

ASSOCIATION OF ART MUSEUM DIRECTORS

STATEMENT OF SUPPORT FOR THE NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING AND PROPOSED MODIFICATIONS TO PROTECT THE MISSION OF AMERICAN ART MUSEUMS

I. Introduction.

The President's 2013 Executive Order and the subsequent National Strategy for Combating Wildlife Trafficking rightly called attention to the many threats to wildlife around the world. The Association of Art Museum Directors (the "AAMD") supports the efforts of the international community to address these threats in a responsible and measured approach. Poaching, trafficking and other illegal forms of wildlife destruction need to be addressed and the President's call to action, in particular with respect to the threats facing African elephants, is to be commended. Museums have a significant role to play, particularly as educators and communicators. At the same time, museums have a responsibility to protect, conserve and display works of art that represent the creativity of the human spirit. That creativity expresses itself in many mediums and in the past, quite legitimately, through works that include elements of species that are now endangered or threatened. Restricting the trade in illegally acquired species should not deny to the public of the present the work of artists of the past.

The AAMD looks forward to working with the Presidential Task Force, Advisory Council and the other agencies of the federal and state governments to shape the national approach to curtailing the trade in illegally acquired wildlife, while sharing the historic works of art created in times when the threats to wildlife were very different. The AAMD has long supported international efforts in this area, particularly through the Convention on International Trade in Endangered Species ("CITES"). American museums have significant experience in complying with CITES and, every day, works of art move in and out of the United States as part

of exhibitions and loans that benefit the viewing public and in strict compliance with CITES and national laws designed to protect endangered and threatened species, such as the Endangered Species Act. Unfortunately, Director's Order 210, as originally drafted, threatened to curtail that legitimate movement in ways which the AAMD believes were unintended. The recent amendment to Order 210 was a welcome recognition of some of those unintended consequences. There are, however, additional unintended consequences that have not yet been addressed. If there is to be a measured and effective approach to the protection of endangered and threatened species in general and the African elephant in particular, more needs to be done to allow the world's great works of art to move in and out of the United States for Americans to see, learn and enjoy them in the context of museums that are open to the public, as well as to permit ongoing research and education with respect to those works.

Furthermore, any national strategy should allow these great works of art of past generations to come into the collections of United States museums, where, in almost all instances they remain forever, as part of the permanent collection. Additions to a museum's permanent collection are done through a rigorous process known as accessioning, whereby the museum not only acquires a work of art, but commits to its long-term care and conservation. Only rarely are works ever removed from the permanent collection. As a result, whether through purchase, gifts or bequests, works of art containing wildlife elements that come into the permanent collections of museums are no longer part of the trade.

While there are a number of technical and legal issues that need to be addressed in order to allow museums to carry out their public mission, the AAMD is not proposing specific language for insertion into relevant regulations, although the AAMD is quite willing to participate in drafting efforts, as appropriate. In this paper, the AAMD has attempted to identify

specific areas of concern and to offer solutions without parsing Director's Order 210 or other existing laws or regulations.

II. Areas of Concern.

A. Exhibition and Direct Loans. One area of major concern for AAMD members, and we believe art museums in general, is the ability to move works of art containing elements of endangered and threatened species in general and, in particular, African elephant ivory, in and out of the United States in connection with exhibitions abroad and exhibitions in the United States and direct loans to and from foreign lenders and borrowers. The distinction between exhibitions and other loans is that art museums often participate in exhibitions which are organized by one or more museums and result in an assemblage of works around a theme, which assemblage will then be displayed at one or more museums. In addition to exhibitions, art museums do make direct loans of individual works to other museums that are not part of specific exhibitions, but often are placed on view alongside the works of the borrowing museum's permanent collection. While exhibition loans are usually of short duration, direct loans can be for a specific period of time, whether long or short, or open ended. Both exhibition and direct loans have been negatively impacted by the Director's Order in ways which the AAMD believes were unintended. In the past, these loans have functioned in accordance with CITES permits where applicable and the AAMD is unaware of any instances in which works of art illegally obtained have been part of these exhibitions or loans.

B. Acquisitions. Another major area of concern is whether art museums in the United States will be able to continue acquiring works of art that contain elements of endangered or threatened species. Many works created hundreds or thousands of years ago contain elements

of species that are now classified as endangered or threatened, a classification which, compared to the centuries of artists using these species in their art, has only recently been defined.

III. Exhibition and Direct Loans.

The Director's Order, not only through its specific prohibitions, but also through the resulting confusion within the art world, has had a significant negative impact on the ability of art museums in the United States to create, organize, effectuate or participate in international exhibitions and to make or receive direct loans. Foreign lenders are reluctant to loan works of art to art museums in the United States because of concern that the works will not be returned and art museums in the United States are concerned about lending to foreign venues for fear that the works will not be able to be re-imported into the United States.¹

There is no indication that any of this movement has in the past been illegal or inappropriate and, at least in the experience of the AAMD, these loans have routinely been made in full compliance with CITES and other applicable laws. In fact, as a broad statement, there is no reason, at least any that has been advanced to the AAMD, to change the practice or procedures applicable to this movement. The only even tangential argument which has been advanced is that the mere viewing of works of art that contain endangered species encourages others illegally to take live members of those species and create new works of art. Even if this were true, which is empirically impossible to prove, the only cure would be to condemn the great works of art of the ages to destruction or some form of exile, either of which is an unconscionable form of censorship.

¹ While the terms re-exported and re-imported are often used, and are used in this paper, to describe a work of art that is going out of and coming back in to the United States or coming into and going back out of the United States, they are, under certain circumstances, a misnomer, as they imply previous movement across U.S. borders, whereas in fact, works made in the United States may never have been previously removed.

To specifically address the issue of exhibition loans and direct loans, the AAMD recommends the following:

A. Return to Pre-February Status Quo.

1. Outgoing Loans.

(a) Loans from United States Art Museums. When an art museum² in the United States (a “U.S. Museum”³) is lending a work of art containing endangered or threatened species (including raw or worked African elephant ivory) (a “listed species”) from its permanent collection to a foreign governmental entity, museum or gallery (a “Foreign Borrower”) for an exhibition at the Foreign Borrower’s venue or at the Foreign Borrower’s venue and other venues abroad or as a direct loan to a Foreign Borrower, and the U.S. Museum certifies to the United States Fish & Wildlife Service (“F&W”) that:

- the certifying museum meets the definition of a U.S. Museum;
- the work will remain the property of the U.S. Museum; and
- pursuant to a written agreement with the Foreign Borrower, the work is required to be returned to the U.S. Museum at the end of the loan period;

the procedures for export to the Foreign Borrower and re-import to the U.S. Museum will be in accordance with the rules and regulations applicable to such loans prior to February 25, 2014.

(b) Loans by U.S. Museums as Organizers or Co-Organizers. When a U.S. Museum is an organizer or co-organizer of an exhibition that will be displayed at one or more foreign venues and the U.S. Museum borrows works of art containing a listed species from

² The AAMD is not in a position to speak on behalf of all museums in the United States, but there does not appear to be a compelling reason not to make this exception applicable to any museum that meets the definition in 45 CFR § 1180.2.

³ “U.S. Museum” means a museum that collects and/or displays works of art and meets eligibility criteria established by the Institute of Museum and Library Services, 45 CFR § 1180.2, and (a) is part of or owned by the Federal or a state or local government or (b) is a nonprofit corporation, trust or other entity that is exempt from Federal taxation in accordance with Internal Revenue Code § 501(c)(3) or (c) is a church, monastery or synagogue.

a third party as part of the exhibition and exports the works from the United States and re-imports the works into the United States as part of an exhibition for display at one or more Foreign Borrowers and the U.S. Museum certifies that:

- the certifying museum meets the definition of a U.S. Museum;
- the purpose of the export of the work is a loan to a Foreign Borrower;
- pursuant to a written agreement with the Foreign Borrower, the work is required to be returned to the U.S. Museum or the third party;

the procedures for export to the Foreign Borrower and re-import to the U.S. Museum or third party shall be in accordance with the rules and regulations applicable to such loans prior to February 25, 2014.

2. Incoming Loans. When a U.S. Museum borrows a work of art containing a listed species from a foreign governmental entity, museum, gallery, entity or person (the “Foreign Lender”) and the U.S. Museum certifies to F&W that:

- the certifying museum meets the definition of a U.S. Museum;
- the purpose of the import of the work is a loan to the U.S. Museum;
and
- pursuant to a written agreement, the work is required to be returned to the Foreign Lender;

then the procedures for import to the U.S. Museum and re-export to the Foreign Lender will be in accordance with the rules and regulations applicable to such loans prior to February 25, 2014.

B. Definition of Antiquity. To the extent applicable, for purposes of the non-commercial import or export of a work of art qualifying for the ESA antique exception, the work should be permitted to be imported and exported and re-imported and re-exported, provided that a U.S. Museum certifies to F&W that:

- the certifying museum meets the definition of a U.S. Museum;

- based on certified documentation of ownership, qualified appraisal, or other accepted methods of proving an object's provenance, the work is more than 100 years old;
- the work is reasonably believed to include the endangered or threatened species identified in the certification;
- the work has not been repaired or modified with any part of any such species on or after December 28, 1973; and
- was either legally imported prior to September 22, 1982 or thereafter entered through a port designated for import of ESA antiques or was created in the United States and never imported.

IV. Acquisitions.

In addition to international exhibitions and loans, the Director's Order and interpretations by F&W have significantly affected the ability of U.S. Museums to acquire works of art containing a listed species, whether by purchase, gift or bequest. As discussed above, art museums are the "last stop" for many works of art and their acquisition by a museum effectively removes them from the trade and allows them to be studied, researched and displayed for the benefit of the public, scholars and students. In order to continue the ability of U.S. Museums to acquire works of art containing listed species, the following changes are recommended.

A. Donations. Currently, there is confusion about whether the possessor of a work of art containing raw or worked African elephant ivory, of which they are in lawful possession, can donate that work to a U.S. Museum, and take a tax deduction constitutes post-February 25, 2014 transfer for financial gain or profit. In order to clarify the situation, F&W should allow the donation of works containing listed species to U.S. Museums provided that the donor does not receive any substantial benefit in exchange (as defined by the Internal Revenue Service).⁴ In addition, in order to effectuate a donation to a U.S. Museum, F&W should allow a work of art containing a listed species to be transported in interstate or intrastate commerce.

⁴ As set out in Revenue Procedure 90-12, 1990-1 C.B. 471, and Revenue Procedure 92-49, 1992-1 C.B. 987.

B. Acquisitions Abroad. U.S. Museums should be permitted to acquire lawfully abroad, whether by purchase, gift or bequest, works containing listed species, and import them into the United States, provided that the U.S. Museum certifies to F&W that:

- the certifying museum meets the definition of a U.S. Museum;
- the work has or will, after importation, become part of the permanent collection of the U.S. Museum; or
- the work is being considered for acquisition by the U.S. Museum and, if not so acquired, will be promptly exported. U.S. Museums frequently bring works of art to the museum in order to permit the work to be researched, reviewed and analyzed prior to concluding an acquisition and accessioning the work. This latter exception will permit U.S. Museums to continue that process while assuring that in the event that the U.S. Museum does not acquire the work, it will not be placed on the United States market.

C. Post-Acquisition Exhibition and Direct Loans. All works of art containing listed species legally acquired by U.S. Museums, both domestically and abroad, whether by purchase, gift or bequest should be allowed to be imported, exported, re-imported, and re-exported for the purpose of creating, organizing, effectuating, or participating in international exhibitions and making or receiving direct loans in accordance with Section III above.

V. Conclusion.

AAMD's goal in providing these proposed modifications is to assist in curtailing the trade in illegally acquired wildlife while preventing unintended consequences which would threaten the legitimate movement of legally acquired art and jeopardize museums' mission to provide the public with access to the great works of art of past generations. The AAMD looks forward to working with the Presidential Task Force, Advisory Council, and other agencies of the federal and state governments to continue the important work of addressing the threats to

wildlife and protecting all endangered and threatened species, in particular African elephants through education, research, and scholarship.