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4337-15

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 1194

[Docket No. BIA-2024-0002; 245A2100DD/AAKC001030/A0A501010.999900]

RIN 1076-AF78

Safeguard Tribal Objects of Patrimony

AGENCY: Office of the Assistant Secretary, Indian Affairs, Interior.

ACTION: Proposed Rule.

SUMMARY: The Department of the Interior (Department) proposes new regulations that provide a framework to prevent the export for sale in foreign countries of Native American cultural items that are held in violation of current Federal laws; to repatriate such items from individuals and organizations having such items; and to improve coordination among Federal agencies, Indian Tribes, and Native Hawaiian organizations seeking to prevent the export and sale, and support the repatriation, of such items. The proposed rule would establish an export certification system, set forth procedures for detention and repatriation of items subject to the rule, establish a framework for voluntary return of items subject to the rule, and establish interagency and Native working groups.

DATES:

- *Proposed Regulations:* Interested parties are invited to submit comments, which must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

- *Tribal Consultation Sessions:* The Department of the Interior will conduct consultation sessions with Indian Tribes virtually on [Month, Day, Year, Time].
- *Native Hawaiian Consultation Sessions:* The Department of the Interior will conduct consultation sessions with the Native Hawaiian Community virtually on [Month, Day, Year, Time].
- *Information Collection Requirements:* If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the *Federal Register*. Therefore, comments should be submitted to OMB by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES:

- *Proposed Regulations:* You may submit comments on the proposed rule, and information collection requirements in the proposed rule, by any one of the following methods.
 - Please visit <https://www.regulations.gov/docket/BIA-2024-0002> or <https://www.regulations.gov> and enter “RIN 1076–AF78” in the search box and click “Search.” Follow the instructions for sending comments.
 - Mail: Please mail comments to Indian Affairs, RACA, 1001 Indian School Road NW, Suite 229, Albuquerque, NM 87104.
- *Consultation Sessions:* See the **SUPPLEMENTARY INFORMATION** section of this document for locations of public meetings and consultation sessions.

- *Information Collection Requirements:* Written comments and suggestions on the information collection requirements should be submitted to OMB at <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review - Open for Public Comments” and then scrolling down to the “Department of the Interior.” Please also provide a copy of your comments to DOI at consultation@bia.gov; and reference “OMB Control Number 1076–NEW STOP Act” in the subject line of your email.
- *Accessibility:* On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals can obtain this document in an alternate format, usable by people with disabilities, at the Office of the Assistant Secretary – Indian Affairs, Room 4660, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Oliver Whaley, Director, Office of Regulatory Affairs and Collaborative Action (RACA), Office of the Assistant Secretary – Indian Affairs; Department of the Interior, telephone (202) 738-6065, consultation@bia.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: This proposed rule is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs (Assistant Secretary; AS–IA) by 209 DM 8.

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I. Statutory Authority and Background

Congress empowered the Secretary of the Interior, under section 10 of the Safeguard Tribal Objects of Patrimony Act (STOP Act) of 2021, Pub. L. No. 117-258, codified at 25 U.S.C. 3071 *et seq.*, to “promulgate rules and regulations to carry out this Act” in consultation with the Secretary of State, the Secretary of Homeland Security, and the Attorney General, and after consultation with Indian Tribes and Native Hawaiian organizations. *See* 25 U.S.C. 3078. The proposed regulations at 25 CFR part 1194 implement this authority.

The Department of the Interior (Department) issued a Dear Tribal Leader Letter inviting input on the development of draft regulations for the STOP Act on April 22, 2023, and a Dear Native Hawaiian Community Leader Letter inviting input on the development of draft regulations for the STOP Act on July 20, 2023. The Department held five consultation sessions with Indian Tribes, and two consultation sessions with the Native Hawaiian Community. The Department convened with Indian Tribes for a first consultation in person on May 31, 2023, at U.S. Geological Survey Oklahoma – Texas Walker Science Center in Oklahoma City, OK; for a second consultation in person on July 14, 2023, at the Bureau of Land Management Fairbanks District Office, in Fairbanks, AK; and for a fifth consultation in person on August 18, 2023, at the Bureau of Land Management New Mexico State Office, in Santa Fe, New Mexico. The Department conducted the third and fourth consultations with Indian Tribes virtually on

Zoom on July 27, 2023, and August 8, 2023, respectively. The Department convened the first consultation with the Native Hawaiian Community in person on August 23, 2023, at the State of Hawai‘i Office of Hawaiian Affairs in Honolulu, HI, and conducted the next consultation virtually on Zoom on August 24, 2023. The Department of State and the Department of Homeland Security joined several of these consultations. Following the consultation sessions, the Department accepted written comments until September 1, 2023.

Thereafter, beginning on August 31, 2023, the Department convened multiple times per week with representatives of the Secretary of State, the Secretary of Homeland Security, and the Attorney General, to develop the proposed rule based on the feedback received in consultation.

II. Public Comments on the Development of the Rule and Response to Comments

Interior asked for answers to three framing questions during the consultations. Individual comments were separated and categorized after the closing of the comment period on September 1, 2023. In total, the submissions were separated into 501 individual comments. Generally, around 131 comments were exclusively supportive, no comments were not supportive, and 370 provided constructive feedback on how the rule may be improved. The Assistant Secretary for Indian Affairs (AS – IA) has decided to proceed to the proposed rule stage after careful consideration of all comments. The AS – IA’s responses to significant comments that provide constructive feedback, were neutral, or provided general support along with constructive criticism are detailed below. No responses are provided for comments that were exclusively supportive.

A. Framing Question One: Which Assistant Secretary, Bureau or Office within the Department of the Interior should be responsible for the STOP Act program?

1. Comment: Fourteen Tribes and organizations recommended that the STOP Act program be housed within the Assistant Secretary-Indian Affairs. Five Tribes recommended that the STOP Act program be housed within the Bureau of Indian Affairs, Office of Justice Services. Four Tribes and organizations asked for one office to take central control over implementation without identifying a specific office. One commenter recommended the National Park Service. Some of these comments came from the same letter.

Response: The Department believes the balance of comments support placing the STOP Act program within the Office of the Assistant Secretary-Indian Affairs.

2. Comment: One Tribe requested more information on the roles and responsibilities of the various offices and bureaus within the Department because the framing question alone was not helpful.

Response: The Department referred this individual to the information about each of the Bureaus and Offices for the Department of the Interior, which may be found at this link: <https://www.doi.gov/bureaus>

3. Comment: One commenter asked that the Office of Native Hawaiian Relations (ONHR) view itself as a centralized agency in this process.

Response: The Department appreciates ONHR's engagement in the drafting of the proposed rule and looks forward to ONHR's active role in implementation of these regulations following publication of a final rule.

B. Framing Question Two: What types of interagency agreements would be helpful for the program and for Act implementation?

4. *Comment:* One Tribe asked that the Department of State prioritize engagement with any foreign government or institution that has been identified by Tribes as holding exported cultural items or ones that are primary markets for items. One Tribe commented that foreign governments and entities that are open to voluntarily returning items should require a different level of engagement than those who are not willing to engage on repatriation.

Response: The Department has conferred with the Department of State about the substance of these comments. The Department of State already engages with international institutions on repatriation and will continue this work in line with provisions in the STOP Act.

5. *Comment:* One organization and one Tribe asked that formation of any agreements include Tribal consultation as early in the process of development as possible to ensure seamless coordination and harmonization of efforts.

Response: The Department agrees. As interagency agreements are formed involving the Department, the Department commits to consultation to the degree possible.

6. *Comment:* Two commenters asked that the United States military be part of any interagency working group.

Response: The Department appreciates this feedback and will reach out to the Department of Defense to seek engagement in implementation of a final rule.

7. *Comment:* One commenter expressed that exporters who act in violation of the STOP Act do not do so alone, and the Department should consult with experts to examine whether the Racketeer Influenced and Corrupt Organizations Act might apply in this situation.

Response: The process for an export certification in subpart B of the proposed regulations, including discussions about potential exports without a certification, was developed with input from the Department of Justice.

8. *Comment:* One commenter expressed that the STOP Act cannot be a barrier to repatriation and that getting through customs would continue to be difficult.

Response: The process for voluntary return in subpart E of the proposed regulations was developed with input from the Departments of State and Homeland Security, including constituent agency, U.S. Customs and Border Protection.

9. *Comment:* A Tribe asked that the Department of State notify foreign nations of the STOP Act's passage to facilitate repatriations under other nations' domestic laws and that the Department of State designate a liaison to facilitate voluntary returns. A Tribe and a Tribal Organization asked that the implementing regulations utilize the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention) to advocate for stronger international cooperation, and to encourage other countries to adopt measures similar to the STOP Act.

Response: The STOP Act, and its implementing regulations, apply primarily to items that a putative exporter seeks to take out of the United States prior to their exit from the country. The STOP Act does not contain mechanisms to persuade or obligate

international governments or institutions. The 1970 Convention provides a common framework of measures each State Party may take, including some included in the STOP Act, such as the prohibition of exportation of designated cultural property and the establishment of export certificates. The Department works with the Department of State to raise awareness of the STOP Act in order to help other countries that are party to the 1970 Convention to identify items that are prohibited from exportation under the Act and, therefore, may be restricted from import into those countries. The Department of State will designate a liaison to facilitate voluntary returns.

10. Comment: One commenter expressed that international engagement will be important based on processes that exist in international conventions like a Hague Convention that was unspecified by the author. The commenter expressed that establishing such processes could help with international borders.

Response: The Department appreciates this feedback and will confer with the Department of State on types of international engagement.

11. Comment: A collective of Tribes asked that the Department of Justice direct all United States Attorneys to prosecute violations of 25 U.S.C. 3073(a)(2) that are referred to them by the Department of the Interior, the Department of Homeland Security, or the Federal Bureau of Investigation. The same collective asked that the Department of Justice add the STOP Act, NAGPRA, and ARPA to the list of statutes enforced by the Department of Justice Environmental Crimes Section.

Response: This comment is beyond the scope of these regulations. However, the Department has conferred with the Department of Justice about the substance of these comments.

12. *Comment:* One Tribal commenter asked for memoranda of understanding (MOUs) among DOI's National Park Service, Insular and International Affairs, and the Office of the Inspector General that lay out the purpose, duties and responsibilities, standards and procedures, reporting requirements, confidentiality provisions, and other resolutions. One Tribal commenter proposed an agreement between the Departments of State and Homeland Security that focused upon NAGPRA and repatriation and international repatriation. One Tribal commenter proposed a memorandum between the State Department and the Federal Bureau of Investigation that focused upon international auctions. A Tribe proposed an agreement among the National NAGPRA Program, NAGPRA Review Committee, Cultural Heritage Coordinating Committee, Bureau of Indian Affairs' Office of Justice Services' Cultural Resources Unit, and all other relevant Federal entities. A Tribe and a Tribal organization proposed cooperative agreements be established among the Department, other Federal agencies, Native Nations, and Native organizations and institutions. A Tribe proposed an agreement among the NPS, the Transportation Security Administration, the United States Forest Service, and the Bureau of Land Management. Two Tribes proposed an agreement among the NAGPRA Program, the Cultural Heritage Coordinating Committee established by the Protect and Preserve International Cultural Property Act, the Bureau of Indian Affairs' Office of Justice Services' Cultural Resources Unit, and all other relevant Federal entities. A collective of Tribes proposed an agreement among the Department of Commerce, Department of Homeland Security, Department of Justice, and Department of State regarding the export of Native American cultural items. A Tribe asked that Cooperative Agreements be established among the Interior, agencies, and Tribal nations to foster

collaboration, training, documentation, outreach, and education. A Tribe requests agreements so that the Department of Commerce creates a “cultural items” and “archaeological resource” list; Homeland Security notifies international travelers and shippers and instructs all baggage and cargo inspectors to prepare to identify any cultural items or archaeological resources; Justice notifies all attorneys of their responsibilities to prosecute violations referred to them; and the Department asks Congress for three million dollars for STOP Act implementation. A Tribe commented that Tribes may encounter problems importing items back into the United States because of protected animal parts in the items, or for other related reasons, and asks that interagency agreements provide a way to avoid seizure or delays.

Response: The Department is grateful for the breadth and variety of feedback received about parties to interagency agreements. Given the diversity of agreements proposed, the Department will carefully evaluate the efficacy and need for each of these agreements upon implementation of the proposed rule. The scope of work for the Interagency Working Group, set forth at proposed subpart F, includes coordination of policy-making processes to facilitate repatriation. The Department’s goal is to establish broad regulatory authority, in alignment with statutory authority, to allow for creation of inter-Departmental MOUs, as appropriate, as these commenters have proposed.

13. Comment: A Tribe asked that any interagency agreements, when read with the regulations, include all STOP Act action items and the two should be written to carry out all action items needed. A Tribal organization and a Tribe asked that any agreements include a step-by-step guide, contacts for each agency with one single Federal point of contact for Tribes, provisions that encourage Tribal collaboration with all agencies,

encourage the Native work group to advise Federal agencies, facilitate voluntary return, and provide for Federal monitoring. Another Tribe asked that agreements be set up quickly and outline commitments of resources and responsibilities for agencies involved, include a single point of contact for Tribes, and a regular time period for review and revisions. Three Tribes and a Tribal organization asked that interagency agreements include a step-by-step guide or flow chart, and contacts for each agency. A Tribe asked that interagency agreements should provide for regular and mandatory meetings co-led by the Native Working Group and Interagency Working Group. A Tribe asked that any agreements include training, funding to Tribes for collaboration and travel to retrieve sacred items, coordination among the various agencies, a framework for the safe return of items, and guidelines and policies for how sacred items are returned, including addressing privacy, photography, media requests, and agency information provided to the public. A Tribe asked that any agreements include appropriate steps and a chain of command, mandatory training for agency officials and staff (semi-annual), consultation requirements with Tribes, and agreements designed to facilitate the importation of items voluntarily returned from foreign nations. A Tribe asked that any agreements address safeguarding, protection and inappropriate disclosure, or facilitation of misappropriation or misuse of tangible or intangible cultural heritage. A Native Hawaiian organization asked for an interagency agreement under which the Executive Branch may engage counterpart governmental entities for foreign countries directly and advocate for the return of stolen cultural objects; and call on respective U.S. Embassies to engage appropriate international government authorities and actively negotiate a process for the return of cultural objects.

Response: The Department is grateful for the breadth and variety of feedback received about the contents of interagency agreements. Given the diversity of agreements proposed, the Department will carefully evaluate the efficacy and what should go into each agreement upon implementation of the proposed rule. The scope of work for the Interagency Working Group, set forth at proposed subpart F, includes coordination of policy-making processes to facilitate repatriation. The Department's goal is to establish broad regulatory authority, in alignment with statutory authority, to allow for specific inclusion in various inter-Departmental MOUs such as those commenters have proposed.

14. Comment: A Tribe and a Tribal organization asked that interagency consultation agreements be established to provide meaningful consultation with Tribes and to provide consistent policies for Federal agencies. A Tribe asked that 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. A Tribe asked that the Department follow the Interagency Consultation Policy and Agreement to ensure meaningful consultation with Indian Tribes, to address frequency of consultation, involvement of agencies, and expertise related to protection and repatriation of cultural heritage.

Response: The Department is grateful for the breadth and variety of feedback received about the contents of interagency consultation agreements. The STOP Act program will maintain a robust consultation function and use of such an agreement may be practical. The scope of work for the Interagency Working Group, set forth at

proposed subpart F, includes coordination of policy-making processes to facilitate repatriation. The Department's goal is to establish broad regulatory authority, in alignment with statutory authority, to allow for potential use of an interagency consultation agreement as these commenters have proposed.

15. Comment: A Tribe asked that any interagency agreements include shared jurisdiction or deputization between Tribal Historic Preservation Officers (THPO) and the Department.

Response: This comment is beyond the scope of these regulations; however, the Department has conferred with the Department of Justice about the substance of this comment.

16. Comment: A collective of Tribes commented that the Department of Commerce should immediately amend the Commerce Control List to include "cultural item" as defined by 18 U.S.C. 1170 and 25 U.S.C. 3001 et seq., and "archaeological resource" as defined at 16 U.S.C. 470ee.

Response: The Department has conferred with the Department of Commerce about the substance of this comment.

17. Comment: A Native Hawaiian organization asked that the Interagency Working Group prioritize work on programs and policies to require that museums better establish the provenance of objects within their collections. The Native Hawaiian organization requests that the Department of State call for a closer examination of existing provenance records at international institutions for cultural objects and human remains that would be subject to NAGPRA in domestic institutions as part of this

agreement. The Native Hawaiian organization notes that these updates may implicate updates to the NAGPRA Program.

Response: The Department will relay this request to the Interagency Working Group upon its formal establishment. The Department has conferred with the Department of State and the National NAGPRA Program about the balance of this comment.

C. Framing Question Three: What should or should not be included in the draft regulations?

18. *Comment:* Several Tribes and Tribal organizations and a Native Hawaiian organization reiterated that cultural resources have been stolen from their homes for many years, resulting in long lasting and devastating harm.

Response: The Department is grateful for this comment and bore it in mind throughout the drafting of the proposed rule.

19. *Comment:* Several Tribes and Tribal organizations and a Native Hawaiian organization expressed a desire that implementation occur immediately or as soon as possible, and that the Department takes perspective of all Tribes into account and consults as much as possible in the process. One Tribe noted the need to consider what can be done immediately, given that there are items being trafficked currently and encouraged the Department to “chew gum and walk at the same time.”

Response: The Department appreciates the need to move quickly, and this is one consideration for the Department issuing a proposed rule rather than an interim rule at this time. The Department looks forward to consulting with Tribes on this proposed rule and on implementation of the STOP Act as set forth in the proposed rule.

20. *Comment:* One organization and two Tribes provided recommendations and suggested language to be included in the purpose section of the regulations. One organization recommended parallel language to the Department's regulations implementing the Native American Graves Protection and Repatriation Act. Another Tribe recommended the regulations include information on the STOP Act, its passage, and a description of its provisions.

Response: The Department appreciates this feedback. The Department has incorporated the Tribal suggestion to the degree possible to the Introduction as set forth in proposed § 11941.1.

21. *Comment:* One Tribe commented about the need for sections on fines and penalties to hold auction houses accountable. The same Tribe explained its desire for a mechanism for Tribes to receive the names, addresses, and information about where the items are going so that the items do not go underground. This will aid Tribes in learning the history of the item and how it moved into commerce. The Tribe commented that this process should be triggered when items are taken outside of reservation boundaries and would require sellers to remove items from the auction block.

Response: The proposed schedule and process for civil penalties and fines appears at proposed § 1194.205. With regard to the mechanism requested, the text of the STOP Act does not provide authority for the Department to obtain information about an item after the sale of that item has been completed. This means the Department's regulations implementing the STOP Act consider primarily the detention and recovery of items prior to export, and do not opine on collection of information about items that have been exported.

22. *Comment:* One Tribal organization asked that enforcement of the STOP Act commence immediately, even though regulations were still forthcoming. A Tribe emphasized that heavy criminal charges would represent a strong incentive to disincentivize the illicit trade of Native artifacts.

Response: The STOP Act was signed into law in December 2022. The law increased criminal penalties for stealing and illegally trafficking in Tribal cultural property. The increased criminal penalties are effective immediately, despite the need for regulations to implement other parts of the STOP Act. Additionally, prosecutors may continue to use other existing Federal criminal laws or Federal civil forfeiture proceedings, as appropriate, to disincentivize the illicit trade of native artifacts.

23. *Comment:* Two Tribes and one Tribal organization asked that the Department ensure that a process to revoke wrongly issued export certificates is part of any proposed rule. This is because revocation would be important under treaties and other countries' laws to prevent defendants from presenting evidence in domestic prosecutions for illegal trafficking. The same Tribal organization asked that export certifications contain language that they do not affirmatively establish an item's legality.

Response: The Department appreciates this feedback. Procedures for revocation of an export certification appear at proposed § 1194.106. The Department anticipates consulting with Tribes and Native Hawaiian organizations on the contents of certification applications, which may include issues related to the legality of an item for which a certification is sought.

24. *Comment:* Two Tribes asked that the proposed rule include processes for the Department to assess civil penalties against individuals attempting to export items

without an export certification. A Tribal collective asked that the Department implement the civil penalties, and related appeals section, as an interim rule. The same Tribal collective, another Tribal organization, and a Tribe asked that civil penalties be uniformly applied and sufficient to completely remove any financial incentive to illegally export, attempt to export, or otherwise transport any item requiring export certification.

Response: The Department appreciates this feedback. Procedures for assessment of civil penalties appear at proposed § 1194.205. The Department is issuing a proposed rule rather than an interim rule at this time.

25. *Comment:* A collective of Tribes asked that the Department be sure that Tribes and Native Hawaiian organizations receive adequate notice of attempted export of objects prohibited from exportation.

Response: The Department appreciates this feedback. The Department anticipates providing notice using current mechanisms for consultation notices, including contact lists directed to THPOs. The Department welcomes methods to improve its consultation processes.

26. *Comment:* A Tribe comments that an item attempted to be exported without an export certification should be promptly returned to an Indian Tribe rather than through a museum.

Response: The Department agrees. In the event of seizure of an item, return of the item to a Tribe will be affected pursuant to NAGPRA or ARPA under proposed § 1194.206.

27. *Comment:* A Tribe and a Tribal organization asked that appeals processes be assigned to the Department's Office of Hearing and Appeals for adjudication.

Response: The Department appreciates this feedback. The Department has incorporated the Tribal suggestion to the Tribal Authorization as set forth in proposed subpart D.

28. *Comment:* Two Tribes and two Tribal organizations provided recommendations on the contents of definitions of the terms “Any other Federal law or treaty,” “consultation,” “cultural affiliation,” “tangible cultural heritage,” “repatriation,” “voluntary return,” “credible evidence,” and “Indian lands.”

Response: The Department is grateful for this comment and the Department sought to incorporate as much of this feedback as possible in the proposed definitions section at proposed § 1194.2.

29. *Comment:* A Tribe asked how the Department will address potential conflicts between claimants of lineal descendent priority versus Tribal priority, as established by NAGPRA.

Response: The Department’s regulations implementing the STOP Act consider primarily the detention and recovery of items prior to export, and do not opine on the implementation of NAGPRA. Even if this comment addressed a matter germane to the STOP Act regulations, the Department generally is not able to provide pre-decisional guidance or to opine on competing claims in the hypothetical.

30. *Comment:* Several Tribes and a Tribal organization expressed thoughts about the criteria and contents of an export certification application and permit. These included, among others, establishing criteria for granting export certification permits to individuals or organizations with demonstrated expertise and a legitimate need to handle and export cultural items, requiring exporters to exercise reasonable care in verifying the

legal origin and compliance of cultural items, and consulting with Indian Tribes about the export certification application.

Response: The Department appreciates this feedback. The Department will develop the form by which an applicant Requests an Export Certification in consultation with interested Tribes.

31. *Comment:* Three Tribes and one Tribal consortium asked for a high degree of detail about how Tribes may access and view the database of export certification applications. One Tribe asked for the ability to limit sensitive information in databases. One Tribe expressed concern about how the database would operate with respect to FOIA. An individual expressed concern about the database and asked for a focus on process instead. Another Tribe asked for the ability to flag particular items in the database that a Tribe identifies as sensitive or missing and circulating in the marketplace. An additional Tribe asked for the ability to flag items that a Tribe has learned are in circulation at present.

Response: The Department has endeavored to include as much detail as is possible about the database of export certification applications in the regulations. The Act's FOIA exemption is codified in regulation at proposed § 1194.107(b), and Tribes may request removal of any application from the database. At this proposed stage, all data to be included in the database is categorized similarly and no identifiers are proposed. The Department anticipates generating more information, including possible trainings, on the database of export certification applications following publication of a final rule.

32. *Comment:* A Tribal consortium asked for a receipt template for Tribes to issue to purchasers that would exempt an item from these regulations.

Response: The Department has incorporated the Tribal suggestion to the Tribal Authorization as set forth in proposed § 1194.109.

33. *Comment:* A Tribe asked that export certification fees not apply to Indian Tribes.

Response: The Department has implemented a process for Tribal Authorization as set forth in proposed § 1194.109. Such a Tribal Authorization would exempt an item from the need for an export certification, and the attendant fee.

34. *Comment:* One Tribe asked for a process by which a revocation of an export certification could be affected without harming any DOJ processes.

Response: The Department has included a provision in the regulations related to revocation of an export certification. The Department further notes that any administrative revocation of an export certification is, based upon these regulations, an administrative procedure different from actions law enforcement may take as part of an active Federal criminal or civil investigation. The Department will also be closely coordinating with the Department of Justice in implementing the STOP Act.

35. *Comment:* Two Tribes and an organization asked for a presumption that if an item is cultural heritage or fits the category of archaeological resource under ARPA, that item is held and not provided an Export Certification until further evidence is shown that the exporter has a right of possession.

Response: The Department has proposed that an applicant for Export Certification must demonstrate the right of possession as part of the application process.

36. *Comment:* A Tribe asked that protection for items under the STOP Act include both objects of matrimony and patrimony and that Tribes be the only ones determining which items are deserving of protection. Another Tribe asked that Tribal consultation inform which items are categorized as cultural items under the STOP Act.

Response: The Department agrees. The STOP Act applies to all “cultural items” as that term is defined in the Native American Graves Protection and Repatriation Act (NAGPRA) (including objects of cultural patrimony) and the proposed rule contemplates alerting Tribes for any request for an export certification and, to the degree possible, treating as determinative Tribal input on the application.

37. *Comment:* A Tribe and two Tribal consortia asked for development of public education campaigns to encourage the purchase of contemporary Native art and emphasize the illegality of taking certain artifacts. A Tribe asked for the Department of State to conduct public awareness campaigns about Tribal repatriation efforts. A Tribe asked for incentives for international dealers and buyers to repatriate items.

Response: The Department does not propose an educational campaign nor an incentive program as part of the proposed regulatory text. The Department will explore these ideas as possible tools following publication of a final rule.

38. *Comment:* Three Tribes and a Tribal organization commented that the Department should not create an exhaustive list of items protected under the STOP Act.

Response: The Department agrees. The Department intends to publish a description of characteristics typical of Items Requiring Export Certification rather than a list of items, as set forth in proposed § 1194.101.

39. *Comment:* A Tribe and a Tribal organization asked that the Federal Register Notice be created in coordination with Indian Tribes. Both commenters suggested that this Notice be a live document and be updated over time. Both commenters asked that the Notice include practical assistance respectful to the fluidity of cultural items and be specific enough to notify exporters, customs officers and others encountering potentially sensitive items.

Response: The Department has incorporated the Tribal suggestion into the Federal Register Notice regarding which items may require an export certification as set forth in proposed § 1194.101.

40. *Comment:* A Tribe asked for the ability to request an *in camera* hearing in any administrative appeal or penalty phase associated with a violation of the STOP Act to shield from the public items subject to these proceedings, because many cultural items can only be seen and handled by particular individuals. The Tribe explained that this will protect the items from further harm. Another Tribe commented that in its religion, sensitive items are only able to be touched and seen by certain people, and such items must be treated with respect when they are brought back.

Response: The Department appreciates this feedback. In the administrative appeals provision of the proposed regulations, at proposed § 1194.302, there is a mechanism for Tribes or Native Hawaiian organizations to provide sealed communications concerning the application for an export certification or detention. In the event of a hearing, the proposed regulations incorporate applicable rules from 43 CFR part 4, at proposed § 1194.303. Part 4, in turn, contemplates certain proceedings occurring under seal or *in camera*.

41. Comment: One Tribe asked for a single point of contact for all Native cultural heritage protection within the Department through which Tribes could access appropriate Federal agencies. A Tribal organization underscores that such Tribal liaisons should be equipped to provide trainings to Tribes about testing cultural heritage items for dangerous chemicals and assisting in the handling, moving, packing, and shipping of items internationally repatriated. The Tribal organization noted that Tribal cultural heritage items, including human remains, have often been subjected to chemicals harmful to humans by collectors or institutions for preservation and that can harm Tribal members that repatriate, handle, or reintegrate cultural heritage items for ceremonial use. The Tribal organization also asked that liaisons coordinate with Federal agencies and domestic institutions to ship fragile Tribal cultural heritage items safely and carefully.

Response: The Department appreciates this feedback. Through the Interagency Working Group, the Department has endeavored to identify and centrally place the most relevant points of contact from the Department, as well as from the Departments of State, Justice, and Homeland Security. The Department welcomes feedback on the appropriateness of this solution.

42. Comment: Two Tribes and a Tribal organization commented that the Department should provide more information on training materials that will be provided to Federal staff and officials. The Tribal organization asks if Tribes may reach out to the Department for technical assistance in developing training materials. The Tribes ask that Tribes be heavily involved in designing trainings.

Response: The Department anticipates providing more information about training following a final rule implementing the STOP Act.

43. *Comment:* Three Tribes asked for flow charts in the regulation to explain processes in the regulatory text. A Tribal consortium asked for a step-by-step guide for Federal officials within agencies to use in the event of a trafficking incident.

Response: The Department does not propose any flow charts as part of the proposed regulatory text, either for Tribal, private, or Federal use. The Department will explore such flow charts as informational tools following publication of a final rule.

44. *Comment:* Five Tribes and two Tribal organizations asked for guidance on the Tribal Working Group. Specific areas of inquiry included the process for nominations, a request for mandatory, regular meeting times, inclusion of compensation for the Tribal Working Group members, a mandatory process to implement judicial proceedings, and a requirement for timely responses from agencies.

Response: The regulations governing the Native Working Group appear at proposed subpart G. These include guidance on nominations and eligibility. The Department declined to include mandatory meetings for the Native Working Group to promote maximum flexibility for this group. The Department is unable to compensate members of the Native Working Group based upon the language of the STOP Act. The Native Working Group may make a request that the Department of Justice initiate judicial proceedings, as set forth in proposed § 1194.603(c) and (d), and Native Working Group requests for assistance and information are set forth in proposed § 1194.603(e).

45. *Comment:* One organization urged the Department to consult on the form of the export certification application. One Tribe asked that the regulations describe the minimum needed to apply for a certification, and also asked for a process or system where Tribes can learn about international or domestic auction yards where their items

may be implicated. A Tribe and a Tribal organization asked that publication of characteristics typical of cultural heritage be general in nature and not require photographs or an exact description unless a Tribe consents to provide that information. The same commenters expressed that any descriptions should be more onerous than the Convention on Cultural Property Implementation Act, 19 U.S.C. 2601 *et seq.*

Response: A draft of the application form is attached to this proposed rule; the Department invites comments on the form from interested Tribes and Native Hawaiian organizations. The form specifically requests the purpose and timeframe of the proposed export. The Department does not have a definitive list of possible auction houses. Consultation on the form will enable Tribes to provide direct feedback on inclusions of photographs and nature of descriptions required.

46. Comment: One Tribe asks that the regulations provide a mechanism for Tribes to review export certification applications.

Response: Under the proposed regulations, the Department will notify the impacted Tribes and Native Hawaiian organizations when an application is submitted and uploaded into the database and again once the Department finds that the application is complete.

47. Comment: One Tribe asks that the Departments of State and Justice consult with and take direction from Tribes on repatriation efforts, especially as it pertains to legal efforts for violations of Federal law and engaging with foreign countries and institutions with a history of holding exported Tribal cultural heritage items.

Response: The Department appreciates this feedback and has included guidance on consultation in a number of areas in the proposed rule.

48. *Comment:* One Tribal organization asks that where dispute resolution systems exist to minimize burdens for Tribes and review committees, Tribes be proactively included at the outset. Ideally, this would include training and curriculum to stakeholders to promote the types of items to look for, and to teach officers how to return sacred objects or objects of patrimony.

Response: The Department appreciates this feedback. The Department has included guidance on consultation in a number of areas in the proposed rule.

49. *Comment:* A Tribe asks that the database follow the "Do No Harm" principle and that Tribes should have access to the system to remove or correct information since the information may be confidential, culturally sensitive, sacred, or secret information to a Tribe.

Response: The Department appreciates this feedback. The proposed rule clarifies that information provided to the Department will be protected to the degree possible in accordance with applicable law, and that a Tribe or Native Hawaiian organization may request the deletion of material from the database.

50. *Comment:* One Tribe asks that the Department focus enforcement efforts on private dealers and brokers rather than placing burdens onto Tribes when facing repatriation.

Response: The Department appreciates this feedback. The Department has endeavored to craft the proposed rule in such a way that it will prevent illegal exportations, while allowing Tribes to authorize exportation at their discretion and facilitate the voluntary return of tangible cultural heritage.

51. *Comment:* One Tribe asks that the Department create a specific tax form and associated paperwork for tax deductible gifts for those who voluntarily return Tribal cultural items.

Response: The Department anticipates providing tax documentation to an individual who successfully completes a voluntary return, as set forth in proposed § 1194.403. In doing so, the Department must comply with IRS rules and will work with the IRS on what documentation is needed.

52. *Comment:* A Tribal organization asks that the United States make a worldwide announcement about the voluntary return provision and provide for acknowledgement of voluntary returns.

Response: The Department has consulted with the Department of State about potential methods and mechanisms to provide notice to international entities. The Department has not proposed a uniform approach to publicizing voluntary returns because the Department understands that some Tribes may not wish to share information about their objects of patrimony returning home.

53. *Comment:* One Commenter asked if the STOP Act will exempt or address how the Marine Mammal Protection Act (MMPA) challenges cultural practices.

Response: The Department is grateful for this comment. Generally, the STOP Act and the MMPA exist in parallel and neither law exempts nor preempts the application of the other.

54. *Comment:* One Commenter referenced Hawai'i state law and how it identifies objects of patrimony and protects certain categories of objects.

Response: The Department is grateful for this comment and has considered it in the drafting of the proposed rule.

55. *Comment:* One Commenter requested that the Interagency Working Group look to Office of Native Hawaiian Relations (ONHR) to provide information about Native Hawaiian organizations. The commenter also referenced including an authentication system that ensures NHOs meet the regulatory definition for consultations they are engaged in.

Response: The Department anticipates calling upon ONHR's expertise as the Interagency Working Group commences its work.

D. Other Comments

57. *Comment:* Multiple Tribes expressed support for the STOP Act and prompt implementation of the regulations.

Response: The Department appreciates this feedback and is pleased to offer this proposed rule for additional Tribal feedback.

58. *Comment:* Three Tribes and two Tribal organizations noted that implementation of the STOP Act requires funding for Tribal Historic Preservation Offices (THPO) to ensure capacity to implement the STOP Act and to have staff to track items. One Tribe noted that the Tribe did not have enough funding to get patrimony back or to bid for it, in the worst-case scenario. Another Tribe noted the need for funds for Tribes to implement, identify, and store items subject to the STOP Act, including travel to locations of items, securing means of safe return, and ongoing storage and safekeeping of items after return.

Response: The Department notes that funding is authorized in the statutory text of the STOP Act. However, that funding is not appropriated. If and when funds are appropriated, the Department will explore best ways to implement in line with these comments.

59. *Comment:* One Tribal organization and one Tribe encouraged regulatory language to utilize more than NAGPRA and ARPA where the STOP Act references “other applicable law.” The commentors cite Tribal law, the Lacey Act, applicable Executive Orders, the Antiquities Act, and the Endangered Species Act.

Response: The Department concurs with Tribes that these and other in-effect laws comprise the “other applicable law” referenced in the STOP Act. However, the Department declines to include a particularized list because all laws in effect may apply depending on a particular factual pattern that arises.

60. *Comment:* A Tribe asked for monitoring of international institutions likely to house or traffic Tribal cultural heritage items, and that information gained from monitoring be made available to Tribes. The same Tribe asked that State officials be directed to monitor international auctions and sales.

Response: The Department’s authority under the STOP Act does not provide a mechanism for the Department to direct monitoring of institutions, either by Federal or State authorities.

61. *Comment:* A Tribe expressed questions on the Indian Arts and Crafts Act and whether there might be space for that Act and the STOP Act to work together.

Response: The Department notes that the text of the STOP Act allows for an agreement with a foreign country “to expand the market for the products of Indian art and

craftsmanship in accordance with section 2 of the Act of August 27, 1935.” Outside of this statutory reference, the Department has not included references to the Indian Arts and Crafts Act in the text of the proposed rule.

62. Comment: A Tribe asked what would happen if a foreign government, entity, or individual is uncooperative, and what recourse the United States has to ensure strong enforcement to persuade uncooperative institutions or governments.

Response: The STOP Act, and its implementing regulations, apply primarily to items that a putative exporter seeks to take out of the United States prior to their exit from the country. The STOP Act does not contain mechanisms to persuade or obligate international governments or institutions to repatriate items.

63. Comment: A Tribal organization asked that the implementing regulations include an intellectual property provision because there continues to be harm to Tribes from the misappropriation, misuse, and exploitation of traditional knowledge, genetic resources associated with traditional knowledge, and traditional cultural expressions because of the lack of protection within the United States’ intellectual property system.

Response: The Department’s authority under the STOP Act does not provide a mechanism for the Department to propose an intellectual property provision in this proposed rule.

64. Comment: A Tribal organization asked that the United States, through the Department, call on countries to participate in a concerted international effort with necessary concrete measures and implement bilateral agreements to obligate countries to monitor imports and facilitate repatriations.

Response: The STOP Act confirms the authority of the President to request agreements with foreign countries to discourage commerce in and collection of certain items, encourage voluntary return of tangible cultural heritage, and expand markets for products of Indian art and craftsmanship. The Department of State approves the negotiation and conclusion of all international agreements to which the United States will become a party. The STOP Act does not contain mechanisms to persuade or obligate international governments or institutions to repatriate items. However, the existence of the STOP Act, including implementing regulations, may be influential under international mechanisms, such as the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

65. *Comment:* One Tribe shared that the application of ARPA was complex on the Tribe's allotted lands, resulting in a scenario where a landholder moved forward with excavation with no permit because ARPA did not apply to Tribal lands and because no Tribal law regulated the excavation. The Tribe wanted the Department to consider this example of complex situations in Indian Country to inform drafting of the proposed regulation.

Response: The Department is grateful to the Tribe for sharing this story as it exemplifies the complex legal issues that manifest in Indian country. ARPA does apply on trust and restricted Indian land. The application for an Export Certification requires presentation of an ARPA permit authorizing export of the resource or attestation that ARPA does not apply.

66. *Comment:* A Tribal organization asked whether the Department would consult on a draft before a proposed rule, or whether the next draft would be a proposed rulemaking.

Response: The Department is issuing a proposed rule rather than an interim rule at this time.

67. *Comment:* One commenter expressed concern with the “most appropriate claimant” language used in the STOP Act. The commenter asked to envision alternative approaches.

Response: The Department appreciates this concern. As required, these implementing regulations have been drafted consistent with the STOP Act’s express language and Congress’ intent in enacting the statute.

68. *Comment:* A Native Hawaiian commenter asked what would happen if a museum in Europe voluntarily returned an item, and whether that item would return to its community or to the national museum. The same commenter asked who determined the item’s ultimate resting place.

Response: The proposed regulations contemplate that the voluntary return of an item would occur as agreed by the individual or organization wishing to return the item and the appropriate Indian Tribe or Native Hawaiian organization.

69. *Comment:* A Native Hawaiian commenter asked if the STOP Act addressed how items are stored or displayed. Another commenter asked if the STOP Act protected items found on public or private lands.

Response: Manner of storage of items, and items from private lands outside the exterior boundaries of a reservation are outside the scope of the STOP Act and this

regulation. The definitions of archaeological resource and cultural item includes resources and items from Federal land.

70. Comment: One commenter expressed concern with the Federal Government’s role in identifying who could be criminalized and therefore who may be seen as a legitimate practitioner, particularly with regard to the Native Hawaiian Community.

Response: The Department appreciates this concern and will endeavor to follow its obligations under the statute.

71. Comment: Two commenters reiterated that Native Hawaiian organizations are different from Indian Tribes, and requested the Department avoid making one look like the other.

Response: The Department agrees that Native Hawaiian organizations are different than Indian Tribes and will continue to strive to ensure that its regulations and guidance reflect that difference.

72. Comment: One commenter asked that the proposed rule include “the provision of technical assistance if NHOs lack sufficient resource[s].”

Response: The Department appreciates this concern and has included a broad offer of technical assistance in the proposed rule.

73. Comment: Two commenters expressed concern about traditional divisions between the political and the spiritual.

Response: The Department appreciates this concern and has considered it in drafting the proposed rule.

74. *Comment:* One commenter asked the Department to amend the definition of Native Hawaiian organization in the STOP Act regulations to include any organization that has Native Hawaiians in substantive and policymaking positions within the organization. Another commenter asked that specific organizations not be listed in applicable definitions.

Response: The Department appreciate these concerns. However, the definition provided in the proposed STOP Act regulations aligns with the terminology utilized in the recently amended NAGPRA regulations.

75. *Comment:* One commenter asked how NHOs may be recognized. Several other commenters provided comments about recognition of NHOs and the Secretary's list of recognized NHOs.

Response: Recognition of NHOs is outside the scope of the Act and this regulation. The Department respectfully refers the inquirer to ONHR, which is well positioned to provide information about applicable processes.

III. Subpart-by-Subpart Summary of the Proposed Rule

This section summarizes the seven subparts of the proposed rule.

A. General Provisions

Subpart A includes an introductory section setting forth the purpose of the regulations, definitions for terms in the regulations, and provisions concerning filing of documents and severability. The definitions are mostly from the Act or, as directed in the Act, from the regulations implementing NAGPRA at 43 CFR part 10 or the Department's uniform regulations implementing the Archaeological Resources Protection Act (ARPA) at 43 CFR part 7. The Department proposes to add Native American human remains to

the Act's definition of "items prohibited from exportation." This is consistent with the provision later in the proposed rule that the Secretary will not issue an export certification for native American human remains. The only major change to the NAGPRA and ARPA definitions is that proposed for "repatriation." Under NAGPRA that term refers to the transfer of possession or control of a cultural item or human remains, but not necessarily physical custody. One of the purposes of the STOP Act, however, is to return tangible cultural heritage to the physical custody of the Indian Tribe or Native Hawaiian organization. This section also includes a placeholder definition for the "Office," the entity within the Department of the Interior that will be delegated the responsibility for implementing the export certification and other programs under the Act. As noted above, as of this notice, the Department has not yet established that entity. This definition will be replaced with one for that entity once the Department establishes it.

As noted, the Department is also proposing a provision concerning severability. In enacting the Act, Congress created several different ways to stop the export of cultural items and archaeological resources and facilitate the repatriation of tangible cultural heritage. While this rule is intended to create systematic processes for those methods, if a court holds any provision of one part of this rule invalid, it should not impact the other parts of the rule. For example, a decision finding invalid a portion of subpart B should not impact subpart C, because the detention, forfeiture, and repatriation of items not having a necessary export certification would not be affected by a problem in the process for obtaining a certification. Similarly, a decision finding invalid part of the export certification process should not impact the process for voluntary return of tangible cultural heritage or the provisions for the Native Working Group. Any decision finding

any provisions in this rule to be invalid would not impact the remaining provisions, which would remain in force. The intent of this rule is to stop exports and facilitate repatriation as a whole, but the rule is not an interdependent whole—other provisions of the rule would implement that intent even if a court declared certain provisions invalid.

B. Export Certification System

The Act directs the Department to establish a system to issue export certifications, which are required to export cultural items and archaeological resources. In deference to the cultural sensitivity for Indian Tribes and Native Hawaiian organizations surrounding Native American human remains and recognition of the common law rule that human remains cannot be owned, the Department is proposing that it will not issue an export certification for the export of Native American human remains.

The proposed export certification process begins with the submission of an application and supporting documents, together with the application fee. Because of the broad variety of such items and variations in the cultural importance of such items to Indian Tribes and Native Hawaiian organizations, the Department is proposing to require a separate application and certification for each item proposed to be exported. A draft application is included with this proposed rule; we invite comment on its contents. To make the Department's review and the subsequent review and consultation with the relevant Indian Tribes and Native Hawaiian organizations as efficient as possible (given the extremely tight decision-making deadlines in the Act), the Department is proposing to require submission of supplemental documents in addition to the application. Such supplemental documents are designed to establish that the item is not an item prohibited from export and to give the Department and the Indian Tribe or Native Hawaiian

organization sufficient information to decide what Indian Tribe or Native Hawaiian organization is culturally affiliated with the item and whether the Secretary should issue an export certification.

After the exporter has filed the application and all supporting documents, the Department will upload the application and supporting documents into the Export Certification Database for review by Indian Tribes and Native Hawaiian organizations, with notification to the relevant Tribes and organizations; review the application for completeness; and begin coordination with relevant Federal agencies. Once the Department has determined that the application and all supporting documents are complete, the statutory process and timeframes for consultation and approval or disapproval begins.

At the end of that process, the Department will notify the applicant and any relevant Indian Tribe or Native Hawaiian organization of its determination to issue or deny an export certification. That notification will include notice of the right to administratively appeal that determination under subpart D. Upon the expiration of the period for appeal, or the final exhaustion of administrative remedies, the Department will issue the Export Certification or decline to issue it. That decision may be further appealed to a United States District Court. If the Department issues an Export Certification, the exporter must provide U.S. Customs and Border Protection (CBP) with a copy of the Certification by following the process in these regulations.

The proposed regulations also provide for an Indian Tribe or Native Hawaiian organization to issue, at its sole discretion, a Tribal Authorization that is equivalent to an Export Certification.

C. Procedures for Detention, Forfeiture, Repatriation

The Act provides for detention by CBP, and forfeiture, and repatriation by the Department of (1) any item that may be an Item Prohibited from Exportation that is exported, attempted to be exported, or otherwise transported from the United States; or (2) any item that may be an Item Requiring Export Certification that is exported, attempted to be exported, or otherwise transported from the United States without an Export Certification or Tribal Authorization. Proposed procedures for such actions are in subpart C of the proposed rule. Under the proposed procedures, CBP will detain any such item and contact the Department. The Department will then inform CBP whether the item is within the scope of the Act and should continue to be detained. If the Department advises CBP that the item is within the scope of the Act and should be detained, CBP will continue to detain the item and provide a detention form to the exporter together with a notice the Department provides to CBP of its right to appeal the detention under subpart D of this part. The Department, within 10 days of detention, will retrieve the detained item from the CBP Port of detention and execute the appropriate CBP Chain of Custody form. The Department is responsible for storage of the item in an appropriate manner based on consultation with the relevant Indian Tribe or Native Hawaiian organization.

Upon the expiration of the period for appeal, or the final exhaustion of administrative remedies, the Department may refer the item to an appropriate Federal agency or U.S. Attorney's Office for forfeiture proceedings, or the Department may follow abandonment procedures. If the exporter abandons the item, the Department will repatriate the item to (1) the Indian Tribe or Native Hawaiian organization from whose

Tribal Land the item was removed or who is culturally affiliated with the item, for cultural items under NAGPRA; or (2) the Indian Tribe from whose Indian Land the item was removed, for archaeological resources under ARPA. Similarly, after an administrative declaration of forfeiture or a final order of forfeiture in a judicial proceeding, the Department may, consistent with applicable law and regulations governing the remission and mitigation of forfeitures, seek the item and repatriate it to (1) the Indian Tribe or Native Hawaiian organization from whose Tribal Land the item was removed or who is culturally affiliated with the item, for cultural items under NAGPRA; or (2) the Indian Tribe from whose Indian Land the item was removed, for archaeological resources under ARPA.

D. Administrative Appeals

The Act provides that the Department afford an exporter the opportunity for a hearing concerning certain actions in the export certification and detention processes. As proposed in subpart D, that hearing would be before the Departmental Cases Hearings Division in the Department's Office of Hearings and Appeals, followed by an appeal to the Interior Board of Indian Appeals. Consistent with the exemption under the Act from the Freedom of Information Act, all proceedings before DCHD or the IBIA would be under seal. The proposed regulations provide that the hearing and appeals process must be exhausted before any appeal to a United States District Court.

E. Voluntary Return of Tangible Cultural Heritage

The Act tasks the Departments of the Interior and State with creating a process for the voluntary return of tangible cultural heritage to Indian Tribes and Native Hawaiian organizations. That proposed process is in subpart E of the proposed rule. The process

begins with the individual or organization wishing to return the items submitting a simple list of the items to the Department, with certain information concerning the items, to the extent that the individual or organization has that information. The Department will then conduct the consultation required for it to determine which Indian Tribe(s) or Native Hawaiian organization(s) would potentially be culturally affiliated with the items. Once the Department makes that determination, it will supply contact information and the list to the parties, and will provide assistance, as needed, to the parties to arrange for the return. The Departments of Homeland Security and State will facilitate both foreign and domestic transportation of the items, and at the request of the Indian Tribe or Native Hawaiian organization, the Interagency Working Group will explore funding mechanisms or use of in-kind resources to assist the Indian Tribe or Native Hawaiian organization. The goal of this process is for the Federal government to facilitate the return, not to obstruct or delay it. As noted by the Act, this process does not apply to a return of an object subject to NAGPRA by a museum as that term is defined in NAGPRA.

F. Interagency Working Group

The Act formalizes an existing informal Interagency Working Group of staff from the Departments of Justice, State, Homeland Security, and the Interior. This subpart sets out the purpose and duties of that group.

G. Native Working Group

The Act also creates a Native Working Group to provide recommendations to Federal agencies on certain areas in implementing the Act. Subpart G of the proposed rule sets out a proposed process for the Secretary to choose the members of the Native Working Group. Under that process, the Native Working Group would consist of

thirteen members—one from each of the BIA’s twelve regions, plus one representing Native Hawaiian organizations. The members would be nominated by Indian Tribes and Native Hawaiian organizations. Any Tribe or organization could nominate someone as a member of the Working Group, even if that Tribe or organization is not in the same region or State as the nominee. The proposed rule also provides for consideration by the Federal Government of requests from the Native Working Group for agency actions, with specific processes by the Departments of Justice and State, and for the Native Working Group to request information and assistance from Federal agencies, committees, and working groups.

IV. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866, 14094 and E.O. 13563)

Executive Order (E.O.) 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

E.O. 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O. 13563 and states that that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The DOI has developed this rule in a manner consistent with these requirements.

In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may be found at <https://www.regulations.gov> by searching for “RIN 1076-AF78.”

B. Regulatory Analysis

1. Regulatory Flexibility Act

The Department certifies that this document would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). For the final rule stage, DOI will prepare a final analysis using the public comments received. For the proposed rule stage, DOI welcomes additional data regarding anticipated compliance costs, and impacts to the annual revenues, for small entities.

The following table lists small business size standards, matched to industries described in the North American Industry Classification System (NAICS), as modified by the OMB, effective January 1, 2022, and published March 17, 2023 at <https://www.sba.gov/document/support-table-size-standards>:

NAICS Code	NAICS Industry Description	Size standards in millions of dollars	Size standards in number of employees
458310	Jewelry Retailers	\$20.5 million	–
459130	Sewing, Needlework, and Piece Goods Retailers	\$34.0 million	–
459420	Gift, Novelty, and Souvenir Retailers	\$13.5 million	–
459920	Art Dealers	\$16.5 million	–

DOI’s preliminary threshold analysis included the small entity communities (and industries) for retailers and dealers listed in the above table. The proposed regulations would not have a significant economic impact on these small entities. During Tribal consultations held in fall 2023 on its draft proposed rule, DOI received feedback from stakeholders in these industries but did not receive any information or comments specific to the development of this preliminary threshold analysis. Consequently, DOI has developed a list of questions located at the end of this section to obtain more information from these small entity communities (and industries) for retailers and dealers to aid in further developing this analysis.

The rule DOI proposes creates a minimal burden on select market participants who voluntarily opt to participate in stopping the export of cultural items, and aid in facilitating the international repatriation of cultural items prohibited from being trafficked by the NAGPRA, and archeological resources prohibited from being trafficked by the ARPA. The burden on a participant includes the administrative fee DOI will assess and potentially an appraisal the IRS would require for cultural items that participants claim as a tax-deductible gift if they have a monetary value of \$5,000.00 or more. The proposed regulations would not have an impact on a substantial number of these small entities. DOI’s threshold analysis identified:

- no increase to regulatory compliance costs;

- no decreases to annual revenue;
- no increases to the risk of short-term or long-term insolvency; and
- no disproportional impacts to small businesses.

Initial/Threshold Regulatory Flexibility Analysis			
NAICS Code	NAICS Industry Description	Regulatory compliance costs	Decrease to annual revenue
458310	Jewelry Retailers	\$0.00	\$0.00
459130	Sewing, Needlework, and Piece Goods Retailers	\$0.00	\$0.00
459420	Gift, Novelty, and Souvenir Retailers	\$0.00	\$0.00
459920	Art Dealers	\$0.00	\$0.00

2. Regulatory Impact Analysis

Alternatives

As this rule is required by the STOP Act, the Department considered no other alternatives to the proposed rule.

Burdens, benefits and costs

The Department is proposing new regulations to establish an export certification system, set forth procedures for detention of items subject to the rule and repatriation of those items, establish a framework for voluntary return of items subject to the rule, and establish interagency and Native working groups. The Preamble discusses the rationale for all the changes, which we assume will have no major economic effects, small business impacts, or distributional effects. Overall, the rule is expected to prevent the export of Native American cultural items that are held in violation of current Federal laws for sale in foreign countries; to repatriate such items from individuals and organizations having such items; and to improve coordination between Federal agencies, Indian Tribes,

and Native Hawaiian organizations (NHOs) seeking to prevent the export and sale of such items.

This regulation will benefit Tribes, NHOs, and individuals who have their patrimony returned, and reduce future illegal trade in patrimony. This will also benefit buyers and sellers of items that qualify for certification, who can be confident of the legality of holding, trading, and owning these items.

Costs related to this regulation may include the time and fees potential exporters spend to obtain certification, higher prices for purchasers of these items (whether certified or not), and the time and expense required for Tribes and NHOs to participate in certification. There may also be costs for purchasers who make a voluntary return of items, and for Tribes and NHOs to receive and curate returned items. Under the Act, the Secretary may assess reasonable fees to process export certification applications and may collect fees to the extent and in the amounts provided in advance in appropriations Acts.

Distributional effects could depend on how fees collected from exporters are used. Distributional effects may be minimal if the fee is set solely to offset the Government costs of administering the program. Under proposed Section 1194.107(e), “if an Indian Tribe or Native Hawaiian organization lacks sufficient resources to access the database or respond to agency communications in a timely manner, the Secretary, in consultation with Indian Tribes and Native Hawaiian organizations, will provide technical assistance to facilitate that access or response, as applicable.” Thus, the Secretary will be able to lessen any distributional effects on Tribes and NHOs.

DOI currently lacks information to describe the baseline, or state of the world in the absence of the regulation. Some priority learning questions where we seek information include:

- What data or estimates do we have to describe the "without-regulation" baseline?
 - How many items are currently exported that will be subject to the regulation?
 - How many firms and individuals are currently engaged in this export?
- What will change as a result of the regulation?
 - Which groups will experience costs and benefits?
 - How can we quantify and value those costs and benefits?
 - What are time and monetary costs of complying with the regulation for the individuals and groups involved?
- What are the likely effects for exporters applying for certification?
 - What are likely scenarios for the proportion of compliant and non-compliant exporters?
- What are the likely effects for purchasers completing a voluntary return?
- What are the roles of Tribes and NHOs in verifying certifications?
- What is the role of Federal government staff?

C. Unfunded Mandates Reform Act of 1995

This rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule would not have a significant or unique effect on State, local, or Tribal governments or the

private sector because this rule affects only putative exporters and their related businesses. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

D. Takings (E.O. 12630)

This rule would not affect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

E. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

F. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

G. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have hosted extensive consultation with federally recognized Indian Tribes in preparation of this proposed rule, including through a Dear Tribal Leader

letter delivered to every federally recognized Tribe in the country, and through three consultation sessions held on May 9, 13, and 23, 2022.

H. Paperwork Reduction Act

This proposed rule contains new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Department is seeking approval of a new information collection, as follows.

Brief Description of Collection: The Act requires the Department to promulgate regulations to implement the Native Working Group; export certification application and issuance procedures; and secure central Federal database information system for the purpose of making export certification applications available to Indian Tribes and Native Hawaiian organizations. We estimate that the annual cost to the Federal Government to administer this information collection is \$3,000,000.

Title: Export Certification System, 25 CFR 1194

OMB Control Number: 1076-NEW.

Form Number: Export Certification Application.

Type of Review: New collection.

Respondents/Affected Public: Individuals, Private Sector, Government.

Total Estimated Number of Annual Respondents: 122.

Total Estimated Number of Annual Responses: 122.

Estimated Completion Time per Response: Varies from 2 to 18 hours.

Total Estimated Number of Annual Burden Hours: 2,504.

Respondents' Obligation: Required to obtain a benefit.

Frequency of Response: On occasion.

Total Estimated Annual Non-Hour Burden Cost: \$50,044.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to <https://www.reginfo.gov/public/do/PRAMain>.

Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Please provide a

copy of your comments to consultation@bia.gov. Please reference OMB Control Number 1076–NEW in the subject line of your comments.

I. National Environmental Policy Act (NEPA)

Under NEPA, categories of Federal actions that normally do not significantly impact the human environment may be categorically excluded from the requirement to prepare an environmental assessment or impact statement. (40 CFR 1501.4) Under the Department, regulations that are administrative or procedural are categorically excluded from NEPA analysis because they normally do not significantly impact the human environment. (43 CFR 46.210(i)) This rule is administrative and procedural in nature. Consequently, it is categorically excluded from the NEPA requirement to prepare a detailed environmental analysis. Further, the Department also determined that the rule would not involve any of the extraordinary circumstances under a categorical exclusion that would necessitate environmental analysis. (43 CFR 46.215.)

J. Energy Effects (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

K. Clarity of This Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;

- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, and so forth.

L. Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

M. Pay-As-You-Go Act of 2010

Public Law 117-258: There is authorized to be appropriated to carry out this Act \$3,000,000 for each of fiscal years 2022 through 2027.

N. Privacy Act of 1974, System of Records

The Privacy Act of 1974, as amended, embodies fair information practice principles in a statutory framework governing the means by which Federal agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to records about individuals that are maintained in a “system of records.” A “system of records” is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other

identifying particular assigned to the individual. The Privacy Act defines an individual as a United States citizen or lawful permanent resident. The Privacy Act requires each agency to publish in the Federal Register a description denoting the existence and character of each system of records that the agency maintains, and the routine uses of each system.

This proposed rule contains recordkeeping requirements subject to the Privacy Act. The Department will publish in the *Federal Register* a description denoting the existence and character of system of record, and the routine uses of the system.

List of Subjects in 25 CFR part 1194

Administrative practice and procedure, Alaska, Hawaiian Natives, Historic preservation, Human remains, Indians, Indians-claims, Indians-law.

For the reasons set forth in the preamble above, the Department of the Interior, Assistant Secretary – Indian Affairs, proposes to add 25 CFR part 1194 to read as follows:

PART 1194 – SAFEGUARD TRIBAL OBJECTS OF PATRIMONY

The authority of this entire part 1194 is as follows:

Authority: 16 U.S.C. 470aaa-470aaa11; 25 U.S.C. 9, 25 U.S.C. 3001-3013; 25 U.S.C. 3071; 25 U.S.C. 3078.

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1194.602 What is the membership of the Native Working Group?

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Subpart A – General Provisions

§ 1194.1 What is the purpose of this part?

In stopping the export of cultural items and archaeological resources and facilitating the repatriation of tangible cultural heritage, the Safeguard Tribal Objects of

Patrimony (STOP) Act, Pub. L. No. 117-258, codified at 25 U.S.C. 3071, et seq., 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 STOP 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.

§ 1194.2 How are key terms defined in the part?

Act means the Safeguard Tribal Objects of Patrimony Act, Pub L. No. 117-258 (136 Stat. 2372) as codified at 25 U.S.C. 3071 et seq.

Archaeological Resource means any material remains of past human life or activities which are of archaeological interest as described in uniform regulations for the Archaeological Resources Protection Act pursuant to 16 U.S.C. 470bb, 43 CFR 7.3; are Native American in origin; and are at least 100 years of age.

Business Day means Monday through Friday, excluding federally recognized holidays; other days that the applicable office of the Federal Government is closed to the public; and holidays or other days when the Indian Tribe or Native Hawaiian organization that could be culturally affiliated with the relevant item is closed to the public.

CBP means the Secretary of the U.S. Department of Homeland Security, acting through the Commissioner of U.S. Customs and Border Protection.

Consultation or *Consult* means the exchange of information, open discussion, and joint deliberations made between all parties in good-faith and in order to:

- (a) Seek, discuss, and consider the views of all parties;
- (b) Strive for consensus, agreement, or mutually acceptable alternatives; and
- (c) Enable meaningful consideration of the Native American traditional

knowledge, including oral history, of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

Cultural Affiliation means there is a reasonable connection between human remains or cultural items and an Indian Tribe or Native Hawaiian organization based on a relationship of shared group identity. Cultural affiliation may be clearly identified by the information available or reasonably identified by the geographical location or acquisition history of the human remains or cultural items.

Cultural Item means a funerary object, sacred object, or object of cultural patrimony according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.

Detention means the holding for further investigation of cultural items or archaeological resources and any associated property that is neither immediately released nor seized but is temporarily held by CBP.

Export Certification means the authorization issued by the Office allowing an exporter to export an Item Requiring an Export Certification.

Funerary object means any object reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. This term does not include any object returned or distributed to living persons according to traditional custom after a death rite or ceremony. Funerary objects are either associated funerary objects or unassociated funerary objects.

(a) *Associated funerary object* means any funerary object related to human remains that were removed and the location of the human remains is known. Any object made exclusively for burial purposes or to contain human remains is always an associated funerary object regardless of the physical location or existence of any related human remains.

(b) *Unassociated funerary object* means any funerary object that is not an associated funerary object and is identified by a preponderance of the evidence as one or more of the following:

- (1) Related to human remains but the human remains were not removed, or the location of the human remains is unknown,
- (2) Related to specific individuals or families,
- (3) Removed from a specific burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization, or

(4) Removed from a specific area where a burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization is known to have existed, but the burial site is no longer extant.

Human remains means any physical part of the body of a Native American individual. This term does not include human remains to which a museum or Federal agency can prove it has a right of possession.

(a) Human remains reasonably believed to be comingled with other materials (such as soil or faunal remains) may be treated as human remains.

(b) Human remains incorporated into a funerary object, sacred object, or object of cultural patrimony are considered part of the cultural item rather than human remains.

(c) Human remains incorporated into an object or item that is not a funerary object, sacred object, or object of cultural patrimony are considered human remains.

Indian Land means lands of Indian Tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian Tribe or Indian individual.

Indian Tribe means any Tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary of the Interior under the Act of November 2, 1994 (25 U.S.C. 5131).

Item Prohibited From Exportation means—

(a) A cultural item prohibited from being trafficked, including through sale, purchase, use for profit, or transport for sale or profit, by—

(1) Section 1170 of title 18, United States Code, as added by the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*); or

(2) Any other Federal law or treaty;

(b) An archaeological resource prohibited from being trafficked, including through sale, purchase, exchange, transport, receipt (including as a gift), or offer to sell, purchase, or exchange, including in interstate or foreign commerce, by—

(1) Section 6(b) and (c) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ee); or

(2) Any other Federal law or treaty; and

(c) Native American human remains

Item Requiring Export Certification means a cultural item and an archaeological resource, but does not include any item or resource for which an Indian Tribe or Native Hawaiian organization with a cultural affiliation with the item has provided a Tribal Authorization.

Native American means of, or relating to, a Tribe, people, or culture that is indigenous to the United States. To be considered Native American under this part, human remains or cultural items must bear some relationship to a Tribe, people, or culture indigenous to the United States.

(a) A Tribe is an Indian Tribe.

(b) A people comprise the entire body of persons who constitute a community, Tribe, nation, or other group by virtue of a common culture, history, religion, language, race, ethnicity, or similar feature. The Native Hawaiian Community is a “people.”

(c) A culture comprises the characteristic features of everyday existence shared by people in a place or time.

Native American traditional knowledge means knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by or confidential to individual Native Americans, Indian Tribes, or the Native Hawaiian Community. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, linguistic, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed, sustained, and passed through time, often forming part of a cultural or spiritual identity. Native American traditional knowledge is expert opinion. Other terms such as Indigenous Knowledge, Traditional Knowledge(s), Traditional Ecological Knowledge, Tribal Ecological Knowledge, Native Science, Indigenous Science, and others, are sometimes used to describe this knowledge system.

Native Hawaiian organization means any organization that:

(a) Serves and represents the interests of Native Hawaiians, who are descendants of the indigenous people who, before 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i;

(b) Has as a primary and stated purpose the provision of services to Native Hawaiians; and

(c) Has expertise in Native Hawaiian affairs, and includes but is not limited to:

(1) The Office of Hawaiian Affairs established by the constitution of the State of Hawai‘i,

(2) Native Hawaiian organizations (including ‘ohana) who are registered with the Secretary of the Interior’s Office of Native Hawaiian Relations, and

(3) Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations as defined under 43 CFR 47.10.

Object of cultural patrimony means an object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group (such as a band, clan, lineage, ceremonial society, or other subdivision), according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization. An object of cultural patrimony may have been entrusted to a caretaker, along with the authority to confer that responsibility to another caretaker. The object must be reasonably identified as being of such importance central to the group that it:

(a) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and

(b) Must have been considered inalienable by the group at the time the object was separated from the group.

Office means the Office in the Department of the Interior that the Secretary has designated as responsible for exercising the duties of the Secretary under the Act.

Repatriation means return of cultural items, archaeological resources, or tangible cultural heritage to a culturally affiliated Indian Tribe or Native Hawaiian organization.

Right of Possession means possession or control obtained with the voluntary consent of a person or group that had authority of alienation. Right of possession is given through the original acquisition of:

(a) An unassociated funerary object, a sacred object, or an object of cultural patrimony from an Indian Tribe or Native Hawaiian organization with the voluntary consent of a person or group with authority to alienate the object; or

(b) An associated funerary object that was exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or, when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization.

Sacred object means a specific ceremonial object needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. While many items might be imbued with sacredness in a culture, this term is specifically limited to an object needed for the observance or renewal of a Native American religious ceremony.

Secretary means the Secretary of the Interior.

Tangible Cultural Heritage means—

(a) Native American human remains; or

(b) Culturally, historically, or archaeologically significant objects, resources, patrimony, or other items that are affiliated with a Native American culture.

Tribal Authorization means the authorization issued by a culturally affiliated Indian Tribe or Native Hawaiian organization, at the sole discretion of the Tribe or organization, stating that an item does not require an Export Certification from the Secretary.

Tribal Land means

- (a) All lands within the exterior boundaries of any Indian reservation;
- (b) All dependent Indian communities; and
- (c) Any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

§ 1194.3 What are the timeframes and methods of delivery of documents under this part?

(a) Whenever this part requires or allows the exporter to file a document on or before a certain date, the exporter is responsible for submitting that document so as to reach the Government office designated for receipt by the time specified. The exporter may use the U.S. Postal Office (USPS), a commercial carrier, or electronic or facsimile transmission. The Office will consider the document filed on the date on which the document is received by the Government office designated for receipt. Acceptable evidence to establish the time of receipt by the Government office includes any official USPS receipt, commercial carrier signature log, time/date stamp placed by the Government on the document, other documentary evidence of receipt maintained by that Government office, or oral testimony or statements of Government personnel.

(b) Whenever this part requires or allows the Government to issue or file a document on or before a certain date, the document will be considered to be issued or filed on the date on which the document was placed in the USPS system, delivered to a

commercial carrier, or sent by electronic or facsimile transmission. Acceptable evidence to establish the time of filing or issuance by the Government includes any official USPS sender's receipt, commercial carrier receipt log, and time/date stamp placed by the government office on the document, other documentary evidence of receipt maintained by that office, or oral testimony or statements of Government personnel.

§ 1194.4 How does severability apply under this regulation?

If a court holds any provisions of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of the regulations and their applicability to other people or circumstances will not be affected.

Subpart B – Export Certification System

§ 1194.101 What is the purpose of the Federal Register Notice under this part?

The Secretary shall publish in the Federal Register, after consultation with Indian Tribes and Native Hawaiian organizations, an announcement that provides fair notice to exporters and other persons regarding which items require an export certification under this section, and:

(a) Includes a description of characteristics typical of Items Requiring Export Certification and definitions for “archeological resource” and “cultural item”;

(b) Describes the provenance requirements associated with the trafficking prohibition of 18 U.S.C. 1170 and 16 U.S.C. 470ee(b)-(c), and describes the characteristics of Items Prohibited From Exportation;

(c) Includes the definitions of Indian Tribe, Native American, and Native Hawaiian organization in § 1194.2 and a description of how those terms apply to archaeological resources and cultural items subject to these regulations; and

(d) Includes a description of characteristics typical of items that do not qualify as Items Requiring Export Certification and therefore do not require an export certification under this section, including clarification that:

(1) An item made solely for commercial purposes is presumed to not qualify as an Item Requiring Export Certification, unless an Indian Tribe or Native Hawaiian organization challenges that presumption during the process for obtaining an export certification under § 1194.102;

(2) A Tribal Authorization may be used as evidence to demonstrate that an item would not qualify as an Item Requiring Export Certification; and

(e) Information on consulting with Indian Tribes and Native Hawaiian organizations. Such information would include information on how to contact Indian Tribes and Native Hawaiian organizations and the possibility, in the sole discretion of the Indian Tribe or Native Hawaiian organization, of obtaining a Tribal Authorization.

§ 1194.102 When do I need an Export Certification?

(a) Any person attempting to export an item that may be an Item Requiring Export Certification must apply to the Office for an Export Certification covering that item before transporting or shipping the item to any foreign country.

(b) Each item to be transported requires a separate application, and the Office will process each application separately.

(c) No Item Requiring Export Certification may be exported from the United States without first having obtained an Export Certification in accordance with this subpart. The Office will not issue an Export Certification for Native American human remains.

(d) Exporters may apply for an Export Certification by filing the application described in § 1194.103 with all required supporting documentation.

(e) The Office will process the application using the procedure in § 1194.104 of this part, and will assess exporters who submit an application the fee in § 1194.108 of this part.

§ 1194.103 What is the process for applying for an Export Certification?

(a) Who may apply:

(1) An exporter seeking to export an item that may be an Item Requiring Export Certification from the United States must submit to the Office an Export Certification Application.

(2) An Indian Tribe or a Native Hawaiian organization with an interest in a particular Item Requiring Export Certification may submit to the Office an Export Certification Application.

(b) How to apply:

(1) Requests for an Export Certification shall be made on an Export Certification Application. The Application must be accompanied by the fee required under § 1194.108.

(2) In addition to completing the Application under § 1194.103(b)(1), an application to the Office must include:

(i) Description and pictures (if culturally appropriate) of the Item Requiring Export Certification;

(ii) All available information regarding the provenance of the Item Requiring Export Certification;

(iii) The presence of any potentially hazardous substances used to treat the Item Requiring Export Certification, if known;

(iv) An attestation that, to the best of the knowledge and belief of the exporter, the exporter is not attempting to export an Item Prohibited from Exportation;

(v) Substantial evidence of consultation with possibly culturally affiliated Indian Tribes or Native Hawaiian organizations, including, but not limited to, written correspondence between the exporter and the leader of the Indian Tribe or Native Hawaiian organization and agreement from the leader of the Indian Tribe or Native Hawaiian organization that the Office should issue an Export Certification;

(vi) Evidence, for an archaeological resource, of a permit under section 4 of the Archaeological Resources Protection Act, 16 U.S.C. 470cc, that authorizes export or that a permit is not necessary;

(vii) Evidence, for Native American cultural items, of a Disposition Statement (43 CFR 10.7(b) or (c)(5)); a Repatriation Statement (43 CFR 10.9(g)); or that a Disposition Statement or Repatriation Statement is not necessary, with written confirmation from the Indian Tribe or Native Hawaiian organization with authority to alienate the Item Requiring Export Certification that the exporter has a right of possession of the Item Requiring Export Certification or the Indian Tribe or Native Hawaiian organization has relinquished title or control of the Item Requiring Export Certification in accordance with section 3 of NAGPRA;

(viii) If the item was excavated or removed, evidence concerning the ownership of the land that the item was removed from at the time the item was removed;

(ix) Evidence adequate to show that the Indian Tribes or Native Hawaiian organizations are culturally affiliated with the item under 43 CFR 10.3; and

(x) The purpose and timeframe for the proposed exportation of the item.

(3) The exporter must submit all documents supporting the Application in the format(s) required for upload into the Export Certification Database established by § 1194.107. The Office will publish the requirements for upload on its website.

(4) When the Office receives an Export Certification Application and supporting documents, the Office will immediately include the Application and supporting documents in the Export Certification Database established by § 1194.107. Any further documents that the exporter submits to support an incomplete application under § 1194.104 will be added to the database upon receipt by the Office.

§ 1194.104 What is the process for the Office to review an Export Certification?

(a) Upon receipt of an Export Certification Application, the Office shall review the application for completeness in compliance with § 1194.103 of this part. That review will include coordination with relevant Federal agencies to identify whether there are active Federal investigations into the trafficking of cultural items or archaeological resources by the applicant. The Office will also notify the relevant Indian Tribes and Native Hawaiian organizations of the receipt of the application.

(b) Within 20 business days of receipt, the Office will notify the exporter by mail or overnight carrier whether the application meets the criteria of § 1194.103.

(c) If the application package is not complete, the Office's notification will identify the missing information or documents required for a complete package.

(d) Upon a determination that the Export Certification Application is complete, the Office will notify the relevant Indian Tribes and Native Hawaiian organizations the following business day that the application is complete.

(e) After receiving the notification from the Office under §1194.104(d), the relevant Indian Tribes and Native Hawaiian organizations will have 9 business days to review the application and supporting documents.

(f) If an Indian Tribe or Native Hawaiian organization notifies the Office that the Item Requiring Export Certification may not be eligible for an Export Certification, the Office will have 7 business days to review the application and supporting documents. If no Indian Tribe or Native Hawaiian organization so notifies the Office, the Office will have 1 business day to review the application and supporting documents.

(g) With notice to the exporter, the Office may extend the review of an application and supporting documents for up to 30 business days if credible evidence is provided that the Item Requiring Export Certification may not be eligible for an Export Certification.

§ 1194.105 What is the process for the Office to approve an Export Certification?

(a) Following completion of the process under §1194.104(a) through (f), and any extension under §1194.104(g), the Office will make a determination to approve or deny the Export Certification Application. The Office will notify the applicant and any relevant Indian Tribe or Native Hawaiian organization of the determination and the right to administratively appeal the determination under subpart D of this part. Upon the expiration of the period for appeal, or the final exhaustion of administrative remedies, the Secretary will issue the Export Certification or decline to issue it.

(b) The exporter must provide CBP with a copy of the Export Certification within 48 hours before presentation of the item to CBP at the border by uploading the Electronic Export Information (including the Export Certification) or successor to the CBP Automated Commercial System or successor system.

§ 1194.106 What is the process for the Secretary to revoke an Export Certification?

(a) If the Office receives credible evidence indicating that an item that received an Export Certification is not eligible for an Export Certification, then the Secretary, after consultation with relevant Indian Tribes and Native Hawaiian organizations, may immediately revoke a previously-issued Export Certification.

(b) Any revocation will be effective immediately, notwithstanding any administrative appeal under subpart D of this part.

§ 1194.107 What is the Export Certification Database?

(a) The Office will enter all Applications for Export Certification and supporting documents in a secure database information system for the purpose of making export certification applications available to Indian Tribes, Native Hawaiian organizations, and other Federal agencies, including the Departments of Homeland Security, Justice, and State. Access to the database will be limited to users within Indian Tribes, Native Hawaiian organizations, and relevant Federal agencies.

(b) Under the Act, the following information will be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552:

(1) Information that a representative of an Indian Tribe or Native Hawaiian organization—

(A) Submits to a Federal agency pursuant to the Act, an amendment made by the Act, or these regulations; and

(B) Designates as sensitive or private according to Native American custom, law, culture, or religion; or

(2) Information that any person submits to a Federal agency pursuant to the Act or an amendment made by the Act or these regulations that relates to an item for which an Export Certification is denied under this Act.

(c) All information in the database other than that under § 1194.107(b) will be treated by the Secretary as controlled unclassified information and will be protected in accordance with applicable law.

(d) If an Indian Tribe or Native Hawaiian organization requests that the Office delete an application and supporting documents or any portion thereof from the database, the Office will immediately do so. The review of the Application will continue off-line.

(e) If an Indian Tribe or Native Hawaiian organization lacks sufficient resources to access the database or respond to agency communications in a timely manner, the Office, in consultation with Indian Tribes and Native Hawaiian organizations, will provide technical assistance to facilitate that access or response, as applicable.

§ 1194.108 When are Export Certification Fees assessed?

(a) As of [INSERT EFFECTIVE DATE OF FINAL RULE], the fee for applying for an Export Certification is \$500.00 per application. Federal, Indian Tribe, State, and local government agencies and Native Hawaiian organizations are exempt from the processing fee.

(b) The fee will be paid when the application is submitted, and is not refundable.

The Office will keep the fee as a service charge even if the Secretary does not issue an Export Certification or the applicant withdraws the application.

(c) The application fee will be adjusted annually according to the change in the Implicit Price Deflator for Gross Domestic Product (published by the Department of Commerce) since the previous adjustment and will subsequently be posted on the Office website before October 1 each year. Revised fees are effective each year on October 1. Because the fee adjustments are simply based on a mathematical formula, the adjustments will not be subject to notice and comment.

§ 1194.109 Under what circumstances may a Tribal Authorization be issued?

(a) In some circumstances, and at the sole discretion of the Indian Tribe or Native Hawaiian organization, an Indian Tribe or Native Hawaiian organization may issue a Tribal Authorization that may be used as evidence to demonstrate a particular item does not qualify as an Item Requiring Export Certification.

(1) The Tribal Authorization will be in a letter signed by the Tribal leader or a duly adopted Tribal resolution, Tribal ordinance, or other, similar act of the Tribal government or Native Hawaiian organization.

(2) The Tribe or Native Hawaiian organization must provide a copy of the Tribal Authorization to the Office.

(3) The Office may publish a template for Indian Tribes or Native Hawaiian organizations to use for the Tribal Authorization.

(b) The exporter must provide CBP with a copy of the Tribal Authorization within 48 hours before presentation of the item to CBP at the border by uploading the

Electronic Export Information (including the Tribal Authorization) or successor to the CBP Automated Commercial System or successor system.

§ 1194.110 How does the Paperwork Reduction Act affect this part?

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number [INSERT CONTROL NUMBER]. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Subpart C – Procedures for Detention, Forfeiture, Repatriation, and Return

§ 1194.201 When can certain items be detained by CBP?

(a) The Act authorizes CBP to detain certain items specified in § 1194.201(b), and through this regulation, the Secretary requests that CBP do so in accordance with the procedures specified below.

(b) CBP will detain, using procedures under this section:

(1) Any item that may be an Item Prohibited from Exportation that is exported, attempted to be exported, or otherwise transported from the United States; or

(2) Any item that may be an Item Requiring Export Certification that is exported, attempted to be exported, or otherwise transported from the United States without an Export Certification or Tribal Authorization.

(c) Upon discovery of an item specified in § 1194.201(b), CBP will contact the Office within 24 hours for the Office to determine whether the item may be lawfully exported in accordance with the Act and these regulations.

(d) Upon the request of the Office, CBP may provide additional information such as photographs of the item to assist the Office in determining whether the item falls within the scope of the Act.

(e) The Office will provide to CBP a written statement within five calendar days of initial CBP contact stating whether the item falls within the scope of the Act, whether the item requires an Export Certification, and whether the Secretary has issued an Export Certification or an Indian Tribe or Native Hawaiian organization has issued a Tribal Authorization for the item. The statement will be accompanied by a notification of the appeal procedures in subpart D of this part for CBP to provide to the exporter. The Office may provide the statement and notification to the exporter by email.

(f) If the Office provides the written statement under § 1194.201(e), CBP will detain the item.

(g) If the Office fails to timely provide the written statement under § 1194.201(e), and assuming no other legal restrictions apply, CBP will provide notice to the exporter that the item is being released back to the exporter.

(h) The exporter will have five calendar days following the issuance of the notice under § 1194.201(g) to arrange retrieval of the detained item. If, after five calendar days, no arrangement has been made, the item will be deemed abandoned and surrendered to the Office.

(i) If the exporter voluntarily abandons the detained good(s) or the goods are deemed abandoned under subsection (h), the shipment will be surrendered to the Office for repatriation under § 1194.206. Such voluntary return may be eligible for the safe harbor from prosecution under § 1194.204.

(j) Detained item(s) will be held in a secure location at the port consistent with current CBP regulations and policy, until they are turned over to the Office for disposition.

§ 1194.202 How does CBP deliver items to the Office?

(a) Within 48 hours after the Office notifies CBP under § 1194.201 of this part that an item is subject to detention, CBP will record the detention on a CBP Form 6051D or equivalent detention form. CBP will provide a copy of that form to the exporter with the notification of appeal procedures provided by the Office under § 1194.201. Once the item has been formally detained by CBP, CBP will notify the Office that the item is available for the Office to retrieve.

(b) The Office will retrieve the item in-person within five days after the notification under § 1194.202(a).

(c) The Office will also notify the exporter within five days that it has custody of the detained items. The Office will also provide a notification to the exporter for purposes of appealing the detention under subpart D of this part.

(d) The Office will hold any items retrieved from CBP in a secure location in a manner based on consultation with the appropriate Indian Tribe or Native Hawaiian organization.

(e) Within 60 days after the Office retrieves an item detained under § 1194.201(b)(2) to the Office, and in consultation with appropriate Indian Tribes and Native Hawaiian organizations, the Office will determine whether the item is an Item Prohibited from Exportation.

(f) If the Office determines under § 1194.202(e) that the item is an Item Prohibited from Exportation subject to forfeiture, the exporter may appeal that determination under subpart D of this part.

§ 1194.203 What is the process for forfeiture proceedings?

Property seized for violations of the Act and subject to forfeiture may be forfeited, depending upon the nature of the property, through civil administrative procedures, civil judicial procedures, or criminal forfeiture proceedings. Upon the expiration of the period for appeal of detention under § 1194.202(f), or the final exhaustion of Department administrative remedies, the Office may refer the item to an appropriate Federal agency or U.S. Attorney's Office for forfeiture proceedings under the appropriate administrative or judicial authorities. The Office will retain the item in its custody unless the agency or U.S. Attorney's Office needs the item for its investigation.

§ 1194.204 Does safe harbor apply to this regulation?

(a) If the exporter voluntarily returns the item or directs that the item be returned to the appropriate Indian Tribe or Native Hawaiian organization, in accordance with § 1194.201(i) of this part prior to the commencement of an active Federal investigation into the trafficking of the item or into the trafficking of cultural items or archeological resources by the applicant, the exporter shall not be prosecuted for a violation of the Act with respect to the item.

(b) For purposes of § 1194.204(a), the following actions shall not be considered to be actions that commence an active Federal investigation:

(1) The submission by the exporter of an export certification application for the item under § 1194.103;

- (2) The detention of the item by CBP under § 1194.201;
- (3) The retrieval of the detained item by the Office from CBP under § 1194.202;

or

- (4) The seizure by the Office of the item under § 1194.202.

§ 1194.205 What are civil penalties for violations of this regulation?

(a) If the item is an Item Prohibited from Exportation, the base penalty amount is \$800.

(b) If the item is an Item Requiring Export Certification, the base penalty amount is \$8,000.

(1) The Act authorizes the assessment of civil penalties for violations of the Act, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74).

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the Item Requiring Export Certification involved, as identified by any aggrieved Indian Tribe or Native Hawaiian organization;

(ii) The archaeological, historical, or commercial value of the Item Requiring Export Certification involved;

(iii) The economic and non-economic damages suffered by any aggrieved Indian Tribe or Native Hawaiian organization, including expenditures by the aggrieved party to compel the exporter to comply with the Act or this regulation;

(iv) The number of prior violations by the exporter that have occurred;

(v) The cost of storing and repatriating the item, or

(vi) Any other appropriate factor justifying an increase.

§ 1194.206 How is an item repatriated or returned?

(a) If an item is deemed abandoned under § 1194.201(h) or (i), the Office will expeditiously repatriate the Item Prohibited from Exportation to:

(1) the Indian Tribe or Native Hawaiian organization from whose Tribal Land the item was removed or who is culturally affiliated with the item, for cultural items under NAGPRA; or

(2) the Indian Tribe from whose Indian Land the item was removed, for archaeological resources under ARPA.

(b) After an administrative declaration of forfeiture or a final order of forfeiture in a judicial proceeding, the Department may, consistent with applicable law and regulations governing the remission and mitigation of forfeitures, seek the Item Prohibited from Exportation and repatriate it to:

(1) The Indian Tribe or Native Hawaiian organization from whose Tribal Land the item was removed or who is culturally affiliated with the item, for cultural items under NAGPRA; or

(2) The Indian Tribe from whose Indian Land the item was removed, for archaeological resources under ARPA.

(c) The Office will return the Item Requiring Export Certification to the exporter if:

(1) The Office does not make the required determination by the deadline under § 1194.202(e);

(2) The Office determines under § 1194.15(e) that the item is not an Item Prohibited from Exportation;

(3) The exporter is successful in the appeal under § 1194.202(f).

(d) The Office will issue a letter or other document authorizing the return of the property. This letter or other document will be delivered personally or sent by registered or certified mail, return receipt requested, and will identify the owner or consignee, the seized property, and, if appropriate, the custodian of the seized property. It will also provide that, upon presentation of the letter or other document and proper identification, and the signing of a receipt provided by the Office, the seized property is authorized to be released, provided it is properly marked in accordance with applicable State or Federal requirements.

(e) The return of an item under § 1194.206(d) does not mean that the item is eligible for an Export Certification, nor does it substitute for an Export Certification. To export the item, the exporter must apply for, and receive an Export Certification under subpart B of this part.

Subpart D – Administrative Appeals

§ 1194.301 What is the purpose of this section?

Any exporter wishing to appeal the Office's denial of an Export Certification Application under § 1194.105 or detention of an Item Requiring Export Certification under § 1194.202 part must follow the procedures in this regulation. The provisions of 25 CFR part 2 do not apply to decisions under this regulation. No decision, which at the time of its rendition is subject to appeal under this subpart, shall be considered final so as to constitute agency action subject to judicial review. The decision being appealed shall not be effective during the pendency of the appeal.

§ 1194.302 How do I request a hearing?

(a) To begin an appeal under this subpart, the exporter must file a written request for a hearing under § 1194.302(b). The request for hearing and any document filed thereafter with the Departmental Cases Hearings Division (DCHD) under this section are subject to the rules that govern the method and effective date of filing and service under the subparts applicable to DCHD in 43 CFR part 4. If the exporter does not file a written request for a hearing in 45 days from the date of the denial or detention, the exporter waives the right to request a hearing and has failed to exhaust administrative remedies.

(b) The exporter must file the written request for a hearing with the DCHD, Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmissions. A copy of the request must be served on the Solicitor of the Department of the Interior at the address specified in the OHA Standing Orders on Contact Information and on any culturally affiliated Indian Tribe or Native Hawaiian organization using the contact information in the Federal Register Notice published by the Secretary under § 1194.101. The Standing Orders are available on the Department of the Interior OHA's website at <https://www.doi.gov/oha>.

(c) The request for a hearing must:

(1) Include a copy of the denial of the Export Certification Application or the notice of detention;

(2) State the relief sought by the exporter; and

(3) Include the basis for challenging the facts used to deny the application or detain the Item.

(d) Upon receiving a request for a hearing, DCHD will assign an administrative law judge to the case and promptly give notice of the assignment to the exporter, the Office of the Solicitor, and any culturally affiliated Indian Tribe or Native Hawaiian organization. Thereafter, each filing must be addressed to the administrative law judge and a copy served on each opposing party or its counsel.

(1) Subject to the provisions of 43 CFR 1.3, an exporter may appear by authorized representative or by counsel and may participate fully in the proceedings. If the exporter does not appear and the administrative law judge determines that this absence is without good cause, the administrative law judge may, at the judge's discretion, determine that the exporter has waived the right to a hearing and consents to the making of a decision on the record.

(2) The Department of the Interior counsel is designated by the Office of the Solicitor of the Department of the Interior. No later than 20 days after receipt of its copy of the written request for hearing, Departmental counsel must file with the DCHD an entry of appearance on behalf of the Office and the following:

(i) Any Application for Export Certification with all supporting documents. The Application and supporting documents will be filed under seal and available only to the administrative law judge. Alternatively, the Office may provide the administrative law judge with read-only access to the appropriate records in the database under § 1194.107;

(ii) Any written communications between the Office and the exporter concerning the application;

(iii) Any written communications between the Office and culturally affiliated Indian Tribes or Native Hawaiian organizations concerning the application or detention.

Such communications will be filed under seal and treated as confidential information available to the exporter only under a protective order;

(iv) A written description of any Item Requiring Export Certification that has been detained. The description may include photographs of the item, but only with the consent of the culturally affiliated Indian Tribe or Native Hawaiian organization. The description and any photographs will be filed under seal and treated as confidential information available to the exporter only under a protective order; and

(v) Any other information considered by the Office in reaching the decision being challenged.

(3) Any Indian Tribe or Native Hawaiian organization that is culturally affiliated with the item that has been detained or the Item Requiring Export Certification is a required party to the hearing and any appeal.

§ 1194.303 What are the hearing procedures?

(a) To the extent they are not inconsistent with this section, the rules in the subparts applicable to DCHD in 43 CFR part 4 apply to the hearing process.

(b) The administrative law judge has all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, and to render a decision under 5 U.S.C. 554 through 557.

(c) The administrative law judge will render a written decision. The decision must set forth the findings of fact and conclusions of law, and the reasons and basis for them.

(d) The administrative law judge's decision shall be the final administrative decision of the Secretary and will take effect 31 days from the date of the decision unless

the exporter or the Indian Tribe or Native Hawaiian organization files a notice of appeal as described in § 1194.302. If the exporter does not file a notice of appeal 30 days from the date of the administrative law judge's decision, the exporter has failed to exhaust administrative remedies.

§ 1194.304 How do I appeal a decision?

(a) The exporter or culturally affiliated Indian Tribe or Native Hawaiian organization seeking review of the decision of the administrative law judge must file a written notice of appeal no later than 30 days after the date of the decision. The notice of appeal must be filed with the Interior Board of Indian Appeals (IBIA), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmission. The Standing Orders are available on the Department of the Interior OHA's website at <https://www.doi.gov/oha>. The notice of appeal must be accompanied by proof of service on the administrative law judge and each opposing party. The notice of appeal and any document filed thereafter with the IBIA are subject to the rules that govern the method and effective date of filing under 43 CFR 4.310.

(b) To the extent they are not inconsistent with this section, the provisions of 43 CFR part 4, subpart D, apply to the appeal process.

(c) The IBIA's decision will be in writing and takes effect as the final administrative decision of the Secretary on the date that the IBIA's decision is rendered, unless otherwise specified in the decision.

(d) OHA decisions in proceedings instituted under this subpart are posted on OHA's website.

(e) The final administrative decision of the Secretary will be final agency action for purposes of 5 U.S.C. 704, only if the exporter has exhausted all administrative remedies under this subpart.

Subpart E – Voluntary Return of Tangible Cultural Heritage

§ 1194.401 What is the purpose of this section?

An individual or organization may return tangible cultural heritage under this part. The goal of this subpart is to facilitate the return of cultural items and Native American human remains to Indian Tribes and Native Hawaiian organizations. If the voluntary return is of an item subject to NAGPRA by a museum as that term is defined in NAGPRA, the return of that item will follow the process under section 7 of NAGPRA (25 U.S.C. 3005) rather than the process in this regulation.

§ 1194.402 When is consultation initiated?

(a) An individual or organization that is seeking to voluntarily return tangible cultural heritage under this subpart must compile a simple itemized list and description of any tangible cultural heritage. The simple itemized list must include, to the extent that the individual or organization has the required information:

- (1) The geographical location (provenience) by county or State where the tangible cultural heritage was removed;
- (2) The acquisition history (provenance) of the tangible cultural heritage;
- (3) Other information available for identifying a culturally affiliated Indian Tribe or Native Hawaiian organization; and

(4) The presence of any potentially hazardous substances used to treat the tangible cultural heritage, if known.

(b) The individual or organization should submit this list to the Office. In consultation with Indian Tribes, Native Hawaiian organizations, and the Native Working Group convened under subpart G of this part, the Office will determine what Indian Tribe or Native Hawaiian organization is potentially culturally affiliated with the tangible cultural heritage, and provide its contact information to the individual or organization. The Office will also provide the contact information of the individual or organization to the identified Indian Tribe or Native Hawaiian organization with the list compiled under § 1194.402(a).

§ 1194.403 What is the process for consultation and return of items under this regulation?

(a) After the Office transmits the contact information under § 1194.402, the individual or organization and the Indian Tribe or Native Hawaiian organization will contact each other and arrange for consultation and return of the tangible cultural heritage.

(b) At the request of the Indian Tribe or Native Hawaiian organization, the Departments of Homeland Security and State will facilitate the transportation and importation of the tangible cultural heritage.

(c) At the request of the Indian Tribe or Native Hawaiian organization, the Interagency Working Group convened under subpart F of this part will explore funding mechanisms to pay the expenses of the Indian Tribe or Native Hawaiian organization for

the return of tangible cultural heritage. Assistance to the Indian Tribe or Native Hawaiian organization could also be in the form of in-kind resources.

(d) Upon a successful voluntary return, and with the consent of the Indian Tribe or Native Hawaiian organization, the Office will provide the individual or organization with tax documentation for a charitable gift to the Indian Tribe or Native Hawaiian organization that may be tax deductible if the requirements under 26 U.S.C. 170 and 26 CFR part 1 are satisfied.

Subpart F – Interagency Working Group

§ 1194.501 What is the Interagency Working Group?

The Office will convene the Interagency Working Group to coordinate the policy-making process with respect to facilitation of the repatriation to Indian Tribes and Native Hawaiian organizations of items that have been illegally removed or trafficked in violation of applicable law; protection of tangible cultural heritage, cultural items, Native American human remains, and archaeological resources still owned or controlled by Indian Tribes and Native Hawaiian organizations; and support for improvements in implementation of NAGPRA, ARPA, and other relevant Federal law.

§ 1194.502 What is the membership of Interagency Working Group?

The Departments of Justice, State, and Homeland Security shall each designate a responsible office and individual to serve on the Interagency Working Group. The Office will represent the Secretary of the Interior on the Working Group.

§ 1194.503 What are the duties of the Interagency Working Group?

The Interagency Working Group will aid in implementation of the Act by, including but not limited to, facilitating the voluntary return of tangible cultural heritage,

attempting to prevent international sales of items that are prohibited from being trafficked under Federal law, and collaborating with the Native Working Group, the NAGPRA Review Committee, and the Cultural Heritage Coordinating Committee.

Subpart G –Native Working Group

§ 1194.601 What is the relationship between the Office and the Native Working Group?

The Office will provide administrative support to the Native Working Group.

§ 1194.602 What is the membership of the Native Working Group?

(a) The Native Working Group is composed of representatives of Indian Tribes and Native Hawaiian organizations with relevant expertise.

(b) There are thirteen members of the Native Working Group: one representing Indian Tribes in each Bureau of Indian Affairs Region, and one representing Native Hawaiian organizations.

(c) The members of the Native Working Group are appointed by the Secretary for an initial term of four years. A member may be reappointed for a term of two years.

(d) Any Indian Tribe or Native Hawaiian organization may nominate a person from a particular BIA Region or Hawai'i for membership, even if that Indian Tribe or Native Hawaiian organization is not in that Region or in Hawai'i. The Office will recommend a list of candidates to the Secretary, in coordination with the Interagency Working Group convened under subpart F.

§ 1194.603 What are the duties of the Native Working Group?

(a) The Native Working Group may provide recommendations for Federal agency action regarding:

(1) The voluntary return of tangible cultural heritage by collectors, dealers, and other individuals and non-Federal organizations that hold such tangible cultural heritage; and

(2) The elimination of illegal commerce of cultural items and archaeological resources in the United States and foreign markets.

(b) Such recommendations shall be considered fully by affected agencies, but shall not be binding upon any affected agency.

(c) The Office of Tribal Justice shall represent the Department of Justice with regard to relevant matters before the Native Working Group including receiving formal requests to initiate agency actions and to provide information and assistance to the Native Working Group. Requests to initiate litigation will be directed by the Office of Tribal Justice to the appropriate litigation component within the Department of Justice.

(d) Upon request from the Native Working Group, the Department of State, in coordination with the Department of Justice when judicial proceedings are initiated either domestically or abroad, may initiate dialog through U.S. missions abroad, in coordination with the Department of State's Cultural Heritage Center, with appropriate foreign government offices.

(e) The Native Working Group may also request information or assistance from:

(1) The Department of the Interior;

(2) The Department of Justice;

(3) The Department of Homeland Security;

(4) The Department of State;

(5) The Review Committee established under section 8(a) of NAGPRA;

(6) The Cultural Heritage Coordinating Committee established pursuant to section 2 of the Protect and Preserve International Cultural Property Act; or

(7) Any other relevant Federal agency, committee, or working group.

Bryan Newland,

Assistant Secretary – Indian Affairs.