



ASSOCIATION ON AMERICAN INDIAN AFFAIRS

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To: consultation@bia.gov; tribalconsultation@state.gov

Deb Haaland, citizen of the Pueblo of Laguna
Secretary of the Interior
U.S. Department of the Interior

Bryan Newland
Assistant Secretary - Indian Affairs
Department of the Interior

Eric Catalfamo
Director of the Cultural Heritage Center
Bureau of Educational and Cultural Affairs
Department of State

Re: Written Comments on Draft Regulations for the STOP Act

Dear Secretary Haaland, Assistant Director Newland, and Director Catalfamo,

Thank you for the opportunity to provide comments regarding the implementation of the Safeguard Tribal Object of Patrimony (STOP) Act. The Association on American Indian Affairs is the oldest national nonprofit serving Native Country. The Association has been involved in the development and passage of the STOP Act before congress, and is the leading organization providing training, technical assistance and policy development regarding domestic and international repatriation. I am writing on behalf of the Association on American Indian Affairs in response to the Interior and State Departments' Tribal Leader letters seeking input from Native Nations regarding the development of draft regulations for the STOP Act.

In this document, the Association offers a comprehensive compilation of insights garnered from our engagement with our Tribal Partners Working Group, as well as other Native and non-Native experts in the field. We believe that the development of robust and inclusive regulations will not only deter the illicit trafficking of Native cultural heritage but also honor the cultural

legacy integral to the sovereign identities of Native Nations.¹

In alignment with the structure presented in the Tribal Leader letters from your agencies, this document addresses the key questions posed therein.

Department of Interior Questions:

1. Which Assistant Secretary, Bureau or Office within the U.S. Department of the Interior should be responsible for the STOP Act program?

The Assistant Secretary for Indian Affairs (ASIA) oversees matters related to Native Nations and the promotion of self-determination and self-governance. Given that the STOP Act specifically pertains to the protection and repatriation of Native cultural heritage, the Assistant Secretary for Indian Affairs is best positioned to handle the program's implementation and coordination with Native Nations and other federal agencies involved in repatriation and protection of Native heritage.

The Office of Justice Services' Cultural Resources Unit, a unit dedicated to protecting Native cultural heritage from trafficking, is already housed under ASIA. We believe it would be beneficial to have all entities within Interior whose main role is to protect Native cultural heritage, such as the National Native American Graves Protection and Repatriation Act (NAGPRA) Program, housed together under ASIA.

We would further support the creation of a new career position and/or office in which the Secretary may delegate authority over NAGPRA and the STOP Act within Interior. Other countries have national cultural heritage officials that serve to protect the country's cultural heritage. Considering the government-to-government relationship between Native Nations and the United States, a position that is an expert and oversees all matters concerning Native cultural heritage would provide more efficient decision-making, maintaining consistency among all matters related to the protection of Native cultural heritage within the federal government. It would make sense that all National Historic Preservation Act activities that involve Native Nation consultation, including work currently within the Advisory Council on Historic Preservation also be tied into a new office overseeing Native cultural heritage.

Moreover, while interagency agreements and regulations will be necessary for a full and robust implementation of the STOP Act, enforcement of the STOP Act can and should begin now under the Interior's direction. Although multiple federal agencies must take immediate actions, those actions will likely fall to Interior to ensure the other agencies are meeting their obligations and carrying them out in a consistent fashion. For example, all federal personnel involved in monitoring items leaving the United States should be put on notice that they must now prevent the export of Native cultural heritage. Similarly, Native cultural heritage should be added to all existing lists, guidance, and forms for export restrictions. In another example of actions that should be happening now, all U.S. Attorneys should be directed to begin prosecuting STOP Act violators. We believe that ownership over issuing these pointed directives, through their relevant federal agency heads, should rest within ASIA, with the backing of the White House

¹ We are using the term "Native Nations" to include the terms "Indian Tribe" and "Native Hawaiian Organizations" collectively in the remainder of this document.

and begin immediately.

2. What types of interagency agreements would be helpful for the program and for Act implementation?

The STOP Act sets forward specific opportunities that will require interagency agreements and consultation with Native Nations, including training (25 U.S.C. 3073(b)(8)), coordination among the various agencies, a Native Working Group to advise those agencies, and a framework for voluntary return. This collaboration must be organized and transparent.

Generally, the collaboration and hence the interagency agreements should include: a step-by-step guide or flow chart, contacts for each agency - including a primary singular contact (such as a career position overseeing Native cultural heritage protection within Interior) that Native Nations can use to trigger the appropriate federal agency(ies). More specifically, interagency agreements should include:

Interagency Consultation Policy and Agreement: To ensure meaningful consultation with Native Nations, interagency consultation agreements should be established. These agreements would set forward consistent policy that all federal agencies involved would follow. An Interagency Consultation Policy and Agreement would specify the process and frequency of consultation, the involvement of relevant agencies, and the sharing of information and expertise related to the protection and repatriation of Native cultural heritage. The policy must set forward the purpose to achieve the goals of the STOP Act for the benefit of Native Nations and provide transparency to Native Nations. The policy and agreement would require Native Nation consultation as early in the process of developing this agreement as possible.

Data Sharing Agreements: These agreements serve as a framework that outlines procedures and protocols for the exchange of pertinent data across participating agencies and with Native Nations. Relevant data encompasses a spectrum of information, including records of Native cultural heritage items, documents detailing instances of illicit trafficking, and any provenance research, among other things. Crucially, these agreements ensure that the privacy and security of sensitive data remain paramount. By facilitating the creation of a centralized hub of shared information, accessible to all participating agencies and Native Nations, these agreements catalyze seamless coordination and harmonization of efforts. The agreement would require Native Nation consultation as early in the process of developing this agreement as possible.

Cooperative or Collaborative Agreements: Cooperative agreements can be established between the U.S. Department of the Interior and other federal agencies, Native Nations, Native organizations and institutions. These agreements would foster collaboration in areas such as training and capacity-building, research and documentation, outreach and education, and the development of best practices for the identification, protection, and repatriation of Native cultural heritage. The agreement would require Native Nation consultation as early in the process of developing this agreement as possible and should also include Native organizations and experts.

3. What should or should not be included in the draft regulations for the Safeguard Tribal Objects of Patrimony (STOP) Act?

Sec. 2. Purposes.

The Purposes section of the Act is significant to set the way the law will be interpreted and carried out. It should give strict deference to Native traditional knowledge and primary expertise; Native Nations are the primary experts in their own cultural heritage. The law's implementation must arise from the federal government's acknowledgment that Native Nations are the beneficiary of the law and maintain the inherent rights over their own cultural heritage.

Subsection (1) states the purpose is to carry out the trust responsibilities with Native Nations. We request that Interior builds on this in the regulations to include:

In order to carry out the trust responsibilities with Native Nations, the Act recognizes the inherent rights of Indian Tribes and Native Hawaiian organizations in their own cultural heritage, wherever their cultural heritage is located. Consistent with the Act's express language and Congress' intent in enacting the statute, these regulations require the Secretary and others to make decisions for the benefit of Indian Tribes and Native Hawaiian organizations, through consultation and collaboration with them. In implementing this systematic process, the Secretary must defer and give preference to the expertise, customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations, as Indian Tribes and Native Hawaiian organizations understand them.

Subsection (8) also requires additional language in the regulations – either in the purposes section or in another location. We request that the development of public education campaigns to encourage buyers to purchase contemporary Native art be included in the regulations. For example, airports, national, state and regional parks, and other significant areas where domestic and international tourists populate, should include signage and interactive opportunities to educate about Native cultural heritage and about purchasing contemporary Native art, and that it is illegal to pick up “artifacts” from the ground or unearthing items. All national parks and monuments should include robust interactive educational materials that will alert the public about the law and the importance of protecting Native cultural heritage.

Moreover, these educational campaigns should also target museums, academia, collectors/dealers/auction houses and their association groups, as well as other cultural and artistic institutions to enhance their understanding of the cultural significance of Native Nations' heritage and sacred items. By fostering a broader appreciation for these items, such campaigns can contribute to identifying objects that are prohibited from export, helping to address the challenge of the “mens rea” clause in the Act, which requires individuals to be aware of the unlawful nature of their actions.

Sec. 3. Definitions.

The following terms should be included in the regulations:

“*Any other federal law or treaty*”: This phrase should be a defined term to clarify that NAGPRA and ARPA are not the only applicable laws relating to theft of Native Nation cultural heritage and property. Our experience is that dealers and auction houses' due diligence only include NAGPRA and does not consider whether a cultural heritage item that belonged to a Native

Nation as “community property” or held by a community for cultural and religious purposes was stolen at the time of its taking. Federal common law is clear that a thief cannot pass good title to even a good faith purchaser. Moreover, in the district that oversees much litigation about theft of art, New York State laws are the strongest to protect the integrity of the art market. See *Solomon R. Guggenheim Museum v. Lubell*, 77 N.Y.2d 311 (1991) (holding that in the case of conversion, the statute of limitations does not start to run until the possessor of the converted artwork refuses a demand by the actual owner for the return of the artwork).

Moreover, Native Nation laws, as well as traditions and customs, assert inherent jurisdiction over their cultural heritage regardless of where it is located. Native Nation laws, traditions and customs should be deferred to and given priority in line with the purpose of the STOP Act and the government-to-government relationship. Finally, where there is controversy between a Native Nation and a non-Native person or entity over who owns property: “In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.” 25 U.S.C. § 194 (this law was the seed for NAGPRA and “right of possession”).

Recognizing the paramount significance of a comprehensive approach to the certification system and export control of cultural items under the STOP Act, it is imperative that the personnel responsible for these functions extend their purview beyond NAGPRA and ARPA. The intricacies of cultural heritage preservation encompass a wide spectrum of legal frameworks, including various international treaties and agreements that the United States is party to. By delving into these broader legal contexts, the agencies can ensure that the STOP Act’s regulatory framework aligns seamlessly with an intricate web of interconnected laws and obligations.

Consultation. The term should be defined as follows:

Consultation means a process to seek consensus through the exchange of information, open discussion, and joint deliberations and by deferring to identifications, recommendations, and Native American traditional knowledge, as the Indian Tribe or Native Hawaiian organization understands them.

Cultural Affiliation. Though this term is being divided up in the NAGPRA proposed rulemaking into cultural affiliation and geographic affiliation, we believe the term on its own can be simply defined and cultural affiliation found on the basis of information that is known and in the hands of relevant parties. The term may should be defined as:

The shared connection between human remains or cultural heritage and an Indian Tribe or Native Hawaiian organization, or multiple Indian Tribes or Native Hawaiian organizations, that can be reasonably determined solely with geographic information where an item was obtained and through consultation with potentially affiliated Indian Tribes or Native Hawaiian organizations. If other types of information are known and in the hands of the parties involved, the following information can also be used to reasonably determine cultural affiliation: Anthropological; Archaeological; Biological; Folkloric; Historical; Kinship; Linguistic; Oral Traditional; or Other relevant information or expert opinion, including Native American traditional knowledge, which alone may be sufficient to identify cultural affiliation because Native Nations are the primary

experts in their own cultural heritage. Determining cultural affiliation is a collaborative process and not a scientific finding or other type of research activity.

Tangible Cultural Heritage. The term should be defined as any item that pertains to the culture of a Native Nation or Native Hawaiian organization based on the primary expertise of a Native Nation or Native Hawaiian organization potentially affiliated with the item.

Repatriation. This term should be defined to include, not only the recognition of the paper transaction in which an item of tangible cultural heritage is returned, but also include the actual physical turnover of the item. The process of repatriation should include provisions that acknowledge and incorporate deference to Native Nation expertise and traditional knowledge when determining the handling of cultural heritage. Native Nations may emphasize the need for cultural sensitivity and respect throughout the regulatory process. This can include provisions that require the handling, storage, and treatment of repatriated items to align with Native Nation customs and traditions. Repatriation processes must defer to the Native Nation expertise, traditions and customs.

Voluntary Return. The STOP Act does not define what constitutes a “Voluntary Return.” The Act only mentions: “Any person who attempts to export or otherwise transport from the United States an Item Requiring Export Certification without first obtaining an export certification, but voluntarily returns the Item Requiring Export Certification, or directs the Item Requiring Export Certification to be returned, to the appropriate Indian Tribe or Native Hawaiian organization in accordance with section 6 prior to the commencement of an active Federal investigation shall not be prosecuted for a violation of subparagraph (A) with respect to the Item Requiring Export Certification”.

The regulations should set clear parameters under which an exporter may avoid prosecution for violating the Act by detailing what constitutes a voluntary return. That process should include consultation with the potentially affiliated Native Nations. Additionally, the definition or process should address the financial implications of voluntary return, clearly placing the burden for covering the costs associated with a voluntary repatriation process on the exporter. This would be in lieu of the cost of any civil penalty amount if the exporter did not voluntarily repatriate.

Credible Evidence. This term is referenced throughout the STOP Act in various contexts, such as determining the lawful origin of cultural items, establishing compliance with export certification requirements, and verifying claims made during repatriation proceedings. Without a clear and standardized definition, there exists a risk of subjectivity and inconsistency in how different agencies and stakeholders interpret and apply the term. A definition of what is credible evidence must also defer and give preference to Native Nation expertise and traditional knowledge and customs. Furthermore, credible evidence must also incorporate the term “right of possession”: if the exporter has not obtained a “right of possession” as defined in NAGPRA, then the item is likely stolen or has been removed improperly. Thus, a bill of sale is not enough to prove proper ownership – even if the bill of sale is dated prior to the enactment of NAGPRA or ARPA. Other laws may apply (such as common law theft, theft from an Indian Tribe or other federal, state or Native Nation laws) even if an item was removed more than 100 years ago. Thus, credible evidence must include the definition of “right of possession” and

incorporate “any other federal law or treaty.”

Sec. 5. Export Prohibitions; Export Certification System; International Agreements

The establishment of an Export Certification System is a vital component of the STOP Act, requiring a thorough examination and understanding of similar systems implemented in past federal laws to combat illegal trafficking and establish permit or certificate regulations for exporters. Notably, the Migratory Bird Treaty Act (MBTA), the Marine Mammal Protection Act (MMPA), and the Lacey Act offer valuable insights into the successful implementation of certification mechanisms in different contexts, safeguarding various resources and items.

Based on the experience provided by the aforementioned laws, the following recommendations can be made for the effective implementation of an export certification system for the STOP Act:

1. *Demonstrated Expertise and Legitimate Need:* Similar to the MMPA, establish criteria for granting export certification permits to individuals or organizations with demonstrated expertise and a legitimate need to handle and export cultural items. This ensures that those involved possess the necessary knowledge and resources to handle such items responsibly.
2. *Reporting and Documentation:* Draw from the Lacey Act's due diligence provision and require exporters to exercise reasonable care in verifying the legal origin and compliance of cultural items. Establish reporting requirements where exporters must submit all information they possess related to an item, such as provenance, legal acquisition, and handling of the items over time, including the use of chemicals or pesticides.
3. *Monitoring and Compliance:* Implement a robust monitoring and compliance mechanism to ensure adherence to the export certification system. This may include periodic inspections, audits, and verification processes to verify the accuracy of export certifications and deter illicit trafficking.
4. *Promoting Native Nation Capacity Building:* Encouraging collaboration and information sharing, along with providing clear guidance on operating and handling the central federal database information system, are crucial aspects of supporting Native Nations' effective engagement with the Export Certification System. It is imperative to provide necessary resources, training, and technical assistance, enabling Native Nations to actively participate in the certification process, review applications, and make well-informed decisions.
5. *Review of Importing Country Requirements:* Emphasize the importance of reviewing importing country requirements before signing documents and certificates. The export certification system for the STOP Act should include a process for thoroughly examining the regulations and specific demands of the destination countries. This ensures that exporters are aware of and can comply with the importing country's requirements.

Additionally, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention) can provide some principles to consider in the regulatory process of the STOP Act:

- *International Advocacy and cooperation:* The UNESCO Convention encourages cooperation in areas such as information sharing, capacity-building, and the

establishment of bilateral and multilateral agreements. Drawing from this, the STOP Act regulations can utilize the UNESCO Convention to advocate for stronger international cooperation and commitment to combating the illicit trafficking of cultural items; and engage with other countries, organizations, and stakeholders to raise awareness, share success stories, and encourage broader adherence to best practices outlined in the Convention.

- *Promote strength of domestic law systems:* In addition, the federal government can encourage other countries to adopt measures similar to the STOP Act, which would regulate the export and trafficking of cultural items and promote repatriation processes. Encouraging countries to strengthen their own domestic laws and regulations can create a more comprehensive and harmonized global approach to combat the issue.

5(a)(3)(C): This provision provides for repatriation of any Item Prohibited from Exportation to be expeditiously repatriated under NAGPRA or ARPA. It is unclear how to achieve repatriation through ARPA, considering that generally NAGPRA is used for repatriation from excavations on federal or Tribal lands as well as for cultural items held by federal agencies and museums. If an item is to be repatriated based on another federal law or treaty, then legal and physical repatriation should follow simply and expeditiously to the affiliated Native Nation(s). Thus, regardless of what type of item is being returned, repatriation should be a consistent process in which consultation and the efficient physical handover of the item should occur as quickly as possible.

5(b)(1)(B): Any publication of a description of characteristics typical of cultural heritage should be general in nature and not require photographs or an exact description, unless a Native Nation consents to provide that information. The Convention on Cultural Property Implementation Act, 19 U.S.C. 2601 et seq., process for developing a Memorandum of Understanding provides an example of how a federal register notice is used to describe another country's heritage. The process must not be made more onerous than this.

Sec. 8. Native Working Group.

The Act does not provide for recoupment of expenses or other compensation for time and expertise for the individuals that are non-federal and part of the Native Working Group. The regulations must provide compensation as well as reimbursement of any expenses for these individuals.

State Department Questions:

- 1. What should the Department of State consider when determining the type of engagement to pursue with a foreign government regarding Native American tangible cultural heritage?**

Being newly enacted, it is likely that many relevant countries remain unaware of the STOP Act's existence. Thus, we ask that State notify foreign nations, such as France and other market countries, of the STOP Act's passage so they will begin monitoring imports and facilitating repatriations under their own domestic laws. Further, we ask that all parties to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1970 Convention), be notified of their obligations to facilitate repatriation of STOP Act items now

that the U.S. has taken necessary steps to protect against the export of Native cultural heritage, see id. at Art. 5, 6, 8, other countries have corresponding obligations, see id. at Art. 7, 9, 10, 13

We also ask that State request agreements from these signatory foreign nations that specify concrete measures the country will carry out to discourage commerce in items prohibited from export, encourage voluntary returns, and expand the market for contemporary Native art, as required by the STOP Act. 25 U.S.C. § 3073(c). Now that the United States has enacted the requisite domestic protections, parties to the UNESCO Convention are obligated under that international treaty to oppose the illicit import, export, and transfer of ownership of cultural property out of the United States with whatever means they have at their disposal, particularly by removing the causes of such practices, putting a stop to current practices, and helping to make the necessary reparations. 1970 Convention, at Art. 2. The United States may now call on other signatories, such as France, to participate in “a concerted international effort” to carry out “necessary concrete measures” that may include control of exports and imports, including via agreement. Id. at Art. 9.

As a starting point, State should amend all existing bilateral agreements and emergency actions already in place with other countries under the Convention on Cultural Property Implementation Act or otherwise. These agreements must be updated such that other countries are obligated to monitor imports and facilitate repatriations for STOP Act items. Moreover, the fact that a country may not be well known as a market country for Native cultural heritage should not stop the inquiries from State asking for more information about the location of Native cultural heritage in their museum or academic institutions and in the private or commercial markets: with any country State interacts with, the questions about Native cultural heritage must be part of the diplomatic processes.

State should work to gain a better understanding of other country’s domestic laws addressing monitoring imports of cultural property and facilitating that cultural property’s repatriation to its home country. State should coordinate with Interior to ensure that Interior’s export certification process is sufficient to utilize a particular country’s domestic laws.

2. What should the Department of State consider when determining which foreign governments and institutions to prioritize for engagement on the return of Native tangible cultural heritage?

It is unclear whether this question is limited to the STOP Act regulations or includes engagement of foreign institutions such as museums for the purposes of repatriation. The Department of State, with its inter-governmental as well as external partners such as the Association on American Indian Affairs, and including Native Nation consultation, must understand what countries’ laws are most advantageous for the return of Native cultural heritage. Developing appropriate processes first with countries whose laws are more amenable to the process will create successes that will reverberate not just within Native Country and the U.S., but also globally.

Second, a basic understanding of an institution’s collections and the geographic location where those collections were obtained, can target specific Native Nations that may be potentially affiliated with a collection. Requiring notice and participation from 574 federally recognized Native Nations is overburdensome when the majority of those Nations are not

connected to a collection. Furthermore, those Nations can work collectively and collaboratively together to achieve a more comprehensive repatriation of Ancestors and cultural items instead of focusing on only a few items at a time.

3. What should the Department of State consider when engaging with Tribes, foreign governments, and foreign institutions on the voluntary return of Native American tangible cultural heritage?

First and foremost, we urge State to work with Interior to designate a liaison within Interior to facilitate voluntary returns, as required by the STOP Act. 25 U.S.C. § 3074(a). This should be a primary contact within Interior to facilitate the relationship between the institution and the Native Nation(s). In addition, the liaison should be properly trained in the sensitive process of returning cultural heritage items. Such training should include assisting Native Nations in testing cultural heritage items for dangerous chemicals and assisting in the handling, moving, packing and shipping of items being repatriated internationally. Native cultural heritage items, including Ancestors, have often been subjected to chemicals by collectors or institutions for their preservation. These chemicals may be harmful to humans and can harm members of Native Nations that repatriate, handle, or otherwise reintegrate cultural heritage items for ceremonial use. Also, many Native cultural heritage items may be extremely fragile or sensitive, requiring careful and culturally appropriate handling, packing, and shipping preparations. When appropriate, the liaison should coordinate support from other federal agencies and domestic institutions, as well as from museums and other international institutions that have expertise in chemical testing or packaging and shipping of sensitive items, to return Native cultural heritage items safely and carefully.

State and the other agencies involved must work closely together once a Native Nation has succeeded in repatriation from abroad. If a cultural item contains protected animal parts, or for other reasons, permits or other requirements may arise for international transport, as well as domestic transport. This work to return an item home must be well coordinated and provide a transparent process that the Native Nation is able to direct if it desires to, or is otherwise substantively involved in.

Finally, State has a strong global presence that comes with an unmatched ability to raise awareness of the voluntary return provisions of the STOP Act and impending regulations. The draft regulations should lay out the voluntary return process and incentives for international and domestic dealers and buyers to repatriate cultural items, and we urge State to conduct public education campaigns about Native Nation repatriation efforts in order to reach as many of these dealers and buyers as possible.

As these regulations evolve, we kindly request the Department of the Interior and Department of State's careful consideration of the insights and recommendations presented in this document. By embracing a comprehensive approach that reflects the collective wisdom of Native Nations, we can ensure that the STOP Act not only stands as a formidable deterrent to cultural heritage trafficking but also as a testament to our collective dedication to honoring and preserving the heritage that defines us.

Thank you for your attention and consideration. If you have any questions or concerns, the

Association may be reached at (240) 314-7155, or to me directly at Shannon@IndianAffairs.org.

Yakoke (thank you),



Shannon O'Loughlin, Choctaw
CEO & Attorney

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