



USET

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December 20, 2024

Bryan Newland
Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Joan Mooney
Principal Deputy Assistant Secretary – Policy, Management, Budget
1849 C Street, NW
Washington, DC 20240

Submitted by email to consultation@bia.gov

Re: Comments on STOP Act Implementation Regulations, RIN 1076-AF78

Dear Assistant Secretary Newland and Principal Deputy Assistant Secretary Mooney,

We write on behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to provide comments to the U.S. Department of the Interior (Department) on its proposed rule implementing the Safeguard Tribal Objects of Patrimony (STOP) Act. We write in response to the Department's [Dear Tribal Leader Letter](#) signed October 18, 2024, initiating Tribal consultation and the Federal Register notice inviting comment, 89 Fed. Reg. 85078 (Oct. 25, 2024).

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

I. Support for STOP Act and Implementing Regulations

We strongly support the Department's proposed rule. Tribal Nations' right to practice our culture is an inherent human right recognized in international law, and the United States owes a trust and treaty obligation to protect that right.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is an international treaty addressing the international cultural property black market, and the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protection Act (ARPA) are domestic laws that help protect Tribal Nations' cultural heritage—but they did not talk to each other. There was a vacuum, as the Department acknowledged during its Tribal consultation sessions, and the STOP Act aimed to help fill that vacuum.

We applaud Congress for enacting the STOP Act in 2022. Pub. L. No. 117-258 (codified at 25 U.S.C. §§ 3071–3079). We now applaud the Department for implementing the STOP Act through these proposed regulations, 25 C.F.R. Part 1194, and for making sure Tribal Nations have been at the table via Tribal consultation from the very beginning.

We know this is a complex area, and we provide the following comments on the proposed rule to help strengthen its impact. But our support and enthusiasm for the Department's regulations cannot be overstated.

II. Call for Legislative Amendments and Full Implementation of NAGPRA and ARPA

We urge the Department to help Congress amend and strengthen NAGPRA and ARPA—which are interwoven into the STOP Act. See, e.g., 25 U.S.C. § 3072(1), (3), (5), (6) (incorporating definitions and trafficking prohibitions of NAGPRA and ARPA); 25 U.S.C. § 3073 (prohibiting export and requiring export certifications for items covered by NAGPRA and ARPA).

In particular, we call on the Department to assist Congress in amending both statutes to remove provenance limitations on their trafficking prohibitions. If an item qualifies as a “cultural item” under NAGPRA, 25 U.S.C. § 3001(3), or an “archaeological resource” under ARPA, 16 U.S.C. § 470bb(1), Congress should make illegal that item's trafficking, regardless of when the item left its Tribal community or federal lands. The existing provenance requirements often freeze out USET SPF Tribal Nations, since we have been dealing with colonization and theft of our sacred items since long before NAGPRA and ARPA were enacted.

We also call on the Department to apply the existing laws to the very fullest extent possible. This includes utilizing ARPA's back-door trafficking prohibition—whereby ARPA's trafficking prohibition applies to an archaeological resource that may have left its Tribal community or public lands before ARPA's enactment, but did so in violation of a different statute in place at that time. See 16 U.S.C. § 470ee(b)(2), (c).

III. Feedback on Proposed Rule

USET SPF is very supportive of the thoughtful and impactful provisions encompassed within the Department's proposed rule. For example, we appreciate the Department's recognition that Tribal Nations have an inherent right to our cultural heritage wherever it is located. 25 C.F.R. § 1194.1. We also appreciate that the federal government will defer to our expertise in implementing the STOP Act's processes, 25 C.F.R. § 1194.1, and that Native American traditional knowledge is defined as expert opinion, 25 C.F.R. § 1194.2. We celebrate the definition of consultation, including the statement that it strives for consensus. 25 C.F.R. §

1194.2. And we are glad to see that STOP Act implementation will be housed in the Assistant Secretary – Indian Affairs’ (AS-IA) Office, 89 Fed. Reg. 85078, 85079 (Oct. 25, 2024), and request this be made clear in the definition of “office” as well, 25 C.F.R. § 1194.2.

Below are some areas where we believe the proposed rule could be strengthened or brought into closer alignment with the STOP Act and its intent.

- **Facilitate Artist Receipts to Encourage the Art Market.**

The proposed rule leans heavily on “Tribal authorizations,” defining “Item Requiring Export Certification” to exclude items that possess such authorizations, 25 C.F.R. § 1194.2, and treating Tribal authorizations and export certifications as equivalent, 25 C.F.R. § 1194.201(b)(2), (e); *see also* 25 C.F.R. § 1194.101(d)(2) (stating authorization serves as evidence certification not required). The proposed rule further says a Tribal authorization is a letter or resolution issued by Tribal leadership and provided by the Tribal Nation to the Department. 25 C.F.R. § 1194.109; *see also* 25 C.F.R. § 1194.2.

It is true that the STOP Act provides for certifications authorizing exportation issued by Tribal Nations, which permit export without an export certification from the Department, and it does so by excluding such items from the definition of “Item Requiring Export Certification.” 25 U.S.C. § 3072(6)(B). The idea is that Tribal Nations may issue such certifications to their own people—even for items that are culturally sensitive, but otherwise require exportation for a culturally appropriate reason.

However, the STOP Act *also* directs the Department—when publishing a Federal Register notice providing guidance on the types of items that require an export certification—to make clear that, “in some circumstances, receipts or certifications issued by Indian Tribes . . . with a cultural affiliation with an item may be used as evidence to demonstrate a particular item does not qualify as an Item Requiring Export Certification.” 25 U.S.C. § 3073(b)(1)(B)(ii)(II). The idea here is that Tribal Nations will provide their artists with documentation or receipts that those artists can then provide to buyers along with their artwork. Such documentation would serve as evidence that the art the buyer purchased was not culturally significant enough to qualify as a cultural item or archaeological resource under NAGPRA or ARPA, and thus does not require an export certification. We believe utilizing such a system will help clarify which items are commercial art and thereby encourage the Native art market.

We call on the Department to clarify the use of artist documentation or receipts. We also urge the Department to provide a template to Tribal Nations for such documentation or receipts.

- **Clarify Coverage for all Federally Recognized Tribal Nations.**

The proposed rule limits the definition of “Native American” to Tribal Nations, people, or cultures that are “indigenous to the United States.” 25 C.F.R. § 1194.2.

While this definition aligns with the STOP Act and NAGPRA, 25 U.S.C. § 3072(7) (incorporating 25 U.S.C. § 3001(9)), many Tribal Nations that are federally recognized today originated or were otherwise present during first contact in Canada or Mexico and migrated across what are today the borders of our colonizers.

We ask that the Department clarify its definition of “Native American” also extends to the people—and their Ancestors—of all Tribal Nations that are federally recognized today. This change aligns with the proposed rule’s List Act definition of “Indian Tribe,” which includes all federally recognized Tribal Nations. 25 C.F.R. § 1194.2.

- **Provide a Mechanism for Export of Native Human Remains.**

The proposed rule prohibits from export all Native American human remains, 25 C.F.R. § 1194.2, and states that export certifications are not available for human remains, 25 C.F.R. § 1194.102(c). Similarly, the proposed rule defines “cultural item” to exclude human remains and defines “human remains” to exclude remains over which a museum or federal agency right of possession attaches. 25 C.F.R. § 1194.2.

We understand the discomfort in referring to Native remains as a type of NAGPRA cultural item, and we understand the desire to protect them from export. But NAGPRA itself defines cultural item to encompass human remains, 25 U.S.C. § 3001(3), and it affords human remains protections against trafficking, 18 U.S.C. § 1170—all of which is incorporated into the STOP Act’s export and certification requirements, 25 U.S.C. § 3072(3), (5)(A), (6)(A)(i); 25 U.S.C. § 3073. Similarly, ARPA defines archaeological resource to include human skeletal remains, 16 U.S.C. § 470bb(1), and it affords them protections against trafficking, 16 U.S.C. § 470ee—again, all of which is incorporated into the STOP Act, 25 U.S.C. § 3072(1), (5)(B), (6)(A)(ii); 25 U.S.C. § 3073. NAGPRA, ARPA, and the STOP Act all treat Native human remains as protected in similar ways to cultural items and archaeological resources, and none provides a blanket prohibition against export of human remains. This is important because some Tribal Nations may need to take their Ancestors across colonizer borders, such as those who originated in Canada or Mexico, for example, to bury their dead in their homelands.

We call on the Department to clarify that Tribal Nations may export their Ancestors’ and relatives remains under the parameters of the STOP Act.

- **Design the Database to Allow Tribal Nations to Flag Items and Input Information.**

The preamble to the proposed rule says the Department did not take up the request to include in the regulations a mechanism whereby Tribal Nations may flag items. 89 Fed. Reg. 85078, 85083 (Oct. 25, 2024). Yet, the proposed rule does provide for “[a]n Indian Tribe or a Native Hawaiian organization with an interest in a particular item requiring export certification [to] submit to the Office an export certification application,” 25 C.F.R. § 1194.103(a)(2), in addition to an exporter seeking to export an item.

Tribal Nations will be more equipped to monitor the database if they can flag items or geographic areas of interest within the database. And flagging missing items will allow Tribal Nations to notify federal officials of such items while maintaining their confidentiality from the public.

We call on the Department to ensure the database has the ability to flag items at a Tribal Nation’s request or to otherwise sort items by region, and without the need for a Tribal Nation to submit a full export certification application to do so.

- **Ensure the Repatriation of all STOP Act Items Aligns with NAGPRA and ARPA Procedures for Tribal Ownership.**

The proposed rule describes the Tribal Nation that should receive an item repatriated through the STOP Act, for example saying that, for archaeological resources under ARPA, an item should go to the Tribal Nation from whose Indian lands the item was removed. 25 C.F.R. § 1194.206.

But NAGPRA and ARPA require repatriation of *all* items under their purview, and they set forth which Tribal Nation should receive such items. For example, the STOP Act incorporates ARPA, which protects

archaeological resources removed from not only Indian lands but also public lands. 25 U.S.C. § 3072(5)(B) (incorporating 16 U.S.C. § 470ee).

We call on the Department to make clear that *all* items recovered under the STOP Act should be repatriated to Tribal Nations under the applicable ownership procedures of NAGPRA or ARPA, including items removed from federal or public lands.²

- **Ensure the STOP Act Applies to Items in Private Hands When Covered by NAGPRA's or ARPA's Trafficking Prohibitions.**

The preamble to the proposed rule states, in response to an inquiry about whether the STOP Act protects items found on public or private lands, that “items from private lands outside the exterior boundaries of a reservation are outside the scope of the STOP Act and this regulation.” 89 Fed. Reg. 85078, 85086 (Oct. 25, 2024).

But the STOP Act incorporates NAGPRA and ARPA, which themselves prohibit the trafficking of cultural items and archaeological resources now held in private hands when those statutes' provenance requirements are met. 25 U.S.C. § 3072(5) (incorporating 18 U.S.C. § 1170 and 16 U.S.C. § 470ee).

We call on the Department to clarify in its final rule that the STOP Act extends to all NAGPRA cultural items and ARPA Native American archaeological resources whose trafficking is prohibited domestically—no matter where those items are now located.

- **Protect Against Criminals' Use of Export Certifications to Defend Against Federal Prosecutions.**

The preamble to the proposed rule says the Department did not address in its regulations the request for export certifications to explicitly state they do not serve as evidence that the item is lawfully held. 89 Fed. Reg. 85078, 85082 (Oct. 25, 2024).

Such a statement is important because export certifications are issued through a truncated timeline, likely resulting in some items wrongfully receiving export certifications when their possession and/or sale is prohibited by NAGPRA, ARPA, or other law. Those responsible for prosecutions have expressed concern that they will see export certifications used by defendants in prosecutions.

We call on the Department to require in the regulations that export certifications contain language stating they do not affirmatively establish an item's legality.

- **Require Photos with Export Certification Applications.**

The proposed rule notes that exporters need not upload a photo with an application for an export certification if such a photo is not culturally appropriate. 25 C.F.R. § 1194.103(b)(2)(i).

Yet, the STOP Act requires a photo. 25 U.S.C. § 3073(b)(3)(A)(iii)(I). And a photo is often the best way for a Tribal Nation to identify its culturally sensitive items. Further, a non-Native exporter will not have the expertise to know whether uploading a photo is culturally appropriate for a particular Tribal Nation.

² Additionally, there should be a mechanism for reinterment or return to a designated entity without the need for a Tribal Nation to take physical custody of the item when doing so would be culturally inappropriate.

We urge the Department to require non-Tribal exporters to upload photos with their applications. At the same time, we call on the Department to make sure Tribal Nations can request such photos be immediately removed should their upload be culturally inappropriate.

- **Clarify Duty of Care for Detained Items.**

The proposed rule discusses how Customs and Border Patrol (CBP) may detain items, 25 C.F.R. § 1194.201(j), and how the AS-IA Office takes and holds those items in consultation with Tribal Nations, 25 C.F.R. § 1194.202(d).

Regardless of the length of time an item is with CBP, all cultural heritage items must be treated with respect and cared for as culturally appropriate.

We ask that the Department make clear within the regulations that CBP and the AS-IA Office must meet the duty of care otherwise required for items covered by NAGPRA, as set forth at 43 C.F.R. § 10.1(d), or set other standards in consultation with Tribal Nations.

- **Do Not Allow Those Who Abandon Items to Receive Safe Harbor.**

The proposed rule notes that abandonment through failure to retrieve a detained item may qualify as a voluntary return and for safe harbor from prosecution. 25 C.F.R. § 1194.201(i).

The STOP Act provides a safe harbor from prosecution for those who voluntarily return items, but it does not reference abandonment as a means for accessing the safe harbor, instead requiring actual voluntary return or giving direction for a voluntary return. 25 U.S.C. § 3073(b)(5)(D). People who abandon items that they attempted to export but that were caught should not fall under the safe harbor, as this could create an incentive to attempt to export items in the hopes they make it through.

We ask that the Department amend the regulations so that abandonment does not qualify as a voluntary return and thus does not create a safe harbor from prosecution. Such revision would reflect that abandonment is not explicitly discussed within the regulation's safe harbor provision. 25 C.F.R. § 1194.204.

- **Do Not Mislable Exporter Engagement with Tribal Nations as Tribal Consultation.**

The proposed rule requires an exporter to submit evidence with an export certification application that they engaged in Tribal consultation. 25 C.F.R. § 1194.103(b)(2)(v); *see also* 25 C.F.R. § 1194.403(a) (referring to consultation within voluntary return framework).

While we support the Department's requirement that exporters engage with relevant Tribal Nations and otherwise submit evidence to demonstrate that they hold an item legally, *see, e.g.,* 25 C.F.R. § 1194.103(b)(2)(vii), Tribal consultation is a term of art referencing nation-to-nation dialogue between the federal government and a Tribal Nation.

We urge the Department to use a different term for engagement between exporters and Tribal Nations. We also ask that the regulations make clear Tribal Nations should contact the Department, and the Department will take action, if Tribal Nations experience any bad actors harassing or attempting to extract wrongful documentation from them under the guise of STOP Act consultation.

- **Clarify the Penalty for Exporting an Item Prohibited from Export.**

The proposed rule sets a significantly lower civil penalty amount for attempting to export an item that is prohibited from export than it does for attempting to export an item that otherwise requires an export certification. 25 C.F.R. § 1194.205.

We ask that the Department clarify that this second layer of penalty should be stacked on the first and paired with criminal prosecution.

- **Protect a Tribal Nation’s Right to Appeal an Export Certification Decision.**

The proposed rule discusses an exporter’s right to appeal a decision not to issue an export certification or a decision to detain an item, 25 C.F.R. § 1194.301, and it states those appeals must happen within 45 days, 25 C.F.R. § 1194.302(a).

The proposed rule does not make clear that a Tribal Nation can appeal a decision by the Department to issue an export certification or to release an item back to an exporter. See 25 C.F.R. 1194, Subpart D.

We call on the Department to clarify that a Tribal Nation also has appeal rights and, further, that the 45-day appeal window does not apply to a Tribal Nation’s rights with regard to recovering its sacred items.

- **Clarify that the FOIA Exemption is Available Regardless of Whether Data is Uploaded into the Database.**

The proposed rule only references the Freedom of Information Act (FOIA) exemption in relation to information uploaded into the export certification database. 25 C.F.R. § 1194.107(b).

But the STOP Act does not limit the FOIA exemption to information in the database, and instead it contains an expansive FOIA exemption meant to encourage the flow of sensitive information necessary to make the STOP Act function as designed. 25 U.S.C. § 3077(a). Further, practically speaking, sensitive information may end up in the hands of the federal government through other means. For example, the proposed rule calls for CBP and the Department to share information and pictures of items. 25 C.F.R. § 1194.201(d).

We call on the Department to uncouple the FOIA exemption from the database regulatory provisions and to describe the exemption as applicable more broadly.

- **Acknowledge that the Voluntary Return Provision Applies Beyond NAGPRA Items.**

The proposed rule says the goal of the voluntary return framework is “to facilitate the return of cultural items and Native American human remains to Indian Tribes and Native Hawaiian organizations.” 25 C.F.R. § 1194.401.

But the STOP Act’s voluntary return provision is intentionally broader than only NAGPRA-protected cultural items—and it covers all “tangible cultural heritage.” 25 U.S.C. § 3074. Tangible cultural heritage is an intentionally sweeping term used in the international arena. See 25 U.S.C. § 3072(10).

We call on the Department to clarify the broad application—through Congress’s design—of the voluntary return framework.

- **Clarify that NAGPRA Repatriation Trumps Voluntary Return, Including for Federal Agencies.**

The proposed rule says it does not subsume museum repatriation under NAGPRA. 25 C.F.R. § 1194.401.

But all NAGPRA repatriation obligations remain alive and valid after passage of the STOP Act, including those of federal agencies. See, e.g., 25 U.S.C. § 3074(f) (stating voluntary return provision does not apply when a cultural item is covered by NAGPRA's repatriation provision at 25 U.S.C. § 3005, which applies to not only museums but also federal agencies).

We ask the Department to clarify that NAGPRA's repatriation requirements for federal agencies remain in effect after the STOP Act's enactment.

IV. Conclusion

Preventing international trafficking of Tribal cultural heritage items has been a bipartisan issue. Indeed, Alaska congressman Don Young was a longtime champion of the STOP Act, and the White House during the Trump Administration was supportive of passage of the STOP Act and facilitated important international repatriations. We are confident this important work will continue under the next Administration.

Please count USET SPF as a partner in your efforts to advance Tribal sovereignty and deliver on trust and treaty obligations through implementation of the STOP Act. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at lmalerba@usetinc.org, and Ms. Katie Klass, USET SPF General Counsel, at kklass@usetinc.org.

Sincerely,



Chief Kirk Francis
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USET SPF



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