



United States  
Department of the  
Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



**Director's Order 210, Appendix 1**

**Guidance on the Antique Exception under the Endangered Species Act (ESA)**

**1. What is the antique exception to the prohibitions of the ESA?**

- The ESA Amendments of 1978 amended the 1973 Act (16 U.S.C. 1539 (h)) to allow the importation and other activities without an ESA permit of an antique article (referred to as an “ESA antique”) that:
  - Is not less than 100 years of age;
  - Is composed in whole or in part of any endangered species or threatened species listed under section 1533 of the Act;
  - Has not been repaired or modified with any part of any such species on or after December 28, 1973; and
  - Is entered at a port<sup>1</sup> designated for the import of ESA antiques.
- The prohibitions under 16 U.S.C. 1533(d) and 16 U.S.C. 1538 (a) and (c)<sup>i</sup> do not apply to an article that meets all of the above criteria. Therefore, articles that meet the ESA antique exception upon import may be sold in interstate commerce, exported, and used in other ways that would otherwise be prohibited under the ESA, without an ESA permit.
- The exception requires that any person who wants to import an ESA antique must submit documentation to establish that the article meets the exception.
- The ESA also requires that any person claiming an exemption from the prohibitions of the Act has the burden of proving that the exemption is applicable (16 U.S.C. 1539 (g)).

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<sup>1</sup> U.S. Customs and Border Protection (CBP) designated 13 ports for the entry of antiques made of ESA-listed species on September 22, 1982 (19 C.F.R. 12.26). The following ports are authorized: Boston, Massachusetts; New York, New York; Baltimore, Maryland; Philadelphia, Pennsylvania; Miami, Florida; San Juan, Puerto Rico; New Orleans, Louisiana; Houston, Texas; Los Angeles, California; San Francisco, California; Anchorage, Alaska, Honolulu, Hawaii; and Chicago, Illinois.

## **2. What are the requirements to import an antique made from an ESA-listed species?**

- ESA antiques may only be imported at a port designated for the import of ESA antiques.<sup>1</sup>
- The import of ESA antiques requires the importer or his/her agent to file Form 3-177, (19 C.F.R. 10.53 (e) and 50 C.F.R. 14.61) with documentation demonstrating that the item meets the ESA exception.
- For ESA antiques made from species that are also listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the importer or the importer's agent must file Form 3-177 and all required documentation directly with the Service.
- For ESA antiques made from species that are not listed under CITES, the importer or the importer's agent may file Form 3-177 and all accompanying documentation with the U.S. Customs and Border Protection (CBP) Port Director. CBP will send all documentation to the Service as described in 19 C.F.R. 12.26(g) for a legal determination prior to release. The importer or the importer's agent may also file directly with the Service and provide the necessary clearance to CBP.
- The commercial import of ESA antiques must meet all licensing and fee requirements in 50 C.F.R. Part 14.
- The import of ESA antiques made from species that are also listed under CITES requires a pre-Convention certificate issued by the CITES Management Authority of the (re)exporting country as part of the declaration (50 C.F.R. 23.45).<sup>1</sup>
- The import of ESA antiques does not require an ESA import permit.
- The importer must provide documented evidence of species identification and age to demonstrate that the article qualifies as an ESA antique. This can include a qualified appraisal, documents that provide detailed provenance, and/or scientific testing. The Service considers this to be a high bar, particularly as it relates to the import of African elephant ivory (because the AECA moratorium prohibits the import of most African elephant ivory, including most antiques). Notarized statements or affidavits by the importer or a CITES pre-Convention certificate alone are not necessarily adequate proof that the article meets the ESA exception.

## **3. What are the requirements to export an antique made from an ESA-listed species?**

- ESA antiques may only be exported at a Service-designated port or at a port authorized under a designated port exception permit.

- The export of ESA antiques must meet all the standard declaration, license, fee, notification, and clearance requirements of 50 C.F.R. Part 14. CBP is not involved in the export of such antiques.
- The export of ESA antiques does not require an ESA export permit.
- The export of ESA antiques from species that are also listed under CITES requires a pre-Convention certificate issued by the U.S. CITES Management Authority as part of the export declaration (50 CFR 23.45).<sup>i</sup>
- The exporter must prove that the antique article had been previously imported and met all of the criteria for import under the ESA antique exception.

#### **4. How does the U.S. importer document the identification of the species used in the ESA antique?**

The person claiming the benefit of the ESA antique exception must definitively prove the identity of the species of which the article is composed in whole or in part. Such proof can be in the form of bona fide DNA analysis, a qualified appraisal, or other documentation that definitively demonstrates the identification of the species through a detailed provenance of the article.

#### **5. How does the U.S. importer document the age of the ESA antique?**

The person claiming the benefit of the ESA exception must definitively prove that the article is not less than 100 years of age. Such proof can be in the form of testing using scientifically approved aging methods by a laboratory or facility accredited to conduct such tests, a qualified appraisal, or another method that documents the age by establishing the origin of the article. The provenance may be determined through a detailed history of the article, including but not limited to family photos, ethnographic fieldwork, or other information that authenticates the article and assigns the work to a known period of time or, where possible, to a known artist.

#### **6. How does the U.S. exporter or seller within the United States document that their article meets the ESA exception for antiques?**

The burden of proof is on the exporter or seller to show that the antique article was previously imported and met all of the criteria under the ESA exception. See Section 2 above for the requirements to import an article made from an ESA-listed species and the type of documentation that was required upon import. Notarized statements or affidavits by the exporter or seller, or a CITES pre-Convention certificate alone, are not adequate proof that the article meets the ESA exception.

**7. What will the Service accept as a qualified appraisal?** An appraisal submitted as documentary evidence of an article's eligibility under the ESA antique exception must meet the following criteria:

- The person executing the appraisal either has earned an appraisal designation from a recognized professional appraiser organization for demonstrated competency in appraising the type of property being appraised, or can demonstrate verifiable education and experience in assessing the type of property being appraised.
- The person executing the appraisal is not the importer, exporter, buyer, recipient, or seller of the article; does not benefit from the results of the appraisal (other than for the cost of the appraisal); is not a party to any of the transactions associated with the article (including any person acting as an agent for the transaction); is not an employee of any business that is a party to the transaction; and is not related to the person claiming the exception.
- Facts the Service will examine in determining the reliability of the appraisal:
  - A description of the article that is detailed enough for a person who is not generally familiar with the type of article to determine that the appraisal is about the article in question.
  - The name and address of the qualified appraiser, or if the appraiser is a partner, an employee, or an independent contractor engaged by a person other than the person claiming the exception, the name and address of the partnership or the person who employs or engages the appraiser.
  - The qualifications of the appraiser who signs the appraisal, including the background, experience, education, and any membership in professional appraiser associations.
  - The date on which the article was appraised.
  - The scientific method in detail used to determine the age or species.
  - Descriptive information on the article, including but not limited to: the size of the article, the medium, the artist or culture, approximate date the article was created, and a professional quality image of the article.
  - A detailed history of the article, including proof of authenticity.
  - The facts on which the appraisal was based including analyses of similar works by the artist on or around the creation date.

#### **8. What articles do not qualify for the antique exception under the ESA?**

- Articles that are less than 100 years old.
- Articles that are not composed in whole or in part of an ESA-listed species.
- Articles with repairs or modifications made on or after December 28, 1973, to the specific part or component of the article that is made of the ESA-listed species

regardless of the age or origin of the parts used to repair or modify the specimen.<sup>2</sup>

- Articles that have been repaired with the addition of any part of the ESA-listed species or modified with the addition of any part of the ESA-listed species on or after December 28, 1973, regardless of the age or origin of the parts used to repair or modify the specimen.
- Articles that were imported prior to the creation of designated ports for ESA antiques (September 22, 1982).
- Articles that are, or were, imported on or after September 22, 1982, at a port that was not designated for ESA antiques.
- Articles that were created in the United States and never imported.

## 9. What other information do I need to know?

- The Lacey Act (16 U.S.C. 3372(d)) makes it unlawful for any person to make or submit any false record, account, label for, or any false identification of any fish, wildlife, or plant which has been, or is intended to be, (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce.
- Whoever knowingly and willfully falsifies, conceals, or covers up, by any trick, scheme, or device, a material fact; makes any materially false, fictitious, fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; may be subject to penalties under 18 U.S.C. 1001.

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<sup>i</sup> Although the ESA includes section 1538 (c) in the introductory exception language of 16 U.S.C. 1539(h)(1), it is consistent with fulfilling our treaty obligations when a CITES specimen is at issue. An interpretation that section 1539(h) exempts an importer or exporter from CITES pre-Convention requirements results in reading section 1539(h) as Congress repealing U.S. treaty obligations both with regard to the Article VII pre-Convention certificate requirement and the Articles II and VIII enforcement provisions as applied to pre-Convention specimens. We are not aware of any information that would indicate that this was Congress' intent when it amended the ESA in 1978.

CITES does not allow Parties to take general reservations from Convention provisions (Article XXIII paragraph 1). We consider section 1539(h)(1) as acknowledgement that the standard import/export document provisions of Articles III, IV, and V would not apply and the Article VII, paragraph 2 pre-Convention certificate requirement is consistent with the section 1539(h)(1)(A) requirement to present evidence of the age of the item in order to qualify for the exemption. In addition, the authority base for the Service's development of the 50 CFR part 23 regulations is section 1540(f) of the ESA. Nothing in section 1539(h)(1) excuses a person from compliance with regulations under section 1540(f) (see section 1540(a) and (b) (penalties for violations of regulations, either under section 1538(c) or "any other regulation").

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<sup>2</sup> Items with repairs or modifications to parts or components of the item not made from an ESA-listed species may be entitled to the exception if all other requirements are met. Items that have been repaired or modified prior to December 28, 1973, may also be entitled to the exception if all other requirements are met.