

**Summary of Comments Received on  
“DOI Draft Summary of Legislative Options Prepared in Response to GAO  
Recommendation”**

The U.S. Government Accountability Office (GAO) report, “Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions,” issued on September 5, 2018, examined (1) federal agencies’ actions to assist Tribes in repatriating cultural items being auctioned overseas, (2) the laws that address the export, theft, and trafficking of cultural items, and (3) any challenges in proving violations of these laws. In its report, the GAO concluded, “federal laws that address the theft and trafficking of Native American cultural items are limited in scope, making it challenging for [T]ribes to provide sufficient evidence of violations.” In light of this finding, the GAO issued recommendations to four U.S. agencies (the U.S. Departments of State (DOS), Justice (DOJ), Interior (DOI), and Homeland Security (DHS)) engaged in supporting Tribal efforts to repatriate Native American cultural items from abroad. The GAO called on each agency to direct its “members of the interagency working group for protection of Native American cultural property to collaborate with the interagency working group members from other agencies to assess, in consultation with Indian [T]ribes, whether and how amending the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items would facilitate the repatriation of these items from auctions overseas and report its findings to Congress.”

In response to the GAO recommendation, a draft summary of legislative options identified by DOI (hereinafter referred to as the “draft assessment”), with substantial input from members of the interagency working group for protection of Native American cultural property, was provided to Tribes in a “Dear Tribal Leader” letter on November 1, 2019. DOI held a

listening session on the draft assessment on November 12, 2019, at the We-Ko-Pa Conference Center, Fort McDowell Yavapai Nation, Arizona. The session was held on the margins of the annual conference on repatriation of cultural heritage organized by the Association on American Indian Affairs. A telephonic consultation was held on the draft assessment on January 14, 2020, and comments were accepted until February 14, 2020. Below is a summary of the comments DOI received from the listening session, the Tribal consultation, and the written comments. Due to the sensitive nature of the subject, specific identifying information has not been included in the summary. (Hereinafter, for brevity and clarity, Native American cultural items, archaeological resources, and objects of antiquity will be referred to as “items.”)

**General support for the Safeguarding Tribal Objects of Patrimony (STOP) Act and the draft assessment**

Several commenters stated that they were in support of the federal government developing and consulting with Tribes on the draft assessment. The commenters were also pleased that the federal government supported exportation requirements on items.

One Tribe and one Tribal consortium stated that the STOP Act is the most efficient method for providing restrictions on the exportation of items.

One Tribe and one Tribal consortium supported all of the options presented in the draft assessment; however, they submitted various comments and suggested edits that are included in the below summary.

One Tribe and two Tribal consortia commented that all Tribes have inherent authority over their own property, which the draft assessment and the STOP Act do not expressly acknowledge. They would like to see this acknowledgement in the final assessment presented to the GAO.

One Tribe commented that the 60-day timeframe to establish credible evidence to support forfeiture after items are seized is appropriate and accurate.

**Draft Assessment Option 1: Prohibit export of items “obtained in violation” of existing domestic cultural property laws**

One Tribe and one Tribal consortium recommended the inclusion of the Antiquities Act whenever the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protection Act (ARPA) are mentioned in the draft assessment.

Four Tribes expressed specific support for this option in the draft assessment. They stated that an explicit ban on these items would deter future theft and provide legal justification for foreign governments to return wrongfully obtained items.

One Tribal consortium representative commented that this particular option is a good idea, but it is not enough in itself.

Another Tribal consortium representative stated that one of the problems with NAGPRA is the start date [i.e., that it has been interpreted to have limited application prior to 1990], and another problem is that NAGPRA only covers federal lands and collections, not private lands.

Several commenters expressed concern that ARPA, NAGPRA, and the Antiquities Act are not broad enough, as written, to protect items from unlawful exportation. These commenters expressed the need for broader national coverage.

**Draft Assessment Option 2: Prohibit export of Native American items except in compliance with permit**

Three Tribes stated that there should be an export certification system that requires exporters seeking to export items that are subject to ARPA, NAGPRA, and the Antiquities Act to obtain a certificate. Furthermore, two of these Tribes suggested that the exporter should be

required to self-attest that the items were legally obtained before being eligible for an export certificate. These two Tribes believed that this type of certificate would provide clarity to exporters and United States Customs and Border Protection agents to determine which items are able to be legally exported from the United States. However, the third Tribe expressed concerns that the creation of a specific list of items prohibited from export would force Tribes to share confidential and sacred information. This Tribe also stated that the creation of a list could be difficult to expand, when necessary.

One Tribe disagreed with the draft assessment's assertion that an attestation and issuance of an export certificate could hamper or negate future criminal investigation and seizure of an item. Conversely, the Tribe stated that this type of certificate is integral to the return of an item possessed overseas.

Additionally, three Tribes would like to see a screening mechanism implemented in conjunction with certification system to ensure that Tribes have an opportunity to review items prior to export.

One commenter stated that any permit or certification requirement should encompass any Native American items originally taken from federal lands, or acquired or held by a federal museum, after 1990.

**Draft Assessment Option 3: Require a declaration to export Native American cultural items**

One Tribal consortium commented that some countries' laws take a holistic approach to protecting cultural property. This Tribal consortium further stated that some countries maintain information on owners of cultural heritage, and this information is used to protect against theft or

improper exportation. One Tribe stated that the federal government should gather information about items from exporters ahead of exportation.

One Tribe stated that a declaration process alone would have the same effect as a certification. This Tribe also expressed concern that a declaration would meet the standards under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention).

#### **Draft Assessment Option 4: Strengthen existing domestic laws**

One Tribe and two Tribal consortia stated that current laws create a “checkerboard of protections” based on the status of the land where the item was taken and the time period of when it was taken.

One Tribe and one Tribal consortium commented that there are laws that protect certain animals regardless of where they are found, and the Tribes would like to see a complete prohibition on the possession and sale of Native American remains and items, regardless of where they were found or what entity possesses them.

Two Tribes suggested that ARPA, NAGPRA, and the Antiquities Act be amended to include stronger penalties for the exportation of items obtained in violation of these laws.

One Tribe commented that increased federal funding for enforcement of current laws addressing international trafficking was necessary, as was increased penalties for applicable laws.

#### **Option 5: Support Tribes in strengthening their laws**

Several Tribes commented that they are generally in support of strengthening Tribal laws related to the exportation of items; however, one Tribe suggested that this was not enough to significantly curb unlawful exportation.

One Tribal consortium stated that Tribal customs and laws that protect these items should serve as the primary source of law and that the United States must defer to these Tribal laws when seeking to protect such items. The Tribal consortium also stated that consultation with Tribes is of the utmost importance when any item is exported, and the authority to possess or export the item must come directly from the Tribe.

One Tribal representative expressed concern that the option of reinforcing Tribal laws should take into account that some of the most important Tribal laws relating to these matters are not written and must not be written.

One Tribe commented that it was a worthy goal to seek to incorporate Tribal law in defining the scope of items prohibited from export.

#### **Option 6: Support for legitimate trade of Native American arts and crafts**

One Tribe commented that they supported the provision of resources to promote the legitimate trade in Native American art and craftwork internationally.

One Tribal consortium stated that it would like to see additional support and resources to promote the difference between legitimate Native American art and craftwork and sensitive cultural heritage both domestically and internationally. This could also include increased access to Native American artists and craftspeople from international markets.

Several commenters stated that export prohibitions and certificate requirements will not harm the legitimate trade of Native American art and craftwork. These commenters suggested that these types of controls will result in increased confidence in items that are legitimately offered for sale domestically and internationally.

#### **Additional comments**

##### **Voluntary repatriation framework**

Two Tribes suggested a voluntary repatriation framework should be included with any legislation. The Tribes stated that such a framework could include a referral program to facilitate the return of items from individuals or organizations to the appropriate Tribe.

### **Confirmation of presidential authority for agreements under the 1970 Convention**

Two Tribes commented that any legislative framework relating to international exportation and repatriation should expressly confirm the President's authority to enter into agreements to request the return of items from foreign countries under the 1970 Convention.

### **Burden of proof**

One Tribal representative suggested addressing the burden of proof. Under NAGPRA now, museums ask for information from Tribes to establish affiliation, and the commenter stated that this puts too heavy a burden on Tribes, far beyond what the commenter believed was required to establish affiliation in cases of unintended excavation.

### **Sharing of confidential information**

One Tribal representative stated that there should be an explicit prohibition on sharing confidential information provided in the course of consultation, not only a protection against public disclosure under the Freedom of Information Act of information provided to the government, but also a requirement that different Tribes not disclose confidential information provided by other Tribes.

### **Custody of repatriated items**

One Tribal representative emphasized that the repatriation process should ensure that items being returned go directly to the affiliated Tribes without going through federal government custody.

### **Federal and Tribal working groups**

Two Tribes stated that they would like to see the establishment of a federal working group to ensure coordination among federal agencies. These two Tribes also states that a Tribal working group dedicated to providing expertise and identifying sensitive items could also assist the federal government in understanding the scope of the issue. Both Tribes stated that the creation of these two working groups would result in a positive collaboration between Tribes and the federal government.

#### **Ratification of international convention**

One Tribe and one Tribal consortium stated that they would like the United States to ratify and accede to the International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Items (1995).