

Sec. 19jj. Definitions

As used in this subchapter the term:

- (a) "Attorney General" means the Attorney General of the United States.
- (b) "Damages" includes the following:
 - (1) Compensation for -
 - (A)
 - (i) the cost of replacing, restoring, or acquiring the equivalent of a park system resource; and
 - (ii) the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource; or
 - (B) the value of the park system resource in the event the resource cannot be replaced or restored.
- (2) The cost of damage assessments under section 19jj-2(b) of this title.
- (c) "Response costs" means the costs of actions taken by the Secretary of the Interior to prevent or minimize destruction or loss of or injury to park system resources; or to abate or minimize the imminent risk of such destruction, loss, or injury; or to monitor ongoing effects of incidents causing such destruction, loss, or injury.
- (d) "Park system resource" means any living or non-living resource that is located within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.
- (e) "Regimen" means a water column and submerged lands, up to the high-tide or high-water line.
- (f) "Secretary" means the Secretary of the Interior.
- (g) "Marine or aquatic park system resource" means any living or non-living part of a marine or aquatic regimen within or is a living part of a marine or aquatic regimen within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.

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Sec. 19jj-1. Liability

- (a) In general
Subject to subsection (c) of this section, any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.
 - (b) Liability in rem
Any instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource [1] any marine or aquatic park resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury to the same extent as a person is liable under subsection (a) of this section.
 - (c) Defenses
A person is not liable under this section if such person can establish that -
 - (1) the destruction, loss of, or injury to the park system resource was caused solely by an act of God or an act of war;
 - (2) such person acted with due care, and the destruction, loss of, or injury to the park system resource was caused solely by an act or omission of a third party, other than an employee or agent of such person; or
 - (3) the destruction, loss, or injury to the park system resource was caused by an activity authorized by Federal or State law.
 - (d) Scope
The provisions of this section shall be in addition to any other liability which may arise under Federal or State law.
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Footnotes

[1] So in original. Probably should be followed by "or".

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Sec. 19jj-2. Actions

- (a) Civil actions for response costs and damages
The Attorney General, upon request of the Secretary after a finding by the Secretary -
 - (1) of damage to a park system resource; or
 - (2) that absent the undertaking of response costs, damage to a park system resource would have occurred; may commence a civil action in the United States district court for the appropriate district against any person who may be liable under section 19jj-1 of this title for response costs and damages. The Secretary shall submit a request for such an action to the Attorney General whenever a person may be liable or an instrumentality may be liable in rem for such costs and damages as provided in section 19jj-1 of this title.

- (b) Response actions and assessment of damages
 - (1) The Secretary shall undertake all necessary actions to prevent or minimize the destruction, loss of, or injury to park system resources, or to minimize the imminent risk of such destruction, loss, or injury.
 - (2) The Secretary shall assess and monitor damages to park system resources.

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Sec. 19jj-3. Use of recovered amounts

Response costs and damages recovered by the Secretary under the provisions of this subchapter or amounts recovered by the Federal Government under any Federal, State, or local law or regulation or otherwise as a result of damage to any living or nonliving resource located within a unit of the National Park System, except for damage to resources owned by a non-Federal entity, shall be available to the Secretary and without further congressional action may be used only as follows:

- (a) **Response costs and damage assessments**
To reimburse response costs and damage assessments by the Secretary or other Federal agencies as the Secretary deems appropriate.
- (b) **Restoration and replacement**
To restore, replace, or acquire the equivalent of resources which were the subject of the action and to monitor and study such resources: **Provided**, That no such funds may be used to acquire any lands or waters or interests therein or rights thereto unless such acquisition is specifically approved in advance in appropriations Acts and any such acquisition shall be subject to any limitations contained in the organic legislation for such park unit.
- (c) **Excess funds**
Any amounts remaining after expenditures pursuant to subsections (a) and (b) of this section shall be deposited into the General Fund of the United States Treasury.
- (d) **Report to Congress**
The Secretary shall report annually to the Committee on Appropriations and the Committee on Energy and Natural Resources of the United States Senate and the Committee on Appropriations and the Committee on Natural Resources of the United States House of Representatives on funds expended pursuant to this subchapter. The report shall contain a detailed analysis and accounting of all funds recovered and expended, including, but not limited to, donations received pursuant to section 19jj-4 of this title, projects undertaken, and monies returned to the Treasury.

Sec. 19jj-4. Donations

The Secretary may accept donations of money or services for expenditure or employment to meet expected, immediate, or ongoing response costs. Such donations may be expended or employed at any time after their acceptance, without further congressional action.

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RESOURCE DAMAGE COST RECOVERY GUIDANCE
NATIONAL CAPITAL REGION

Introduction

The Act of July 27, 1990 (16 U.S.C. §19jj), which addresses resources protection, as amended by the Omnibus Parks and Land Management Act (P.L. 104-333, enacted November 12, 1996), provides the National Park Service with expanded authority to recover costs from those who cause damage to park resources. This authority applies to damages resulting from both intentional acts and accidents. This authority is of great importance to the Service because it provides clear avenue for the Service to collect response and damage costs in most situations. Funds recovered during cost recovery may remain with the park unit that incurred the costs. Previously, in most situations, recovered damages would had to be deposited in the General Fund of the U.S. Treasury. Copies of these authorities are attached for your information.

This authority applies to damage to "any living or non-living resource that is located within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity." This guidance interprets this authority and provides administrative guidance for implementation in the parks.

The Service is and will continue to be faced with tight financial constraints in the future. It is imperative that we take advantage of this authority to recover costs associated with resource damage.

Definitions and Limitations

1. Types of Damages

There is a wide variety of incidents and events where there is damage to park resources for which the Service should initiate cost recovery under this authority.

Any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury. Damages includes compensation for the cost of replacing, restoring, or acquiring the equivalent of a park system resource.

Damages also include the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource. In the event the resource cannot be replaced or restored, damages include the value of the park system resource.

The responsible person is also liable for response costs. These

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actions include those taken by the Service to prevent or minimize destruction or loss of or injury to park system resources, or to abate or minimize the imminent risk of such destruction, loss, or injury, or to monitor ongoing effects of incidents causing destruction, loss, or injury.

For purposes of this cost recovery guidance, the definition of "Living or Non-Living Resource" include the following:

Living or non-living resource includes the following Federally-owned resources.

1. Natural resources (e.g., flora, fauna, water, geology and soils).
2. Cultural resources
3. Man-made equipment and facilities (e.g., recreational facilities, vehicles, lights, signs, guardrails, equipment, buildings, walls)

2. Exclusions

A person is not liable under this authority if such person can establish the following.

1. The destruction, loss of, or injury to the park system resource was caused solely by an act of God or an act of war;
2. Such person acted with due care, and the destruction, loss of, or injury to the park system resource was caused solely by an act or omission of a third party, other than an employee or agent of such person; or
3. The destruction, loss, or injury to the park system resource was caused by an activity authorized by Federal or State law.

Cost Recovery Procedure

A case file shall be established for each case of resource damage.

All incidents shall be fully documented on a criminal incident report, case incident report, or other authorized reporting form.

The case file shall also include any follow-up reports, results of any tests, photos or other information relevant to the incident. The report shall identify the person(s) responsible for the damage, describe the nature of the incident including how the reported damage was caused by the named person(s) and why he/she/they are responsible. Whenever possible, the incident should be investigated and documented by a law enforcement officer with assistance by other specialists. It is the responsibility of the investigating law enforcement officer/investigator to initiate and track the cost recovery process for each case. This individual will prepare reports, collect damage assessment reports, obtain estimates, prepare letters of collection for the superintendent's signature, and coordinate cases with the Solicitor's Office as needed.

The case file shall include damage assessment reports and repair/replacement estimates from reliable repair companies,

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internal park repair/work order estimates, repair invoices or completed work orders, or a contract award. These costs shall be fully investigated and documented before an initial letter of collection is sent to the responsible person.

A certified return receipt requested letter of collection shall be signed and sent by the park superintendent to the responsible person which includes the following information.

1. The purpose of the letter
2. Description of the incident which resulted in the resource damage.
3. Why the National Park Service believes the person is responsible for the response costs and damages.
4. Itemized statement on the costs for which the National Park Service is seeking recovery.
5. Cite the legal authority for this recovery action (e.g., 16 U.S.C. §19jj).
6. State that the payment by certified check or money order shall be made to the National Park Service and provide a full mailing address. A contact person shall be provided for the responsible person to obtain additional information.
7. Request payment within 30 days, as required by the Debt Collection Act.

If the responsible person does not respond to the first letter, a second certified letter shall be sent to the person or insurance company if so referred. This letter shall provide the same information as the first letter as well as a statement that if payment is not received, the matter will be referred to legal counsel for recovery action. If no action results from the second letter, the case should be referred to Rick Robbins, Assistant Solicitor, National Capital Parks, who will take legal action as appropriate.

Note: For incidents involving violation of the U.S. Criminal Code (Title 18), cost recovery should initially be attempted through cooperation and assistance from the prosecuting Assistant U.S. Attorney. The desire of the NPS to be made whole on all damages and response costs should be made clear to the Assistant U.S. Attorney.

To ensure legal adequacy and consistency in applying these guidelines, all letters of collection must be surnamed by the Solicitor's Office and Regional Tort Claims Officer with a copy of all outgoing letters sent to the Regional Chief Ranger. This is a temporary measure to help ensure that we administer this new authority as mandated by Congress.

Financial Management

Funds received shall be credited to a no-year park benefitting account with the PWE 460. Funds shall only be used for the purpose they were collected and should be expended as soon as possible. Parks shall also track all funds received and expended.

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under resource damage cost recovery actions as annual reporting to Congress is required on the part of the Service. Any amount collected in excess of costs shall be credited to Miscellaneous Receipts account number 3073-891.

Further Assistance

Parks needing further assistance may contact either Einer Olsen, Ranger Services, at (202) 619-7065, or Rick Robbins, Solicitor's Office, at (202) 208-4338. If they are unable to provide the proper assistance, they will refer you to other specialists. Thank you for your cooperation.

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5 Cultural Resource Management

The National Park Service will preserve and foster appreciation of the cultural resources in its custody, and will demonstrate its respect for the peoples traditionally associated with those resources, through appropriate programs of research, planning, and stewardship.



Children in the shadow of the Edmund Pettus Bridge learn the history of the 1965 Selma to Montgomery voting rights march, which led to passage of the Voting Rights Act of 1965.

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The National Park Service is the steward of many of America's most important cultural resources. These resources are categorized as archeological resources, cultural landscapes, ethnographic resources, historic and prehistoric structures, and museum collections. The Service's cultural resource management program involves:

- Research to identify, evaluate, document, register, and establish basic information about cultural resources and traditionally associated¹ peoples;
- Planning to ensure that management processes for making decisions and setting priorities integrate information about cultural resources, and provide for consultation and collaboration with outside entities; and
- Stewardship to ensure that cultural resources are preserved and protected, receive appropriate treatments (including maintenance), and are made available for public understanding and enjoyment.

The cultural resource management policies of the National Park Service are derived from a suite of historic preservation, environmental, and other laws, proclamations, Executive orders, and regulations. A comprehensive list can be found in the Cultural Resource Management Handbook issued pursuant to Director's Order #28. Taken collectively, they provide the Service with the authority and responsibility for managing cultural resources in every unit of the national park system so that those resources may be preserved unimpaired for future generations. Cultural resource management will be carried out in a manner consistent with these legislative and regulatory provisions, and with implementing policies and procedures such as the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 Federal Register (FR) 44716-740), and Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act (63 FR 20497-508).

Park superintendents and appropriately qualified cultural resource professionals will work together to carry out the Park Service's cultural resource management program. Other NPS staff and volunteers participating in cultural resource research, planning, and stewardship activities will be supervised by full-performance-level cultural resource professionals of the appropriate disciplines. Law enforcement professionals will consult with full-performance-level cultural resource professionals of the appropriate disciplines when investigating cultural resource crimes.

The Service will support its cultural resource professionals in maintaining and improving their disciplinary knowledge and

¹ For purposes of these Management Policies, social/cultural entities such as tribes, communities, and kinship units are "traditionally associated" with a particular park when:

- The entity regards the park's resources as essential to its development and continued identity as a culturally distinct people; and
- The association has endured for at least two generations (40 years); and
- The association began prior to the establishment of the park. See "Evaluation and Categorization" 5.1.3.2; and "Ethnographic Resources" in the Cultural Resource Management Handbook.

skills and in promoting their professionalism through continuing education, graduate-level courses, seminars, training, teaching, attendance at professional conferences, and other programs sponsored by professional or scholarly institutions. NPS personnel with cultural resource responsibilities will acquire and maintain the knowledge, skills, and abilities necessary to carry out those responsibilities. All occupational groups in or associated with cultural resource research, planning, and stewardship activities will complete the relevant cultural resource competency requirements commensurate with their job and grade.

Park superintendents and cultural resource professionals will ensure that research about and stewardship of cultural resources are carried out only after adequate planning and consultation with interested or affected stakeholders and other outside entities.

(See Decision-making Requirements to Avoid Impairments 1.4.7. Also see NHPA [16 USC 470b-4]; Secretary of the Interior's Professional Qualification Standards [48 FR 44738-44739]; Employee Training and Development Planning and Tracking Kit [1996])

5.1 Research

5.1.1 National Park Service Research

The National Park Service will conduct a vigorous interdisciplinary program of research into the cultural resources of each park. The principal goals of such research will be to:

- Ensure a systematic, adequate, and current information base representing the park's cultural resources and traditionally associated peoples, in support of planning, management, and operations;
- Ensure appropriate protection, preservation, treatment, and interpretation of cultural resources, employing the best current scholarship;
- Develop approaches for managing park cultural and natural resources that ensure consideration of the views held by traditionally associated peoples and others, as appropriate;
- Collect data on subsistence and other consumptive uses of park resources in order to reach informed decisions; and
- Develop appropriate technologies and methods for monitoring, protecting, preserving, and treating cultural resources.

Adequate research to support informed planning and compliance with legal requirements will precede any final decisions about the treatment of cultural resources, or about park operations, development, and natural resource management activities that might affect cultural resources. Research will be periodically updated to reflect changing issues, sources, and methods. Research needs will be identified and justified in a park's approved resource management plan.

A written scope of work, research design, project agreement, proposal, or other description of work to be performed will be prepared and approved before any research is conducted. All archeological research, whether for inventory, data recovery, or other purposes, must comply with the Archaeological Resources Protection Act of 1979 (ARPA), the Antiquities Act, and the Native American Graves Protection and Repatriation Act (NAGPRA), as applicable. The National Park

Service will not take or allow any action that reduces the research potential of cultural resources without first performing an appropriate level of research, consultation, and documentation. Because research involving physical intervention into cultural resources or the removal of objects or specimens is a destructive process entailing an irretrievable commitment of the resources, and often affecting traditional practices associated with the resources, research in parks will employ non-destructive methods to the maximum extent feasible.

The features of sites, landscapes, and structures will be left in place unless impracticable. Field data, objects, specimens, and features of sites and structures retrieved for preservation during cultural resource research and treatment projects, together with associated records and reports, will be managed within the park museum collection.

Research conducted by NPS personnel, contractors, and cooperative researchers will be subjected to peer review both inside and outside the Service, to ensure that it meets professional standards, reflects current scholarship, and adheres to the principles of conduct for the appropriate discipline. The data and knowledge acquired through research will be recorded on permanent and durable (long-lived) media, documented in the appropriate Service-wide databases, and placed permanently in park museum and library collections and park files. This information will be made widely available, and be incorporated, as appropriate, into park planning documents, exhibits, and interpretive programs. As appropriate, information will be shared with proper state and tribal historic preservation offices and certified local governments.

Certain research data may be withheld from public disclosure to protect sensitive or confidential information about archeological, historic, or other NPS resources when doing so would be consistent with FOIA. In many circumstances, this will allow the NPS to withhold information about ethnographic resources.

(See Park Planning Processes 2.3; Studies and Collections 4.2; Confidentiality 5.2.3; Research 7.5.4; Native American Use 8.5. Also see 36 CFR Part 800; 43 CFR Parts 3, 7, and 10; NHPA; Secretary of the Interior's Standards and Guidelines for Preservation Planning [48 FR 44716-720]; Secretary of the Interior's Standards and Guidelines for Historical Documentation [48 FR 44728-730]; Director's Order #28: Cultural Resource Management; Cultural Resource Management Handbook 28)

5.1.2 Independent Research

The National Park Service will promote relationships with individuals and organizations qualified to perform research, and encourage them to direct their research toward park management objectives and the broader contexts within which park resources exist. The Park Service will encourage independent researchers to follow the Secretary of the Interior's standards and guidelines and those of the Park Service to the fullest extent possible, and will require that the views of traditionally associated peoples be fully considered.

Research that includes taking plants, fish, wildlife, rocks, or minerals must comply with the permit requirements of 36 CFR 2.5. Permits that would allow cultural resources to be physically disturbed, or allow objects or specimens to be

collected, will be issued only when there is compelling evidence that the proposed research is essential to significant research concerns, and that the purpose of the research can be reasonably achieved only by using park resources. As appropriate, permits may require researchers to provide for the long-term preservation and management of any recovered objects and specimens and for their cataloging, together with any associated records, in the NPS museum cataloging system. Independent researchers will be authorized to conduct archeological research on park lands only through the issuance of an ARPA or Antiquities Act permit by the appropriate regional director. This permitting authority cannot be further delegated. As appropriate, parks will also issue other necessary permits, such as a special use permit. Archeological research conducted by independent researchers must comply with NAGPRA, when applicable.

NPS facilities, collections, and assistance will be made available to qualified scholars conducting NPS-authorized research, as long as park operations are not substantially impeded or park resources adversely impacted thereby. *(See Independent Studies 4.2.2; Consultation 5.2.1; Natural and Cultural Studies, Research, and Collection Activities 8.10. Also see 43 CFR Parts 3, 7, and 10)*

5.1.3 Identification and Evaluation of Resources

The National Park Service will conduct surveys to identify and evaluate the cultural resources of each park, assessing resources within their larger cultural, chronological, and geographic contexts. The resulting inventories will provide the substantive data required for (1) nominating resources to the National Register of Historic Places; (2) general park planning and specific proposals for preserving, protecting, and treating cultural resources; (3) land acquisition, development, and maintenance activities; (4) interpretation, education, and natural and cultural resource management activities; and (5) compliance with legal requirements.

5.1.3.1 Inventories

The Park Service will (1) maintain and expand the following inventories about cultural resources in units of the national park system, (2) enter information into appropriate related databases, and (3) develop an integrated information system:

- Archeological sites inventory for historic and prehistoric archeological resources and the related Archeological Sites Management Information System (ASMIS) database;
- Cultural landscapes inventory of historic designed landscapes, historic vernacular landscapes, ethnographic landscapes, and historic sites, and the related Cultural Landscapes Automated Inventory Management System (CLAIMS) database;
- Ethnographic Resources Inventory (ERI) of places, including sites, structures, objects, landscapes, and natural resources with traditional cultural meaning and value to associated peoples and other resource users;
- List of Classified Structures (LCS), encompassing historic and prehistoric structures; and
- National Catalog of Museum Objects, encompassing all cultural objects, archival and manuscript materials, and natural history specimens in NPS collections and the related automated version, the Automated National Catalog System (ANCS+ or its successor).

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(See *Park Planning Processes* 2.3; *Confidentiality* 5.2.3. Also see *Secretary of the Interior's Standards and Guidelines for Identification* [48 FR 44720-723]; *Director's Order* #28; *Cultural Resource Management Handbook*)

5.1.3.2 Evaluation and Categorization

Cultural resources will be professionally evaluated and categorized to assist in management decisions about their treatment and use. Cultural resources will be evaluated for significance using National Register Criteria for Evaluation (36 CFR 60.4), and those meeting the criteria will be nominated for listing. Museum collections are inappropriate for listing and will not be evaluated using these criteria. Some collections in their original structures can be included as contributing elements to a listed structure. As appropriate, cultural resources will be categorized using other management categories established by the National Park Service and listed in the *Cultural Resource Management Handbook*. Cultural resource professionals will evaluate cultural resources in consultation with the appropriate state and tribal historic preservation officers. Ethnographically meaningful cultural and natural resources, including traditional cultural properties, will be identified and evaluated in consultation with peoples having traditional associations to park resources. Examples of traditionally associated peoples include Acadians, African Americans, Hispanic Americans, and Native Americans. (For editorial convenience, in these Management Policies the term "Native Americans" includes American Indians, Alaskan natives, native peoples of the Caribbean, native Hawaiians, and other native Pacific islanders.) Some ethnographically meaningful resources do not meet National Register Criteria for Evaluation, but will be inventoried in consultation with traditionally associated peoples and considered in management decisions about treatment and use.

(See *Consultation* 5.2.1. Also see *Secretary of the Interior's Standards and Guidelines for Evaluation* [48 FR 44723-726])

5.1.3.2.1 National Register Nomination

Park resources that appear to meet the criteria for the National Register of Historic Places will be nominated—either individually, as components of historic districts, or within multiple property nominations—for listing by the Keeper of the National Register. National historic sites, national historical parks, and other parks significant primarily for their cultural resources are entered automatically in the National Register upon establishment. However, nomination forms will be prepared and submitted to document the qualifying and contributing features of such parks and other National-Register-eligible resources within them.

(Also see 36 CFR Parts 60 and 63; *Secretary of the Interior's Standards and Guidelines for Registration* [48 FR 44726-728]; *National Register Bulletins* 16A and 16B [*Guidelines for Completing National Register of Historic Places Forms*])

5.1.3.2.2 National Historic Landmark Designation

Historic and cultural units of the national park system are nationally significant by virtue of their authorizing legislation or Presidential proclamation. National historic landmark designations are appropriate for park cultural resources that

meet National historic landmark criteria if the national significance of those resources is not adequately recognized in the park's authorizing legislation or Presidential proclamation. Cultural parks may warrant landmark designation as parts of larger areas encompassing resources associated with their primary themes. Modified National Register forms will be prepared and submitted to nominate such resources for landmark designation by the Secretary of the Interior.

(Also see 36 CFR Part 65)

5.1.3.2.3 World Heritage List Designation

Park cultural properties believed to possess outstanding universal value to humanity may qualify for World Heritage List designation. Proposals for the nomination of such resources by the United States will be prepared and submitted to document the case for this designation by the United Nations Educational, Scientific and Cultural Organization.

(See *World Heritage Sites* 4.3.7. Also see 36 CFR Part 73)

5.2 Planning

Effective park stewardship requires informed decision-making about a park's cultural resources. This is best accomplished through a comprehensive planning process. Effective planning is based on an understanding of what a park's cultural resources are, and why those resources are significant. To gain this understanding, the Service must obtain baseline data on the nature and types of cultural resources, and their (1) distribution; (2) condition; (3) significance; and (4) local, regional, and national contexts. Cultural resource planning, and the resource evaluation process that is part of it, will include consultation with cultural resource specialists and scholars having relevant expertise; traditionally associated peoples; and other stakeholders. Current scholarship and needs for research are considered in this process, along with the park's legislative history and other relevant information.

Planning decisions will follow analysis of how proposals might affect the values that make resources significant, and the consideration of alternatives that might avoid or mitigate potential adverse effects. Planning will always seek to avoid harm to cultural resources, and consider the values of traditionally associated groups. To ensure that approaches and alternatives for resource preservation have been identified and considered, planning processes that could affect cultural resources must include cultural resource specialists, traditionally associated peoples, and other stakeholders, and provide them with appropriate notification about opportunities to become involved.

The general management planning process will include goals and strategies for research on, consultation about, and stewardship of cultural resources, and for research on and consultation with traditionally associated and other peoples. Planning for park operations, development, and natural resource management activities will integrate relevant concerns and program needs for identifying, evaluating, monitoring, protecting, preserving, and treating cultural resources.

Superintendents will ensure full consideration of the park's cultural resources and values in all proposals for operations, development, and natural resource programs, including the

management of wilderness areas. When proposed undertakings may adversely affect national historic sites, national battlefields, and other predominantly cultural units of the national park system that were established in recognition of their national historical significance, superintendents will provide opportunities for the same level of review and consideration by the Advisory Council on Historic Preservation and the Secretary of the Interior that the Advisory Council's regulations require for undertakings that may adversely affect national historic landmarks (36 CFR 800.10).

Each park will prepare and periodically update cultural resource components of the park's management plans. Resource plans will define and program activities needed to identify, evaluate, manage, monitor, protect, preserve, and treat the park's cultural resources, as well as provide for their enjoyment and understanding by the public.

(See Decision-making Requirements to Avoid Impairments 1.4.7; Strategic Planning 2.3.2; Implementation Planning 2.3.3. Also see Executive Order 13007; Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act [63 FR 20496-508]; Secretary of the Interior's Standards and Guidelines for Preservation Planning [48 FR 44716-720]; Secretary of the Interior's Standards for the Treatment of Historic Properties)

5.2.1 Consultation

The National Park Service is committed to the open and meaningful exchange of knowledge and ideas to enhance (1) the public's understanding of park resources and values, and the policies and plans that affect them; and (2) the Service's ability to plan and manage the parks by learning from others. Open exchange requires that the Service seek and employ ways to reach out to, and consult with, all those who have an interest in the parks.

Each park superintendent will consult with outside parties having an interest in the park's cultural resources or in proposed NPS actions that might affect those resources, and provide them with opportunities to learn about, and comment on, those resources and planned actions. Consultation may be formal, as when it is required pursuant to NAGPRA or Section 106 of the NHPA, or it may be informal when there is not a specific statutory requirement. Consultation will be initiated, as appropriate, with tribal, state, and local governments; state and tribal historic preservation officers; the Advisory Council on Historic Preservation; other interested federal agencies; traditionally associated peoples; present-day park neighbors; and other interested groups.

Consultations on proposed Park Service actions will take place as soon as practical, and in an appropriate forum that ensures, to the maximum extent possible, effective communication and the identification of mutually acceptable alternatives. The Service will establish and maintain continuing relationships with outside parties to facilitate future collaboration, formal consultations, and the ongoing informal exchange of views and information on cultural resource matters.

Since national parks embody resources and values of interest to a national audience, efforts to reach out and consult must be national in scope. But the Service will be especially mindful of consulting with traditionally associated peoples—those whose cultural systems or ways of life have an association with park resources and values that pre-dates establishment of the park. Traditionally associated peoples may include park neighbors, traditional residents, and former residents who remain attached to the park area despite having relocated. Examples of traditionally associated peoples include American Indians in the contiguous 48 states, Alaska Natives, African Americans at Jean Lafitte, Asian Americans at Manzanar, and Hispanic Americans at Tumacacori.

In particular, it is essential to consult traditionally associated peoples about:

- Proposed research on, and stewardship of, cultural and natural resources with ethnographic meaning for the groups;
- Development of park planning and interpretive documents that may affect resources traditionally associated with the groups;
- Proposed research that entails collaborative study of the groups;
- Identification, treatment, use, and determination of affiliation of objects subject to NAGPRA;
- Repatriation of Native American cultural items or human remains based on requests by affiliated groups in accordance with NAGPRA;
- Planned excavations and proposed responses to inadvertent discoveries of cultural resources that may be culturally affiliated with the groups;
- Other proposed NPS actions that may affect the treatment and use of, and access to, cultural and natural resources with known or potential cultural meaning for the groups; and
- Designation of National Register, national historic landmark, and world heritage sites.

Consultation with federally recognized American Indian tribes will be on a government-to-government basis. The Service will notify appropriate tribal authorities (such as tribal historic preservation officers) about proposed actions when first conceived, and by subsequently consulting their appointed representatives whenever proposed actions may affect tribal interests, practices, and traditional resources (such as places of religious value).

When engaging in the consultation process, group meetings may be held only for the purpose of exchanging views and information, and to solicit individual advice on proposed NPS actions. NPS may not hold meetings to obtain consensus advice from a group unless the group is chartered pursuant to the Federal Advisory Committee Act (FACA). FACA does not apply to inter-governmental meetings held exclusively between NPS officials and elected officers of tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities, when the meetings relate to intergovernmental responsibilities or administration.

(See Ethnographic Resources 5.3.5.3. Also see ARPA; NAGPRA; NEPA; NHPA [16 USC 470f]; 36 CFR Part 800;

40 CFR Parts 1500-1508; 41 CFR Part 101; 43 CFR Parts 7 and 10; Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments; Executive Order 13007; Executive Order 13175; 512 Department of the Interior Manual [DM] 2; Director's Order #71: Relationships with Indian Tribes; NPS Guide to the Federal Advisory Committee Act)

5.2.2 Agreements

The National Park Service will seek to establish mutually beneficial agreements with interested groups to facilitate collaborative research, consultation, park planning, training, and cooperative management approaches with respect to park cultural resources and culturally important natural resources. The goal of the NPS is to allow traditionally associated peoples to exercise traditional cultural practices in parks to the extent allowable by law, and consistent with the criteria listed in section 8.2. To the extent this goal can be legally reached through agreements, park superintendents should do so.

Whenever parks have cultural resources that are owned or managed by others, agreements will clarify how the resources are to be managed. Agreements will provide ways for periodically reviewing their effectiveness and making mutually agreed-upon modifications, and for avoiding and resolving disagreements and disputes. All agreements will conform to the requirements of Director's Order #20: Agreements.

(See Decision-making Requirements to Avoid Impairments 1.4.7; Partnerships 1.9; Partnerships 4.1.4; Park Structures Owned or Managed by Others 5.3.5.4.8; Submerged Cultural Resources 5.3.5.1.7; Native American Use 8.5; Consumptive Uses 8.9. Also see Executive Order 13007; 36 CFR 2.1)

5.2.3 Confidentiality

Sensitive or confidential information is sometimes acquired during consultations and during other research, planning, and stewardship activities. Under certain circumstances, and to the extent permitted by law, information about the specific location, character, nature, ownership, or acquisition of cultural resources on park lands will be withheld from public disclosure. If a question arises about withholding information, and disclosure could result in a significant invasion of privacy or a risk of harm to a cultural resource, the Park Service will consult the provisions of ARPA (16 USC 470hh); the National Parks Omnibus Management Act (16 USC 5937); and NHPA (16 USC 470w-3) before making a decision. Under some conditions, the Service may be required by law to disclose confidential information acquired during consultations, public meetings, and other research, planning, and stewardship activities, or in association with the acquisition of resources, including museum collections. Before these activities occur, NPS staff and authorized researchers will make every effort to inform affected parties that, while the information they provide will not be shared voluntarily, confidentiality cannot be guaranteed.

To the extent permitted by law, the Service will withhold from public disclosure (1) information provided by individuals who wish the information to remain confidential, and (2) the identities of individuals who wish to remain anonymous and who are protected from release by exemption under FOIA. In each instance, the Service will document its decision to disseminate or withhold sensitive or confidential information from public disclosure.

More detailed guidance on sensitive and confidential information can be found in Director's Order #66: The Freedom of Information Act and Protected Information; and the Museum Handbook, Part III.

(See Managing Information 1.7. Also see 43 CFR Part 2; 43 CFR 7.18; Privacy Act)

5.3 Stewardship

5.3.1 Protection and Preservation of Cultural Resources

The National Park Service will employ the most effective concepts, techniques, and equipment to protect cultural resources against theft, fire, vandalism, overuse, deterioration, environmental impacts, and other threats, without compromising the integrity of the resources.

5.3.1.1 Emergency Management:

Measures to protect or rescue cultural resources in the event of an emergency, disaster, or fire will be developed as part of a park's emergency operations and fire management planning processes. Designated personnel will be trained to respond to all emergencies in a manner that maximizes visitor and employee safety and the protection of resources and property.

(See Emergency Preparedness and Emergency Operations 8.2.5.2. Also see 36 CFR Part 78)

5.3.1.2 Fire Detection, Suppression, and Post-fire Rehabilitation and Protection

The NPS will take action to prevent or minimize the impact of wildland, prescribed, and structural fires on cultural resources, including the impact of suppression and rehabilitation activities.

In the preservation of historic structures and museum and library collections, every attempt will be made to comply with national building and fire codes. When these cannot be met without significantly impairing a structure's integrity and character, the management and use of the structure will be modified to minimize potential hazards, rather than modifying the structure itself.

Subject to the previous paragraph, when warranted by the significance of a historic structure or a museum or library collection, adequate fire detection, warning, and suppression systems will be installed. "Pre-fire plans" will be developed for historic structures and buildings housing museum or library collections, designed to identify the floor plan, utilities, hazards, and areas and objects requiring special protection. This information will be kept current and made available to local and park fire personnel.

Park and local fire personnel will be advised of the locations and characteristics of cultural resources threatened by fire, and of any priorities for protecting them during any planned or unplanned fire incident. At parks with cultural resources, park fire personnel will receive cultural resource protection training. At parks that have wildland or structural fire programs, cultural resource management specialists will receive fire prevention and suppression training and, when appropriate, will be certified for incident management positions commensurate with their individual qualifications.

Smoking will not be permitted in spaces housing museum or library collections, or in historic structures (except those used as residences in which smoking is permitted by the park superintendent).

(See *Fire Management 4.5*; *Fire Management 6.3.9*; *Structural Fire Protection and Suppression 9.1.8*. Also see *Director's Order #18: Wildland Fire Management*; *Director's Order #58*, and *Reference Manual 58: Structural Fires*)

5.3.1.3 Compensation for Damages

The National Park System Resource Protection Act authorizes the Park Service to take all necessary and appropriate steps to recover costs and damages from any person who destroys, causes the loss of, or injures any resource of the national park system. When such incidents involve cultural resources, the Service will:

- Prevent or minimize the destruction or loss of, or injury to, the cultural resource, or abate or minimize the imminent risk of such destruction, loss, or injury;
- Assess and monitor damage to the cultural resource;
- Recover any and all costs associated with the restoration or replacement of the cultural resource, or with the acquisition of an equivalent resource;
- Recover the value of any significant loss of use of the cultural resource pending its restoration or replacement or the acquisition of an equivalent, or the value of the cultural resource in the event it cannot be restored or replaced; and
- Recover any and all costs incurred in responding to, assessing, and/or monitoring damage to the cultural resource.

(See *Compensation for Injuries to Natural Resources 4.1.6*)

5.3.1.4 Environmental Monitoring and Control

When necessary to preserve a historic structure or a museum collection, appropriate measures will be taken to control relative humidity, temperature, light, and air quality. When museum collections are housed in a historic structure, the needs of both the collection and the structure will be identified and evaluated, weighing relative rarity and significance, before environmental control measures are introduced. The environmental conditions of all areas housing museum collections will be regularly monitored, according to a schedule specific to each condition, to determine whether appropriate levels of relative humidity, temperature, and light are being maintained.

(See *Air Quality 4.7.1*. Also see *Director's Order #24: Museum Management*)

5.3.1.5 Pest Management

The Park Service will follow an integrated pest management approach in addressing pest problems (including invasive vegetation) related to cultural resources. Pest occurrences will be dealt with on a case-by-case basis. Available pest management methods, as described in *Director's Order #77-7*, will be reviewed to determine the most effective and lowest risk management strategy.

(See *Pest Management 4.4-5*)

5.3.1.6 Carrying Capacity

Park superintendents will set, enforce, and monitor carrying capacities to limit public visitation to, or use of, cultural resources that would be subject to adverse effects from unrestricted levels of visitation or use. This will include (1) reviewing the park's purpose; (2) analyzing existing visitor use of, and related impacts to, the park's cultural resources and traditional resource users; (3) prescribing indicators and specific standards for acceptable and sustainable visitor use; and (4) identifying ways to address and monitor unacceptable impacts resulting from overuse. Studies to gather basic data and make recommendations on setting, enforcing, and monitoring carrying capacities for cultural resources will be conducted in collaboration with cultural resource specialists representing the appropriate disciplines.

(See *Visitor Carrying Capacity 8.2.1*)

5.3.2 Physical Access for Persons with Disabilities

The National Park Service will provide persons with disabilities the highest feasible level of physical access to historic properties that is reasonable, consistent with the preservation of each property's significant historical features. Access modifications for persons with disabilities will be designed and installed to least affect the features of a property that contribute to its significance. Modifications to some features may be acceptable in providing access, once a review of options for the highest level of access has been completed. However, if it is determined that modification of particular features would impair a property's integrity and character in terms of the Advisory Council's regulations at 36 CFR 800.9, such modifications will not be made.

To the extent possible, modifications for access will benefit the greatest number of visitors, staff, and the public, and be integrated with, or in proximity to, the primary path of travel for entrances and from parking areas. In situations where access modifications cannot be made, alternative methods of achieving program access will be adopted.

(See *Access to Interpretive and Educational Opportunities 7.5.1*; *Accessibility for Persons with Disabilities 8.2.4*; *Accessibility for Persons with Disabilities 9.1.2*; *Accessibility of Commercial Services 10.2.6.2*. Also see *Director's Order #42: Accessibility for Visitors with Disabilities*)

5.3.3 Historic Property Leases and Cooperative Agreements

The National Park Service may lease or permit the use of a historic property through a cooperative agreement, if such lease or cooperative agreement will ensure the property's preservation. Proposed uses must not unduly limit public appreciation of the property; interfere with visitor use and enjoyment of the park; or preclude use of the property for park administration, employee residences, or other management purposes judged more appropriate or cost effective.

Each lease will be competitively offered. The government will receive at least fair market rental value, adjusted for investments required of the lessee. The term of the lease will be the shortest time needed for the proposed use, taking into account required lessee investments, the common practice for the type of lease, possible future alternatives for the property, and other relevant factors. No lease will exceed 50 years. As

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authorized by the National Parks Omnibus Management Act (16 USC 1a-2(k)), a lessee may use a property to provide a commercial service if the service will be patronized by park visitors only to a minor extent.

Cooperative agreements to maintain, repair, rehabilitate, restore, or build upon a historic property can be entered into with state, local, and tribal governments; other public entities; educational institutions; and private non-profit organizations.

If a lease or cooperative agreement requires or allows the lessee or cooperator to maintain, repair, rehabilitate, restore, or build upon the property, it will require the work be done in accordance with applicable Secretary of the Interior's standards and guidelines and other NPS policies, guidelines, and standards.

(Also see NHPA [16 USC 470h-3]; 16 USC 460l-22(a); Omnibus Consolidated Appropriations Act, 1997 [16 USC 1g]; 36 CFR Part 18)

5.3.4 Stewardship of Human Remains and Burials

Marked and unmarked prehistoric and historic burial areas and graves will be identified, evaluated, and protected. Every effort will be made to avoid impacting burial areas and graves when planning park development and managing park operations. Such burial areas and graves will not knowingly be disturbed or archeologically investigated unless threatened with destruction.

The Service will consult with American Indian tribes, other Native American groups, and other individuals and groups linked by demonstrable ties of kinship or culture to potentially identifiable human remains when such remains may be disturbed or are inadvertently encountered on park lands. Re-interment at the same park may be permitted, and may include remains that may have been removed from lands now within the park.

Native American human remains and photographs of such remains will not be exhibited. Drawings, renderings, or casts of such remains may be exhibited with the consent of culturally affiliated Indian tribes and native Hawaiian organizations. The exhibit of non-Native American human remains, or photographs, drawings, renderings, or casts of such remains, is allowed in consultation with traditionally associated peoples. The Service may allow access to, and study, publication, and destructive analysis of, human remains, but must consult with traditionally associated peoples and consider their opinions and concerns before making decisions on appropriate actions. In addition, such use of human remains will occur only with an approved research proposal that describes why the information cannot be obtained through other sources or analysis, and why the research is important to the field of study and the general public.

(See Cultural Resources 6.3.8; Consultation 7.5.5; Cemeteries and Burials 8.6.10. Also see ARPA; NAGPRA; 36 CFR Part 79; 43 CFR Part 10)

5.3.5 Treatment of Cultural Resources

The Park Service will provide for the long-term preservation of, public access to, and appreciation of, the features, materials, and qualities contributing to the significance of cultural resources. With some differences by type, cultural resources are subject to several basic treatments, including (1) preservation in their existing states; (2) rehabilitation to serve contemporary uses, consistent with their integrity and character; and (3) restoration to earlier appearances by the removal of later additions and replacement of missing elements. Decisions regarding which treatments will best ensure the preservation and public enjoyment of particular cultural resources will be reached through the planning and compliance process, taking into account:

- The nature and significance of a resource, and its condition and interpretive value;
- The research potential of the resource;
- The level of intervention required by treatment alternatives;
- The availability of data, and the terms of any binding restrictions; and
- The concerns of traditionally associated peoples and other stakeholders.

Except for emergencies that threaten irreparable loss without immediate action, no treatment project will be undertaken unless supported by an approved planning document appropriate to the proposed action.

The preservation of cultural resources in their existing states will always receive first consideration. Treatments entailing greater intervention will not proceed without the consideration of interpretive alternatives. The appearance and condition of resources before treatment, and changes made during treatment, will be documented. Such documentation will be shared with any appropriate state or tribal historic preservation office or certified local government, and added to the park museum cataloging system. Pending treatment decisions reached through the planning process, all resources will be protected and preserved in their existing states.

As a basic principle, anything of historical appearance that the National Park Service presents to the public in a park will be either an authentic survival from the past, or an accurate representation of that once existing there. Reconstructions and reproductions will be clearly identified as such.

The Service will holistically approach the treatment of related cultural resources in a park. All cultural resource and natural resource values will be considered in defining specific treatment and management goals. Research will be coordinated and sequenced so that decisions are not made in isolation. Each proposed action will be evaluated to ensure consistency or compatibility in the overall treatment of park resources. The relative importance and relationship of all values will be weighed to identify potential conflicts between and among resource preservation goals, park management and operation goals, and park user goals. Conflicts will be considered and resolved through the planning process, which will include any consultation required by 16 USC 470f.

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Although each resource type is most closely associated with a particular discipline, an interdisciplinary approach is commonly needed to properly define specific treatment and management goals for cultural resources. Policies applicable to the various resource types follow.

(See *Park Management 1.4*; *Park Planning Processes 2.3*; *Planning 5.2*; *Cultural Resources 6.3.8*. Also see *NEPA*; *Secretary of the Interior's Standards for the Treatment of Historic Properties*)

5.3.5.1 Archeological Resources

Archeological resources will be managed in situ, unless the removal of artifacts or physical disturbance is justified by research, consultation, preservation, protection, or interpretive requirements. Preservation treatments will include proactive measures that protect resources from vandalism and looting, and maintain or improve their condition by limiting damage due to natural and human agents. Data recovery actions will be taken only in the context of planning, consultation, and appropriate decision-making. Preservation treatments and data recovery activities will be conducted within the scope of an approved research design. Archeological research will use non-destructive methods of testing and analysis wherever possible. The Park Service will incorporate information about archeological resources into interpretive and educational, and preservation, programs. Artifacts and specimens recovered from archeological resources, along with associated records and reports, will be maintained together in the park museum collection.

(Also see 36 CFR Part 79; *Secretary of the Interior's Standards and Guidelines for Archeological Documentation* [48 FR 44734-737]; *Museum Handbook*)

5.3.5.1.1 Preservation

Archeological resources will be maintained and preserved in a stable condition to prevent degradation and loss. The condition of archeological resources will be documented, regularly monitored, and evaluated against initial baseline data. Parks are encouraged to enlist concerned local citizens in site stewardship programs to patrol and monitor the condition of archeological resources. The preservation of archeological components of cultural landscapes, structures, and ruins are also subject to the treatment policies for cultural landscapes, historic and prehistoric structures, and historic and prehistoric ruins.

5.3.5.1.2 Stabilization

Archeological resources subject to erosion, slumping, subsidence, or other natural deterioration will be stabilized using the least intrusive and destructive methods. The methods used will protect natural resources and processes to the maximum extent feasible. Stabilization will occur only after sufficient research demonstrates the likely success of the proposed stabilizing action, and after existing conditions are documented.

5.3.5.1.3 Rehabilitation, Restoration, and Reconstruction

These terms are normally related to the treatment of historic structures and cultural landscapes. The Park Service will not normally undertake the rehabilitation, restoration, or reconstruction of archeological resources or features. Archeological studies undertaken in conjunction with the rehabilitation or restoration of cultural landscapes, structures, or ruins, or with

the reconstruction of obliterated cultural landscapes or missing structures, will be guided by the treatment policies for archeological resources, as well as those for the other associated resource types.

5.3.5.1.4 Protection

Archeological resources will be protected against human agents of destruction and deterioration whenever practicable. Archeological resources subject to vandalism and looting will be periodically monitored, and, if appropriate, fencing, warning signs, remote-sensing alarms, and other protective measures will be installed. Training and public education programs will be developed to make park staff and the public aware of the value of the park's archeological resources, and the penalties for destroying them. For public safety reasons, local citizens who are monitoring resources under site stewardship programs will be instructed to report incidents of vandalism and looting to law enforcement personnel for response.

(See *Volunteers in Parks 7.6.1*; *Shared Responsibilities 8.3.3*)

5.3.5.1.5 Archeological Data Recovery

Archeological data recovery is permitted if justified by research or interpretation needs. Significant archeological data that would otherwise be lost as a result of resource treatment projects or uncontrollable degradation or destruction will be recovered in accordance with appropriate research proposals and preserved in park museum collections. Data will be recovered to mitigate the loss of significant archeological data due to park development, but only after:

- The redesign, relocation, and cancellation of the proposed development have all been considered and ruled out as infeasible through the planning process;
- The park development has been approved; and
- The project has provided for data recovery, cataloging, and the initial preservation of recovered collections.

(See *Planning 5.2*)

5.3.5.1.6 Earthworks

Appropriate—and, when feasible, native—vegetation will be maintained when necessary to prevent the erosion of prehistoric and historic earthworks, even when the historic condition might have been bare earth. Because earthwork restorations and reconstructions can obliterate surviving remains and are often difficult to maintain, other means of representing and interpreting the original earthworks will receive first consideration.

(See *Management of Native Plants and Animals 4.4.2*; *Management of Exotic Species 4.4.4*)

5.3.5.1.7 Submerged Cultural Resources

Historic shipwrecks and other submerged cultural resources will be protected, to the extent permitted by law, in the same manner as terrestrial archeological resources. Protection activities involve inventory, evaluation, monitoring, interpretation, and establishing partnerships to provide for the management of historic shipwrecks and other submerged cultural resources in units of the national park system. The Service will not allow treasure hunting or commercial salvage activities at or around historic shipwrecks or other submerged cultural resources.

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located within park boundaries unless legally obligated to do so. Parks may provide recreational diving access to submerged cultural resources that are not susceptible to damage or the removal of artifacts. The Service will ensure that the activities of others in park waters do not adversely affect submerged cultural resources or the surrounding natural environment. The Service will consult with the owners of non-abandoned historic shipwrecks, and enter into written agreements with them to clarify how the shipwrecks will be managed by the NPS. Shipwrecks owned by a state government pursuant to the Abandoned Shipwreck Act of 1987 will be managed in accordance with the Abandoned Shipwreck Act Guidelines (55 FR 50116-145, 55 FR 51528, and 56 FR 7875).

(See *Recreational Activities* 8.2.2. Also see 36 CFR Part 2; 485 DM 27; Director's Order #4: Diving Management)

5.3.5.2 Cultural Landscapes

The treatment of a cultural landscape will preserve significant physical attributes, biotic systems, and uses when those uses contribute to historical significance. Treatment decisions will be based on a cultural landscape's historical significance over time, existing conditions, and use. Treatment decisions will consider both the natural and built characteristics and features of a landscape, the dynamics inherent in natural processes and continued use, and the concerns of traditionally associated peoples.

The treatment implemented will be based on sound preservation practices to enable long-term preservation of a resource's historic features, qualities, and materials. There are three types of treatment for extant cultural landscapes: preservation, rehabilitation, and restoration.

(See *Decision-making to Avoid Impairments* 1.4.7. Also see *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes*)

5.3.5.2.1 Preservation

A cultural landscape will be preserved in its present condition if:

- That condition allows for satisfactory protection, maintenance, use, and interpretation; or
- Another treatment is warranted but cannot be accomplished until some future time.

5.3.5.2.2 Rehabilitation

A cultural landscape may be rehabilitated for contemporary use if:

- It cannot adequately serve an appropriate use in its present condition; and
- Rehabilitation will retain its essential features, and will not alter its integrity and character or conflict with approved park management objectives.

5.3.5.2.3 Restoration

A cultural landscape may be restored to an earlier appearance if:

- All changes after the proposed restoration period have been professionally evaluated, and the significance of those changes has been fully considered;

- Restoration is essential to public understanding of the park's cultural associations;
- Sufficient data about that landscape's earlier appearance exist to enable its accurate restoration; and
- The disturbance or loss of significant archeological resources is minimized and mitigated by data recovery.

5.3.5.2.4 Reconstruction of Obliterated Landscapes

No matter how well conceived or executed, reconstructions are contemporary interpretations of the past, rather than authentic survivals from it. The National Park Service will not reconstruct an obliterated cultural landscape unless:

- There is no alternative that would accomplish the park's interpretive mission;
- Sufficient data exist to enable its accurate reconstruction, based on the duplication of historic features substantiated by documentary or physical evidence, rather than on conjectural designs or features from other landscapes;
- Reconstruction will occur in the original location;
- The disturbance or loss of significant archeological resources is minimized and mitigated by data recovery; and
- Reconstruction is approved by the Director.

A landscape will not be reconstructed to appear damaged or ruined. General representations of typical landscapes will not be attempted.

5.3.5.2.5 Biotic Cultural Resources.

Biotic cultural resources, which include plant and animal communities associated with the significance of a cultural landscape, will be duly considered in treatment and management. The cultural resource and natural resource components of the park's resource management plan will jointly identify acceptable plans for the management and treatment of biotic cultural resources. The treatment and management of biotic cultural resources will anticipate and plan for the natural and human-induced processes of change. The degree to which change contributes to or compromises the historic character of a cultural landscape, and the way in which natural cycles influence the ecological processes within a landscape, will both be understood before any major treatment is undertaken. Treatment and management of a cultural landscape will establish acceptable parameters for change, and manage the biotic resources within those parameters.

(See *Maintenance of Altered Plant Communities* 4.4.2.5)

5.3.5.2.6 Land Use and Ethnographic Value

Many cultural landscapes are significant because of their historic land use and practices. When land use is a primary reason for the significance of a landscape, the objective of treatment will be to balance the perpetuation of use with the retention of the tangible evidence that represents its history. The variety and arrangement of cultural and natural features in a landscape often have sacred or other continuing importance in the ethnic histories and cultural vigor of associated peoples. These features and their past and present-day uses will be identified, and the beliefs, attitudes, practices, traditions, and values of traditionally associated peoples will be considered in any treatment decisions.

Contemporary use of a cultural landscape is appropriate if it:

- Does not adversely affect significant landscape characteristics and features; and
- Either follows the historic use or does not impede public appreciation of it.

All uses of cultural landscapes are subject to legal requirements, policy, guidelines, and standards for natural and cultural resource preservation, public safety, and special park uses.

5.3.5.2.7 New Construction

Contemporary alterations and additions to a cultural landscape must not radically change, obscure, or destroy its significant spatial organization, materials, and features. New buildings, structures, landscape features, and utilities may be constructed in a cultural landscape if:

- Existing structures and improvements do not meet essential management needs;
- New construction is designed and sited to preserve the landscape's integrity and historic character; and
- Unless associated with an approved restoration or reconstruction, the alterations, additions, or related new construction is differentiated from, yet compatible with, the landscape's historic character.

New additions will meet the Secretary of the Interior's Standards for Rehabilitation.

5.3.5.3 Ethnographic Resources

Park ethnographic resources are the cultural and natural features of a park that are of traditional significance to traditionally associated peoples. These peoples are the contemporary park neighbors and ethnic or occupational communities that have been associated with a park for two or more generations (40 years), and whose interests in the park's resources began prior to the park's establishment. Living peoples of many cultural backgrounds—American Indians, Inuit (Eskimos), Native Hawaiians, African Americans, Hispanics, Chinese Americans, Euro-Americans, and farmers, ranchers, and fishermen—may have a traditional association with a particular park.

Traditionally associated peoples generally differ as a group from other park visitors in that they typically assign significance to ethnographic resources—places closely linked with their own sense of purpose, existence as a community, and development as ethnically distinctive peoples. These places may be in urban or rural parks, and may support ceremonial activities or represent birthplaces of significant individuals, group origin sites, migration routes, or harvesting or collecting places. While these places have historic attributes that are of great importance to the group, they may not necessarily have a direct association with the reason the park was established, or be appropriate as a topic of general public interest. Some ethnographic resources might also be traditional cultural properties. A traditional cultural property is one that is eligible for inclusion in the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that are (1) rooted in that community's history, and (2) important in maintaining the continuing cultural identity of the community.

The Service's primary interest in these places stems from its responsibilities under

- The NPS Organic Act—to conserve the natural and historic objects within parks unimpaired for the enjoyment of future generations;
- NHPA—to preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage;
- AIRFA—to protect and preserve for American Indians access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites;
- ARPA—to secure, for the present and future benefit of the American people, the protection of archeological resources and sites which are on public lands; and
- NEPA—to preserve important historic, cultural, and natural aspects of our national heritage; and
- Executive Order 13007—to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

The Service must therefore be respectful of these ethnographic resources, and carefully consider the effects that NPS actions may have on them. When religious issues are evident, the Service must also consider constraints imposed on federal agency actions by the first and fourteenth amendments to the U.S. Constitution.

The National Park Service will adopt a comprehensive approach that considers parks and traditionally associated and other peoples as interrelated members of an ecosystem. As an aid to appreciating the diverse human heritage and associated resources that characterize the national park system, the Service will identify the present-day peoples whose cultural practices and identities were, and often still are, closely associated with each park's cultural and natural resources.

ANILCA recognizes the importance of maintaining the Alaska Native culture, and contains several provisions that authorize activities by the NPS that would assist in the cultural preservation of Alaska Native communities. For many rural Alaskans, the land and the way of life are inseparable. The Service will explore opportunities in Alaska to forge a mutually beneficial relationship between Alaska Natives and the NPS. In Alaska and elsewhere, the Service will try to strengthen the ability of traditional and indigenous peoples to perpetuate their culture and to enrich the parks with traditional knowledge and a deeper sense of place.

Ethnographic information will be collected through collaborative research that recognizes the sensitive nature of such information. Cultural anthropologists/ethnographers will document the meanings that traditionally associated groups assign to traditional natural and cultural resources and the landscapes they form. The park's ethnography file will include this information, as well as data on the traditional management practices and knowledge systems that affect resource uses, and the short- and long-term effects of use on the resources.

(See Confidentiality 5.2.3. Also see Director's Order #29: Ethnography Program)

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5.3.5.3.1 Resource Access and Use

Consistent with the requirements of the Organic Act, NHPA, AIRFA, ARPA, NEPA, and Executive Order 13007 cited in section 5.3.5.3 above, the Service will strive to allow American Indians and other traditionally associated peoples access to, and use of, ethnographic resources. Continued access to and use of ethnographic resources is often essential to the survival of family, community, or regional cultural systems, including patterns of belief and sociocultural and religious life. However, the Service may not allow access and use if it would violate the criteria listed in section 8.2.

The Service generally supports traditional access and use, and is considering policy and regulatory revisions that will clarify when reasonable accommodations can be made under NPS authorities to allow greater access and use. Park superintendents may reasonably control the times when, and the places where, specific groups may have exclusive access to particular areas of a park.

With regard to consumptive use of park resources, current NPS policy is reflected in regulations published at 36 CFR 2.1. These regulations allow superintendents to designate certain fruits, berries, nuts, or unoccupied seashells which may be gathered by hand for personal use or consumption if it will not adversely affect park wildlife or the reproductive potential of a plant species, or otherwise adversely affect park resources. The regulations do not authorize the taking, use, or possession of fish, wildlife, or plants for ceremonial or religious purposes, except where specifically authorized by Federal statute or treaty rights, or where hunting, trapping, or fishing are otherwise allowed. These regulations are currently under review, and NPS policy is evolving in this area.

Regulations addressing traditional subsistence uses that are authorized in Alaska by ANILCA are published at 36 CFR Part 13. Some park-specific enabling acts (e.g., Big Cypress National Preserve and Kaloka-Honokohau National Historical Park) allow subsistence or other traditional uses of park resources.

(See Native American Use 8.5; Special Park Uses 8.6; Collecting Natural Products 8.8; Consumptive Uses 8.9)

5.3.5.3.2 Sacred Sites

The National Park Service acknowledges that American Indian tribes, including native Alaskans, treat specific places containing certain natural and cultural resources as sacred places having established religious meaning, and as locales of private ceremonial activities. Consistent with Executive Order 13007, the Service will, to the extent practicable, accommodate access to and ceremonial use of Indian sacred sites by religious practitioners from recognized American Indian and Alaska native tribes, and avoid adversely affecting the physical integrity of such sacred sites.

In consultation with the appropriate groups, the Service will develop a record about such places, and identify any treatments preferred by the groups. This information will alert superintendents and planners to the potential presence of sensitive areas, and will be kept confidential to the extent permitted by law. The Service will collaborate with affected groups to prepare mutually agreeable strategies for providing access to

ordinarily gated or otherwise-inaccessible locales, and for enhancing the likelihood of privacy during religious ceremonies. Any strategies that are developed must comply with constitutional and other legal requirements. To the extent feasible and allowable by law, accommodations will also be made for access to, and the use of, sacred places when interest is expressed by other traditionally associated peoples, especially native Hawaiians and other Pacific islanders, and by American Indian peoples and others who often have a long-standing connection and identity with a particular park or resource.

Various ethnic groups, local groups with recently developed ties to resources in neighboring parks, and visitors to family and national cemeteries and national memorials also might use park resources for traditional or individual religious ceremonies. Mutually acceptable agreements may be negotiated with known groups to provide access to, and the use of, such places, consistent with constitutional and other legal constraints.

(See Confidentiality 5.2.3; Resource Access and Use 5.3.5.3.1; Native American Use 8.5; First Amendment Activities 8.6.3. Also see Director's Orders #66: The Freedom of Information Act and Protected Resource Information, and #71B: Sacred Sites; NHPA [16 USC 470w-3]; Executive Order 13007; 512 DM 3)

5.3.5.3.3 Research

The Park Service will maintain a program of professional cultural anthropological/ethnographic research, designed to provide NPS managers with information about relationships between park resources and associated peoples. Research will be undertaken in cooperation with associated peoples in an interdisciplinary manner whenever reasonable, especially in studies of natural resource use and ethnographic landscapes. Research findings will be used to inform planning, cultural and natural resource management decision-making, and interpretation, as well as to help managers meet responsibilities to associated peoples and other stakeholders in the outcomes of NPS decisions. Information required for an ethnographic resource inventory will be drawn from ethnographic research reports to the fullest extent possible.

Collaborative research dealing with recent or contemporary cultural systems and the resources of park-associated peoples will involve the groups in the design and implementation of the research and the review of research findings to the fullest possible extent. The Service will provide individuals or groups involved with, or directly affected by, the research with copies or summaries of the reports, as appropriate.

(See Park Planning Processes 2.3; Studies and Collections 4.2; Consultation 7.5.5; Native American Use 8.5. Also see Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes)

5.3.5.4 Historic and Prehistoric Structures

The treatment of historic and prehistoric structures will be based on sound preservation practice to enable the long-term preservation of a structure's historic features, materials, and qualities. There are three types of treatment for extant structures: preservation, rehabilitation, and restoration.

(Also see Secretary of the Interior's Standards for the Treatment of Historic Properties)

5.3.5.4.1 Preservation

A structure will be preserved in its present condition if:

- That condition allows for satisfactory protection, maintenance, use, and interpretation; or
- Another treatment is warranted but cannot be accomplished until some future time.

5.3.5.4.2 Rehabilitation

A historic structure may be rehabilitated (rehabilitation does not apply to prehistoric structures) for contemporary use if:

- It cannot adequately serve an appropriate use in its present condition; and
- Rehabilitation will retain its essential features and will not alter its integrity and character or conflict with approved park management objectives.

5.3.5.4.3 Restoration

A structure may be restored to an earlier appearance if:

- All changes after the proposed restoration period have been professionally evaluated, and the significance of those changes has been fully considered;
- Restoration is essential to public understanding of the park's cultural associations;
- Sufficient data about that structure's earlier appearance exist to enable its accurate restoration; and
- The disturbance or loss of significant archeological resources is minimized and mitigated by data recovery.

5.3.5.4.4 Reconstruction of Missing Structures

No matter how well conceived or executed, reconstructions are contemporary interpretations of the past rather than authentic survivals from it. The National Park Service will not reconstruct a missing structure unless:

- There is no alternative that would accomplish the park's interpretive mission;
- Sufficient data exist to enable its accurate reconstruction based on the duplication of historic features substantiated by documentary or physical evidence, rather than on conjectural designs or features from other structures;
- Reconstruction will occur in the original location
- The disturbance or loss of significant archeological resources is minimized and mitigated by data recovery; and
- Reconstruction is approved by the Director.

A structure will not be reconstructed to appear damaged or ruined. Generalized representations of typical structures will not be attempted.

(See *Environmental Monitoring and Control* 5.3.1.4; *Physical Access for Persons with Disabilities* 5.3.2; *Historic and Prehistoric Ruins* 5.3.5.4.10)

5.3.5.4.5 Movement of Historic Structures

Proposals for moving historic structures will consider the effects of movement on the structures, their present environments, their proposed environments, and the archeological research value of the structures and their sites. No historic

structure will be moved if its preservation would be adversely affected, or until the appropriate recovery of significant archeological data has occurred. Prehistoric structures will not be moved.

A nationally significant historic structure may be moved only if:

- It cannot practically be preserved on its present site; or
- The move constitutes a return to a previous historic location, and the previous move and present location are not important to the structure's significance.

A historic structure of less-than-national significance may be moved if:

- It cannot practically be preserved on its present site; or
- Its present location is not important to its significance, and its relocation is essential to public understanding of the park's cultural associations.

In moving a historic structure, every effort will be made to reestablish its historic orientation, immediate setting, and general relationship to its environment.

The Park Service will not acquire historic structures for relocation to parks.

5.3.5.4.6 New Construction

In preference to new construction, every reasonable consideration will be given to using historic structures for park purposes compatible with their preservation and public appreciation. Additions may be made to historic structures when essential to their continued use, and when new construction will not destroy historic materials, features, and spatial relationships that characterize the structure. Structural additions will harmonize in size, scale, proportion, and materials with, but be readily distinguishable from, the older work, and will not intrude upon the historic scene. New additions will meet the Secretary of the Interior's Standards for Rehabilitation.

In those areas of parks managed for the preservation, protection, and interpretation of cultural resources and their settings, new structures, landscape features, and utilities will be constructed only if:

- Existing structures and improvements do not meet essential park management needs; and
- New construction is designed and sited to preserve the integrity and character of the area.

Unless associated with an approved restoration or reconstruction, all alterations, additions, or related new construction will be differentiated from, yet compatible with, the historic character of the structure.

(See *Rehabilitation* 5.3.5.4.2; *Use of Historic Structures* 5.3.5.4.7; *Adaptive Use* 9.1.1.4. Also see *Executive Order* 13006; NHPA)

5.3.5.4.7 Use of Historic Structures

NHPA (16 USC 470h-2(a)(1)) and Executive Order 13006 require each federal agency—prior to acquiring, constructing, or leasing buildings—to use, to the maximum extent feasible, historic properties available to it, whenever operationally appropri-

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ate and economically prudent. NHPA also requires each agency to implement alternatives for the adaptive use of historic properties it owns, if that will help ensure the properties' preservation. Therefore, compatible uses for structures will be found whenever possible. This policy will help prevent the accelerated deterioration of historic structures due to neglect and vandalism. Unused significant historic structures should be stabilized and protected through appropriate measures, such as "mothballing," until long-term decisions are made through the planning process.

All uses of historic structures are subject to preservation and public safety requirements. No administrative or public use will be permitted that would threaten the stability or character of a structure, the museum objects within it, or the safety of its users, or that would entail alterations significantly compromising its integrity.

(See Fire Detection, Suppression, and Post-fire Rehabilitation and Protection 5.3.1.2; Physical Access for Persons with Disabilities 5.3.2; Adaptive Use 9.1.1.3; Energy Management 9.1.7; Historic Structures 9.4.3.3)

5.3.5.4.8 Park Structures Owned or Managed by Others
Structures and related property owned or managed by others will be managed in accordance with NPS policies, guidelines, and standards to the extent permitted by the Service's interest. This includes structures and property owned but not occupied by the Service, and structures and property owned by others in which the Service has a less-than-fee interest or plays a major management or preservation role. Interests acquired or retained by the Service will enable the application of this policy.

(See Land Protection Plans 3.3; Historic Property Leases and Cooperative Agreements 5.3.3; Historic Properties 10.2.2.3)

5.3.5.4.9 Damaged or Destroyed Historic Structures
Historic structures damaged or destroyed by fire, storm, earthquake, war, or any other accident may be preserved as ruins; be removed; or be rehabilitated, restored, or reconstructed in accordance with these policies.

5.3.5.4.10 Historic and Prehistoric Ruins
The stabilization of historic and prehistoric ruins will be preceded by studies leading to the recovery of any data that would be affected by stabilization work. Ruins and related features on unexcavated archeological sites will be stabilized only to the extent necessary to preserve research values or to arrest structural deterioration, recognizing that it is preferable to preserve archeological sites in situ than to excavate them. Archeological ruins to be exhibited will not be excavated until consultation has occurred with traditionally associated peoples, and adequate provisions are made for data recovery and stabilization. Structures will not be deliberately reduced to ruins, and missing structures will not be reconstructed to appear damaged or ruined.

5.3.5.5 Museum Collections
The Service will collect, protect, preserve, provide access to, and use objects, specimens, and archival and manuscript collections (henceforth referred to collectively as "collections," or individually as "items") in the disciplines of archeology, ethnography, history, biology, geology, and paleontology, to aid understanding among park visitors, and to advance

knowledge in the humanities and sciences. As appropriate, the Service will consult with culturally affiliated or traditionally associated peoples before treating or reproducing items in NPS collections that are subject to NAGPRA.

(Also see Museum Handbook)

5.3.5.5.1 Preservation

An item in a museum collection will be preserved in its present condition through ongoing preventive care if:

- That condition is satisfactory for exhibit or research; or
- Another treatment is warranted, but it cannot be accomplished until some future time.

An item will be stabilized if:

- Preventive measures are insufficient to reduce deterioration to a tolerable level; or
- The item is so fragile that it will be endangered under any circumstances.

Active conservation treatment (intervention) will be minimized to reduce the possibility of compromising the item's integrity. All active treatment will be documented.

5.3.5.5.2 Restoration

An item in a museum collection may be restored to an earlier appearance if:

- Restoration is required for exhibit or research purposes;
- Sufficient data about that item's earlier appearance exist to enable its accurate restoration; and
- Restoration will not modify that item's known original character.

Restoration will be accomplished using the techniques and materials that least modify the item and in such a manner that the materials can be removed at a later time with minimal adverse effect. Restored areas will be distinguishable from original material, and be documented. Restoration will take into account the possible importance of preserving signs of wear, damage, former maintenance, and other historical and scientific evidence.

5.3.5.5.3 Reproduction

Items needed for interpretive and educational presentations will be reproduced for such use when the originals are (1) unavailable; or (2) would be subject to undue deterioration or loss; or (3) are otherwise inappropriate for exhibit. If an object is inappropriate for exhibit because of its religious or spiritual significance to a traditionally associated people, it will be reproduced only after consultation with such people.

5.3.5.5.4 Acquisition, Management, and Disposition

Collections and related documentation essential to achieving the purposes and objectives of parks will be acquired and maintained in accordance with approved scope of collection statements for each park. When museum objects, specimens, or archival documents become available and fall within a park's approved scope of collection statement, every reasonable effort will be made to acquire them, if they can be managed and made accessible according to Service standards.

Archeological objects systematically collected within a park, and natural history specimens systematically collected within a park for exhibit or permanent retention, will be managed as part of the park's museum collection. The management and care of museum collections will be addressed at all appropriate levels of planning. Requisite levels of care will be established through the interdisciplinary efforts of qualified professionals.

Museum collections will be acquired and disposed of in conformance with legal authorizations and current NPS procedures. The National Park Service will acquire only collections having legal and ethical pedigrees. Each park will maintain complete and current accession records to establish the basis for legal custody of the collections in its possession, including intellectual property rights when acquired. Each park will prepare museum catalog records to record basic property management data and other documentary information about the park's museum collection. Collections will be inventoried in accordance with current procedures. Archeological, cultural landscape, ethnographic, historic and prehistoric structure, historic furnishings, natural resource, and other projects that generate collections for parks will provide for cataloging and initial preservation of those collections in the project budget.

The Service may cooperate with qualified entities in the management, use, and exhibition of museum collections, and may loan items to, or borrow items from, such entities for approved purposes. The Service may de-accession items using means authorized in the Museum Act and NAGPRA.

Interested persons will be permitted to inspect and study NPS museum collections and records in accordance with standards for the preservation and use of collections, and subject to laws and policies regarding the confidentiality of resource data. At cost, copies of documents may be provided.

(See Natural Resource Collections 4.2.3; Confidentiality 5.2.3; Fire Detection, Suppression, and Post-fire Rehabilitation and Protection 5.3.1.2; Environmental Monitoring and Control 5.3.1.4; Consultation 7.5.5; Special Park Uses 8.6; Museum Collections Management Facilities 9.4.2. Also see 16 USC 18f; 43 USC 1460; 36 CFR Part 79; 43 CFR Part 10; and Museum Handbook)

5.3.5.5 Historic Furnishings

When historic furnishings are present in their original arrangement in a historic structure, every effort will be made

to preserve them as an entity. Such historic furnishings will not be moved or replaced unless required for their protection or repair, or unless the structure is designated for another use in an approved planning document. The original arrangement of historic furnishings will be properly documented. A structure may be refurnished in whole or in part if:

- All changes after the proposed refurnishing period have been professionally evaluated, and their significance has been fully considered;
- A planning process has demonstrated that refurnishing is essential to public understanding of the park's cultural associations; and
- Sufficient evidence of the design and placement of the structure's furnishings exists to enable its accurate refurnishing without reliance on evidence from comparable structures.

Generalized representations of typical interiors will not be attempted except in exhibit contexts that make their representative nature obvious. Reproductions may be used in place of historic furnishings, but only when photographic evidence or prototypes exist to ensure the accurate re-creation of historic pieces.

(See Park Planning Processes 2.3; Nonpersonal Services 7.3.2)

5.3.5.6 Archives and Manuscripts

Archival and manuscript collections are museum collections, and will be preserved, arranged, cataloged, and described in finding aids. They will be maintained and used in ways that preserve the collections and their context (provenance and original order) intact while providing controlled access. With few legal exemptions, the Park Service will make archives and manuscripts available to researchers. Electronic documents that are to be preserved in archival and manuscript collections will be migrated so that their information remains accessible.

All documentation associated with natural and cultural resource studies and other resource management actions will be retained in the park's museum collection for use in managing park resources over time. Parks will retain notes or copies of records significant to their administrative histories when they periodically transfer their official records to federal record centers.

(See Confidentiality 5.2.3)

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DIRECTOR'S ORDER #24: NPS MUSEUM COLLECTIONS MANAGEMENT

Approved: /s/ Robert Stanton (original on file)
Director, National Park Service

Effective Date: August 21, 2000

Sunset Date: August 21, 2004

This Director's Order supplements NPS *Management Policies* and, augmented by procedures in the *Museum Handbook*, supercedes Special Directives 80-1, "Guidance for Meeting NPS Preservation and Protection Standards for Museum Collections"; 87-3, "Conservation of Archeological Resources," as it pertains to museum collections; 91-4, "Ensuring that Natural Resource Projects Fund the Curation of Collections"; 94-6, "Ensuring that Projects Generating Museum Collections Fund Cataloging and Basic Preservation"; 93-2, "Preserving NPS Cellulose Nitrate Film Collections"; and Staff Directive 87-1, "NPS Clearinghouse Procedures and Requirements Regarding Disposal and Acquisition of Excess and Needed Museum Objects."

1. Background and Purpose

The National Park Service is custodian in perpetuity of irreplaceable and priceless museum collections that include objects, specimens, and archival and manuscript materials (textual, electronic, and audio-visual documents), representing cultural and natural resources in the United States, including but not limited to the disciplines of archeology, biology, ethnology, geology, history, and paleontology. NPS museum collections are part of the natural and cultural heritage of the country and are collected, preserved, and interpreted for public benefit.

NPS museum collections inform and enhance every aspect of park work, from resource management and interpretation, to research and public accountability. Featured in exhibits, interpretive programs, films, and print and electronic publications, NPS museum collections are key resources for educators, students, researchers, park managers, park neighbors, and the general public. Accessibility of museum collections is a prime component of museum management.

The NPS *Management Policies* lay the foundation by which the NPS meets its responsibilities toward these museum collections. This Director's Order provides further policy guidance,

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standards, and requirements for preserving, protecting, documenting, and providing access to, and use of, NPS museum collections.

2. Authority for this Director's Order

Authority for issuing this Director's Order is found in 16 U.S.C. 1 through 4, and delegations of authority contained in Part 245 of the Department of the Interior Manual. Additional key related authorities are found in the Antiquities Act of 1906 (16 U.S.C. 431-433), the Historic Sites Act of 1935 (16 U.S.C. 461-467), the Management of Museum Properties Act of 1955, as amended (16 U.S.C. 18f), the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm), the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001), and the Departmental Manual 411 DM, Managing Museum Property.

3. Objectives

The objectives of this Director's Order, in conjunction with the accompanying Level 3 *Museum Handbook*, are to:

- Ensure that NPS managers and staff have information on the standards and actions for successfully and ethically complying with NPS *Management Policies* on museum collections.
- Provide a means of measuring and evaluating progress in preserving, protecting, documenting, accessing, and using museum collections.

4. Responsibilities

4.1 Associate Director, Cultural Resource Stewardship and Partnerships

The Associate Director, Cultural Resource Stewardship and Partnerships, with the assistance of the Chief Curator, has the following responsibilities:

4.1.1 Code of Ethics: Follow the Code of Ethics for the museum management program.

4.1.2 Museum Handbook: Develop, issue, and periodically update a *Museum Handbook* containing the information park managers need to know to comply with laws, departmental and Service-wide policies, regulations, professional standards, and a code of ethics applicable to museum collections management. Include in the *Museum Handbook*, as a supplement to this Director's Order, specific guidance for collecting, preserving, protecting (including security and fire protection), documenting, accessing, and using museum collections, clearly distinguishing between those actions that are mandatory requirements and those that are discretionary. Cite those laws, policies, and regulations in relevant sections.

4.1.3 Strategic Plans: Develop strategic plans and goals to improve and maintain the management of NPS museum collections Service-wide, consistent with the Government Performance and Results Act of 1993 (31 USC 1115).

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4.1.4 National Catalog: Maintain for management and public benefit a National Catalog of Museum Objects, consisting of electronic and paper catalog records, with accession and catalog data for all parks. Develop and maintain an automated collections management program (the Automated National Catalog System [ANCS+ and its successor]) for use by parks, centers, and offices Service-wide, as well as the general public.

4.1.5 Report Requirements and Analysis: Identify reports that are required annually, or at other times, to further museum collections management. Reporting requirements will be kept to the minimum necessary. Maintain, analyze, and report on data submitted by parks, centers, and regions, including: the Collections Management Report, the NPS Checklist for Preservation and Protection of Museum Collections; funding distributions and accomplishments; and other required reports and surveys.

4.1.6 Annual Inventory: Review regional certifications of annual inventories, and take any necessary corrective action.

4.1.7 Museum Supplies, Equipment, and Technologies: Research products and facilitate park and center acquisition and use of appropriate supplies, forms, equipment, and technologies for management of museum collections.

4.1.8 Service-wide Initiatives: Develop and coordinate Service-wide initiatives and funding to improve museum management.

4.1.9 Technical Information: Publicize and disseminate technical information on museum management, including conservation and archival collections management.

4.1.10 Information Access: Develop and maintain access to Service-wide information on NPS museum collections through various media (for example, ANCS+ and World Wide Web).

4.1.11 Professional Qualifications and Training: Evaluate Service-wide professional competencies and training needs in museum management, and develop strategies, guidelines, and curricula to meet those needs. Coordinate training to address new technologies, programs, and initiatives.

4.1.12 Plan Review: Review draft park plans that receive Washington Office review, such as General Management Plans, for appropriate coverage of museum management.

4.1.13 Technical Assistance: Provide technical assistance and advice to park and center managers regarding acquiring, preserving, protecting, documenting, accessing, and using museum collections. Provide this assistance and advice at the request of regions.

4.2 Regional Directors and WASO Associate Directors with Museum Collections Responsibility

Regional directors (assisted by regional museum support staff), and WASO associate directors accountable for museum collections, have the following responsibilities:

4.2.1 Code of Ethics: Follow the Code of Ethics for the museum management program.

4.2.2 Plan and Performance Review: Use the strategic and annual performance planning processes, the park planning process, and the performance management system to ensure that superintendents and center managers meet their responsibilities to manage museum collections according to this directive. Review park plans for appropriate coverage of museum collections management, and to ensure consistency with NPS requirements.

4.2.3 Technical Assistance: Provide technical assistance to parks and centers to assist them in meeting NPS museum management requirements, and in providing for access and use of collections.

4.2.4 Staffing and Training: Evaluate museum management staffing and training needs, and develop and provide training to park and center staff. Regional directors will alert the Associate Director, Cultural Resource Stewardship and Partnerships, about regional training needs that may apply Service-wide.

4.2.5 Plans, Priorities, and Reports: Develop plans and set priorities (including funding priorities) for managing museum collections based on all approved planning documents and information provided through Service-wide reports and requirements, including the Collections Management Report, NPS Checklist for Preservation and Protection of Museum Collections, and Automated Inventory Program. Review reports to ensure that parks and centers meet reporting requirements.

4.2.6 Annual Inventory Certification: Annually certify to the Associate Director, Cultural Resource Stewardship and Partnerships, Attention: Chief Curator, no later than September 30 each fiscal year, that parks and centers have completed their annual inventories. Review park and center annual inventories and take any necessary corrective actions. Establish a regular schedule for parks in the region to submit the inventories.

4.2.7 Destructive Analysis and Consumptive Use: After careful review, if the benefits can be clearly shown to outweigh the resulting or potential damage or loss, approve destructive analysis of rare or highly significant objects, specimens, and archival items, and any consumptive use of museum collections.

4.2.8 Unconditional Gifts: Grant exceptions to the unconditional gift policy on a rare, and case-by-case basis.

4.3 Park Superintendents and Center Managers

Park superintendents, center managers, and others who manage collections (with the assistance of museum management staff) have the following responsibilities:

4.3.1 Code of Ethics: Follow the Code of Ethics for the museum management program.

4.3.2 Standards: Meet museum management standards in the NPS *Museum Handbook* (Parts I-III) for:

- acquiring, preserving, protecting, documenting (including accessioning, cataloging, lending, deaccessioning), accessing, and using museum collections; and
- completing actions specific to archival and manuscript collections (appraising, arranging, describing, producing finding aids, and providing reference and duplication services).

4.3.3 Procedures: Follow procedures in the *Museum Handbook*.

4.3.4 Ongoing and Corrective Actions: Provide ongoing funding for recurring museum management functions and take appropriate action to correct identified preservation, protection, documentation, and access and use deficiencies, including programming for funding to correct such deficiencies. Complete Project Management Information System (PMIS) and Resource Management Plan (RMP) project statements that identify all preservation, protection, documentation, access and use needs.

4.3.5 Staffing and Training: Evaluate and address museum management staffing and training needs according to established personnel qualifications standards and Service-wide professional competencies.

4.3.6 Scope of Collection: Approve and keep current a Scope of Collection Statement to identify the scope of collecting activities and define the purpose of the collection. Ensure acquisitions are consistent with the Scope of Collection Statement. Deaccession objects inconsistent with the Scope of Collection Statement.

4.3.7 Collection Management Plan: Approve, keep current, and implement a Collection Management Plan to:

- evaluate issues of preserving, protecting (including security and fire protection), documenting, accessing and using collections;
- address issues specific to archival and manuscript collections (appraising, arranging, describing, producing finding aids, and providing reference and duplication services); and
- propose a strategy to address the issues, including staffing and cost estimates.

4.3.8 Housekeeping Plan: Approve, keep current, and implement a Housekeeping Plan for every space that houses museum collections, to ensure that housekeeping routines are sensitive to museum collections preservation needs.

4.3.9 Integrated Pest Management: Approve, keep current, and implement an Integrated Pest Management Plan that addresses the museum collections.

4.3.10 Emergency Operation: Approve, keep current, and implement a Museum Collections Emergency Operations Plan, as part of the park's Emergency Operations Plan, that identifies museum collection vulnerabilities to events (such as fire, earthquakes, and floods), and identifies responses that will protect resources without endangering human health and safety. Ensure staff is practiced and prepared for emergency response.

4.3.11 Job Hazard Analysis: Complete a Job Hazard Analysis (JHA) for all museum jobs that have an associated history of injury, illness, or death; or that require the use of personal protection equipment, such as respirators; or that involve activities that are clearly dangerous, such as handling collections with mold, working with toxic or flammable chemicals, or operating heavy machinery.

4.3.12 Collection Condition: Monitor and record information about the environment in spaces housing collections and manage the environment to maximize preservation. Complete Collection Condition Surveys, as needed, to assess conditions in spaces housing museum collections, to record the condition of objects or groups of objects, and to determine treatment needs and priorities. Incorporate survey data in ANCS+ and in accession or catalog files.

4.3.13 Accession and Catalog Records: Accession collections upon acquisition to establish basic accountability. Catalog the collections immediately following acquisition, or program to catalog them in the near future. Survey, appraise, rehouse, arrange, and describe archival and manuscript collections and prepare finding aids. Develop park archival duplication and reference procedures. Have PMIS statements in place to address eliminating any archival processing backlog.

4.3.14 Accession and Catalog Backup: Maintain a complete current backup of all electronic accession and catalog records at a location that is not vulnerable to the same catastrophic events as the computer workstation. Submit a complete annual backup to the National Catalog in Harpers Ferry, West Virginia.

4.3.15 Unconditional Gifts: Accept only unconditional gifts and bequests, and, where possible, obtain applicable copyrights and releases with acquisitions. Obtain regional director's approval for rare exceptions, on a case-by-case basis.

4.3.16 Project-generated Collections: Require project budgets to include funding for the basic management of collections that are project-generated. Collections management includes cataloging; labeling; conservation examination and treatment (including specimen preparation); initial storage of objects and specimens; and organization and storage of project documentation, including appraisal, arrangement, description, finding aid production, and appropriate archival housing.

- Before starting, permitting, or contracting a project, specify in writing in the task directive, proposal, agreement, permit, or contract, the parties responsible, the designated NPS or non-NPS repository, the collections management tasks, and a time schedule for completion.

- Fund subsequent ongoing maintenance costs of collections management from the operating base of the responsible park, center, or other repository.
- If project-generated collections cannot be accommodated in available storage space, and new storage space construction is necessary, program to construct new space to accommodate the expanded collection. If interim storage is needed, specify in the project task directive the location of that storage, and state that it must meet NPS standards. Identify the funding source for interim storage.

4.3.17 Systematic Collections: Add collections made through systematic research to the museum collection. House those associated with a single accession at the same repository to facilitate research and use. As appropriate, lend these collections for exhibit, research, conservation, and other approved uses. Superintendents may authorize housing of collections from the same accession at different repositories if by so doing preservation, research, and use will be improved.

4.3.18 Collections Management Report: Annually complete the automated Collections Management Report (CMR), using ANCS+. The report provides information on accessions, deaccessions, cataloging, backlogs of objects to be cataloged, use of museum collections, and total collection size. The report must include all collections, whether kept in park facilities, other NPS facilities, or in non-NPS repositories. Submit the CMR using ANCS+.

4.3.19 Annual Inventory: Conduct an annual collection inventory on a regular schedule using the Automated Inventory Program (AIP) in ANCS+ and reconcile the results with existing accession and catalog records. Take any necessary corrective action.

4.3.20 Checklist: Keep the NPS Checklist for Preservation and Protection of Museum Collections (Checklist) up-to-date in the Automated Checklist Program (ACP) in ANCS+. The Checklist records information on preservation and protection conditions in parks and centers, identifies deficiencies, and provides estimated costs to correct deficiencies.

4.3.21 Treatment Documentation: Document treatment of collections, and record that information in ANCS+ and retain reports and documentation in accession or catalog files.

4.3.22 Cellulose Nitrate and Cellulose Ester Film: Identify cellulose nitrate and cellulose ester film, and take steps to preserve the visual information contained by duplicating the images onto safety film. After inspecting the copies, evaluate and either deaccession and destroy or provide for long-term storage of the original film according to the criteria in *Museum Handbook*, Part I, Appendix M, "Management of Cellulose Nitrate and Ester Film."

4.3.23 Access and Use: Promote access to cataloged collections for research and interpretive purposes through a variety of means and media, such as exhibits, interpretive programs, loans, publications, film and television, the World Wide Web, archival finding aid production and distribution, and posting of finding aids and repository-level guides for archival and manuscript collections in the National Union Catalog of Manuscript

Collections (NUCMC).

- Ensure that access and use are consistent with the laws and NPS policies pertaining to Freedom of Information Act disclosures, copyright, privacy, publicity, obscenity and pornography, defamation, and resource protection.
- Document access and use with a researcher logbook, signed access policy statement, researcher registration, copyright and privacy restriction statement, and duplication forms.

4.3.24 Consultation: Consult with affiliated groups in managing collections, including Native American groups when managing collections subject to the Native American Graves Protection and Repatriation Act.

1.1.25 Preservation vs. Destructive Use: Manage objects to preserve their condition, including using reproductions when originals may be damaged by use. Authorize in writing destructive analysis of collections, except for rare or highly significant objects, specimens, and archival materials. Obtain regional director approval for destructive analysis of rare or highly significant objects, specimens, and archival materials and for any consumptive use of collections.

4.3.26 Exhibits: Exhibit collections according to an approved exhibit plan, accompanied by maintenance instructions. Ensure that all exhibits meet the standards in the NPS Checklist for Preservation and Protection of Museum Collections.

4.3.27 Objects in Historic Structures: Document furnishings that are exhibited in their associated historic structures with an approved Historic Furnishings Report. Consider the preservation requirements of both objects and historic structures when objects are on exhibit or in storage in historic structures.

4.3.28 Exhibit of Human Remains: Never exhibit Native American human remains or photographs, drawings or renderings, or casts of the remains. Exhibit non-Native-American human remains and photographs, drawings or renderings, or casts of the remains only in consultation with traditionally associated groups.

4.3.29 CRBIB: Ensure that approved museum plans are entered in the Cultural Resource Management Bibliography (CRBIB).

5. Submissions and Deadlines

5.1 Collections Management Report: Parks and centers will submit the CMR for the previous fiscal year by **November 1** simultaneously to the Regional Director, Attention: Regional Curator, and to the Museum Management Program (MMP), National Center for Cultural Resources. The MMP will prepare this information for the strategic planning and annual reporting processes and compile and distribute cluster, regional, and Service-wide reports.

Parks and MMP use CMR data to report on Strategic Plan Goal Ia6 in compliance with the

Government Performance and Results Act.

5.2 Checklist: Parks and centers will update their Checklist in the ACP by **November 1** to show changes as of the end of the previous fiscal year. Parks and centers will submit their Checklist data using the ACP simultaneously to the Regional Director, Attention: Regional Curator, and to the MMP. The MMP will compile and distribute cluster, regional, and Service-wide reports.

Parks and MMP use Checklist data to report on Strategic Plan Goal Ib2D in compliance with the Government Performance and Results Act.

5.3 Annual Inventory: Parks and centers will annually submit the inventory generated using the AIP to the regional director, according to a schedule that the region approves. The regional director will certify the completion of the inventories to the Associate Director, Cultural Resource Stewardship and Partnerships, Attention: Chief Curator, no later than **September 30** each fiscal year.

5.4 National Catalog Submissions: Parks and centers will annually submit to the National Catalog complete electronic backups of their ANCS+ accession and catalog records, identifying new or modified records. The submission for the previous fiscal year is due in **November, December, or January**, according to the schedule established in the *Museum Handbook*, Part II. The National Catalog will print and store archival paper copies of the catalog records. The National Catalog will print and send paper copies of catalog records to parks and centers upon request.

--- End of Director's Order ---

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INTERNATIONAL ASPECTS OF THE ILLICIT TRADE IN ART

**THE ROLE OF THE OFFICE OF INTERNATIONAL
AFFAIRS (OIA)**

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INTRODUCTION

Prior to the 1970's, it was widely acknowledged in most countries that there did indeed exist an illegal trade in cultural property that was international in scope. The transportation of the Elgin marbles from Greece to England, so emotionally documented in Lord Byron's famous poem, was, perhaps, the best known example of this illegal trade, but, on a more mundane level, art and antiquities dealers worldwide were generally aware of the increasing demand for such cultural property. By 1970, however, an alarm bell was being sounded, and, as a result of the appearance of a number of important publications outlining the devastation of ancient sites, the mutilation of monuments, and the loss of opportunities to understand ancient civilizations through the study of antiquities in their original environment, the concern about the illicit trade in this kind of art became more acute. See Paul Bator, "An Essay on the International Trade in Art", 34 Stanford Law Review, 275 to 384, 1982. Throughout the 1970's, a number of important efforts were made, both in the United States and internationally, to find a solution to this problem that would preserve the history and patrimony of nations while at the same time fostering the growing interest in international efforts to share and enjoy the culture of other civilizations.

In this paper, I intend to focus on some of the rather narrow legal issues that represent only a few of the many questions confronting those who seek to control the illicit trade in art and artifacts. In particular, I will outline what I see to be the role of O.I.A. attorneys who are confronted with requests from countries to assist in the repatriation of objets d'art which, they claim, form a part of their national patrimony. This is by no means an exhaustive study, but it will, hopefully, provide some general guidelines on how to respond to the requests described above. I will first deal with some of the treaties and legislation that are relevant to an analysis of the fact situations that you will

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encounter; I will then describe the ramifications of the important case law that has had an enormous impact in this area; next I will set out the policy of U.S. Customs in dealing with matters of this nature, including a brief reference to the criticisms that have been leveled at Customs by members of both the legal and the arts professions; and finally, I will provide you with my list of suggestions on how to differentiate between and respond to requests from countries which, having traced certain art treasures to American locations, demand that these items be seized and returned with all due haste to the legal owners.

TREATIES AND LEGISLATION SPECIFIC TO THE ILLICIT TRADE IN ART

1) Treaties, Agreements, and Specific Legislation

As indicated above, the 1970's represented a turning point in the general level of awareness of the problems in this area. One of the first official reactions to what was then considered to be the pressing crisis of the pillaging of ancient Mayan sites in order to supply the growing market for antiquities was the Treaty of Cooperation with the United Mexican States Providing for Recovery and Return of Stolen Archeological, Historical and Cultural Properties, 22 U.S.T.494, which was signed by the United States and Mexico in July of 1970. In 1972, Congress enacted legislation prohibiting the importation into the United States of illegally exported Pre-Columbian monumental sculpture and murals. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§2091-2095, 1976. Both of these efforts represented a response to the specific problems facing ancient sites in South and Central America. In addition to these enactments, the United States is a signatory to agreements with Peru, Ecuador, and Guatemala which are intended to ensure the recovery and repatriation of stolen archaeological, cultural, and historical properties. Also in 1972, the United States Senate unanimously gave its advice and consent to ratify, subject to a reservation and certain understandings, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This agreement is of wider scope and different focus to the treaties mentioned above, and was finally enacted into law as the Convention on Cultural Property Implementation Act ("Cultural Property Act") 19 U.S.C. §§ 2602 to 2613, on January 12, 1983. This very important legislation warrants further examination.

2) The Cultural Property Act

The final text of the "Cultural Property Act" is the product

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of many years of debate, both within the United States, and also in international fora, over the extent to which unrestricted free trade in the arts should be made subject to restrictions and import controls. As originally proposed, the UNESCO Convention advocated blanket import and export controls on the international movement of cultural property. Objections to such a stringent régime resulted in a compromise which is reflected in the present legislation. For the purposes of this analysis, the "Cultural Property Act" can be divided into two distinct parts -- one dealing with the impact of the legislation on the movement of archeological and ethnological materials, and the other touching upon the extent to which the "Act" impacts upon other cultural property.

i) Briefly stated, §§ 2602 to 2606 of the "Cultural Property Act" provide that a state, the cultural patrimony of which is in jeopardy from the pillage of archaeological or ethnological materials, may call upon other state parties to the UNESCO Convention to participate in a concerted international effort to remedy the situation. Such efforts may, under certain circumstances, include import restrictions on the objects concerned. Furthermore, provision is made for the imposition of temporary import restrictions by way of executive action in situations which satisfy the statutory conditions and fall into the defined category of emergency conditions. It must be emphasized that the provisions of the legislation described above apply to archaeological and ethnological material only. As of April 18, 1991, import restrictions pursuant to the "Cultural Property Act" have been imposed on the following items: archaeological objects and pre-Columbian artifacts from the Cara Sucia Region of El Salvador, on September 11, 1987; ethnological material, antique ceremonial textiles from Coroma, Bolivia, on March 14, 1989; and culturally significant archaeological objects from the Sipan Region of Peru, on May 7, 1990. See Customs Directive 5230-15, April 18, 1991. It is important to note that no archaeological or ethnological material may be seized pursuant to the "Act" unless it has been specifically published in the Federal Register. As can be seen, the use to which the provisions of the "Act" in this area has been put, is limited in the United States.

ii) § 2607 of the "Cultural Property Act" deals with other kinds of art treasures, such as paintings, books and sculpture, that are frequently the subject of requests for assistance from Western European countries. § 2607 sets out a prohibition against the importation into the United States of stolen cultural property that can be demonstrated to have belonged to a "museum or religious or secular public monument or similar institution" in any state party to the Convention. The prohibition is limited, however, to importations which occur after either the coming into force of the Convention in the state party alleging ownership of the article, or the effective date of the Cultural Property Act, whichever is

later. While § 2607 will be of some use in dealing with certain specific instances of art objects recently imported into the United States, it is certainly not a blanket solution to all requests for assistance in retrieving this kind of cultural property stolen from foreign collections. The important proviso that the object must be documented as belonging to the inventory of the kinds of institutions described means that the importation of many stolen art treasures, other than those covered in the sections previously mentioned, is not proscribed under § 2607 of the "Cultural Property Act." For example, a Botticelli stolen from a private collection is not covered by this section, since such collection does not fall within the definition found in the legislation. Accordingly, on a strict reading of the "Cultural Property Act," an O.I.A. Attorney responding to a request for assistance in the return of § 2607 material will be required to determine: first, whether the article was stolen from a public or private collection; second, whether the foreign government seeking action is a state party to the Convention; and third, whether the importation of the objet d'art occurred after the later of the two time restrictions set out in that section. Having ascertained all of these facts, the O.I.A. Attorney will then be in a position to advise the foreign state as to the availability of a remedy pursuant to the "Cultural Property Act." These remedies range from the imposition of import restrictions or less drastic measures upon a Presidential determination that such measures are required (§§ 2602, 2603 and 2607) to seizure and forfeiture of the specific piece of cultural property illegally imported into the United States by U.S. law enforcement agencies (§ 2609).

The "Cultural Property Act," without reference to any other federal enactments, would appear to provide definitive guidelines on how to deal with certain classes of cultural material that have entered this country, the return of which is sought by a foreign state that is a signatory to the Convention. Unfortunately, the situation is not nearly as straight-forward as it would appear to be upon simple resort to this single piece of legislation. In order to provide requesting states with a complete analysis of all potential remedies available under U.S. law, it is necessary to look at other enactments.

3) Customs and Other Relevant Legislation

As has been indicated above, the "Cultural Property Act" is a carefully crafted piece of legislation which represents compromise and a careful balance between those who advocate free trade in cultural property and those who would impose strict controls on the movement of such material. Although the intentions of those involved in developing the "Act" were clearly directed towards the promulgation of a complete code for dealing with cultural property imported into the United States, several important pre-existing

pieces of legislation would appear to cover this field and to provide federal enforcement officials, primarily Customs, with wider-ranging powers in the area. I shall make reference to four examples of such legislation which have been used extensively by Customs to effect results that would not necessarily be available to U.S. officials under the "Cultural Property Act." The first, and most obvious, legislative enactment in this regard is 19 U.S.C. § 1497 which reads as follows:

Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

The next relevant piece of federal legislation is 18 U.S.C. § 545 which provides that:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -

Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Another important federal enactment in this area is 18 U.S.C. § 2314, the relevant part of which is:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; ...shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Finally, I will make reference to 19 U.S.C. § 1595a.(c), which provides that:

Any merchandise that is introduced or attempted to be introduced into the United States contrary to the law ... may be seized and forfeited.

As will be seen below, federal law enforcement agencies have used these provisions in such a way as to permit greater flexibility in dealing with the claims of foreign owners than the "Cultural Property Act" would allow.

THE COMMON LAW -- U.S. v. HOLLINSHEAD AND U.S. v. McCLAIN

Two very important cases arose in the 1970's as a result of the decision by federal enforcement officers to avail themselves of the legislative enactments cited immediately above. It is notable that both of these cases were decided prior to the passage of the "Cultural Property Act," but the reasons for judgement, arguably, remain valid to this date. I will make reference firstly to the U.S. v Hollinshead, 495 F.2d 1154. In this case, an individual by the name of Clive Hollinshead offered for sale a pre-Columbian stela, which, by chance, was brought to the attention of the archaeologist who had discovered and documented the ancient Mayan ruins located in Guatemala from which this item came. The archaeologist immediately recognized the stela being advertised for sale as one of those found at the ruins in Guatemala. He reported this to authorities, and the resulting investigation uncovered a significant smuggling ring operating in the United States. Hollinshead and several others were ultimately convicted in 1973 by a jury of the offences of transporting and conspiring to transport stolen property in interstate and foreign commerce. This conviction was upheld on appeal in 1974. The facts in this case are somewhat unique in that the stela was a documented artifact clearly belonging to the government of Guatemala which came to the attention of the individual who actually made the discovery. Nevertheless, the use by United States authorities of the "National Stolen Property Act," 18 U.S.C. § 2314, in conjunction with the legislation providing for the forfeiture of any item imported contrary to the law, is significant.

The second, and more important, case relevant to this discussion is the United States v. McClain, 545 F.2d 988 (5th Cir.) [McClain I], rehearing denied, 551 F.2d 52 (5th Cir. 1977) (per curiam); United States v. McClain, 593 F.2d 658 (5th Cir.) [McClain II], cert. denied, 444 U.S. 918 (1979). The juridical history of this matter is complicated and the case was finally decided on two separate appeals by the Court of Appeals for the Fifth Circuit.

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Once again, the facts here revolve around a smuggling ring in the United States, but in this case the artifacts were Mexican in origin and there is no information as to the circumstances or the date of their discovery. Unlike the situation in Hollinshead, the investigation into this matter only revealed that the individuals involved in this activity knew that their actions were illegal under Mexican law and that the artifacts were illegally exported from Mexico. One of the more contentious issues in the extended litigation in this matter was the legitimacy of the Mexican law vesting ownership of all pre-Columbian artifacts, both discovered and undiscovered, in the government of that country. After two trials and two appeals, the final result of the McClain case can be summarized as follows: i) the "National Stolen Property Act" applies to material that has been exported illegally from a country which has legislatively declared ownership in that property; and ii) it is not necessary for the country claiming such ownership to demonstrate actual possession of the material in order for U.S. authorities to invoke the provisions of the "National Stolen Property Act."

While it is possible to restrict the application of the reasoning in the Hollinshead case to a certain specific set of unusual facts, the same cannot be said about the decisions in McClain. One of the most vigorously argued points on behalf of the defence in McClain was that the United States has not historically enforced, and should not now begin to enforce, within its own boundaries the domestic law of other countries. It was contended that by giving effect to the Mexican statutory declaration of ownership in order to establish the necessary requirement of theft for the application of the "National Stolen Property Act", the American Courts were, in effect, doing exactly that. In other words, prior to McClain, the fact that an artifact was illegally exported from another country would not, absent other considerations, make its importation into the United States an illegal act. As a result of McClain, such an importation would now be considered to be illegal if the country from which it had been exported had passed some kind of a law declaring national ownership in that specific class of artifacts or ethnological material. As has been pointed out by Paul Bator, a well-respected expert in this area of the law, McClain gives to the exporting country the right to invoke the criminal law in the United States to help enforce its export rules "by simply waving a magic wand and promulgating this metaphysical declaration of ownership." "An Essay on the International Trade in Art," supra, 275 at 351.

Applying the logic of the McClain decision(s) to the area of paintings, sculpture, and other categories of art, it would seem that, provided the aggrieved foreign party is able to establish ownership in the property that has been stolen and imported into the United States, American authorities are not without power to provide some relief. The use of the federal statutes cited above and resorted to in the McClain case would appear to obviate the

need to meet the rather stringent conditions set forth in the "Cultural Property Act." Thus, McClain judicially approves of the use of pre-existing federal legislation by U.S. law enforcement agencies to take action in cases that are not covered by the "Cultural Property Act." The Botticelli stolen from a private collection, while clearly excluded from the class of items covered by the "Act," would not necessarily be beyond the reach of federal authorities pursuant to McClain.

Clearly, there are some limitations on the use of McClain in situations involving stolen art or artifacts imported into the United States. First and foremost of these limitations is the requirement that the value of the stolen property be greater than \$5,000. 18 U.S.C. § 2314. Furthermore, when dealing with artifacts or ethnological material, it is necessary that the country from which the items have been exported has enacted a statute claiming ownership in all such property. Finally, there must be some evidence that the individuals involved in the exportation are aware of, and have attempted to evade the foreign country's ownership laws. When the case involves art objects, it is equally necessary that the victim of the theft be in a position to establish clear and documented ownership in the item stolen and that the parties arranging to import the items into the United States knew, or ought to have known, that this property was stolen. While these limitations are not insignificant, they are considerably less onerous than the ones imposed by the "Cultural Property Act" and give federal authorities much more scope in handling requests from foreign owners, both public and private.

It is important to point out that when cultural property is detained by federal authorities for an alleged violation of U.S. law, there are procedures that vary with the circumstances for the ultimate return of that material to the foreign owner. If the property is seized pursuant to the McClain doctrine, it will not be available for return until the criminal proceedings against the accused parties are completed. When the material is no longer needed as evidence of the criminal offences charged, it will usually be disposed of by way of an interpleader action to determine which party is the valid owner. The interpleader action is only necessary if the importer or other interested party refuses to concede that the foreign claimant has legal title to the goods. As can be seen, the litigation that may ensue in matters such as these can delay the ultimate return of the cultural property to the foreign owner. Nevertheless, should that owner be in a position to pursue the case in the American courts, there is an excellent chance that the goods will be returned. See attached the brief filed by the government of Guatemala in civil proceedings pursuant to a seizure of pre-Columbian artifacts. The procedures for the restoration of archaeological and ethnological property, or cultural material covered by the "Cultural Property Act" or other specific treaties, will vary, but the foreign party claiming ownership will not, in most cases, be able to acquire the objects

sought until there has been a final determination of any related forfeiture or criminal proceeding.

CUSTOMS POLICY: PRINCIPLES AND CRITICISMS

1) Customs Directive on the "Detention and Seizure of Cultural Property"

The policy of U.S. Customs in this area is set out in Directive #5230-15, entitled "Detention and Seizure of Cultural Property," issued on April 18, 1991. The Directive is still current and unrevised as of the date of this paper. In essence, this document brings together and analyzes all of the various pieces of legislation and treaties relevant to the movement into the United States of stolen cultural property. The Directive makes the point very clearly at the outset that caution is necessary when dealing with cultural property in order to avoid interference with legitimate commerce in this kind of material. It also points out that the fact that the exportation of an artifact is illegal within the scope of another country's law does not necessarily make the subsequent importation into the United States unlawful. The Directive then goes on to describe what action Customs should take when confronted with various situations involving items that are either stolen or the import of which has been prohibited by treaty or statute. Without ignoring the important ramifications of the treaties and the "Cultural Property Act," all of which make specific provisions for dealing with material of this nature, the Directive clearly adopts the dicta of McClain and devotes considerable space to a description of the application of the "National Stolen Property Act" to the importation of cultural property into the United States. The main thrust of this Directive appears to be directed towards the regulation of the trade in archaeological and ethnological artifacts. Very little space is specifically devoted to situations involving fine art, such as paintings, sculpture and other kinds of objets d'art. Nevertheless, the principles enunciated throughout the document could be said to be applicable to both of these kinds of cultural property.

2) Criticism of Customs Policy

Notwithstanding the careful and moderate position taken in the Directive, Customs policy, as it is reflected in this document, has been subjected to strong criticisms by a number of experts in the legal and arts professions. One of the most forcefully worded critiques of both the Directive and Customs enforcement actions in this area can be found in an article which is entitled "A Wayward

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Course: The Lawless Customs Policy Toward Cultural Properties," written by James F. Fitzpatrick in International Law and Politics, Vol. 15, p.857, 1983. Here, the author outlines an impressive list of reasons why Customs has erred in law in developing a policy which incorporates the McClain doctrine into its arsenal of possible enforcement tools to be used in curbing the illegal trade in cultural property. It is important to point out before proceeding to a summary of the criticisms outlined in his paper that Mr. Fitzpatrick was, at the time of the writing of this article, a partner in the legal firm of Arnold and Porter, the Washington law firm that filed an extensive brief on behalf of the American Association of Dealers in Ancient, Oriental and Primitive Art at the appeal in the McClain case. The position taken on behalf of the Association at appeal was that blanket legislation declaring state ownership of broad classes of artifacts, absent any further steps to demonstrate such ownership, should not trigger the application of the "National Stolen Property Act." Given his background in this matter, it is hardly likely that Mr. Fitzpatrick would be disposed to produce a dispassionate analysis of the merits of Customs' policy as it is described in this Directive. Nevertheless, it is worth taking a brief look at the contents of the Fitzpatrick article in order to gain some insight into the concerns of those who have been most vocal in their criticism of Customs in this area.

One of the most interesting points that the author makes in this paper relates to a description of the rather Byzantine negotiations and dealings that were undertaken by the various parties involved in the process to ensure passage of the "Cultural Property Act." According to Mr. Fitzpatrick, one of the key elements of the ultimate compromise was that legislation to modify the doctrine enunciated in the McClain case in order to bring it into accord with the "Cultural Property Act" would be introduced promptly after the passage of the "Act," and that the various parties to the compromise would support, or at least not oppose, passage of this legislation. p.862-3. Mr. Fitzpatrick refers to comments made at the time by Senator Dole, who stated, "it is important for the Congress to insure that the potential application of existing law (i.e., the "National Stolen Property Act") is consistent with our national policy, that will be substantially established by ... (the Cultural Property Act)", with respect to illicitly traded cultural materials." p.863. Although legislation to overturn McClain was introduced by Senator Dole soon after the passage of the "Cultural Property Act", it did not pass in that Congress, nor has it yet been enacted. This fact does not alter the view expressed by Mr. Fitzpatrick that the continuing use by Customs of the McClain doctrine has "unfortunately, and inexcusably" overturned and preempted the careful compromise that is reflected in the "Cultural Property Act." p.864.

Many of the subsequent criticisms that the author makes of the Customs Directive are elaborations on this general premise. He

states that the Directive is bad policy because: it contradicts the essential judgments that Congress made in the "Cultural Property Act"; it was adopted without hearings and without the notice and comment required by the "Administrative Procedure Act"; it establishes an institutionalized system to enforce foreign statutory ownership declarations; it does not require a multinational response to the claims of ownership of a foreign country to the property in question; and it is over broad in that it does not respond to particular situations of pillage, but applies indiscriminately to all items of cultural property. The author also makes the point that foreign laws are often ambiguous and that Customs is not in a position to determine the legal validity of the legislative enactments made by a foreign country. He then goes on to make objections to the Directive on the basis that, unlike the "Cultural Property Act," Customs policy does not have specific guidelines on such issues as time limitations, protection afforded to bona fide purchasers, and types of documentation necessary to trigger an embargo. Mr. Fitzpatrick predicts that as a result of the fact that Customs has transformed itself into the central agency administering a national cultural property policy, an inevitable turf battle between government departments will occur.

I would agree with Mr. Fitzpatrick and some of the other experts in this field that there does appear to be a divergence between the way in which Customs handles certain issues involving the importation of stolen art and the position that is reflected in the "Cultural Property Act." To the best of my knowledge, however, such divergence has not resulted in the inter-agency warfare predicted in the Fitzpatrick article, nor has it produced a great deal of confusion on the part of federal enforcement agencies. It has been my impression that there is a general desire on the part of federal authorities to work with foreign parties as efficiently and effectively as possible to reduce the traffic in stolen art and artifacts into this country. In order to accomplish this goal, they make use of all the statutes, treaties, and agreements at their disposal. But, because of the rather limited circumstances in which the provisions of the "Cultural Property Act" can be of use to federal officials, resort is more easily made to the other federal legislation described above and applied in McClain.

There is, however, another criticism that has been leveled at the McClain doctrine by several experts in this area that is, in my view, potentially more troublesome than the concerns described above. Following the logic of McClain to its ultimate conclusion, one could justify the conviction of "dealers, collectors, or museum officials ... under the NSPA, ("National Stolen Property Act"), if a jury believed on the basis of such evidence that they acquired an art work knowing that it had been removed from a foreign country in contravention both of export restrictions and that country's declaration of ownership." See James R. McAlee, "From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art

into the United States," Dickenson Law Review, Vol. 85, no. 4, Summer, 1981, page 565, at page 589. If such an extreme legal consequence encourages museums, collectors and dealers to conduct a more thorough scrutiny of the background of the art works that they are about to acquire, it is difficult not to applaud the deterrent value of McClain. If, on the other hand, federal authorities make "indiscriminate and frequent use of the McClain principle" to seize cultural material that has been present in the United States for many decades, and to indict, where the legal requirements for prosecution have been met, the individuals involved in the importation of such material, venerable collections, held for hundreds of years by a number of American museums, could be disturbed in a significant fashion. See Bator, supra, p. 354. The judgements in the McClain case, when taken at face value, deal only with artifacts imported into the United States and acquired by institutions and collectors after the legislative declaration of ownership by the country from which this material came. However, the extension of the reasoning in this case to cover items stolen from private collections and acquired by American museums and collectors many decades ago could potentially have a serious detrimental effect on the cultural life of this nation. It is disturbing to think that art treasures, long considered to be a legitimate part of the American heritage, are subject to being seized and removed from public or private exhibition by federal officials who resort to the McClain doctrine injudiciously and in all circumstances. Such behaviour would, I suspect, result in the enactment of the kind of legislation overturning McClain that was proposed by Senator Dole prior to the passage of the "Cultural Property Act."

It is my view that federal authorities should adopt a policy regarding the application of the McClain doctrine that is self-limiting and sensible. I would argue that no cultural property acquired by American institutions or collectors prior to the commencement of World War II should be disturbed pursuant to McClain. I choose this date simply because many questions surrounding the vast movements of art that occurred during the war remain unresolved, and the courts in several countries continue to adjudicate issues relevant to pre-war title and ownership. The fact that McClain is applied only in relatively modern, i.e., post-1939, claims does not, in my opinion, detract from its usefulness in providing more complete assistance to foreign states seeking the return of art treasures than does the "Cultural Property Act."

3) An Update on Customs Activities

Recent discussions with the office of counsel to U.S. Customs has confirmed my impression that federal authorities continue to try to assist foreign owners in their efforts to repatriate stolen cultural property located in the United States. Notwithstanding

the flurry of criticism that the Customs Directive on cultural property attracted in the 1980's, the policy in this area has not changed. Indeed, I am informed that Customs makes most of its seizures of cultural material pursuant to the McClain doctrine. Ironically, the major problem that Customs presently encounters relates to the somewhat unresponsive attitude of foreign states when they are alerted to a seizure of art or artifacts belonging to them. The cost of storage, given the delicate nature of much of the material seized by Customs, has become a problem for the federal government, and, as result, every effort is made to assist foreign parties to assert their claims in the interpleader actions that follow the seizures. In response to my request that a general review be conducted of the unreported cases involving seizures pursuant to McClain, I was told that most of these files were resolved before they reached a judicial level that would result in a written judgement. Nevertheless, I was assured that a search would be undertaken. As a result of this review, Customs counsel was able to provide me with a very recent unreported case out of the District Court for the Northern District of Illinois, Eastern Division, which involved an interpleader action to determine entitlement to certain pre-Columbian artifacts seized in November of 1990. See attached judgement and brief presented on behalf of Guatemala. This case, United States v. Pre-Columbian Artifacts and the Republic of Guatemala, Hart, J., decided October 4, 1993, affirms the McClain doctrine. Judge Hart, in his written reasons, makes the following comments at page 5:

The Republic contends that this law ... (Article 21 of Guatemala's "Congressional Law for the Protection and Maintenance of the Monuments, Archeological, Historical, Artistic Objects and Handicrafts," providing for confiscation in favour of the state upon illicit export) ... therefore makes the Grunes defendants' possession of stolen property in violation of the "National Stolen Property Act".... It is undisputed that stolen property possessed in violation of the the N.S.P.A. is subject to being seized. The Grunes defendants, however, argue that, even assuming unlawful exportation, the artifacts must have belonged to the Republic prior to exportation in order for the artifacts to be considered stolen property under N.S.P.A. Since the Republic only contends that Guatemalan law makes the artifacts its property upon illegal exportation, the legal issue raised by the Grunes defendants can be reviewed on the pleadings.

Judge Hart goes on to conclude at page 6 that:

Mere violation of export restrictions does not make possession of the illegally exported property a violation of the N.S.P.A.... For the property to be stolen, it must belong

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to someone else.... Here, there is no allegation that the artifacts were stolen from any Guatemalan individual. The only allegation is that the artifacts belong to the Republic. The N.S.P.A. "protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government." McClain III, 593 F. 2d at 664. Guatemalan law (as assumed for purposes of the present motion) provides that, upon illegal export, the artifacts became the property of the Republic. Therefore, the moment the artifacts left Guatemala they became the property of the Republic. Thus, while traveling in foreign commerce, the artifacts were stolen in that they belonged to the Republic, not the person who unlawfully possessed the artifacts. The Republic has alleged facts under which the artifacts would be subject to being seized as being stolen property possessed in violation of the N.S.P.A. The Grunes motion will be denied.

This case clearly affirms the McClain doctrine and would appear to justify Customs' continuing use of the "National Stolen Property Act" in combination with other federal legislation to seize, in the appropriate circumstances, stolen cultural property imported into the United States.

SUGGESTIONS ON HOW TO HANDLE SPECIFIC SITUATIONS INVOLVING IMPORTED CULTURAL PROPERTY

I now propose to provide some suggestions on how to handle a number of specific situations upon which OIA has been, or may in the future, be asked by foreign states to provide advice and assistance. My suggestions will incorporate remedies drawn from the "Cultural Property Act," the McClain doctrine, and the federal legislation regulating imports into the United States, giving alternative solutions where such exist. For the purposes of organization, I will divide the analysis into three parts -- the first dealing with archaeological and ethnological cultural material, the second with more traditional kinds of art, such as paintings and sculpture, and the third with any cultural property that is imported into the United States in violation of the Customs legislation.

(1) Archaeological and Ethnological Cultural Property

A) Articles illegally exported from a foreign state:

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In this situation, it is necessary to determine if the country from which the articles have been exported has a law declaring ownership of all such material, either ab initio or upon export. Increasingly, countries with ancient sites and ruins have passed laws of this nature, but, without such a legislative declaration, there can be no resort to the procedure approved of in McClain. If such a law does exist, and the material imported into the United States has a value greater than \$5,000, then action under McClain may be instigated. If, however, there is no law vesting ownership of this kind of material in the government, the foreign authorities should provide assurances to the O.I.A. attorney handling the case that the artifacts in question fit within the definition of the term "archaeological or ethnological material of the State Party" as found at § 2601(2) of the "Cultural Property Act." The O.I.A. attorney should also satisfy her/himself that the material is, in fact, included in the definition found in the "Act." § 2601(2) of reads as follows:

(2) The term "archaeological or ethnological material of the State Party" means -

- A) any object of archaeological interest;
- B) any object of ethnological interest; or
- C) any fragment or part of any object referred to in subparagraph (A) or (B);

which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph -

- (i) no object may be considered to be an object of archaeological interest unless such object -
 - (I) is of cultural significance;
 - (II) is at least 250 years old; and
 - (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; and
- (ii) no object may be considered to be an object of ethnological interest unless such object is -
 - (I) the product of a tribal or nonindustrial society, and
 - (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development or history of that people.

If the material under consideration does, indeed, fall within the definition set out above, it will then be necessary to ascertain whether an agreement pursuant to § 2602 or presidential action under § 2603 has been concluded with respect to the cultural property under consideration. In the event that the item does not qualify within the strict guidelines set out in the "Cultural

Property Act," it is possible that a solution may lie in one of the treaties or other federal enactments specific to certain countries and specific kinds of materials (i.e., treaties or agreements with Mexico, Peru, Ecuador and Guatemala providing for the return of stolen cultural properties; regulations regarding the importation of pre-Columbian artifacts). It will be necessary to regularly update the list of such treaties and regulations in order to provide the best advice to the party seeking assistance.

Given the complications inherent in making use of the "Cultural Property Act," it is apparent why Customs and other federal agencies have preferred, where possible, to make use of the procedure described in McClain.

B) Articles stolen from a private party:

The limitations of the "Cultural Property Act" are even more clear when dealing with materials stolen from private collections. There is no specific provision to deal with objects of archaeological or ethnological significance stolen from private owners. Although the definition of this kind of material as set out above would seem to imply that the item must have come directly from an ancient site, I would assume that the fact that, after discovery, it has found its way into the hands of a private collector would not disqualify it from the falling within the parameters of the "Act." Nevertheless, the strict definitions of what is covered and the cumbersome nature of the remedies available pursuant to the "Cultural Property Act" would seem to make resort to it by a private citizen a rather daunting proposition. Accordingly, if it can be established that the object has a value that is greater than \$5,000 and that it has been stolen from an owner who has good and demonstrable title, Customs or other federal law enforcement officials will, in most circumstances, be able to make use of the McClain doctrine to assist in its eventual return to the foreign collector. Once again, it might be of some use to review the appropriate treaties, agreements, and other federal enactments relevant to this area in order to determine whether the importation into the United States of the specific item being sought has been prohibited.

2) Other Kinds of Cultural Property

A) Cultural property stolen from a Public institution:

As has been mentioned earlier in this paper, § 2607 of the "Cultural Property Act" prohibits the importation of any stolen

article of cultural property that is documented as belonging to a museum, religious or secular public monument, or other similar institution. This is a relatively straight-forward provision which gives to federal law enforcement agencies the right to deal quickly with such objects as they enter the United States. The "Act" adopts as a definition of the term "cultural property" the list found in Article 1(a) to (k) of the 1970 UNESCO Convention. For ease of reference, Article 1 of the Convention reads as follows:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- f) objects of ethnological interest;
- g) property of artistic interest, such as:
 - i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - ii) original works of statuary art and sculpture in any material;
 - iii) original engravings, prints and lithographs;
 - iv) original artistic assemblages and montages in any material;
- h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- i) postage, revenue, and similar stamps, singly or in collections;
- j) archives, including sound, photographic and cinematographic archives;
- k) articles of furniture more than one hundred years old and old musical instruments.

It is hard to imagine any object of cultural interest that would not fit into this seemingly exhaustive definition of "cultural

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property". Nevertheless, as is evident from § 2607 of the "Act", the item must have been stolen from one of the public institutions therein described. If such is not the case, and the cultural material has been stolen from a private collection, assistance may well be available to the foreign party through an application of the principles found in McClain. See below.

B) Cultural property stolen from a private collection:

Clearly, there is no recourse to be had for the private collector pursuant to the "Cultural Property Act." Once again, the only avenue of assistance for the foreign private collector who has suffered the loss of cultural property through theft is to seek the intervention of U.S. authorities on the basis of the McClain doctrine. As before, the items sought must have a value of more than \$5,000 and the collector must be in a position to demonstrate clear title. As stated earlier, McClain authorizes federal officials to seize items imported into the United States through the combined effect of the "National Stolen Property Act," and 19 U.S.C. § 1595a.(c). The items seized may be held as evidence for the criminal trial of the individuals involved in the illegal importation and will, in any event, be made the subject of an interpleader action in the United States in order to determine ownership. This procedure may involve lengthy delays; however, provided that the collector is able to satisfy the Court that she/he is the real owner, the object will eventually be returned to that individual.

3) Cultural Property Imported in Violation of U.S. Customs Laws

Perhaps the most important issue to be considered in any attempt to determine a course of action in this area is the question of whether there has been a violation of the Customs law when the cultural property, which is the subject of a claim by a foreign party, was imported into the United States. If authorities can establish that an object, no matter what its nature or classification, was not declared by the importer, no further analysis of the situation is necessary. Undeclared, falsely described, and undervalued objects are all, pursuant to federal legislation, subject to seizure and forfeiture, and the importer is liable to fines and penalties upon a failure to make a full declaration. Even in circumstances where the items being imported into the United States would not be dutiable, a failure to declare the material can result in the full range of penalties and forfeiture. An excellent example of this kind of situation occurred in 1969 when, upon the celebration of its centenary, the Boston Museum of Fine Arts announced the acquisition of a painting by Raphael. The Director of the Museum stated that the painting

had been purchased from a private collection in Switzerland, but investigations by Italian authorities revealed that, in reality, it had been smuggled out of the country by its owner, in contravention of the Italian export laws, and then sold to the Museum. The fact that the painting was illegally exported from Italy would not have presented a barrier to its entering the United States lawfully, and in this case, duty-free. For reasons that remain unknown, however, the employee of the Museum who brought the painting back to the United States failed to declare it to Customs, which action led to its seizure by U.S. authorities. In the end the Museum agreed to the return of the painting to Italy, thereby suffering the loss of both the painting and a substantial amount of the price paid to the seller. Had the Museum's employee seen fit to make the proper declaration, nothing could have been done to assist the Italian authorities seeking the return from Boston of the painting. See Bator, supra, footnote 30, p. 287.

Clearly, then, it is of the utmost importance to take the time to ascertain whether any Customs violations occurred at the time the cultural property being sought by a foreign party was imported into the United States.

CONCLUSION

As can be seen from the comments in this paper, it is no easy matter to provide a blanket solution to all of the problems presented by the illegal traffic in cultural property. There is a legitimate concern on the part of some experts in the area that an inconsistent approach is being taken to this situation in the United States. This concern was eloquently expressed by Paul Bator, supra, in his excellent article entitled "An Essay on the International Trade in Art". At pages 355 and 356, he makes the following observations:

If the implications of McClain are followed through, the question whether and how article 7(b) (of the Vienna Convention, now represented in the "Cultural Property Act") will be implemented may lose its significance, since virtually everything that it could accomplish -- and much more -- will have been accomplished through the "National Stolen Property Act" and its interaction with existing customs legislation. Indeed, it was one of the defendants' and amici's major arguments in McClain that the Government's theory of the "National Stolen Property Act" would short-circuit Congressional consideration of just how the specific and circumscribed provisions of articles 7 and 9 of the Convention should be implemented (as well as being fundamentally inconsistent with the narrow and focused manner in which Congress had dealt with the problem of looted art in the 1972

pre-Columbian Act). The argument has considerable merit: Elaborate debates about just what powers the Government should be granted in connection with the recapture of accessioned national treasures stolen from foreign museums become pointless if these powers already exist with respect to a significantly broader category of objects under the "National Stolen Property Act".

It is fair to say that the "official" position of the United States in this area is that which is reflected in the "Cultural Property Act." Nevertheless, the Customs Directive, which makes use of all the remedies available to federal law enforcement officers, including those contained in the "Cultural Property Act," presents a more efficient approach to problems of this nature. Of the two positions, the one utilized by Customs is far more capable of producing favourable results for the foreign parties seeking the return of their cultural property. It is for this reason that I believe that OIA should consider both the McClain doctrine and the "Cultural Property Act" when called upon to analyze problems of this nature. Unfortunately, the "Cultural Property Act," as is so often the case when legislation reflects compromise, imposes too many restrictions and proposes too few remedies to make it an effective tool in bringing about the return of stolen art and artifacts to the appropriate foreign owners.

Accordingly, where there is a conflict between the "Cultural Property Act" and the recently approved procedures used in the McClain case, I would advocate resort to the latter as being more consistent with the role that is appropriate to attorneys working in OIA.

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APPENDIX

I thought that it would be helpful to analyze several fictional situations wherein an O.I.A. attorney is asked to provide assistance to a foreign state seeking the return of cultural property, claimed to be part of that country's patrimony, which has been traced to the United States. My suggestions as to approach are not exclusive. They are intended only as possible solutions to the kinds of problems that you may be asked to resolve in this area of your work.

1) France asks for assistance in the return of a Monet which was sold from a private collection to an American dealer and exported to the United States without the proper export permit required by the French government. The painting is not declared to U.S. Customs officials upon entry into New York, but, in law, would not be subject to any duties even if it had been reported.

Here, you are faced with a rather straight-forward scenario. Even though the importer would not have been required to pay any duty on this painting upon its entry into the United States, the failure to make a proper declaration contravenes U.S. Customs law and subjects it to seizure. Incredibly, this situation may occur more frequently than you would think. Many importers, fearing that U.S. Customs officials would prohibit the entry of the painting into the United States because it was exported without the required French documentation, fail to make the necessary declaration and thereby render it subject to seizure. In fact, U.S. officials have no power to prohibit the entry of art works legitimately acquired but exported in a fashion that contravenes another country's laws regulating the transfer of cultural property to a foreign owner. When faced with facts similar to those described above, the O.I.A. attorney would be well advised to make inquiries with Customs in order to verify whether the item sought was properly declared -- a concept which includes description and valuation as well as the actual declaration. Frequently, the problem can be resolved at this point without any further examination of the relevant law.

2) Italy requests assistance on behalf of an Italian citizen from whom a silver tea service, appraised as having a value of \$4,800, has been stolen. The tea service was spotted in the catalogue of an upcoming auction at Sotheby's, New York. A check of U.S. Customs records reveals that the service was properly declared when it was brought into the country.

In this situation, it would be my opinion that there is little of a formal nature that U.S. authorities can do to assist the Italians in recovering the tea service. There is no violation of Customs laws that would give rise to a remedy under that legislation. Given that the collection from which the service was stolen is a private one, and not an institution as described in § 2607 of the "Cultural Property Act," American officials cannot avail themselves of the remedies pursuant to that legislation. Furthermore, action pursuant to the McClain doctrine is not permissible since the value of the service falls short of the \$5,000 threshold stipulated by § 2314 of the "National Stolen Property Act". The only role that can be played by U.S. officials in circumstances such as these would be that of intermediary between the auction house and the private citizen seeking civil redress. Such involvement may not be advisable, given that an official, merely through well-meaning efforts to facilitate negotiations, might be implicated in the civil proceedings that follow upon a failure to resolve the matter through negotiation.

3) El Salvador asks for assistance in recovering some religious statuary made for an important sixteenth-century Spanish bishop by a famous Mayan artist. These items were stolen from the country's largest cathedral, but the importers declared them to U.S. Customs, providing a recent appraisal as proof of their estimated value of \$2,000,000.

In this situation, there are two possible courses of action: one, pursuant to the "Cultural Property Act"; the other, by making use of the McClain doctrine. El Salvador is a State Party to the UNESCO Convention and it is therefore advisable to look to the "Cultural Property Act" for possible remedies. There can be little doubt that although these treasures might not fall within the definition of "ethnological material" as defined by the "Act," they most certainly are covered under § 2607, which is capable of providing a quick solution to this problem. Pursuant to § 2607, the importation of the religious statuary, because stolen from a religious institution located within the boundaries of a State Party, is prohibited. Consequently, the items are subject to seizure and forfeiture and all subsequent proceedings will be governed by federal Customs law, or, where otherwise indicated, according to the provisions of the "Cultural Property Act." The other way of dealing with this situation would be to apply the McClain doctrine, assuming that either state or private ownership of the statuary has been established, and to seize the items pursuant to a Customs warrant as evidence of a criminal offence. The ultimate effect of either of these remedies, in terms of the restoration of the statuary to El Salvador, is similar, although

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the "Cultural Property Act," being legislation of a civil rather than criminal nature and designed to deal with this kind of situation, contains more specific provisions for the disposition of the material. If there is strong evidence of criminality on the part of the individuals involved in the theft, importation, or subsequent possession of the items sought, I would recommend that, at some stage, thought be given to prosecution pursuant to the McClain doctrine.

4) Panama requests advice on how to recover several pre-Columbian stone murals which were sold by a private Panamanian collector to a legitimate American historical foundation, and were imported into the United States in 1990. The importer of the murals made a proper declaration of the items and provided U.S. Customs with an evaluation accurately representing the price that was paid for them in Panama. The importer was not asked, however, to supply a certificate from the Panamanian government declaring that the export of these murals did not violate that country's laws. In fact, the importer was unaware of the certificate requirement, and did not have one.

Here, there is no question of making use of either the "Cultural Property Act" or the McClain doctrine. Although Panama is a State Party to the UNESCO Convention, the "Act" nevertheless does not come into play. The murals would not be covered under the definition of "archaeological material" found at § 2601(2) of the "Act" because pre-Columbian murals are not found in their original setting in Panama -- a required condition of the definition. It is also doubtful whether the McClain doctrine has any application in this situation because the murals were not stolen from the private collector, and Panama is unlikely to have any broad legislative declaration which could be construed as declaring state ownership of all such artifacts. There is, however, a solution to this problem which is, in fact, quite simple. Pursuant to the 1972 "Pre-Columbian Monuments Act," 19 U.S.C. §§ 2091-2095, (see attached), the importation into the United States of any pre-Columbian monumental or architectural sculpture or mural, as defined by that legislation, is prohibited unless the importer is able to present to U.S. Customs either a certificate indicating that such importation was not contrary to the export laws of the country of origin, or satisfactory evidence that the items were exported prior to the date that the required regulations were passed. Since the importer did not have the required certificate in this case, and the regulations found at 19 C.F.R. § 12.105(a)(1980), (see attached), which cover this situation, were passed a full decade prior to the importation in this case, U.S. Customs officials are authorized pursuant to the "Pre-Columbian Monuments Act" to seize the murals and return them to Panama.

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As can be seen from the examples set out above, there are as many different sets of facts as there are potential cases in this area. Accordingly, it is impossible for me to provide in this paper a solution to every conceivable situation that may arise. The situations described above merely provide illustrations of the kind of analysis that should be undertaken when an O.I.A. attorney is asked by a foreign state to provide advice on the return of cultural property. As I have demonstrated, it is necessary to look at all relevant federal enactments, most particularly the "Cultural Property Act" and the legislation basic to the McClain doctrine, in order to determine which provisions, if any, are applicable to the facts at hand. Furthermore, a proper response may require research into the domestic law of the requesting nation, especially in cases involving countries that are rich in history, but poor economically, in order to determine whether legislation declaring state ownership of certain classes of cultural property has been enacted. A thorough study of all of these various factors should result in the provision of helpful advice to both the requesting foreign state and to U.S. officials, ultimately leading to the recovery of the cultural property being sought.

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- [Overview](#) -- Overview of the process by which import restrictions are implemented, the implementation of agreements, and exceptions to import restrictions.
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Agreements, Emergency Actions, and Import Restrictions (by Country)

Bolivia

- [Bolivia Information Page](#) -- Background information on the 1989 emergency action and the recovery of Aymara textiles.

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- 1989 Federal Register Notice -- Notice of emergency action and description of categories of artifacts subject to import restriction.

Cambodia

- Cambodia Information Page -- Background information on the 1999 emergency action.
- 1999 Federal Register Notice (html) (text) -- Notice of emergency action and description of categories of artifacts subject to import restriction.

Canada

- Canada Information Page -- Background information on the 1997 Agreement.
- 1997 Agreement -- Text in English and French.
- 1997 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import restriction.

Cyprus

- Cyprus Information Page -- Background information on the 1999 emergency action.
- Cyprus Image Collection -- Illustrations of artifact categories subject to import restriction.
- 1999 Federal Register Notice (html) (text) -- Notice of emergency action and description of categories of artifacts subject to import restriction.

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- El Salvador Information Page -- Background information on the 1995 Agreement.
- El Salvador Image Collection -- Illustrations of artifact categories subject to import restriction.
- 2000 Extension and Amendment -- Text of extended and amended 1995 agreement.
- 2000 Federal Register Notice -- Notice of extension and amendment to 1995 agreement.
- 1998 Interim Report -- Text in English and Spanish.
- 1995 Agreement -- Text in English and Spanish.
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- 1987 Federal Register Notice -- Notice of emergency action and description of categories of artifacts subject to import restriction.

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- Guatemala Information Page -- Background information on the 1997 Agreement.
- Guatemala Image Collection -- Illustrations of artifact categories subject to import restriction.
- 1997 Agreement -- Text in English and Spanish.
- 1997 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import

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restriction.

- 1991 Federal Register Notice -- Notice of emergency action and description of categories of artifacts subject to import restriction.

Italy

- Italy Information Page -- Background information on the 2001 Agreement.
- Italy Image Collection -- Illustrations of artifact categories subject to import restriction.
- 2001 Agreement -- Text in English and Italian.
- 2001 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import restriction.

Mali

- Mali Information Page -- Background information on the 1997 Agreement.
- Mali Image Collection -- Illustrations of artifact categories subject to import restriction.
- 1997 Agreement -- Text in English and French.
- 1997 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import restriction.
- 1993 Federal Register Notice -- Notice of emergency action and description of categories of artifacts subject to import restriction.

Nicaragua

- Nicaragua Information Page -- Background information on the 2000 Agreement.
- Nicaragua Image Collection -- Illustrations of artifact categories subject to import restriction.
- 1999 Agreement -- Text in English and Spanish.
- 2000 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import restriction.

Peru

- Peru Information Page -- Background information on the 1997 Agreement. Text in English and Spanish.
- Peru Image Collection -- Illustrations of artifact categories subject to import restriction. Text in English and Spanish.
- 1997 Agreement -- Text in English and Spanish.
- 1997 Federal Register Notice (html) (text) -- Notice of agreement and description of categories of artifacts subject to import restriction.
- 1990 Federal Register Notice -- Notice of emergency action and description of categories of artifacts subject to import restriction.

U.S. and International Laws

U.S. Federal Cultural Property Legislation -- Links to text of laws and other legislation.

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- [Convention on Cultural Property Implementation Act](#)
- [U.S. Senate Report, 97-564](#)
- [19 United States Code 2600](#)
- [Executive Order 12555 \(1986\)](#)
- [Pre-Columbian Monumental and Architectural Sculpture and Murals Statute](#)
- [National Stolen Property Act](#)
- [Archaeological Resources Protection Act](#)
- [Native American Graves Protection and Repatriation Act](#)
- [Abandoned Shipwreck Act](#)

International Conventions -- Links to international conventions and multilateral and bilateral international agreements.

- [1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict \(The Hague Convention\)](#)
- [1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property -- Signatories of the 1970 UNESCO Convention](#)
- [1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage](#)
- [UNESCO World Heritage Sites](#)
- [1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Object -- Signatories of the 1995 UNIDROIT Convention](#)
- [1992 European Union Regulation on the Export of Cultural Goods](#)
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Chart of Current and Expired Import Restrictions Under the Convention on Cultural Property Implementation Act*

	Bolivia	Cambodia	Canada	Cyprus	El Salvador	Guatemala	Italy	Mali	Nicaragua	Peru
2003							Bilateral Agreement on Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy Jan. 23, 2001			
2002									Bilateral Agreement on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua Oct. 26, 2000	
2001		Emergency Import Restriction		Emergency Import Restriction				Bilateral Agreement on Archaeological Material from the Niger River Valley and Bandiagara Escarpment (continues emergency restrictions) Sept. 23, 1997		Bilateral Agreement on Pre-Columbian Archaeological and Colonial Ethnological Materials (continues protection for Sipan) June 11, 1997
2000		Khmer Stone Archaeological Material Dec. 2, 1999	Bilateral Agreement Archaeological & Ethnological Materials April 22, 1997	Byzantine Ethnological Materials April 12, 1999		Bilateral Agreement on Pre-Columbian Archaeological Materials (continues protection for Peten) Oct. 3, 1997				
1999					Extended and Amended March 8, 2000					
1998					Bilateral Agreement on Pre-Hispanic Archaeological Material (continues protection for Cara Sucia) March 10, 1995					
1997										
1996	May 5, 1996 (expiration date)									
1995								Emergency Import Restriction on Archaeological Material (as above) Sept. 23, 1993		
1994						Emergency Import Restriction on Pre-Columbian Materials from Peten April 15, 1991				
1993	Emergency Import Restrictions on Textile Artifacts (Expired)									Emergency Import Restriction on Pre-Columbian Materials from Sipan May 7, 1990
1992										
1991										
1990										
1989	March 14, 1989				Emergency Restriction on Cara Sucia Material Sept. 11, 1987					
1988										
1987										

*Each country name is linked to its fact sheet. Shaded areas indicate continuous protection for restricted materials. Each action (agreement or emergency) is linked to the *Federal Register* notice which gives a detailed list of the archaeological or ethnological materials subject to restriction. The date (in bold) indicates when the restriction went into effect.

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List of Agreements, Emergency Actions, and *Federal Register* Notices

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Note: Import restrictions are effective from the date of publication of the *Federal Register* notice. Categories of objects subject to import restrictions are described in the notice. More information on the background and implementation of each agreement is available in the country's information page.

A chart summarizes information on current and expired cultural property agreements.

Cultural Property Agreements

19 January 2001 -- [Italy Information Page](#)

- [Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy \(Italiano\)](#)

8 March 2000 -- [El Salvador Information Page](#)

- [Extension and Amendment to the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador](#)

16 June 1999 -- [Nicaragua Information Page](#)

- [Agreement between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua \(Español\)](#)

29 September 1997 -- [Guatemala Information Page](#)

- [Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre Columbian Cultures of Guatemala \(Español\)](#)

19 September 1997 -- [Mali Information Page](#)

- [Agreement between the Government of the United States of](#)

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**America and the Government of the Republic of Mali
Concerning the Imposition of Import Restrictions on
Archaeological Material from the Region of the Niger River
Valley and the Bandiagara Escarpment (Cliff) (Français)**

9 June 1997 -- Peru Information Page

- **Memorandum of Understanding between the Government of the United States of America and the Government of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru (Español)**

10 April 1997 -- Canada Information Page

- **Agreement between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material (Français)**

8 March 1995 -- El Salvador Information Page

- **Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador (Español) (Amended and Extended)**

**Federal Register Notices of Import Restrictions
(including Emergency Actions)**

23 January 2001 -- Italy Information Page

- **Import Restrictions Imposed On Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods (html) (text) U.S. Federal Register Notice: January 23, 2001; 66(15): 7399-7402**

26 October 2000 -- Nicaragua Information Page

- **Import Restrictions Imposed On Archaeological Material From the Pre-Hispanic Cultures of the Republic of Nicaragua (html) (text) U.S. Federal Register Notice: October 26, 2000; 65(208): 64140-64142**

8 March 2000 -- El Salvador Information Page

- **Extension of Import Restrictions Imposed on Certain Categories of Archaeological Material From the Prehispanic Cultures of the Republic of El Salvador U.S. Federal Register Notice: March 9, 2000; 65 (47): 12470-12471**

2 December 1999 -- (Emergency Action) Cambodia Information Page

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- **Import Restrictions Imposed On Certain Khmer Stone Archaeological Material of the Kingdom of Cambodia (html) (text)** *U.S. Federal Register Notice: December 2, 1999; 64 (231): 67479-67481*

12 April 1999 --(Emergency Action) Cyprus Information Page

- **Import Restrictions Imposed on Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus (html) (text)** *U.S. Federal Register Notice: April 12, 1999; 64(69): 17529-17531*

3 October 1997 -- Guatemala Information Page

- **Import Restrictions Imposed on Archaeological Artifacts From Guatemala (html) (text)** *U.S. Federal Register Notice: October 3, 1997; 62(192):51771-51774*

23 September 1997 - Mali Information Page

- **Import Restrictions Imposed on Archaeological Artifacts From Mali (html) (text)** *U.S. Federal Register Notice, September 23, 1997; 62(184):49594-49597*

11 June 1997 -- Peru Information Page

- **Archaeological and Ethnological Material From Peru (html) (text)** *U.S. Federal Register Notice, June 11, 1997; 62(112):31713-31721*

22 April 1997 -- Canada Information Page

- **Archaeological and Ethnological Material From Canada (html) (text)** *U.S. Federal Register Notice, April 22, 1997; 62(77):19488-19492*

10 March 1995 -- El Salvador Information Page

- **Pre-Hispanic Artifacts From El Salvador (html) (text)** *U.S. Federal Register Notice, March 10, 1995; 60(47):13352-13361*

23 September 1993 -- (Emergency Action) Mali Information Page

- **Import Restrictions Imposed on Significant Archaeological Artifacts From Mali** *U.S. Federal Register Notice, September 23, 1993; 58(183):49428-49430 (Amended 1997)*

15 April 1991 -- (Emergency Action) Guatemala Information Page

- **Import Restrictions Imposed on Archaeological Artifacts from Guatemala** *U.S. Federal Register Notice, April 15, 1991; 56(72): 15181-15182 (Amended 1997)*

7 May 1990 -- (Emergency Action) Peru Information Page

- **Import Restrictions Imposed on Significant Archaeological Artifacts From Peru** *U.S. Federal Register Notice, May 7, 1990; 55(88): 19029-19030 (Amended 1997)*

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14 March 1989 -- (Emergency Action) Bolivia Information Page

- **Import Restrictions on Cultural Textile Artifacts from Bolivia**
U.S. Federal Register Notice, March 14, 1989;
54(48):10618-10620 (EXPIRED)

11 September 1987 -- (Emergency Action) El Salvador Information Page

- **Import Restrictions on Archaeological Material From El Salvador** *U.S. Federal Register Notice, September 11, 1987;*
52(176):34614-34616 (Amended 1995)

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Revised: January 23, 2001

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CUSTOMS DIRECTIVE

ORIGINATING OFFICE: CO:R:T

DISTRIBUTION: See
signature
page

NEW NUMBER: 099 5230-015

OLD NUMBER: 5230-15

ISSUE DATE: APRIL 18, 1991

SUBJECT: DETENTION AND SEIZURE OF CULTURAL PROPERTY

1. REFERENCES

See the Attachment for a list of the applicable statutes, regulations and treaties.

2. PURPOSE

To clarify procedures for the detention and/or seizure of cultural property.

3. BACKGROUND

Historically, nations have attempted to preserve their cultural heritage by controlling the possession, sale or exportation of culturally important art or artifacts. Some countries, including several South and Central American countries, have passed laws which give title to the government to all pre-Columbian artifacts which were unexcavated before a certain date. Most countries in Latin America, Europe, Asia and Africa have enacted export controls on a broad range of cultural property.

In recent years, these measures have become increasingly utilized in an effort to stop the looting and pillaging of archaeological sites. Also, nations have become more aggressive in seeking the return of stolen cultural property. However, it is important to note that merely because an exportation of an artifact is illegal within a particular country does not necessarily mean that the subsequent importation into the United States is illegal. Close coordination among the various local Customs offices (inspectors, import specialists, agents, public affairs officers and Regional or District Counsel), Headquarters Offices (Enforcement, Chief Counsel, Trade Operations, Regulations and Rulings, Public Affairs and International Affairs), United States Information Agency, Department of State, and the various foreign governments is essential to avoid interfering with

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legitimate commerce in cultural property while at the same time avoiding embarrassment or an international incident. The nature of the coordination will vary according to the situation described in ACTION below.

The following are two recent efforts by the United States to assist countries in protecting their cultural patrimony.

a. Pre-Columbian Monumental and Architectural Sculpture and Murals Statute

In order to discourage the illicit pillaging of archaeological sites and the looting of certain pre-Columbian (pre-1500) artifacts, Congress enacted Public Law 92-587, 19 USC 2091 et seq. ("Pre-Columbian Monumental Act"), in 1972, which prohibits the importation of pre-Columbian monumental or architectural sculpture or murals into the United States from countries which prohibit their exportation. This act is one of two U.S. laws under which the U.S. Customs Service may seize a cultural object based on the fact that it was illegally exported from the country of origin. Under the Pre-Columbian Monumental Act, fragments or portions of pre-Columbian stelae, or murals or monumental sculpture may only enter the United States if the importer can provide documentation that the object was legally exported from the country of origin. The statute applies to the stone carvings, monuments, and wall murals of pre-Columbian Indian cultures of Mexico, Central America, South America and the Caribbean Islands.

b. The 1970 UNESCO Convention and the Convention on Cultural Property Implementation Act

On November 14, 1970, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, and Export, and Transfer of Ownership of Cultural Property. The Convention resulted from a growing international concern that high demand for cultural objects in the art market had generated rampant pillaging of archaeological and ethnological materials, particularly in countries with few resources to protect their cultural heritage. In 1972, the United States Senate gave its unanimous advice and consent to ratify the 1970 UNESCO Convention subject to a reservation and certain understandings. The Convention on Cultural Property Implementation Act, P.L. 97-446, 19 USC 2601, et seq; as amended, ("Cultural Property Act"), was passed by Congress in December 1982 and signed into law by the President on January 12, 1983. The withdrawal of the United

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States from membership in UNESCO does not alter the commitment of the United States to carry out its obligations under the Cultural Property Act.

The Cultural Property Act sets forth a mechanism by which countries which are signatories to the UNESCO Convention can gain protection of their endangered archaeological and ethnological material. The terms "archaeological" and "ethnological" material, are defined in 19 CFR 12.104. To gain protection of its endangered archaeological and ethnological material, a signatory country must submit a formal request to the U.S. Government describing the types or categories of material for which U.S. import controls are requested. Requests are submitted to the Director of the U.S. Information Agency and are reviewed by the Cultural Property Advisory Committee. The Committee may recommend that the President enter into a bilateral or multilateral agreement with the requesting state regarding import controls, or that emergency import restrictions be unilaterally established, or that no action be taken. Once a country's request has been approved, the U.S. Customs Service is authorized to publish, in the Federal Register, a list of archaeological and/or ethnological material, that is subject to import restrictions. These items are prohibited entry into the United States if not accompanied by documentation specifying that the particular object was legally exported from the country of origin.

To date, U.S. import restrictions have been imposed under the Cultural Property Act on: 1) archaeological objects, pre-Columbian artifacts, from the Cara Sucia Region of El Salvador on September 11, 1987 (See Other Agency Compliance Circular No. 202, November 16, 1987, CIE N-87/87); 2) ethnological material, antique ceremonial textiles from Coroma, Bolivia, on March 14, 1989 (See Other Agency Compliance Circular No. 212, June 12, 1989); and 3) culturally significant archaeological objects from the Sipan Region of Peru (See Federal Register/Vol. 55, No. 88/Monday, May 7, 1990/ Rules and Regulations).

For an item to be seized under the Cultural Property Act (19 USC 2601-13), it must be either specifically mentioned in the Federal Register or be inventoried cultural property stolen from a museum, or similar institution or public monument. The fact that an item appears to meet the general definition of "cultural property," does not justify seizure under this statute. However, such items may be detained by Customs, for proscribed time periods, to ensure proper entry.

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4. ACTION

a. Routine Customs Violations Involving Cultural Property

Items of cultural property which are smuggled, improperly declared or undervalued shall be seized pursuant to 18 USC 545, 19 USC 1497, or 1595a(c), as appropriate, and the local Office of Enforcement office advised. That office shall notify the Headquarters Smuggling Division (FTS 566-8005). The local Office of Enforcement should determine the country of origin and the authenticity of the items, and whether it is subject to legislation which vested title in that country, or was stolen from an institution. Expert advice from recognized curators or archaeologists may be necessary and should be arranged through the local Office of Enforcement. The U.S. Information Agency, Cultural Property Staff (202-619-6612; FAX 202-619-5177) may be able to provide additional local contacts. The Assistant Chief Counsel (Enforcement) (FTS 566-2482) maintains copies of many foreign laws relating to cultural property and may be contacted for assistance.

Once the country of origin is established, the seizing/investigating office will contact the Smuggling Division, General Smuggling Branch, FTS 566-8005. The General Smuggling Branch will contact the Office of International Affairs which, after consultation with the Assistant Chief Counsel (Enforcement), will notify the cultural attache of the appropriate embassy. Contacts with local consular officers should not be made without the approval of the embassy concerned. If the respective embassy requests that the object be returned to that country, under 19 USC 1618 (Remission or Mitigation of Penalties), the request shall be treated as a petition for relief by an interested party having an ownership interest in the goods. Generally, the request will be granted. However, return of the item usually must await completion of any related criminal action, forfeiture proceedings or interpleader action, if challenges are made by the importer or other interested parties to the claim of ownership. Regional Counsel and Headquarters Office of International Affairs should be notified after the foreign country has indicated that it wishes an item returned. Return of articles should be coordinated through the office of Enforcement, the Office of Chief Counsel and the Office of International Affairs. As in other cases, if the value exceeds local delegated

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authority, the Headquarters office of Regulations and Rulings will issue the decision.

b. Stolen Cultural Property

Customs officers should be alert to all importations of stolen cultural property. Information regarding items of stolen cultural property is forwarded by INTERPOL and the Office of Enforcement to the field. Depending on the circumstances of the case, criminal action may be taken pursuant to 18 USC 2314, ("National Stolen Property Act"), or civil forfeiture may be appropriate pursuant to 19 USC 2609 for violations of 19 USC 2607, the Cultural Property Act. The National Stolen Property Act prohibits the transportation in foreign commerce of an article with a value of \$5,000 or greater which is known to be stolen. This law covers items stolen from individuals, institutions and nations. A successful criminal prosecution requires evidence of guilty knowledge. Circumstances may even allow prosecution under 18 USC 2315 (Sale or Receipt of Stolen Goods), when the item has an appraisal of \$5,000 or more and is known, by those possessing the item, to have been stolen.

Expert advice and assistance regarding appraisals of cultural property should be coordinated through the Office of Enforcement. Articles seized under 18 USC 2314-15 will be detained as evidence, and upon completion of the criminal proceeding, returned to the owner. If the original owner is a foreign museum or institution, return of the articles should be coordinated with the appropriate embassy, through the Office of International Affairs.

Stolen articles of cultural property fulfilling the requirements of the Cultural Property Act (19 USC 2607), that is, articles that have been documented as part of an inventory of a museum, religious or secular monument or similar institution of a nation which is a signatory to the UNESCO Convention on Cultural Property (See 19 CFR 12.104a for list of countries) may be seized and forfeited pursuant to 19 USC 2609(c). In the Cultural Property Act, the term "cultural property" encompasses a broad range of cultural material including: manuscripts, paintings, old musical instruments, fauna, flora, as well as, archaeological and ethnological materials. Title 19 USC 2607 applies to any article stolen after April 12, 1983, or after the date for which the UNESCO Convention on Cultural Property entered into force for the signatory nation, whichever date is later. (Other stolen items may still be

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subject to seizure under other provisions).

Under the Cultural Property Act, forfeited articles shall be returned to the country where the institution from which the article was stolen is situated, if the country bears the expenses incident to the return and delivery. However, if during a forfeiture proceeding, a claimant is able to establish valid title to the article, forfeiture in favor of a country is only decreed if the country pays the claimant just compensation for the article. Valid title can only pass through the legal sale of an item, that being sale with the consent of the owner.

In the situation where a claimant is unable to establish valid title but does establish that he is a bona fide purchaser, that is, he purchased the article for value without knowledge or reason to believe it was stolen, forfeiture in favor of the requesting country is only decreed if the country pays claimant an amount equal to the amount claimant paid for the article. However, an item purchased with the knowledge that it was stolen, is subject to seizure and forfeiture without compensation to the buyer. In addition, a country is not required to pay compensation to a bona fide purchaser, if the United States establishes that the nation, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from a U.S. institution without requiring the payment of compensation. Evidence of reciprocity should be supplied by the requesting country and may comprise of a government decree, proclamation, written commitment, written opinion or similar evidence. Regional Counsel should be notified if an item is seized pursuant to 19 USC 2607. All forfeitures pursuant to 19 USC 2607, and any return of stolen cultural property shall be coordinated through the Office of Enforcement, the Office of Chief Counsel, Office of Regulations & Rulings and the Office of International Affairs.

Pursuant to 19 CFR 12.104f, pending final determination, cultural property seized in violation of 19 USC 2607 may be retained at a museum or other cultural or scientific institution provided a sufficient bond is posted and the Secretary of Treasury finds that sufficient safeguards to protect the item have been taken. Forfeited items that are not returned to the requesting country shall be disposed of according to standard Customs procedures.

- c. Pre-Columbian Monumental and Architectural Sculpture and Murals Statute

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Pursuant to 19 USC 2091-2095, no pre-Columbian monumental or architectural sculpture, or mural, or fragment thereof, exported from the country of origin after June 1, 1973, may be imported into the United States unless accompanied by sufficient documentation that the exportation of the article was not in violation of the laws of the country of origin. Those items which fall within 19 USC 2091-2095 (monumental anti architectural sculpture and murals) should be detained in accordance with the law and the regulations, 19 CFR 12.105-109. Articles should be stored at a public storage facility or a bonded warehouse at the risk and expense of the consignee until proper documentation is presented. If no documentation is presented within 90 days, the items shall be seized and forfeited in accordance with 19 USC 2093. Any pre-Columbian monument or mural which is forfeited shall be first offered to the country of origin and returned if the country bears all expenses incident to the return. Items not returned to the country of origin shall be disposed of in accordance with standard Customs procedures.

d. Cultural Property Act and Seizure of Archaeological and Ethnological Articles

No archaeological or ethnological material designated pursuant to 19 USC 2604 and listed in 19 CFR 12.104g will be permitted entry, unless accompanied by a certificate from the country of origin certifying that such exportation was not in violation of its laws; or satisfactory evidence is presented to the district director that the material was exported from the country of origin ten (10) years before the date of entry and the person making the entry had acquired interest in the material more than one (1) year prior to the date of entry; or satisfactory evidence is presented to the district director that the material was exported from the country of origin on or before the date that the material was designated under 19 USC 2604.

Any designated archaeological or ethnological material which is imported into the United States in violation of 19 USC 2606 shall be subject to seizure and forfeiture. Forfeited articles shall first be offered for return to the country of origin and returned if the country bears all expenses incident to the return. If the article is not returned to the country of origin, it may be returned to the claimant, if he establishes valid title, and that he was a bona fide purchaser for value. A claimant is also required to pay the expenses of return and delivery and may be required to pay the bona fide purchaser under

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certain circumstances. Articles not returned to either the country of origin or the claimant shall be disposed of pursuant to standard Customs procedures.

Pending final determination, any archaeological or ethnological article seized under 19 USC 2605 may be retained at a museum or other cultural or scientific institution pursuant to 19 CFR 12.104f.

e. Application of the National Stolen Property Act (18 USC 2314) and the McClain case to Cultural Property

To protect their national heritage from being plundered by treasure hunters and unscrupulous dealers and collectors, several Latin American countries, as well as, countries in Europe, Asia and Africa have passed laws which give title to the government to all artifacts, excavated or unexcavated. The unauthorized excavation and/or exportation of those items is illegal in those countries.

The leading case construing the National Stolen Property Act as it relates to claims of ownership of cultural property by foreign countries is United States v. McClain, 593 F.2d 658 (5th Cir. 1979). In that case, the court upheld a criminal prosecution under 18 USC 2314 involving articles worth over \$5,000 that were imported into the United States in violation of a foreign law claiming ownership where the importer had knowledge of the country's ownership claims. The use of the McClain case has several limitations: (1) the articles must be worth over \$5,000 (18 USC 2314 establishes the statutory threshold amount); (2) the foreign country's statute must claim ownership and not merely impose export controls; and (3) there must be some evidence of intent to evade the foreign country's ownership laws.

To date, the courts have only determined that Mexico's laws claiming ownership of cultural artifacts are sufficient for a successful criminal prosecution under 18 USC 2314.

If the foreign country involved does not claim ownership but only controls exports, no action should be taken unless there has been a violation under U.S. Customs laws, or the Cultural Property Act (19 USC 2001-2613) or the Pre-Columbian Monumental Act (19 USC 2091-2095). If a Customs officer has a question whether an article is subject to a claim of national ownership, the Office of Enforcement and Regional Counsel shall

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be notified and the Office of International Affairs should be requested to contact the cultural attache of the respective embassy to verify whether the country has a claim of ownership to the specific item. If the Customs officer determines that 18 USC 2314 is applicable, the articles may also be seized as evidence of a crime or for forfeiture.

f. Procedures for Determining if an Item is Stolen

The Pre-Columbian Monumental Act, National Stolen Property Act, Cultural Property Implementation Act and various agreements and treaties, all deal, at least in part, with the importation and/or possession of stolen property. A problem often encountered by the investigator is determining whether or not an item is stolen.

If an item is encountered which is suspected of being stolen, the U.S. Customs INTERPOL Representative, Washington, D.C., telephone number (FTS) 272-8383, (commercial) (202) 272-8383; should be contacted. INTERPOL receives reports concerning the world wide theft of stolen works of art and cultural property and can verify whether or not an item is stolen.

g. International Treaties and Agreements

The United States is a signatory to agreements with Peru, Ecuador and Guatemala and a treaty with Mexico, all involving the recovery and return of stolen archaeological, historical and cultural properties. These individual agreements and treaty are separate from the UNESCO convention mentioned above. Although each agreement and treaty sets forth a procedure in which a requesting party (nation) asks the requested party (nation) for the return of stolen property, action can also be implemented by advising these nations that we have possible stolen items in our possession. They may then ask for the return of those items through outlined procedures.

The Treaty of Cooperation Between the United States and Mexico is the most significant of the previously mentioned documents, since, as a treaty, it obligates the United States to take various actions, such as instituting judicial proceedings. Also, U.S. courts have accepted Mexico's claim of ownership of cultural property, while the ownership of such items by Peru, Guatemala and Ecuador is more open to challenge. This situation should not, however, preclude use of these agreements when appropriate.

h. Interpleader Actions

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In each case where a detention of cultural property is made for possible violation of United States law, the cultural attache of the respective embassy shall be notified by the Office of International Affairs. In instances where there is insufficient evidence to sustain a violation, a foreign country may nevertheless still wish to assert a claim to the article. If an importer does not recognize the country's claim of ownership, consideration should be given to filing a legal proceeding (an interpleader action to determine which party is the valid owner). A factor in determining whether to file an interpleader action is whether the country requesting return of the object is willing to bear the expense of a legal proceeding. Regional Counsel shall be notified whenever such an action is contemplated.

i. Procedures for Return of Articles to a Requesting Country

In all cases in which pre-Columbian artifacts or any archaeological, ethnological, or cultural property is seized or detained by enforcement personnel, the Office of International Affairs, through the Smuggling Division, General Smuggling Branch, shall be notified and requested to contact the cultural attache of the embassy of the country of origin in Washington, D.C.

If the country asserts a claim to the article, the cultural attache shall be informed that a written request (with an indemnification and hold-harmless agreement executed in favor of the United States) is necessary for the return of pre-Columbian artifacts, or any archaeological, ethnological or cultural property forfeited to the United States Government under the Customs laws, the Cultural Property Act, the Pre-Columbian Monumental Act, or if the country claims ownership for purposes of a criminal action under 18 USC 2314. This request will be accompanied by a statement indicating the provisions of law which served as the basis for the seizure. The request should be coordinated with the Office of Chief Counsel.

Upon final determination of any related forfeiture or criminal proceeding, the requested items may be returned to the embassy of the country of origin in Washington, D.C., or to any other agreed place within the united States. If the items are subject to forfeiture, the return will be based on a remission of the forfeiture. If the value of the property exceeds local delegated authority, the decision will be prepared by the Office of Regulations and Rulings (International Trade

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Compliance Division).

The requested items should be returned in such a manner as to ensure their safety and a written receipt indicating receipt of the goods must be provided. The costs of return and delivery are borne by the requesting country.

A copy of the delivery receipt will be forwarded to the Office of International Affairs at the address given above to ensure that accurate data is available on the seizure and return of these goods.

j. Recovery of Cultural Property in non-Border Situations

On occasion, the U.S. Customs Service receives information from representatives of foreign governments or from private individuals that cultural property has been entered into the United States contrary to law and is in the possession of various persons or institutions. If investigation determines that those holding the items are unaware of related illegal activity, a direct approach, requesting voluntary return of the property, may be appropriate.

There are occasions when investigators, through informant information or undercover operations, become involved with foreign cultural property already in the United States. If an undercover purchase of the imported property is contemplated, based on the belief that it may be stolen or subject to import restrictions, the previously described procedures for determining that, should be initiated immediately. Such verifications, especially from the lesser developed nations, take time and delays could adversely affect an investigation in which a suspect item is exposed to purchase/seizure for only a limited time period.

Often, the target of a criminal investigation is the importer of the suspect cultural property. For purposes of obtaining search/arrest warrants, a variety of the previously discussed laws may be applied. At other times, however, the person possessing the item is not the smuggler/importer, but rather a buyer, broker or fence. In such instances, merchandise can still be seized, if it can be demonstrated that it is evidence of a crime. In addition, a number of laws may still be applicable, including: 18 USC 545 (relative to the transportation, concealment or sale of items imported contrary to law); 18 USC 2315 (possession or sale of stolen goods); and 19 USC 1595a (seizure of merchandise brought into

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the United States unlawfully). The appropriate Regional Counsel or U.S. Attorney's Office should be consulted for additional legal advice on this subject.

k. Requests For Information On Admissibility

Prospective importers may request information on the admissibility of cultural property by writing to the Intellectual Property Rights Branch, International Trade Compliance Division, Office of Regulations & Rulings, 1301 Constitution Avenue NW, Washington, DC 20229.

5. RESPONSIBILITIES

District Directors, Special Agents in Charge, and Regional Counsels are responsible for ensuring that personnel assigned to their offices are familiar with and follow the contents of this directive.

Copies of this directive may be released to the public by District Directors, Special Agents in Charge, Regional Counsels and Regional Commissioners and by the Chief Counsel, branch chiefs, division and office directors and assistant commissioners in headquarters Offices of Enforcement, Inspection & Control, and Commercial Operations without the necessity of a formal Freedom of Information Act request.

6. SUPERSEDED MATERIAL

Manual Supplement 3280-01 (October 5, 1982) is hereby superseded.

The statements made herein are not intended to create or confer any rights, privileges or benefits for any private person, but are intended merely for internal guidance.


Commissioner of Customs
(Acting)
Commissioner of Customs
(Acting)

Attachment

Distribution:

- H-12 Headquarters Managers/Supervisors
- R-01 Regional Commissioners
- R-02 Regional Counsels
- F-01 District/Area Directors

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Attachment

APPLICABLE LEGAL REFERENCES

Applicable Statutes, Regulations and Treaties:

19 USC 2091-2095, 2601-2613
19 CFR 12.104-12.109
18 USC 542, 545, 981, 2314, 2315

UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property. (823 U.N.T.S. 231) opened for signature November 14, 1970; entered into force for the United States, December 2, 1983.

Treaty of Cooperation Between the United States of America and Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties. (22 UST 494; TIAS 1088) Signed July 17, 1970; entered into force March 24, 1971.

Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen, Archaeological, Historical and Cultural Properties. (TIAS 10136) Signed September 15, 1981; entered into force September 15, 1981.

Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties. Signed May 21, 1984; entered into force August 12, 1984.

Agreement Between the United States of America and Ecuador for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties. Signed November 12, 1983; entered into force January 14, 1987.

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MEXICO

Recovery and Return of Stolen Archaeological, Historical and Cultural Properties

Treaty signed at Mexico City July 17, 1970;
Ratification advised by the Senate of the United States of
America February 10, 1971;
Ratified by the President of the United States of America
February 23, 1971;
Ratified by Mexico February 12, 1971;
Ratifications exchanged at Washington March 24, 1971;
Proclaimed by the President of the United States of America
April 7, 1971;
Entered into force March 24, 1971.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

A Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties was signed at the City of Mexico on July 17, 1970, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of February 10, 1971, two-thirds of the Senators present concurring, gave its advice and consent to ratification of the Treaty;

The President ratified the Treaty on February 23, 1971 in pursuance of the advice and consent of the Senate;

The instruments of ratification of the respective Parties were exchanged at Washington on March 24, 1971; and

It is provided in Article VI of the Treaty that it shall enter into force on the day of exchange of the instruments of ratification;

Now, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Treaty to the end that it shall be observed and fulfilled with good faith on and after March 24, 1971 by the United States of America and by the citizens

of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this seventh day of April in the year of our Lord one thousand nine hundred seventy-one [SEAL] and of the Independence of the United States of America the one hundred ninety-fifth.

RICHARD NIXON

By the President:

WILLIAM P ROGERS
Secretary of State

TREATY OF COOPERATION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES PROVIDING FOR THE RECOVERY AND RETURN OF STOLEN ARCHAEOLOGICAL, HISTORICAL AND CULTURAL PROPERTIES.

The United States of America and the United Mexican States, in a spirit of close cooperation and with the mutual desire to encourage the protection, study and appreciation of properties of archaeological, historical or cultural importance, and to provide for the recovery and return of such properties when stolen, have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty, "archaeological, historical and cultural properties" are defined as

- (a) art objects and artifacts of the pre-Colombian cultures of the United States of America and the United Mexican States of outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art;
- (b) art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States of outstanding importance to the national patrimony;
- (c) documents from official archives for the period up to 1920 that are of outstanding historical importance;

that are the property of federal, state, or municipal governments or their instrumentalities, including portions or fragments of such objects, artifacts, and archives.

TIAS 7088

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2. The application of the foregoing definitions to a particular item shall be determined by agreement of the two governments, or failing agreement, by a panel of qualified experts whose appointment and procedures shall be prescribed by the two governments. The determinations of the two governments, or of the panel, shall be final.

ARTICLE II

1. The Parties undertake individually and, as appropriate, jointly
 - (a) to encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars of both countries;
 - (b) to deter illicit excavations of archaeological sites and the theft of archaeological, historical or cultural properties;
 - (c) to facilitate the circulation and exhibit in both countries of archaeological, historical and cultural properties in order to enhance the mutual understanding and appreciation of the artistic and cultural heritage of the two countries; and
 - (d) consistent with the laws and regulations assuring the conservation of national archaeological, historical and cultural properties, to permit legitimate international commerce in art objects.
2. Representatives of the two countries, including qualified scientists and scholars, shall meet from time to time to consider matters relating to the implementation of these undertakings.

ARTICLE III

1. Each Party agrees, at the request of the other Party, to employ the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that are removed after the date of entry into force of this Treaty from the territory of the requesting Party.
2. Requests for the recovery and return of designated archaeological, historical and cultural properties shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, documentation and other evidence necessary to establish its claim to the archaeological, historical or cultural property.
3. If the requested Party cannot otherwise effect the recovery and return of a stolen archaeological, historical or cultural property located in its territory, the appropriate authority of the requested Party shall institute judicial proceedings to this end. For this purpose, the Attorney General of the United States of America is authorized to institute a civil action in the appropriate district court of the United States of America, and the Attorney General of the United Mexican States is authorized to institute proceedings in the appropriate district court of the United Mexican States. Nothing in this Treaty shall be deemed to alter the domestic law of the Parties otherwise applicable to such proceedings.

ARTICLE IV

As soon as the requested Party obtains the necessary legal authorization to do so, it shall return the requested archaeological, historical, or cultural property to the persons designated by the requesting Party. All expenses incident to the return and delivery of an archaeological, historical or cultural property shall be borne by the requesting Party. No person or Party shall have any right to claim compensation from the returning Party for damage or loss to the archaeological, historical or cultural property in connection with the performance by the returning Party of its obligations under this Treaty.

ARTICLE V

Notwithstanding any statutory requirements inconsistent with this Treaty for the disposition of merchandise seized for violation of laws of the requested Party relating to the importation of merchandise, stolen archaeological, historical or cultural property which is the subject matter of this Treaty and has been seized, or seized and forfeited to the requested Party, shall be returned to the requesting Party in accordance with the provisions of this Treaty. The Parties shall not impose upon archaeological, historical or cultural property returned pursuant to this Treaty any charges or penalties arising from the application of their laws relating to the importation of merchandise.

ARTICLE VI

1. The Parties shall ratify this Treaty in accordance with the provisions of their respective constitutions, and instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Treaty shall enter into force on the day of exchange of the instruments of ratification, and shall remain in force for two years from that date and thereafter until thirty days after either Party gives written notice to the other Party of its intention to terminate it.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, Ambassador Robert Henry McBride for the United States of America and Antonio Carrillo Flores, Secretary of Foreign Relations, for the United Mexican States, duly authorized, have signed this Treaty.

DONE in duplicate, in English and Spanish, in the City of Mexico this seventeenth day of the month of July, nineteen hundred seventy.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,

ROBERT MCBRIDE

Robert Henry McBride
*Ambassador Extraordinary
and Plenipotentiary.*

FOR THE GOVERNMENT OF THE
UNITED MEXICAN STATES,

ANTONIO CARILLO F

Antonio Carrillo Flores
*Secretary of Foreign
Relations.*

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