 WL 884564, at *20 (9th Cir. Mar. 1, 2024).
- Because Apache Stronghold's Free Exercise claim failed under *Lyng*, its RFRA claim necessarily failed as well. *Id.*



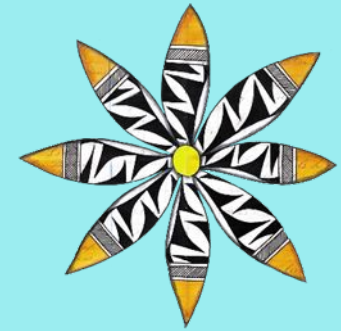
NHPA

- National Historic Preservation Act (“NHPA”) of 1966 established a federal policy of preserving historic places at the federal, state, and local level.
- In 1992, the Act was amended to include sites of cultural and religious significance to Tribal Nations on the National Register of Historic Places.



NHPA

- The NHPA protects places listed on, or eligible for inclusion on, the National Register. 54 U.S.C. § 300101.
- To be eligible for inclusion on the National Register, the place must be associated with significant events, people, or architecture, or the place must have the potential to yield information relating to prehistory or history. 36 C.F.R. § 60.4.
- This includes property that is “of traditional religious and cultural importance to” Native Nations. 54 U.S.C. § 302706(a).
- Medicine Wheel and White Eagle Park are examples of TCPs.



NHPA

- The NHPA requires that a federal agency consider the adverse effects of an “undertaking” when a federal or federally assisted “undertaking” may have an effect on a historic property. 54 U.S.C. § 306108.
- Section 106 review seeks to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. 36 C.F.R. § 800.1.
- Requires consultation with Tribal Nations on affected properties.
- Courts often refer to this type of provision as a “stop, look, and listen” provision, similar to NEPA. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016) (denying motion for PI for NHPA violations).



NEPA

- Requires environmental impact statements (EIS) for federal actions, necessitating detailed studies of anticipated impacts on the human environment, including impacts on tribal interests and resources. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.16(a)(5).
- NEPA requires federal agencies to create a record mapping the impact of proposed actions on Indigenous religious practices and sacred sites.



NEPA

- An agency must take a hard look at impacts on treaty rights, but often may do so by analyzing the effects on a specific resource identified in the treaty. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 131 (D.D.C. 2017).
- NEPA's requirements are “procedural,” not dictating any outcome. *Id.* at 113.
- And even when there is a violation, there may not be a remedy. *See Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (concluding there was a NEPA violation, vacating the permit, but not requiring operations of pipeline to stop).



NAGPRA

- NAGPRA expressly provides rules that address ownership or control of cultural items that are discovered in the future on federal and tribal land. 25 U.S.C.A. § 3001.
- In the case of human remains and associated funerary objects, any lineal descendants have the initial right of ownership or control. *Id.* at 3002.
- If lineal descendants of the human remains and associated funerary objects cannot be ascertained or when unassociated funerary objects, sacred objects, and items of cultural patrimony are involved, ownership or control is determined in a statutory order of priority, which includes in Tribal Nations. *Id.*



CWA

- The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. 33 U.S.C. §1251 et seq.
- The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained.
- Tribal Nations can obtain treatment as state (TAS) status for implementing and managing the CWA, which allows Tribes to set and have enforced their own water quality standards. *E.g. City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

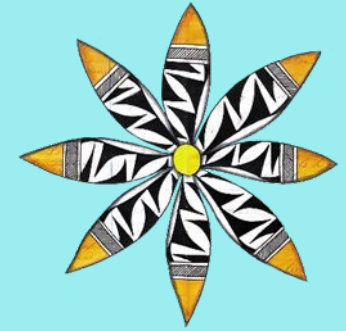


CWA

- Bristol Bay was a place protected by the denial of a CWA 404 permit.
- Section 404(c) authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.



ESA



- The Endangered Species Act (ESA), 16 U.S.C. 1531 et seq.:
 - Establishes protections for fish, wildlife, and plants that are listed as threatened or endangered.
 - Provides for adding species to and removing them from the list of threatened and endangered species, and for preparing and implementing plans for their recovery.
 - Provides for interagency cooperation to avoid take of listed species and for issuing permits for otherwise prohibited activities.



ESA

- Federal agencies must ensure that any action that it takes is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its habitat. 16 U.S.C. § 1536(a)(2).
- If an action “may affect” a listed species or critical habitat, the agency typically must engage in a formal consultation process with either the United States Fish and Wildlife Service or the National Marine Fisheries Service. 50 C.F.R. § 402.14; 402.01.
- The consultation process culminates with the issuance of a written biological opinion.



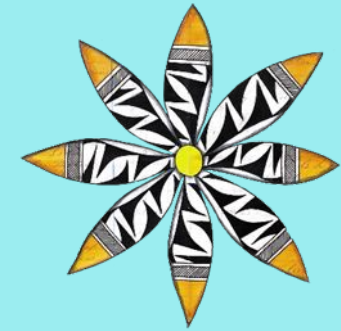
ESA

- Section 9 makes it unlawful for “any person” to “take” any member of an endangered or threatened species. *See* 16 U.S.C. § 1538(a)(1)(B), (C), (G).
- A recent example of ESA litigation is *Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941 (N.D. Cal. 2023); *see also* *Klamath Tribes v. United States Bureau of Reclamation*, No. 1:22-CV-00680-CL, 2024 WL 472047, at *6 (D. Or. Feb. 7, 2024).
- There, the Court held that the ESA preempts state law in the operation of the Klamath Project, and thus Reclamation can release downstream flows to support the coho salmon and Southern Resident Killer Whale as opposed to Klamath Project irrigators.



Antiquities Act

- Enacted in 1906, the Antiquities Act was the first U.S. law to provide general legal protection of cultural and natural resources of historic or scientific interest on Federal lands.
- The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. 54 U.S.C. § 320301(a).
- Presidents “may reserve parcels of land as a part of the national monuments.” *Id.* at § 320301(b).



Antiquities Act

- Requires advocacy to the administration and Presidential action.
- Examples:
 - Bears Ears National Monument
 - Baaj Nwaavjo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument
 - Avi Kwa Ame National Monument
 - Navajo National Monument



Bears Ears and Co-Management

- President Obama first established a Bears Ears Commission comprised of Tribal Nation representatives.
- Commission ensures “management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge” and provides “guidance and recommendations” on the management of the monument. 82 FR 1139.
- The Secretaries have to “meaningfully engage the Commission” in the development of the management plan and to inform subsequent management of the monument. *Id.*
- Secretaries must “carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission” and if they do not they must provide the Commission “with a written explanation of their reasoning.” *Id.*
- President Biden re-affirmed the Commission. 86 FR 57321.



Baaj Nwaavjo I'tah Kukveni—Ancestral Footprints National Monument

- President Biden established a Tribal Commission for the Ancestral Footprints Monument. 88 FR 55331.
- The Commission shall consist of one elected officer each from any Tribal Nation with ancestral ties to the area in which the Tribal Nation and the Secretaries agree to co-stewardship of the monument through shared responsibilities or administration. *Id.*



Baaj Nwaavjo I'tah Kukveni—Ancestral Footprints National Monument

- The Secretaries shall ensure the protection of sacred sites and cultural properties and sites in the monument and shall provide access to Tribal members for traditional cultural, spiritual, and customary uses. 88 FR 55331.
- Such uses shall include the collection of medicines, berries, plants and other vegetation for cradle boards and other purposes, and firewood for ceremonial practices and personal noncommercial use. 88 FR 55331





Bering Sea Elders Group

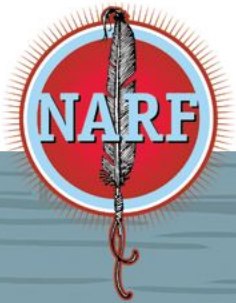


LAND CO- MANAGEMENT REPOSITORY

The repository is designed to consolidate resources for those interested in sovereign-to-sovereign cooperative land management agreements and their practical applications.



<https://narf.org/resources/land-co-management-repository/>



Agency Guidance*

- Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites (2023)
- MOU Regarding Inter Agency Coordination and Collaboration for Protection of Indigenous Sacred Sites (2021)
- Report to Secretary of Agriculture, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites (2012)
- EO 13007 – Indian Sacred Sites; *see Te-Moak Tribe of W. Shoshone Indians of Nevada v. U.S. Dep't of the Interior*, 565 F. App'x 665, 667 (9th Cir. 2014) (Although E.O. 13007 has no force and effect on its own, its requirements are incorporated into FLPMA by virtue of FLPMA's prohibition on unnecessary or undue degradation of the lands).

*Not Comprehensive



Protecting the Sacred – Tools for Protecting Sacred Sites and Cultural Heritage Items

Part II:

- Safeguard Objects of Patrimony Act & Proposed Draft Regulations



Significance of the Acoma Shield



Immediate Response by Acoma

- Cultural Sensitivity – being public about sensitive and protected information
- Protest in French Administrative Body - Denied
- Public and political appeal
- Withdrawal of Shield at 2nd Auction
- *In Rem* action by DOJ
- Consignor identification, settlement, and repatriation.





Identified Issues

Overview of issues identified from the Acoma Shield repatriation experience.

1. Locating the Acoma Shield and other items of Acoma Tribal Cultural Heritage
2. International Legal Recognition
3. Timely Federal Intervention and Clear Points of Contact and Procedures
4. Public Awareness and Media Engagement
5. International Cooperation and Legal Recourse
6. Legal Documentation and Evidence Gathering
7. International Transport
8. Testing



H.Con.Res.122 - Protection of the Right of Tribes to stop the Export of Cultural and Traditional Patrimony Resolution

Summary of Sec. 4 - Declaration of Congress (PROTECT Patrimony Resolution):

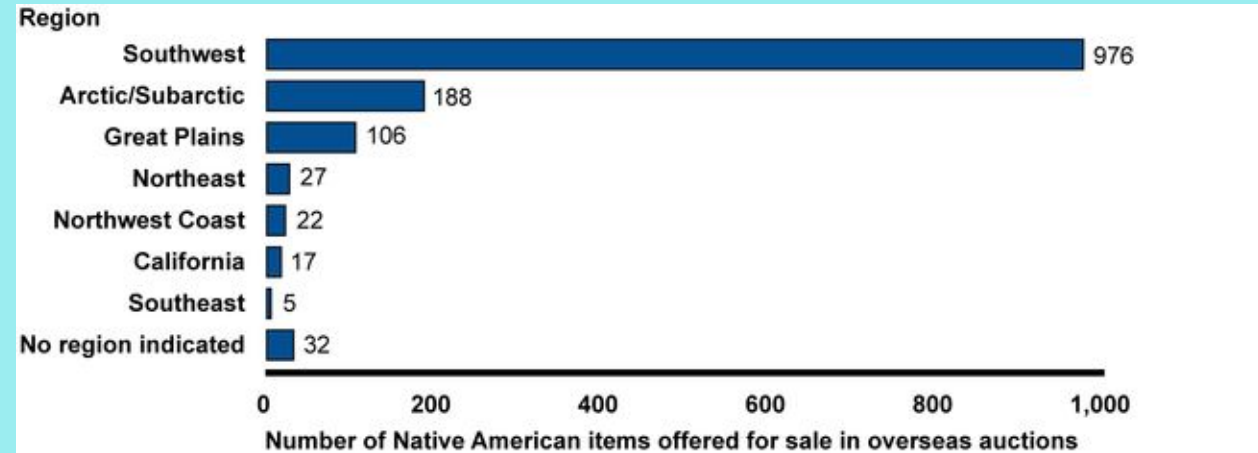
1. **Condemns** theft, illegal possession, sale, transfer, and export of tribal cultural items.
2. **Calls for federal consultation** with Native American leaders to stop these practices and secure repatriation.
3. **Supports investigations** into illegal trafficking and discussions on steps to end it.
4. **Backs export restrictions** on tribal cultural items.
5. **Encourages cooperation** with state/local governments and organizations to prevent these crimes.



GAO-18-537 - Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions

- “No federal law explicitly prohibits the export of Native American cultural items, creating a challenge for tribes because they cannot easily prove that the items were exported from the United States illegally.
- In addition, several federal laws address the theft and sale of Native American cultural items, but they are limited in scope, creating a challenge for tribes to prove that a violation of these laws has occurred.”

Native American Items in Overseas Auctions
by Region of Origin, 2012-2017



Source: GAO analysis of auction catalog data. Regions were derived from Clark Wissler, *The American Indian: An Introduction to the Anthropology of the New World* (Gloucester, Mass.: Peter Smith, 1957 [orig. 1917]). | GAO-18-537





Formation of the STOP Act

- STOP Act as a response to the challenges faced by tribal communities in addressing international trafficking and repatriation of cultural heritage.



Key Provisions of the STOP Act, 25 USC Ch. 32B § 3071, et seq.

1. Purpose (§3071):

1. Fulfill the U.S.'s trust responsibility towards Indian Tribes.
2. Enhance penalties for violations of the Native American Graves Protection and Repatriation Act (Section 1170 of Title 18 – First violation: 1 year & 1 day; Second violation: 5 years increased to 10 years).
3. Prohibit the export and facilitate the international repatriation of certain cultural items.
4. Establish a Federal framework to support voluntary returns of tangible cultural heritage.
5. Create interagency and Native working groups for better implementation.
6. Exempt certain information from disclosure under the Freedom of Information Act.
7. Encourage the legal purchase of contemporary Native art.

2. Definitions (§3072):

1. Definitions include terms like "Archaeological resource," "Cultural affiliation," "Cultural item," "Indian Tribe," "Item Prohibited from Exportation," "Item Requiring Export Certification," "Native American," "Native Hawaiian organization," "Secretary," and "Tangible cultural heritage."

3. Export Prohibitions, Certification, and International Agreements (§3073):

1. It will be illegal to export or attempt to export items prohibited from exportation.
2. Penalties include fines and imprisonment.
3. Establishes an export certification system requiring items to obtain certification before export. Includes revocation, detention, forfeiture, repatriation, and return of items.
4. Database of exports certifications for Tribal review.
5. The President may request agreements from foreign nations to discourage commerce in prohibited items, encourage the voluntary return of cultural heritage, and expand the market for Indian art and craftsmanship.



4. Voluntary Return of Tangible Cultural Heritage (§3074):

1. Designation of liaisons by the Secretary and the Secretary of State to facilitate voluntary return of cultural heritage.
2. Offering trainings and workshops to concerned parties regarding voluntary return.
3. Referrals to Indian Tribes and Native Hawaiian organizations for voluntary return.
4. Legal liability and tax documentation provisions related to voluntary return.

5. Interagency Working Group (§3075):

1. Formation of an interagency working group with representatives from various federal departments.
2. Goals include facilitating repatriation of illegally removed or trafficked items, protection of cultural heritage, and improving implementation of relevant federal laws.
3. Responsibilities encompass aiding in the voluntary return of cultural heritage and halting international sales of prohibited items.

6. Native Working Group (§3076):

1. Formation of a Native working group to advise the Federal Government.
2. The group may provide recommendations on voluntary return of cultural heritage and elimination of illegal commerce of cultural items.
3. The group may also make formal requests to initiate certain agency actions to aid in repatriation.

7. Treatment under Freedom of Information Act (§3077):

1. Exemptions from disclosure under section 552 of title 5 for certain information submitted to a Federal agency regarding cultural heritage.

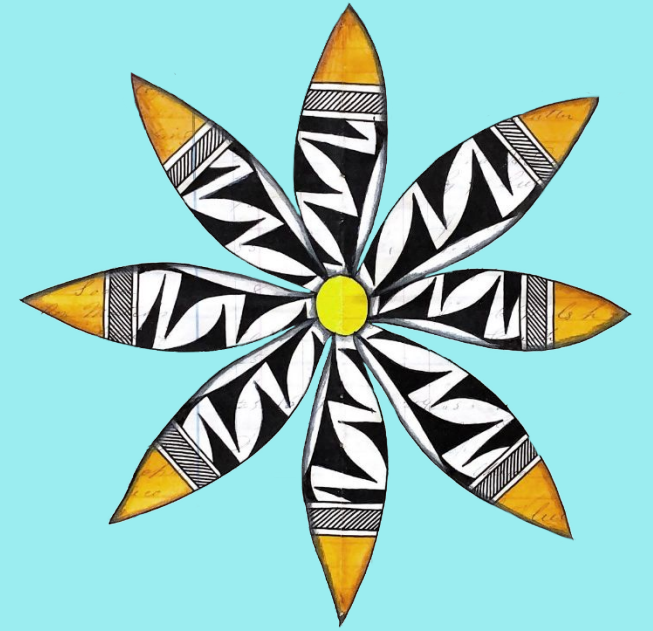
8. Regulations (§3078):

1. Mandate for the Secretary to promulgate rules and regulations to carry out this chapter, in consultation with other key federal personnel and Indian Tribes and Native Hawaiian organizations.

9. Authorization of Appropriations (§3079):

1. Authorization for appropriations of \$3,000,000 for each fiscal year from 2022 through 2027 to carry out this chapter.





STOP Act – Draft Regulations



Dear Tribal Leader - Proposed Rulemaking

Virtual Consultation Sessions:

- Nov. 18th, 2024, 1pm (EST)
- Nov. 19th, 2024, 3pm (EST)

Written Comments Due:

- Dec. 24, 2024
- Email: consultation@bia.gov

Info & Registration Link:

<https://www.bia.gov/service/tribal-consultations/safeguard-tribal-objects-patrimony-stop-act-notice-proposed-rulemaking>



Proposed Regulations - Overview

1. Subpart A – General Provisions

- Purpose
- Definition of Key Terms

2. Subpart B – Export Certification System

- **Publication in Federal Register:** In consultation with tribes, publication of items, or the characteristics of items, subject to the export certification requirement and those NOT subject to exportation requirements.
- **Export Certification Requirement:** Mandatory for cultural heritage items subject to the STOP Act.
- **Application Process:** Includes detailed requirements such as item description, photos (if appropriate), provenance, attestation that item is not prohibited from export, and evidence of consultation with Tribes or Native Hawaiian organizations recommending Export Certification.
- **Review and Approval:** The Office reviews applications, consults with relevant tribes, and can issue or deny certifications.
 1. Timeframes for review, notice to tribes, and extension of review based on “credible evidence” that an item is not subject to exportation.
 2. Uploads applications to Export Certification Database accessible by tribes. Tribes can request withholding an application from the Database for off-line review.
- **Revocation of Certification:** Outlines process for immediate revocation of an export certification issues upon credible evidence the item was not eligible for export certification.
- **Tribal Authorization:** Allows tribes to issue an authorization as an alternative to the Export Certification for items under their cultural affiliation.



Proposed Regulations - Overview

3. Subpart C – Procedures for Detention, Forfeiture, and Repatriation

- **Detention by Customs Border Patrol (CBP):** Items without proper export certifications may be detained by CBP and held for review by the Office designated by DOI for STOP Act enforcement.
- **Forfeiture and Repatriation:** Items may be forfeited to culturally affiliated tribes or Native Hawaiian organizations following a review process, abandonment, or voluntary return by an exporter.

4. Subpart D – Administrative Appeals

- **Hearing Rights:** Exporters can appeal denials of certifications or detentions through hearings with the Departmental Case Hearings Division (DCHD) and subsequent appeals with the Interior Board of Indian Appeals (IBIA).
- **Confidentiality:** Hearings and appeals are conducted under seal to protect sensitive information.

5. Subpart E – Voluntary Return of Tangible Cultural Heritage

- **Facilitated Returns:** Process for individuals or organizations to voluntarily return cultural items to tribes, including consultation and coordination for transportation. Office can provide tax documentation for individual or organization to claim a tax deduction for the return (treated as a charitable gift).
- **Government Support:** Departments like Homeland Security and State assist with logistics, and the Native Working Group may upon request explore funding to support for returns.



Proposed Regulations - Overview

6. Subpart F – Interagency Working Group

- **Purpose:** Coordinates federal efforts to prevent illegal export of cultural items and improve implementation of NAGPRA and ARPA.
- **Members:** Includes representatives from the Departments of Justice, State, Homeland Security, and the Office designated by Interior for STOP Act enforcement.

7. Subpart G – Native Working Group

- **Advisory Role:** Provides recommendations on voluntary returns and reducing illegal commerce of cultural items.
- **Membership:** Includes 13 tribal representatives from each Bureau of Indian Affairs (BIA) region and 1 from Native Hawaiian organizations.



Questions?

