

## **International Repatriation of Native American Cultural Items Reference Information for Federal Officials**

This document provides a checklist of possible issues for U.S. Government officials to consider when they receive a request from an Indian tribe<sup>1</sup> or Native Hawaiian organization<sup>2</sup> (Native American Community) representative to assist in the recovery of Native American cultural items from a foreign government, private institution (including but not limited to museums), or individual located outside of the United States. Not every question needs to be answered in order for assistance to be provided. However, the questions do illustrate the type of information typically requested by foreign governments, museums, and U.S. Government agencies. This information can also help Federal officials evaluate options for Federal action in support of a request for assistance, recognizing that the tools available to Federal agencies can be constrained by the limited reach of U.S. law in foreign countries.

**Cultural Sensitivity** - Keep in mind that cultural protocols and traditions may limit the information Native American Communities can provide about a cultural item. It is also important to note that western methods of tracking ownership/physical custody/control of a cultural item sometimes differ from that of Native American Communities. It is for this reason that folkloric and linguistic evidence as well as expert opinion, to include testimony from elders or traditional religious leaders, is acceptable.<sup>3</sup>

- 1. Which Native American Community is seeking repatriation of the cultural item?**
- 2. Has the Native American Community designated a representative to communicate with the U.S. Government and the foreign government, private institution, or individual that has control or physical custody of the cultural item?**
- 3. What is the date of the official request for assistance by the Native American Community to the U.S. Government?**
- 4. Does the cultural item fall into one or more of the categories below?<sup>4</sup> Note: one item can fall into multiple categories.**

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<sup>1</sup> 573 Tribes are recognized by the Federal government and listed annually pursuant to 25 U.S.C. 5131.

<sup>2</sup> Congress, under its plenary authority over Indian affairs, recognized the Native Hawaiian Community by establishing a special political and trust relationship through over 150 enactments. Under laws such as the Native American Graves Protection and Repatriation Act (NAGPRA), National Historic Preservation Act (NHPA), and Native Hawaiian Healthcare Improvement Act, Congress charged Federal agencies to work with the Native Hawaiian Community through Native Hawaiian organizations.

<sup>3</sup> 25 U.S.C. 3005(a)(4) permits, among other evidence, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion to support finding cultural affiliation between human remains/funerary objects and an Indian tribe or Native Hawaiian organization.

<sup>4</sup> Federal assistance may be possible regardless, but if an item fits within one of these categories, that can bolster the argument that a foreign government should support repatriation because repatriation would be required under U.S. domestic law such as the Native American Graves Protection and Repatriation Act (NAGPRA) or Archeological Resources Protection Act (ARPA).

- \_\_\_ Native American human remains,<sup>5</sup> meaning the physical remains of the body of a person of Native American ancestry (43 CFR 10.2(d)(1)).
- \_\_\_ Funerary object, meaning an item that, as a part of the death rite or ceremony of a Native American Community's culture, is reasonably believed to have been placed with individual human remains, either at the time of death or later (25 U.S.C. 3001(3)(A)-(B)).
- \_\_\_ Sacred object, meaning specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents (25 U.S.C. 3001(3)(C)).
- \_\_\_ Object of cultural patrimony, meaning an object having ongoing historical, traditional, or cultural importance central to a Native American Community itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization, and such object shall have been considered inalienable by such Native American Community at the time the object was separated from such Community (25 U.S.C. 3001(3)(D)).
- \_\_\_ Archaeological resource, meaning any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest (16 U.S.C. 470bb).
- \_\_\_ Any other cultural item which the Native American Community considers important for its heritage and which was wrongfully taken or transferred away from the Native American Community;

**5. Who currently has control of the cultural item?<sup>6</sup>**

- a. What is the name of the person or entity?
- b. Where does the person or entity reside?
- c. Are they a dealer, auction house, museum, or other type of entity?
- d. Are they a foreign governmental entity or do they receive foreign governmental funding?

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<sup>5</sup> 18 USC 1170 (a) restricts the knowing sale, purchase, use for profit, or transport for sale or profit of Native American human remains without the right of possession provided in NAGPRA.

<sup>6</sup> In NAGPRA, control means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency. 43 CFR §10.2.

- 6. Who currently has physical custody of the cultural item?<sup>7</sup>**
  - a. What is the name of the person or entity?
  - b. Where does the person or entity reside?
  - c. Are they a dealer, auction house, museum, or other entity?
  - d. Are they a foreign governmental entity or do they receive foreign governmental funding?
  
- 7. If there is a scheduled sale or auction date for the cultural item, what is that date?** If the date of the sale or auction is close to the date that the information is received by the Federal government, there may be very limited initial recourse.
  
- 8. Please describe the cultural item, including any religious or cultural significance.** A Federal official should be aware that there may be limits to what the requesting Native American Community is culturally able or willing to share. A Federal official should also inform the representative that the U.S. Government may not be able to guarantee confidentiality. Information shared may be exempt from disclosure under the Freedom of Information Act only if it meets certain criteria (e.g. if the information is compiled for purposes of law enforcement).
  
- 9. When was the cultural item originally removed from the Native American Community?**
  
- 10. Under what circumstances was the cultural item removed from the Native American Community?**
  
- 11. Was the cultural item documented in writings, illustrations, or other images such as photographs when it was in the Native American Community?**
  
- 12. Was the cultural item removed from Federal or tribal lands?<sup>8</sup> If yes --**
  - a. Please give the general location from which the object was removed.
    - i. If the item was removed from Federal lands, it would be significant to know specifically which lands. Otherwise, determining the possible legal ramifications associated with the location the item was removed from would be very difficult.
  - b. When was the item removed?<sup>9</sup>

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<sup>7</sup> For the purposes of this protocol, physical custody means having immediate charge of Native American cultural items regardless of whether or not one has sufficient legal interest to lawfully treat the objects as part of one's collections.

<sup>8</sup> 25 U.S.C. § 3001(15) defines tribal lands as (a) all lands within the exterior boundaries of any Indian reservation; (B) all lands within the exterior boundaries of any Indian reservation; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920(42 Stat. 108). For the purposes of this document, please use 25 U.S.C. § 3001(15) definition of tribal lands.

<sup>9</sup> The Archaeological Resources Protection Act (ARPA), which was enacted on October 31, 1979, prohibits removal of archaeological resources (cultural items more than 100 years old) from Federal or Indian (trust or restricted) lands without a permit. 16 U.S.C. §470bb. NAGPRA requires the transfer of any Native American human remains or cultural items removed from Federal or tribal land after November 16, 1990, to the Indian tribe or Native Hawaiian organization with the priority claim to the items. NAGPRA also requires that such removal from Federal or tribal land must be pursuant to an ARPA permit.

**13. Is the cultural item composed in whole or in part of protected wildlife (e.g. eagle feathers, whale bone, or other items from fauna or flora listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES))? If yes, please specify.**

**14. Is the cultural item composed in whole or in part of an endangered or threatened species? If yes, was the item made less than 100 years ago?<sup>10</sup>**

**15. How was the cultural item obtained by the person or entity currently in control or physical custody of the item? Please provide background and any available documentation.**

**16. Is there any evidence the cultural item was freely given by, or wrongfully taken from, a Native American Community or one of its members? Please provide background and any available documentation for both positive and negative answers.**

**17. Does the Native American Community believe it could be useful for the U.S. Government to undertake any of the following specific actions?**

\_\_\_ Alert a Foreign Government and the party in control or physical custody of a cultural item that a Native American Community is concerned about the potential sale or possession of a cultural item.

\_\_\_ Present a Native American Community with a supporting cover letter from the State Department and/or other Federal agencies to the party in control or physical custody of a cultural item and Foreign Government. While there may be no way to legally compel parties to respond to such a letter or take any requested action, such a letter could request clarification of items being sold, request provenance of those items, express concern of the Native American Community and the U.S. Government, request a delay in a scheduled sale to allow time for the Native American Community to inspect the item or investigate its provenance, and/or request an in-person meeting.

\_\_\_ Have the appropriate U.S. Embassy encourage the party in control or physical custody of a cultural item to speak directly with representatives of the Native American Community. Ideally, discussions between the interested parties should occur prior to the commencement of any formal actions to transfer possession of the cultural items.

\_\_\_ Forward the Native American Community inquiry or request to U.S. law enforcement (FBI, DOJ, Homeland Security Investigations). Law enforcement

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<sup>10</sup> Limited exemption exists for certain antique articles more than 100 years of age that are composed in whole or in part of any endangered or threatened species. See Section 10(h) of the Endangered Species Act or 16 U.S.C §1539(h) for further details.

can investigate when there is specific information that a U.S. law has been violated – e.g. an item was stolen and we know the specific circumstances of the theft. The Native American Community representatives would need to gather specific preliminary information to trigger an investigation. U.S. law enforcement can work with foreign counterparts if a case progresses.

\_\_\_ Other. Please describe.