

MEMORANDUM

To: Natalie Landreth
From: Sigvanna Topkok, legal extern
Date: Nov. 30, 2016
Re: Walrus Ivory Bans

I. Summary of the Issue

In the effort to protect elephants from poaching for their ivory tusks, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) specifically put in place prohibitions of the importation of elephant ivory.¹ The side effects of this law, however, have been a movement, on a U.S. nationwide level, to ban all ivory, including (possibly unintentionally) walrus ivory. These bans have severe consequences on Alaska Native artists, who are specifically exempted from bans on walrus hunting for subsistence purposes, and who have legal protections to sell handicrafts made from walrus ivory.

II. Proposed Solutions and Needs

State legislators must be educated on the differences of elephant and walrus ivory, and how the livelihoods of many indigenous Alaskans rely on walrus ivory carving to supplement their income. As states enact their own laws to mirror CITES, they must be made aware that banning all ivory, with no distinction for the legal protections of walrus ivory for Alaska Natives, adversely affects the human rights of indigenous peoples in Alaska. Equally as important, federal laws such as the Marine Mammal Protection Act likely preempt conflicting state laws.

III. Analysis

Today, there is a need for a viable economy for Alaska Native artists to tap into in order to support their families, especially in the face of climate change, and as a way to offset the high cost of living in rural communities. Several important legal frameworks ensure the protection of Alaska Native peoples' right to carve walrus ivory, and state legislator oversight of these protections may lead to costly lawsuits, and require revision of state statutes. By understanding these frameworks, states may avoid financial and time intensive pitfalls.² Most important, federal laws likely preempt state laws on comprehensive ivory bans, and it's important to understand that the rights of indigenous people are intricately connected to walrus ivory.

¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 29 I.L.M. 1076.

² Currently, several states have or are considering bans on walrus ivory (some laws using explicit language that bans walrus ivory). These states include California, New Jersey, Massachusetts, Hawaii, and New York. See Mike Dunham, *How laws meant to protect African elephants may end up hurting Alaska Native artists*, ALASKA DISPATCH NEWS, May 21, 2016, available at: <http://www.adn.com/alaska-news/2016/05/21/how-laws-meant-to-protect-african-elephants-may-end-up-hurting-alaska-native-artists/>.

A. Federal Law Likely Preempt State Law

Most importantly, from a legal perspective, federal law may preempt any state laws banning all ivory, regardless of whether it is elephant or walrus ivory. These federal laws guarantee Alaska Native subsistence hunting of walrus and selling of the non-edible byproducts of walrus as authentic handicrafts. While CITES is an international convention, and is incorporated into U.S. law through Executive Order 13648 (E.O.)³ and 16 U.S.C. § 1531 et seq.,⁴ the convention and U.S. federal law specifically apply to trafficking of elephant ivory.

In direct contrast, the Marine Mammal Protection Act (MMPA) Section 109 explicitly provides: "Except as otherwise provided in this section, no State may adopt any law or regulation relating to the taking of marine mammals within its jurisdiction or attempt to enforce any State law or regulation relating to such taking."⁵ Further on in this same section, Congress defines "subsistence uses" as "the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption" (emphasis added).⁶ Takings under the MMPA include walrus as they are listed as an endangered species.⁷

Caselaw relating to the attempts by states to regulate these exemptions, as set forth in the MMPA for Alaska Natives, has resulted in federal preemption of state law. Notably, Alaska attempted to manage walrus takings and federal law preempted these statutes. In *People of Togiak v. United States*, a D.C. court held that the Department of Interior could not transfer control of walrus taking to the State of Alaska, nor could the State prevent the taking of walrus or other marine mammals by Alaska Natives.⁸

B. Human Rights Violations

The United Nations Declaration on the Rights of Indigenous Peoples further emphasizes the need for tribal consultation on these issues, as well as respect for indigenous peoples' rights to subsistence and to engage in traditional activities, even as a mode of income to support rural community members' livelihoods.⁹ From a human rights perspective, walrus ivory is a vitally important cultural object and tradition for Alaska Native people. Not only do walrus provide

³ Exec. Order No. 13,648, 78 FR 40621 (Jul. 1, 2013).

⁴ 16 U.S.C.A. 1531 et seq.

⁵ 16 U.S.C.A. 1379(a)(1).

⁶ *Id.* at 1379(f).

⁷ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened, 76 Fed. Reg. 7,634, 7,634 (Feb. 10, 2011).

⁸ *People of Togiak v. United States*, 470 F. Supp. 423, 429-30 (D.D.C. 1979).

⁹ See United Nations Declaration on the Rights of Indigenous Peoples, Articles 3, 8, 10 and 11 (March 2008), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

physical nourishment, but also are also culturally and spiritually nourishing.¹⁰ Walrus occupy prominence within songs, dances, and stories for Iñupiat people.¹¹ Ivory carving has been an important cultural practice since time immemorial for many indigenous people, and the objects carved may carry important spiritual significance, while other carvings are purely aesthetic and for decorative purposes.¹²

C. Need for Viable Economies for Alaska Native People

In a rapidly changing arctic environment, supporting a family in rural communities is increasingly difficult. Walrus, like all marine mammals, rely on the spring breakup and fall formation of ice during their migration.¹³ Animals use ice to feed, rest, and give birth to young.¹⁴ As the ice forms later each fall, and breaks up earlier in the spring, the window for walrus hunting is becoming increasingly narrow.¹⁵ Unpredictable and shifting weather patterns also make it difficult to go out hunting for more than a day at time.¹⁶ Because the weather is less predictable, and susceptible to turn from good to bad weather in a matter of hours, hunters may not have long, open periods for hunting. Finally, the cost of gas and bullets is expensive.¹⁷ If a hunter is unsuccessful due to bad weather, or because he or she missed the walrus migration, entire families and communities may face food insecurity throughout the winter months. Some communities in the Bering Strait region even declared economic disaster due to poor walrus hunting opportunities in 2013.¹⁸

¹⁰ See Brendan Raymond Yakoubian, et al, *"The World Has Changed": Inuit Traditional Knowledge of Walrus in the Bering Strait*, North Pacific Research Board Final Report (2014), available at: <http://kawerak.org/socialsci.html>.

¹¹ For instance, there are stories from the community of Diomedes about a man named Ayuunga, who wasted walrus parts when he went hunting and was changed into a walrus so he would learn what life was like under the sea. See Raymond-Yakoubian, et al, *"The World Has Changed,"* at 57. There are also dances about walrus hunting, with songs narrating a typical walrus hunt accompanied by motions that illustrate the actions of the walrus hunter.

¹² See, e.g., Tara Young, *Inupiat artist Sylvester Ayek balances life, art*, ALASKA DISPATCH NEWS, May 23, 2012. Available at: <http://www.adn.com/video/video-inupiat-artist-sylvester-ayek-balances-life-art>.

¹³ See National Snow and Ice Data Center, *Wildlife: Mammals*, All About Sea Ice (2016), <https://nsidc.org/cryosphere/seaice/environment/mammals.html>.

¹⁴ *Id.*

¹⁵ See Indigenous Knowledge & Use of Bering Strait Region Ocean Currents, Social Science Program, Natural Resource Division, Kawerak, Inc., at 31-34 (2014). "Changes in ice conditions are among the biggest changes noted by local experts. All three communities experience later freeze-up and earlier break-up of ice...freeze-up appears to happen approximately one month later and break-up one month earlier than it did several decades ago." *Id.* at 31-32.

¹⁶ *Id.*

¹⁷ Cost of gas in many rural community hubs (such as Nome, Kotzebue, Barrow) can range from \$6 to \$8 a gallon for fuel.

¹⁸ Suzana Caldwell, *Disaster declared for subsistence walrus hunt on St. Lawrence Island*, ALASKA DISPATCH NEWS, Sep. 2, 2013, <http://www.adn.com/rural-alaska/article/disaster-declared-subsistence-walrus-hunt-st-lawrence-island/2013/09/03/>.

Conclusion

While the protection of elephants from poaching is a worthy cause, and one that mostly likely everyone is sympathetic, it is critical for state policy makers to understand the difference between elephant and walrus ivory, and the legal frameworks around these two species. States cannot simply put in place laws that ban ivory across the board. Doing so places Alaska Native artists in difficult positions, having to defend their livelihood, culture, and even their identity in order to exercise their inherent rights to take walrus and undermines their ability to support their families. From a legal perspective, it creates a very direct legal conflict that has to be addressed.

Links to state laws re elephant ivory:

New York

- Law (bans elephant and mammoth): <https://www.nysenate.gov/legislation/bills/2013/S7040>
- Legislative history materials: http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/49058

New Jersey

- Law (walrus and mammoth): http://www.njleg.state.nj.us/2014/Bills/A3500/3128_I1.HTM
- Legislative history materials: <http://www.njleg.state.nj.us/bills/BillView.asp>

Massachusetts

- Law (new draft legislation has no walrus): <https://malegislature.gov/Bills/189/S2241>
 - "Ivory", any tooth or tusk composed of ivory from a species of elephant or hippopotamus...
- Text of original legislation included walrus: <https://malegislature.gov/Bills/189/S440>
 - "Ivory" means a tooth or tusk composed of ivory from an animal, including but not limited to, an elephant, hippopotamus, mammoth, narwhal, walrus, or whale or a piece thereof...
- Latest legislation is dated Sept. 22, 2016. Can't find any more recent drafts of the text or if it was signed into law.

Hawaii

- Law (walrus): http://www.capitol.hawaii.gov/session2016/bills/SB2647_.HTM
 - Seems to at least acknowledge that walrus ivory is ok to sell as long as it's covered by an MMPA exception – see Section 2(b)
- Legislative history materials: http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2647&year=2016

California

- Law (explicitly bans walrus): <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fgc&group=01001-02000&file=2000-2022>
- CDFW: <https://cdfnews.wordpress.com/2016/07/01/california-ivory-ban-now-in-effect/>
- Legislative history materials: http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=ab_96&sess=CUR&house=B&author=atkins_%3Catkins%3E

Washington

- Doesn't seem to affect walrus or mammoth ivory, just elephant, etc.:
https://www.sos.wa.gov/assets/elections/initiatives/FinalText_784.pdf
 - RCW 77.15.135
- <http://nwnewsnetwork.org/post/washington-state-votes-overwhelmingly-shut-down-ivory-trade>

Oregon (doesn't list walrus or mammoth explicitly but may have provisions allowing Oregon Fish & Wildlife Commission to adopt rules that will include walrus and mammoth)

- **Goes into effect July, 2017** (passed on ballot in recent election)
- Westlaw: 2016 Oregon Laws Ballot Measure 100 (I.P. 68)
- [https://ballotpedia.org/Oregon_Wildlife_Trafficking_Prevention_Measure_100_\(2016\)](https://ballotpedia.org/Oregon_Wildlife_Trafficking_Prevention_Measure_100_(2016))
- See Section 2 of Ballot Measure 100 amending ORS 498.022(2)(f): (f) The Oregon Fish and Wildlife Commission may adopt rules necessary for the implementation of subsection (2) of this section, including rules restricting the purchase, sale, offer for sale, or possession with intent to sell, of parts or products of any animal species that so closely resemble in appearance parts or products of a covered animal species that law enforcement personnel would have substantial difficulty in attempting to differentiate between the species.
 - May need to keep an eye on this as commission adopts rules to implement the state statute in case walrus and mammoth ivory are included
 - Any rulemaking will require notice and comment periods, as well. These are published in the Oregon Bulletin
 - Director of the Oregon Department of Fish and Wildlife: Curt Melcher
 - Bios of people on the commission:
<http://www.dfw.state.or.us/agency/commission/members.asp>
 - Contact info for Oregon Fish and Wildlife Commission:
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302
(503) 947-6000
odfw.commission@state.or.us
- Commission meets next on January 20, February 9&10, March 17

Florida

- Legislation (mammoth, no walrus) died in Environmental Preservation and Conservation committee: <https://www.flsenate.gov/Session/Bill/2015/1120>

Arizona

- Legislation (mammoth, walrus included), "final deposition: held in committees" = died?:
<http://www.azleg.gov/legtext/52leg/2r/bills/hb2176p.pdf>
- http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/52Leg/2r/bills/hb2176o.asp&Session_ID=115

Connecticut

- Appears to have been tabled and never picked up again. (NRA lobbying held up?)
- Legislation (

Maryland (doesn't define which species of animals the ivory ban effects) doesn't seem to have progressed past the House "unfavorable report by Judiciary"

- <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=02&id=hb0713&tab=subject3&ys=2015RS>

~~Illinois~~ (mammoth, walrus) doesn't seem to have progressed

- <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1858&GAID=13&DocTypeID=SB&SessionID=88&GA=99>

~~Vermont~~ (mammoth) doesn't seem to have progressed

- <http://legislature.vermont.gov/bill/status/2016/H.297>

~~Iowa~~ (mammoth) -- doesn't seem to have progressed past Iowa Senate?

- <https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=SF30>
- <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=86&type=b&hbill=SF30>

~~Virginia~~ (walrus) "stricken at the request of Patron In Courts of Justice"

- <https://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB1215>

~~Oklahoma~~ (walrus, mammoth) died in committee

- <https://legiscan.com/OK/bill/HB1787/2015>

Other

- NYT article: http://www.nytimes.com/2016/09/12/fashion/ivory-jewelry-elephants.html?_r=1
- Info on types of ivory: https://www.fws.gov/lab/ivory_natural.php#elephant
- May or may not be updated with status of different state laws relating to ivory bans: <http://www.aaps-journal.org/fossil-ivory-legislation.html>