

**Written Testimony of Governor Timothy Menchego  
Pueblo of Santa Ana  
Before the  
House Natural Resources Committee  
Subcommittee on Indigenous Peoples of the United States**

**Hearing on the  
Safeguard Tribal Objects of Patrimony (STOP) Act of 2019, H.R. 3846**

**September 19, 2019**

On behalf of the Pueblo of Santa Ana, hereinafter referred to by our traditional name of “Tamaya”, please accept this written testimony for the hearing on the Safeguard Tribal Objects of Patrimony (STOP) Act of 2019, H.R. 3846, by the House Natural Resources Committee’s Subcommittee on Indigenous Peoples of the United States on Thursday, September 19, 2019.

The Pueblo of Santa Ana appreciates the opportunity to speak to you on this important legislation, which the All Pueblo Council of Governors as well as many other individual pueblos also support. Trafficking in tribal cultural heritage items is not a problem unique to pueblos, however, and for this reason 36 tribes and tribal organizations across the country have already submitted letters of support for the STOP Act.

Below, we have described: the importance of tribal cultural heritage items; existing federal laws that are meant to protect them; continued trafficking despite these laws, especially internationally; and the ways in which the STOP Act is intended to address international trafficking.

**I. The Importance of Tribal Cultural Heritage Items**

The pueblos are some of the earliest continuously inhabited communities in the nation practicing traditional religious and spiritual ways of life. Tamaya is located in north-central New Mexico along the Rio Grande River. Our reservation encompasses approximately 150,000 acres in Sandoval County, and we have over 800 enrolled members.

Like all tribes, Tamaya’s items of cultural heritage are a vital part of our identity, helping us connect with our ancestors and teaching and reminding us of who we are, where we come from, our ways of life and values, and why we do the things we do. They keep us rooted.

Our cultural heritage items have significant roles to play within our culture, our traditional calendar, our societies, our families, and our way of life. And they help us honor and uphold our values and teach those values to our young people. So important are these items of cultural heritage that, under Tamaya’s traditional laws, no one person may own them. Rather, they belong to the community as a whole and are cared for by their caretakers, who cannot sell them or take them away from Tamaya. As Tamaya, we have an inherent responsibility to protect these life-affirming items of cultural heritage for the continuity of our identity.

## **II. Existing Federal Laws Protecting Tribal Cultural Heritage Items**

United States federal laws prohibit the possession and sale of certain protected items of tribal cultural heritage. To qualify for protection under these laws, an item must meet the definition and provenance requirements of the particular statute. While these laws do not expansively protect all cultural heritage items tribes protect under their own laws and do not stop international trafficking, as discussed below, they are important tools nonetheless. And dealers have been operating under their restrictions for decades.

The Native American Graves Protection and Repatriation Act (NAGPRA) protects cultural items, including ancestral remains. 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170. NAGPRA defines cultural items to include human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3). Sacred objects are defined to include specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions in present day. *Id.* § 3001(3)(C). Objects of cultural patrimony are defined to include objects having ongoing historical, traditional, or cultural importance and considered inalienable because they are communally owned. *Id.* § 3001(3)(D). Law enforcement officials consult with tribal officials to identify items of cultural patrimony. *See United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999); *United States v. Carrow*, 119 F.3d 796 (10th Cir. 1997).

NAGPRA prohibits removal of cultural items from tribal or federal land after its 1990 enactment date without proper permitting. 25 U.S.C. § 3002(c); *see also id.* § 3002(a). Additionally, it prohibits selling and purchasing as well as transportation for sale of cultural items that were obtained in violation of NAGPRA. 18 U.S.C. § 1170. Violators are subject to fines and imprisonment of one year for a first offense and five years for subsequent offenses. *Id.*

The Archaeological Resources Protection Act (ARPA) protects archaeological resources. 16 U.S.C. §§ 470aa–470mm. Archaeological resources are defined to include material remains of past human life or activities that are of archaeological interest and are at least 100 years old. *Id.* § 470bb(1).

ARPA prohibits removal of archaeological resources from Indian and public land without proper permitting, *id.* § 470ee(a), where removal took place after ARPA’s 1979 enactment date, *id.* § 470ee(e). It also bars selling and purchasing as well as transportation of archaeological resources that were originally removed in violation of ARPA. *Id.* § 470ee(b)(1). However, ARPA also has sweeping trafficking provisions that incorporate illegal removal under other federal and state laws, which allows its trafficking prohibitions to apply to archaeological resources illegally removed before ARPA’s 1979 enactment date. *Id.* § 470ee(b)(2), (c), *see also id.* § 470ee(f). Violators of ARPA are subject to fines of \$10,000 and imprisonment of one year for a first offense and fines of \$100,000 and imprisonment of five years for subsequent offenses, *id.* § 470ee(d), as well as civil penalties, *id.* § 470ff; 43 C.F.R. Part 7

Other federal laws also protect tribal cultural heritage items. For example, the Antiquities Act of 1906 protects objects of antiquity removed from land owned or controlled by

the federal government. 54 U.S.C. §§ 320301–320303, 18 U.S.C. § 1866. It prohibits appropriation of or injury to objects of antiquity without proper federal permission. 18 U.S.C. § 1866(b). Violators are subject to fines and imprisonment of 90 days. *Id.*

### **III. Trafficking in Tribal Cultural Heritage Items Continues, Especially Internationally**

Despite the existing federal laws in place, trafficking in tribal cultural heritage items continues unabated, especially internationally. According to the Government Accountability Office (GAO), tribal cultural heritage items are being illegally obtained, transported, and sold in overseas auctions and other marketplaces.<sup>1</sup> A quick look at past auction catalogues of places where pueblos' cultural heritage items have been sold reveals the sheer enormity of tribal cultural heritage items that have left the country.<sup>2</sup> Put simply, countries like France have become a safe haven for the illegal trafficking of sensitive tribal cultural heritage items, which are sold freely without recourse.

The pueblos have developed expertise in the protection of cultural heritage items, especially across international borders, out of necessity, as pueblo cultural heritage items are targeted by traffickers. According to the GAO, the pueblos are among a list of tribes that have previously identified important cultural items for sale at overseas auctions.<sup>3</sup> Many people view our cultural heritage items as beautiful works of art, as talismans of a past culture they would like to own, or as items to trade for profit. Whatever intrinsic beauty these items possess, that is not their intended purpose and they should not leave their home communities.

The STOP Act grows out of pueblos' and other tribes' experiences attempting to halt the international sale of their cultural heritage items, closing some of the most problematic gaps in existing laws that allow international trafficking to continue.

First, as the GAO has recognized, halting international sale requires quick deployment of multiple federal agencies, and there is no formal mechanism for a tribe to contact them and for

---

<sup>1</sup> U.S. Gov't Accountability Office, GAO-18-537, *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, at 5–6 (2018).

<sup>2</sup> The auction of tribal cultural heritage items in France has been widely reported since at least 2013. See, e.g., Tom Mashberg, *Secret Bid Guides Hopi Spirits Home*, N.Y. TIMES, (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html>; Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, N.Y. TIMES, (June 29, 2014), <http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items-continues-despite-us-embassy-efforts.html>; SeaAlaska Heritage Institute, *Secret Bidder Saves Sacred Object from Auction for Alaska Natives*, INDIAN COUNTRY TODAY, (Sept. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/09/06/annenbergfoundation-returns-sacred-object-alaska-natives-156764>; AP, *Navajos Reclaim Sacred Masks at Auction*, CBS NEWS, (Dec. 16, 2014), <http://www.cbsnews.com/news/navajo-indians-buy-back-sacred-masks-in-france-auction/>; Reuters, *Hopi Sacred Masks Auction in Paris Despite Protests*, REUTERS, (June 11, 2015), <http://www.reuters.com/article/us-france-auction-masks-idUSKBN0OR1DG20150611>.

<sup>3</sup> See, e.g., U.S. Gov't Accountability Office, GAO-18-537, *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, at 2, 6 n.13 (2018).

them to act quickly and in coordination.<sup>4</sup> Although tribes track auction houses known to sell tribal cultural heritage items, we often have only days between learning of an upcoming sale and the sale taking place.

Second, also recognized by the GAO, United States law lacks an explicit export prohibition and certification system, and these elements are required to successfully retrieve tribal cultural heritage items from other countries.<sup>5</sup> Certain countries, such as France, under their own domestic laws restrict import of items of cultural heritage illegally exported from a country that provides export certificates. But these countries are not always willing to return cultural heritage items to a country lacking these legal elements in their own domestic laws.

Additionally, the United States entered into the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property, an international treaty in which signatories agreed to protect each other's cultural heritage items when their exportation is illegal in the originating country. This treaty allows countries to enter into agreements and otherwise to return each other's items of cultural heritage. But the United States has not put into place the elements necessary to utilize the treaty to retrieve tribal cultural heritage items. Instead, viewing itself as a market country, the United States has only enacted laws and entered into agreements with other countries that prohibit import of other countries' cultural heritage items and facilitate their return to the originating country, and it has invested the resources necessary for vigorous enforcement. To pave the way for the United States to enter into agreements with and otherwise request other countries return tribal cultural heritage items, it is incumbent upon the United States to enact an explicit export prohibition and create a certification system—thereby protecting the cultural heritage items originating within its own borders.

Third, we have learned that many individuals would like to repatriate items but do not know where to start. We have also learned that the federal government lacks a systematic process for locating a tribe associated with an item and connecting the individual with a tribal representative. This legislation will provide a framework for well-intended individuals to work collaboratively in returning tribal cultural heritage items. We understand that most tribal cultural heritage items come home through voluntary return rather than through prosecution, and we want to support and facilitate these returns.

#### **IV. The STOP Act Closes Gaps in United States Laws**

The STOP Act sets out with the two main goals of: (1) protecting against the exportation of, as well as facilitating the international repatriation of, Native American cultural items, archaeological resources, and objects of antiquity obtained in violation of NAGPRA, ARPA, or the Antiquities Act; and (2) facilitating coordination among federal agencies in protecting and

---

<sup>4</sup> *Id.* at 2 (2018) (“Tribes may need the assistance of multiple federal agencies because each agency has different roles and responsibilities related to international relations and the enforcement of laws that address the export, theft, and trafficking of cultural items.”).

<sup>5</sup> *Id.* at 17 (2018) (“[F]ederal law does not regulate the export of Native American cultural items through an export system that requires, for example, an export license or certificate when exporting such items. This means Native American cultural items can be exported from the United States without the exporter receiving permission from the federal government to do so.”).

repatriating such items and in aiding the voluntary return of tribes' tangible cultural heritage more broadly.

The STOP Act was originally introduced in June 2017 by Senator Martin Heinrich of New Mexico. The Senate Committee on Indian Affairs held a hearing in November 2017 and unanimously voted the bill be reported favorably in a May 2018 markup. Since the STOP Act's introduction, tribal, federal, and other experts and the GAO have provided feedback to ensure the STOP Act meets its goals, much of which has been incorporated into the STOP Act of 2019.

### Increased Penalties

The STOP Act would increase criminal penalties under NAGPRA. This increase is needed to deter potential violators. It is also needed to encourage federal officers to initiate prosecutions, as increased penalties justify additional resources expended on a case.

### Explicit Export Prohibition

The STOP Act would also explicitly prohibit the exportation of Native American cultural items, archaeological resources, and objects of antiquity that were obtained in violation of NAGPRA, ARPA, or the Antiquities Act or are otherwise under federal investigation. This explicit export prohibition would help make it possible to regain tribal cultural heritage items under other countries' domestic laws and under the 1970 international treaty.

Congress has already spoken to the importance of this issue when it passed the Protection of the Right of Tribes to stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, a 2016 joint congressional resolution condemning the illegal trafficking in sensitive tribal cultural heritage items, specifically stating that Congress "supports the development of explicit restrictions on the export of tribal cultural items."<sup>6</sup>

To be clear, the STOP Act's prohibition applies only to items that were already protected under NAGPRA, ARPA, or the Antiquities Act. The dealer industry has been operating under the definitions in these laws for decades.

### Certification System

The STOP Act would also create an export certification system where an exporter seeking to export something that qualifies under NAGPRA, ARPA, or the Antiquities Act as a Native American cultural item, archaeological resource, or object of antiquity must apply for a certification. Only cultural items, archaeological resources, or objects of antiquity that were legally obtained are eligible for a certification. This certification system would help make it possible to regain tribal cultural heritage items under other countries' domestic laws and under the 1970 international treaty.

---

<sup>6</sup> The PROTECT Patrimony Resolution was cosponsored by 17 bipartisan Representatives from the House, and its companion in the Senate was cosponsored by four bipartisan Senators.

The STOP Act would allow an exporter to initially demonstrate through self-attestation that the NAGPRA, ARPA, or Antiquities Act Native American cultural item, archaeological resource, or object of antiquity was legally obtained.

Further, the STOP Act includes within it an immunity provision, which states an individual who returns a NAGPRA, ARPA, or Antiquities Act Native American cultural item, archaeological resource, or object of antiquity that the individual had sought to export without a certificate shall not be prosecuted for the violation.

#### International Treaty

The STOP Act would confirm the President's authority to enter into agreements and otherwise request the return under the 1970 international treaty of Native American cultural items, archaeological resources, and objects of antiquity obtained in violation of NAGPRA, ARPA, or the Antiquities Act. This last element—authorization of agreements—paired with the export prohibition and export certification system would ensure the United States has the tools necessary to utilize the treaty.

#### Federal Framework for Voluntary Return

The STOP Act would create a framework for the federal government to work with individuals and organizations to facilitate the voluntary return of cultural heritage items to tribes, including calling on the Department of the Interior to create a referral system for directing individuals to the correct tribe for return.

This voluntary return framework would apply broadly to Native American tangible cultural heritage, a term used internationally that encompasses not only Native American cultural items, archaeological resources, and objects of antiquity obtained in violation of NAGPRA, ARPA, or the Antiquities Act but also other culturally significant items. Thus, to access this voluntary return framework, an individual need not establish whether the item is held illegally.

#### Interagency Working Group and Tribal Working Group

The STOP Act would create a federal working group to ensure coordination between federal agencies and a tribal working group to make recommendations and request certain federal actions.

#### Freedom of Information Act Exemption

The STOP Act would exempt information submitted by tribes under the STOP Act from disclosure. Many tribes are rightly hesitant to provide culturally sensitive or sacred information that may be disclosed, but this makes prosecutors' gathering of evidence difficult. Protection from disclosure would facilitate evidence collection.

### **V. Conclusion**

Tamaya fully supports the passage of the Safeguard Tribal Objects of Patrimony (STOP) Act of 2019, H.R. 3846. Through pueblos' experiences protecting our cultural heritage items from international trafficking, we have learned many hard lessons first hand. One lesson we have learned is that existing federal laws are not enough. The STOP Act would strengthen these federal laws in areas we believe need it most.