

**S. 465 AND S. 1400**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTEENTH CONGRESS**  
FIRST SESSION  
\_\_\_\_\_  
NOVEMBER 8, 2017  
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## S. 465 AND S. 1400

WEDNESDAY, NOVEMBER 8, 2017

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:53 p.m. in room 628, Dirksen Senate Office Building, Hon. John Hoeven, Chairman of the Committee, presiding.

### **OPENING STATEMENT OF HON. JOHN HOEVEN, U.S. SENATOR FROM NORTH DAKOTA**

The CHAIRMAN. Good afternoon. Thanks to everyone for coming. I will call this hearing to order.

Today, the Committee will examine two bills: S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017 and S. 1400, the Safeguarding Tribal Objects of Patrimony Act of 2017.

On February 28, 2017, Senator Rounds introduced S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017. Senators Lankford and McCain are co-sponsors. At this time, there is no House companion bill.

The bill, S. 465, would mandate a reputable private entity to conduct an independent assessment of the health care delivery systems and financial management processes of the Indian Health Service within the Department of Health and Human Services.

The assessment is intended to lead to recommendations on how the IHS, tribes, and other stakeholders can improve health care delivery and services provided by the IHS.

Indian patients have suffered from inefficiency and mismanagement at various levels of the IHS for too long. The poor decision-making by the IHS has even led the Government Accountability Office to place the agency on their High Risk List. I have chaired two Committee hearings on these problems this year alone, and I intend to hold another one next spring to ensure that the IHS comes off the High Risk List.

In a moment, I will turn to Senator Rounds, so he can speak more on his bill, S. 465. I know that Senator Rounds and his staff have already made improvements to this bill. I appreciate his efforts here as well as the Indian Health Service for providing technical drafting edits. I look forward to hearing from the Administration on those.

On June 21, 2017, Senator Heinrich introduced S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017. Senators Udall,

Daines, Flake, McCain, Murkowski, Schatz and Tester are all original co-sponsors of the bill. Senators Lankford and Crapo were recently added. There is a House companion bill, H.R. 3211, sponsored by Representative Lujan.

This legislation is centered on providing additional legal protection to Native American tribal artifacts and sacred objects by amending the Archaeological Resources Protection Act of 1979, ARPA; the Native American Grave Protection and Repatriation Act, NAGPRA; and other Federal laws which serve to protect and preserve Native cultural heritage.

Among other things, S. 1400 provides increased criminal penalties for repeat traffickers of Native American human remains or cultural items. It bans the export of illegally obtained Native American cultural objects and sets penalties for violations of this ban.

To incentivize repatriation, the bill allows immunity from prosecution if an individual voluntarily surrenders to the appropriate tribe all Native American cultural objects in possession, no later than two years after enactment of this bill.

In addition, the bill would require the Government Accountability Office report on the number of Native American cultural objects illegally trafficked, and the extent to which the Department of Justice has prosecuted cases of trafficking. The GAO must also recommend actions to eliminate such trafficking and to secure the repatriation of Native American cultural objects.

Lastly, the Department of the Interior is directed to convene a Tribal Working Group to contribute information to the GAO report and advise on how best to implement the GAO's recommendations.

Before we hear from the witnesses on this bill, I would like to turn to Vice Chairman Udall for any opening statement he might have.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you so much, Chairman Hoeven. This is a very important legislative hearing today. I appreciate working with you on this.

I am especially pleased to see S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017, known as the STOP Act, on today's agenda. The STOP Act would prohibit the export of sacred Native American items and increase penalties for stealing and illegally trafficking in tribal patrimony.

This is an important piece of legislation. S. 1400 is intended to provide tribes with the tools they need to prevent the export of illegally-obtained sacred objects. I recognize there are concerns, particularly those of the Antique Tribal Art Dealers Association.

I stand ready to work with anyone who believes this bill can be improved to achieve its goals by providing substantive changes and recommendations. This hearing is an opportunity to discuss the legislation, to talk about its impact on tribal communities, and discuss ways we can improve on it.

I would like to thank my colleague from New Mexico, Senator Heinrich for joining us today and for his strong advocacy on this bill. His dedication to protecting cultural patrimony, in particular by introducing the STOP Act, is greatly commendable. I appreciate

our partnership on this and many other issues affecting tribes and Native Americans.

I am pleased to see that Governor Riley of Acoma Pueblo is here with us today. Welcome. Governor Riley is a tireless advocate for the people of Acoma. He knows all too well the importance of protecting Native American culture and tradition. Thank you, Governor, for taking time to travel all the way here and to share your peoples' experiences.

As Vice Chairman of this Committee, the Ranking Member on Interior Department Appropriations, and as a member of the New Mexico congressional delegation charged with representing 23 tribes in my home State, helping fulfill the Federal trust responsibility is absolutely critical to me.

I worked to secure more funding for tribal programs, to push for increased transparency and tribal consultation, and to improve Federal support for tribal cultural initiatives. That is why I introduced the Protect Patrimony Resolution in the last Congress and why I made the cultural sovereignty series of hearings a focus of my time as Vice Chairman.

The first hearing in the cultural sovereignty series was an oversight hearing in Albuquerque, New Mexico where we looked at the issues raised by the STOP Act. Governor Riley testified at that hearing and helped provide us with a very good record. The second of the series was an oversight hearing in Santa Fe where we examined the shortcomings of the Indian Arts and Crafts Act and how criminals are counterfeiting authentic Indian arts and crafts at incredible rates and selling them at hugely inflated prices.

I look forward to continuing this focus over the coming months. There is much work to do. I hope the STOP Act and the cultural sovereignty series will shed light on the extent of the problem and ultimately bring meaningful change.

Turning to S. 465, after decades of underfunding and neglect, it is not surprising that the Indian Health Service has documented shortcomings. In fact, Federal oversight agencies generally fail to live up to their obligations to Indian Country. Tribes should not be subjected to this continuing breach of trust any longer. The trust responsibility does not end with IHS and it does not end with BIA. Every branch of the Federal Government must do its part, including the Congress.

I am proud to work with Chairman Hoeven and this Congress to strengthen the Senate's oversight role and look forward to continuing to do so. The Indian Affairs Committee has dedicated several hearings to address IHS, but we need to bring more Federal oversight agencies and experts into our conversations about IHS reform.

The Office of Management and Budget, Centers for Medicare and Medicaid Services, and the Health and Human Services' Office of Inspector General must answer for their role in improving accountability of IHS.

Thank you, Mr. Chairman, for calling this hearing. I am really looking forward to the testimony today.

The CHAIRMAN. Thank you, Vice Chairman Udall.  
Senator Rounds.

**STATEMENT OF HON. MIKE ROUNDS,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator ROUNDS. Thank you, Chairman Hoeven.

First of all, good afternoon. I want to start by thanking Chairman Hoeven, Vice Chairman Udall, and members of the Senate Committee on Indian Affairs for their dedicated service to the Native American communities.

Today, I am introducing my bill, S. 465, to provide for a comprehensive assessment of the Indian Health Service. As you know, the IHS is the agency responsible for providing health care for American Indians and Alaska Natives, as required by Federal treaty agreement.

For years, tribal members in my home State of South Dakota have dealt with unimaginable horrors in dealing with IHS facilities. Upon taking office in 2015, my staff and I have spent significant time trying to learn more about these problems. In our research, we found four primary areas of concern: there is no funding allocation strategy for the 12 IHS regions; there is no standard of quality measurement; there is a high turnover of staff resulting in low accountability among management; and there is no consultation with the tribes.

The IHS serves approximately 2.2 million Native Americans who are members of 567 federally-recognized tribes. For fiscal year, 2017, IHS was appropriated just under \$5 billion in discretionary funding and \$147 million in mandatory funding from the Special Diabetes Program. This does not include third party collections of approximately \$1.1 billion.

Despite a large user population and an annual appropriation of \$5 billion, IHS does not have a funding formula. Regional allocations are not based upon the number of people who received health care through IHS, regional user population growth or types of services offered.

While many believe that IHS is underfunded, from my standpoint, investing more taxpayer money into a dysfunctional system will only compound the problem. IHS lacks an efficient system and accountability. This needs to be addressed before we consider funding and then, I agree, it is time to talk about adequate and appropriate funding.

Furthermore, there are no consistent qualitative measurements. The most recent qualitative measurements are from 2008, nearly a decade ago. It is unclear if IHS management has any sense of which regions are successful or failing.

IHS divides itself into 12 service areas in the United States. IHS' Great Plains area, which serves South Dakota tribal members, has the worst health care disparities of all IHS regions, including the lowest life expectancy, the highest diabetes rate, five times the U.S. average, the highest TB death rate; and the highest overall age-adjusted death rate.

To give you an idea of some of the things we are seeing and hearing in our area, the Wall Street Journal reported three examples in June 27. "At the Indian Health Service hospital in Pine Ridge," in South Dakota, "57-year-old man was sent home with a bronchitis diagnosis only to die five hours later of heart failure. When a patient at the Federal agency's Winnebago, Nebraska facility



stopped breathing, nurses responded to the Code Blue, found the emergency supply cart was empty, and the man died. In Sisseton, South Dakota, a high school prom queen was coughing up blood. An IHS doctor gave her cough syrup and an anti-anxiety medication. Within days, she died of a blood clot in her lung.”

Just this August, IHS officials announced that patients who recently received care at the Podiatry Clinic in the Winnebago IHS hospital may have been exposed to HIV and hepatitis. Because there are not standard of quality expectations or a methodology to measure quality, these facilities are failing very basic quality performances that our people deserve.

In fact, the quality problems have become so pervasive that the Centers for Medicare and Medicaid Services’ accreditation of several IHS facilities is in jeopardy. Throughout the past year and a half, the Rosebud and Pine Ridge hospitals in the Great Plains Region have been operating under a systems improvement agreement with CMS trying to regain their accreditation status.

Thankfully, the systems improvement agreement at Rosebud was completed on September 1 of this year. However, our office was made aware of multiple timeline extensions in Pine Ridge because IHS direct care facilities continue to fail CMS surveys.

Just last Friday, the Pine Ridge IHS hospital was deemed not in compliance with CMS’ conditions of participation for emergency services. By issuing a final notification for the Pine Ridge IHS hospital, the facility is in immediate jeopardy status and the hospital’s provider agreement will be terminated at the end of next week.

Termination means that IHS can no longer bill Medicare for services and impacts Medicaid funding as well. Further, future third party revenue available to IHS fund services, maintenance projects and other necessary costs will likely be reduced.

Finally, there is a high turnover throughout the entire IHS organization. In fact, in the Great Plains Region, we have had five different area directors in just the last 21 months. That is an average tenure of roughly four months in this important management position. We have not had a full-time director since February 2015.

Tribal members are suffering and even dying due to inadequate and disgraceful care. IHS will only continue to fail until we take a close look at the operations funding, quality of care and management at IHS.

I believe a comprehensive assessment of IHS is necessary first, as a necessary first step to making calculated and systemic changes at IHS. S. 465 would accomplish this goal and set us on a path of addressing the longstanding failures of IHS.

It would require the Inspector General of the Department of Health and Human Services to conduct an assessment of IHS’ health care delivery systems and financial management processes only at direct care facilities. I want to be clear. This assessment is not proposed for tribes with 638 agreements in place, only direct IHS facilities.

Let me finish with this. The assessment I am proposing is a proven model of identifying potential reforms. We all remember the problems in 2014 with the Veterans Administration’s health care. To address this issue, Congress passed legislation calling for the

Secretary of the VA to conduct an overall and systematic assessment of the VA health care system.

The integrated report was completed within the mandated time frame of less than a year and was officially submitted to the Secretary of the VA in September of 2015. The assessment provided feedback and recommended changes that could lead to improvement in health care outcomes. The same should be done for the Indian Health Service.

Mr. Chairman and Ranking Member Udall, I thank you both for your time and patience with me in my message to you today.

Thank you.

The CHAIRMAN. Senator Heinrich.

**STATEMENT OF HON. MARTIN HEINRICH,  
U.S. SENATOR FROM NEW MEXICO**

Senator HEINRICH. Thank you, Chairman Hoeven and Vice Chairman Udall for holding this hearing on my legislation, the Safeguard Tribal Objects of Patrimony Act of 2017, the STOP Act. I would also like to thank the members of this Committee who are co-sponsors in this legislation. I believe that 8 out of the 15 members of the Committee have signed on in support.

This bill's strong bipartisan support gives me hope that we can solve this problem for tribal communities that we represent in the very near future. The need for this legislation is straightforward.

We all recognize the incredible beauty of American Indian art, especially when you live in a State like New Mexico, you can explore and admire the remnants of ancient culture in places like Chaco Canyon and the Gila Cliff dwellings. You can discover both traditional and modern art masterpieces created by Native artists.

We can also recognize there is a clear difference between supporting tribal artists or collecting artifacts ethically and legally as opposed to dealing or exporting items tribes have identified as essential and sacred pieces of their cultural heritage. This issue came up last year when Pueblo of Acoma Governor Kurt Riley, who is here today, discovered that a sacred ceremonial shield had been stolen and was about to be sold to the highest bidder in Paris. I look forward to hearing Governor Riley's testimony today so that he can tell us all about the devastating impact cultural theft has on communities like his.

When Governor Riley informed me about this robbery of the Pueblos' cultural patrimony last year, I called on the State Department to take all possible action to halt that auction. Thankfully, intense public outcry and diplomatic pressure were enough to halt the illegal sale of a tribe's cultural patrimony, but the case is still pending. The shield has not been returned to the Pueblo.

In many other cases, tribes in New Mexico and across the Nation have been forced to effectively pay a ransom or had to stand by and watch the sale of priceless, religious and cultural items in international markets. Under current Federal law, it is a crime to sell these types of protected Native American cultural objects in the United States. Unfortunately, however, the penalties in the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act are not as high as other similar statutes like the National Stolen Property Act.

Prosecutions are too infrequent to deter criminals from smuggling and selling these objects. There is no explicit ban on exporting these items to foreign nations where they might be sold at auction, a fact cited by the French Government when they initially declined to stop the auction of the Acoma Shield.

That is why I introduced the Safeguard Tribal Objects of Patrimony Act, the STOP Act. The STOP Act increases penalties for illegally trafficking in tribal cultural patrimony. It also explicitly prohibits exporting these objects and establishes a Federal policy to encourage the voluntary return of sacred objects held in private collections.

While improving Federal law to create a stronger legal deterrence, if we are going to end cultural theft, we also need to change the hearts and minds of collectors and dealers engaged in it. I appreciate the collaboration and support we have had with New Mexico's Pueblos, the Jicarilla and Mescalero Apache Nations, the Navajo Nation and tribes across Indian Country to craft this legislation.

I am proud that the STOP Act has the support of the National Congress of American Indians, the All Indian Pueblo Council, the United South and Eastern Tribe Sovereignty Protection Fund, the Great Plains Tribal Chairmen's Association, the Midwest Alliance of Sovereign Tribes, and more than 20 individual tribal Nations.

The widespread support for the STOP Act across Indian Country is unfortunate evidence of how widespread theft and illegal sale of tribal patrimony have been. When I introduced the STOP Act earlier this year, I met with high school students from the Santa Fe Indian School's Leadership Institute who had come to Capitol Hill to advocate for important issues in their communities. These students shared with me a position paper they had prepared on the importance of passing the STOP Act. They also shared personal stories about how important protecting cultural items is to their generation as they work to fulfill their sacred trust, as generations before them have.

Listening to what these incredible young people had to say reinforced the urgency with which we must act to return and safeguard these items. We need to take all possible action to repatriate stolen, culturally-significant items to their rightful owners.

Chairman Hoeven and Vice Chairman Udall, again, I am grateful to you both for holding this hearing. I hope you will work to pass the STOP Act out of this Committee and work with me to pass it in the full Senate as soon as possible.

Thank you both very much. Thanks to the Committee.

The CHAIRMAN. Thank you, Senator.

Are there other opening statements before we proceed to our witnesses?

[No audible response.]

The CHAIRMAN. If not, then we have with us today: Mr. John Tahsuda, Principal Deputy Assistant Secretary, Indian Affairs, U.S. Department of the Interior; Ms. Elizabeth A. Fowler, Deputy Director, Management Operations, Indian Health Service, U.S. Department of Health and Human Services; the Honorable Dave Flute, Chairman, Sisseton Wahpeton Oyate of the Lake Traverse

Reservation, which we share in North Dakota and South Dakota; and the Honorable Kurt Riley, Governor, Pueblo of Acoma.

Thanks to all of our witnesses for being here.  
Secretary Tahsuda, you may proceed.

**STATEMENT OF JOHN TAHSUDA III, PRINCIPAL DEPUTY  
ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S.  
DEPARTMENT OF THE INTERIOR**

Mr. TAHSUDA. Thank you, Chairman Hoeven, Vice Chairman Udall and members of the Committee. My name is Jon Tahsuda. I am the Acting Assistant Secretary for Indian Affairs at the Department of the Interior.

Thank you for the opportunity to provide testimony before this Committee on S. 1400, the Safeguarding Tribal Objects of Patrimony Act of 2017.

The protection of tribal nations is of the utmost importance to the Department of the Interior. Safeguarding sacred and cultural patrimony is integral to that mission and vital to the livelihoods and culture of tribal Nations.

While we appreciate Congress' interest to address the repatriation of cultural heritage, as evidenced by the passage last Congress of H. Con. Res.122, the Protection of the Right of Tribes to stop the Export of Cultural and Traditional Patrimony Resolution, the Government Accountability Office is currently in the process of completing an important study on this matter. The study, which was requested by the House Judiciary Committee in 2016, includes an assessment of policies and practices conducted by DOI, as well as the Department of State and Department of Justice.

The GAO is in the process of assessing the following questions which assessment will also likely be accompanied by a series of recommendations for Federal actions: One, what actions, if any, have Federal agencies taken to prevent the looting, theft, and trafficking of Native American cultural items; two, what actions, if any, have Federal agencies taken over the past 10 years to investigate and prosecute cases of looting, theft, and trafficking of Native American cultural items; three, what actions, if any, have Federal agencies and Native American tribes taken to repatriate Native American cultural items held in foreign collections or repositories; and four, what challenges, if any, are there regarding efforts to prevent and prosecute cases related to looting, theft, and trafficking of Native American cultural items and what options, if any, exist for addressing these challenges?

The Department believes this report will be paramount in informing a broader conversation among agencies as to how best to address the protection and repatriation of Native American cultural items. Therefore, we believe it would be premature for the Department to provide a position on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017, until the GAO report is released in full.

Thank you for providing the Department the opportunity to testify today. I am available to answer any questions the Committee may have.

[The prepared statement of Mr. Tahsuda follows:]

PREPARED STATEMENT OF JOHN TAHSUDA III, PRINCIPAL DEPUTY ASSISTANT  
SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Chairman Hoeven, Vice Chairman Udall, and members of the Committee, my name is John Tahsuda, and I am the Acting Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide testimony before this Committee on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017.

The protection of tribal nations is of the utmost importance to the Department of the Interior. Safeguarding sacred and cultural patrimony is integral to that mission and vital to the livelihoods and culture of tribal nations. While we appreciate Congress' interest to address the repatriation of cultural heritage, as evidenced by the passage last Congress of H.Con.Res.122, Protection of the Right of Tribes to stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, the Government Accountability Office (GAO) is currently in the process of completing an important study on this matter. The study, which was requested by the House Judiciary Committee in 2016, includes an assessment of policies and practices conducted on behalf of the Department, as well as the Department of State and Department of Justice. The GAO is in the process of assessing the following questions, which assessment will also likely be accompanied by a series of recommendations for federal actions:

1. What actions, if any, have federal agencies taken to prevent the looting, theft, and trafficking of Native American cultural items;
2. What actions, if any, have federal agencies taken over the past 10 years to investigate and prosecute cases of looting, theft, and trafficking of Native American cultural items;
3. What actions, if any, have federal agencies and Native American tribes taken to repatriate Native American cultural items held in foreign collections or repositories; and
4. What challenges, if any, are there regarding efforts to prevent and prosecute cases related to looting, theft, and trafficking of Native American cultural items and what options, if any, exist for addressing these challenges?

The Department believes this report will be paramount in informing a broader conversation among agencies as to how best to address the protection and repatriation of Native American cultural items. Therefore, we believe it would be premature for the Department to provide a position on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017, until the GAO report is released in full.

The Department's continuing commitment to combatting the theft, and illegal possession, sale, or transfer of tribal cultural heritage remains as strong today as it has ever been. The Department is also devoted to combatting the export of illicitly acquired cultural items and to helping tribes repatriate their cultural heritage from abroad. Within the Department, many offices and bureaus have responsibilities relating to this effort, including not only the Office of the Assistant Secretary for Indian Affairs, but also the Office of International Affairs, Office of the Solicitor, the National Native American Graves Protection and Repatriation Act (NAGPRA) Program, and the cultural resources and law enforcement staff of the land management agencies.

The Department believes an essential element to combatting Native American cultural heritage theft is vigorous enforcement of laws such as NAGPRA and the Archaeological Resources Protection Act (ARPA). Currently, these laws are our best enforcement mechanisms to prevent theft, illegal possession, sale, transfer and export of cultural patrimony within the United States.

Thank you for providing the Department the opportunity to provide a statement on S. 1400. I am available to answer any questions the Committee may have.

The CHAIRMAN. Thank you.  
Ms. FOWLER.

**STATEMENT OF ELIZABETH A. FOWLER, DEPUTY DIRECTOR,  
MANAGEMENT OPERATIONS, INDIAN HEALTH SERVICE, U.S.  
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Ms. FOWLER. Good afternoon, Chairman Hoeven, Vice-Chairman Udall, and Members of the Committee. I am Elizabeth A. Fowler, Deputy Director for Management Operations, Indian Health Serv-

ice. I am an enrolled member of the Comanche Tribe with descendency from the Eastern Band of Cherokee Indians as well.

I am pleased to provide testimony before the Senate Committee on Indian Affairs on S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017. I would like to thank you, Chairman Hoeven, Vice-Chairman Udall, and members of the Committee for elevating the importance of accountability and transparency in the IHS.

IHS is a distinct agency in the Department of Health and Human Services established to provide health care services to American Indians and Alaska Natives with the mission to raise their physical, mental, social and spiritual health to the highest level. The IHS is steadfastly committed to responsible stewardship of the resources entrusted to us. We are working every day to overcome the longstanding challenges that impede our efforts to meet our mission and provide the quality health care to American Indians and Alaska Natives they expect and deserve.

We are proud to report to you that our concerted efforts are producing results. In the past year, IHS has established patient wait time standards, updated governing board bylaws, acquired a credentialing software system, developed a standard patient experience survey, developed a quality assurance accountability dashboard, and awarded a master contract for accreditation of all of our hospitals.

Our efforts have brought positive results at the IHS Rosebud Hospital. As of September 1, the IHS Rosebud Hospital is no longer under a Systems Improvement Agreement after the Centers for Medicare and Medicaid Services determined it had substantially met all the Medicare conditions of participation.

However, longstanding challenges remain. On November 3, the IHS Pine Ridge Hospital received a CMS notice of termination effective November 18, 2017 due to non-compliance with the Medicare Conditions of Participation for hospitals.

The IHS immediately began instituting corrective actions at the Pine Ridge Hospital. For instance, we are enhancing staffing levels in the emergency department and improving emergency department operations through Federal oversight and more effective utilization of telehealth consultation. It is an Agency priority to bring the IHS Omaha Winnebago Hospital and the IHS Pine Ridge Hospital into full compliance with CMS standards.

To better serve our patients, we pursue new ideas and innovative ways to improve how we do business in delivering quality care. Two innovative ways in which we are transforming the IHS is through implementing our Quality Framework and executing an IHS strategic plan.

The agency is also focused on strengthening our operations to improve communication with stakeholders and securely and effectively managing assets and resources. We are leveraging tools from the private sector to improve our financial operations. For example, we are using a business financial planning tool to standardize and enhance budget planning throughout our agency.

We are also using the data analytic software that was selected for our health care delivery and quality assurance efforts to also provide improved financial analysis and reporting. These tools will

profoundly reshape the business of IHS and allow us to better use our existing financial and administrative systems to support our mission.

The IHS continues to strengthen our overall internal control environment. We are expanding the role of our internal audit staff which augments existing external audits and assessments. This allows us to proactively resolve problems as they are identified.

Regarding financial audits, the fiscal year 2016 HHS-wide CFO audit resulted in a clean opinion for the financial statements that cover the Indian Health Service. The fiscal year 2017 audit is nearing completion. In addition, the IHS complies with standard Federal budget execution and budgetary resource reporting requirements, including publicly available quarterly reports.

With regard to the bill S. 465, IHS is prepared to provide the Committee technical assistance on the legislation.

Thank you for your commitment to improving quality, safety and access to health care for American Indians and Alaska Natives.

I would be happy to answer any questions you may have.

[The prepared statement of Ms. Fowler follows:]

PREPARED STATEMENT OF ELIZABETH A. FOWLER, DEPUTY DIRECTOR, MANAGEMENT OPERATIONS, INDIAN HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Chairman and Members of the Committee:

Good afternoon, Chairman Hoeven, Vice-Chairman Udall, and Members of the Committee. I am Elizabeth A. Fowler, Deputy Director for Management Operations, Indian Health Service (IHS). I am an enrolled member of the Comanche Tribe with descendancy from the Eastern Band of Cherokee Indians. I am pleased to provide testimony before the Senate Committee on Indian Affairs on S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017. I would like to thank you, Chairman Hoeven, Vice-Chairman Udall, and Members of the Committee for elevating the importance of accountability and transparency in the IHS.

IHS is a distinct agency in the Department of Health and Human Services (HHS), established to carry out the responsibilities, authorities, and functions of the United States to provide health care services to American Indians and Alaska Natives. It is the only HHS agency whose primary function is direct delivery of health care. The mission of IHS, in partnership with American Indian and Alaska Native people, is to raise the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level. The IHS system consists of 12 Area offices, which oversee 170 Service Units that provide care at the local level. Health services are provided through facilities managed by the IHS, by Tribes and tribal organizations under authorities of the Indian Self-Determination and Education Assistance Act (ISDEAA), and through contracts and grants awarded to urban Indian organizations authorized by the Indian Health Care Improvement Act.

The IHS is steadfastly committed to responsible stewardship of the resources entrusted to us. We are working every day to overcome the longstanding systemic challenges that impede our efforts to meet our mission and provide the quality health care to American Indians and Alaska Natives that they expect. We are proud to report to you that our concerted efforts are producing results. On August 25, the official Patient Wait Times policy setting the IHS wait times standards for outpatient primary care visits in direct care IHS facilities was signed by the IHS Acting Director. In less than a year, we updated Governing Board Bylaws, acquired a credentialing software system, developed a standard patient experience of care survey, developed a quality assurance accountability dashboard, and awarded a master contract for accreditation of all of our hospitals. In the Great Plains Area, our efforts have brought positive results at the IHS Rosebud Hospital. As of September 1, the IHS Rosebud Hospital is no longer under a Systems Improvement Agreement after the Centers for Medicare & Medicaid Services (CMS) determined it had substantially met all the Medicare Conditions of Participation.

While we are making progress in the Great Plains, longstanding challenges remain. On November 3, the IHS Pine Ridge Hospital received a CMS notice of intent to terminate its provider agreement effective November 18, 2017 due to non-compli-

ance with the Medicare Conditions of Participation for hospitals. The IHS immediately began instituting corrective actions at the Pine Ridge Hospital. For instance, we are enhancing staffing levels in the emergency department; deploying U.S. Public Health Service officers to reduce staff turnover; and continuing to improve emergency department operations through federal oversight and more effective utilization of telehealth consultation. These actions are in addition to the significant steps we have taken in the last year at the Pine Ridge Hospital. It remains an Agency priority to bring the IHS Omaha Winnebago Hospital and the IHS Pine Ridge Hospital into full compliance with CMS standards. We are improving agency oversight of quality care at all levels of the IHS.

To better serve American Indians and Alaska Natives, we proactively pursue new ideas and innovative ways to improve how we do business in delivering quality care and accounting for the transparent administration of federal resources. Two innovative ways in which we are transforming the IHS is through implementing our Quality Framework and executing an IHS strategic plan. These tools will guide the development, implementation and sustainability of quality-focused, high-reliability programs at all of our hospitals and clinics. Core elements of the Framework focus on strengthening our organizational capacity, and improving transparency and communication to IHS stakeholders. The IHS strategic plan is currently being developed, with consultation and conferral from Tribes and urban Indian organizations. The strategic plan will sustain and build on the achievements of the Quality Framework and institute objectives such as providing comprehensive, culturally acceptable health services, promoting a quality performing organization through innovation of the Indian health system, and strengthening IHS program management and operations that securely and effectively manage assets and resources.

#### **Efficient, Effective, and Transparent Stewardship**

As responsible stewards of the resources entrusted to us, one of our most important duties is to practice fiscal responsibility and transparency. The Agency is focused on strengthening our program management and operations in order to improve communication with IHS stakeholders and securely and effectively manage assets and resources. We have taken solid steps to ensure that our stewardship is efficient, effective, and transparent within the IHS and with our external stakeholders as well.

To help us reach our objectives, we are leveraging a widely used private sector tool to standardize and enhance budget planning throughout our agency. We are also in the process of using data analytics software to provide improved transparency of our financial information. This is software we purchased for use in health care delivery and quality assurance, and is now being effectively used for additional purposes to improve our communications with IHS stakeholders and management of our resources.

One application of the data analytics software being used for financial purposes is a dashboard for our third party collections, which is nearing deployment. While the agency has been able to provide summary or detailed reports for specific pieces of our collections data, we lacked the ability to rapidly review and report our data in a more efficient and automated manner. This new application enables us to review data from Fiscal Year (FY) 2010 forward, by location, insurance type, and month, for example, and easily do comparisons. We are also using the data analytics software to develop a standard financial report to enhance the transparency and communication of our financial data with tribal partners. This report can be run by Area Offices and Service Units to combine data on our funding allocations, actual spending, and collections. These tools will profoundly reshape the business of IHS and allow us to better utilize our existing financial and administrative systems to support our mission.

To better serve our stakeholders, the IHS continues to search for new ways to strengthen our overall internal control environment. The IHS is actively inspecting its system and programs to resolve any shortfalls that exist. Our Chief Financial Officer (CFO) will be expanding the role of internal audit staff within our enterprise risk management program. This includes augmenting existing annual audits and assessments performed by contracted external professionals so that we can target and examine key financial and administrative programs and address the areas of greatest risk. This audit program enables us to conduct our own reviews, complementing the important work of our Departmental Inspector General and the Government Accountability Office, and allows us to proactively resolve problems as they are identified.

As the IHS continues to expand our internal audit capabilities, this will also complement the current routine and statutorily required external audits and financial reporting. For example, IHS just participated in the annual CFO Audit Act audit



of our financial statement, conducted by a nationally-known independent firm contracted by HHS. While we do not yet have the results for FY 2017, the audit opinion for FY 2016 was unqualified for the entire Department, meaning financial records and statements were fairly and appropriately presented, and in accordance with Generally Accepted Accounting Principles. In addition, the IHS complies with the Office of Management and Budget Circular A-11 which includes standard federal budget execution and budgetary resource reporting requirements, including quarterly reports that are publicly available. IHS meets the standards applicable to federal financial reporting as we continue our efforts to be more transparent and improve our utilization of financial information.

Another aspect of the IHS stewardship of resources is the Purchased and Referred Care (PRC) program. Improving the data reporting and measurement system is essential to assuring that PRC programs are efficient. IHS modified the data system that tracks PRC referrals and emergency self-referrals and expects to begin baseline reporting for calendar year (CY) 2017, which will be available in CY 2018.

The IHS offers the following comments on the draft amendment in the nature of a substitute to S. 465. The substitute to S. 465 provides authority for a comprehensive assessment of the IHS health care delivery systems and financial management process by the HHS Inspector General or a private entity. IHS is prepared to provide the Committee technical assistance on the legislation.

If the HHS Inspector General does not conduct the assessment, the legislation requires the Secretary to enter into contracts with one or more private entities to conduct the assessment no later than 180 days after the date of enactment. We are reviewing possible acquisition strategies that would allow us to obtain a qualified, quality provider expeditiously but would prefer that the deadline be expressed as a goal to ensure the process results in the identification and selection of the best provider, including adequate time to consider Indian Economic Enterprises as required under the Buy Indian Act.

If a contract is entered into by the Secretary with a private entity, the magnitude and detail of the assessments proposed by the bill may require significant financial resources. If the Secretary directs IHS to fund the cost of the contract with the independent entity, it is important to note that IHS's existing budget could not support a project of this scale without affecting direct health services. With approximately 60 percent of the budget administered by Tribes and tribal organizations through ISDEAA agreements, there would be very little flexibility for reprogramming remaining resources to accomplish the proposed assessment.

Finally, S. 465 would require that the Secretary of HHS immediately submit the proposed assessment to several Congressional Committees and Members, then publish the report in the *Federal Register* and on a public HHS website. Requiring concurrent reporting and near-immediate publication of such a broad assessment may raise constitutional concerns about executive branch supervision and executive privilege. We recommend giving the Secretary a chance to review the report before it is submitted to Congress and made public.

Thank you for your commitment to improving quality, safety, and access to health care for American Indians and Alaska Natives. I will be happy to answer any questions the Committee may have.

The CHAIRMAN. Chairman Flute.

**STATEMENT OF HON. DAVE FLUTE, CHAIRMAN, SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION**

Mr. FLUTE. Chairman Hoeven, Vice Chairman Udall and members of the Committee, it is good to see you again since the couple of weeks ago I think I was here.

For the record, my name is Dave Flute, Chairman of the Sisseton Wahpeton Sioux Tribe. I am pleased to testify in support of S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017. I appreciate the opportunity to be able to provide some oral testimony here today.

First of all, we want to thank Senator Rounds for his leadership and being a champion for us in the Great Plains Region, for not just listening to us, but hearing us and, more importantly, for the Senator and for all of you great Committee members here taking

action. We appreciate that. You are not just listening and hearing us but you are taking action. We appreciate that because action is needed.

We support this bill. I am the Chairman of the Sisseton Wahpeton Sioux Tribe, Chairman of the United Tribes of North Dakota, and a member of the Great Plains Tribal Chairmen's Association. We do have a letter and resolution from the Great Plains Tribal Chairmen's Association that fully supports Senator Rounds' efforts with S. 465.

We know that health care is a treaty right. That treaty right was established for the cessation of lands of that we ceded for American immigrants over 150 years ago. We are coming up on the sesquicentennial of the Ft. Laramie treaty. My tribe just celebrated the sesquicentennial of our treaty. We know that is a treaty right.

The Great Plains Tribal Chairmen's Association and Great Plains Tribal Chairmen Health Board strongly feel that the Indian Health Service is failing us. They are failing to meet that treaty obligation. We are not getting the quality service we need. We are not getting the transparency that we are asking for. We are not getting the financial accountability.

I do want to echo and reiterate Senator Rounds' comments that we appreciate the recognition of those treaty obligations by our congressional leadership to those treaty tribes in the Great Plains Region. Transparency is important for us. When the Great Plains Tribal Chairmen's Health Board, the Great Plains Tribal Chairmen's Health Association and the Chairmen's Association requests information, it would be beneficial to both the treaty tribes and the Indian Health Service if the Indian Health Service would provide us that information without questioning us as to why we need that information or that it is or is not going to help us in trying to find the solutions so that we can help our congressional leaders fix this problem.

We see in S. 465 that this will be a good first step forward to try to figure out what the problems are and why there is a high turnover rate. The Sisseton Wahpeton Sioux Tribe has not had a permanent CEO at our local service unit for quite some time, two or three years now. The Aberdeen area has not seen a permanent area director there for the Indian Health Service for a long, long time.

The lack of consistency rolls downhill. The lack of consistency at the regional level also contributes to the lack of consistency at the local level. That even goes further to the service we are not getting.

Mr. Chairman, if I could quickly give an example of this. We have tribal members with heart conditions, with diabetes conditions, and different types of health conditions. They go to the Indian Health Service and see a doctor. In three months, they see a different doctor who gives them a different medication.

Our tribal members are being tossed here and there with different types of medications and different types of diagnoses. We have issues there where, as Senator Rounds said, we are talking about peoples' lives and health care.

In my tribe, that young girl was given cough syrup when she was coughing up blood. It makes the hair on the back of my neck stand up. I apologize for being very passionate on this issue but there is

a very big problem in the Great Plains Region. We need to get it fixed. We support the Senator.

We have doctor positions that need to be filled at the local service level. IHS comes in and takes our monies, hospital and clinic monies. Those might not be tribal monies, but they are obligated to the tribes, H&C monies. For the Sisseton unit, \$2.2 million was taken. From the Cheyenne River Sioux Tribe, \$4 million was taken with no consultation whatsoever, no communication.

Because our tribal members who have worked in the health profession for a long, long time, they are restricted to not saying anything to their tribal leadership. I am not going to mention any names but we have good tribal members working in our local service units telling the tribal leaders, we think H&C monies are going to be taken.

I called Admiral Buchanan and asked, are you taking our H&C monies? He would not say anything. He would not say yes or no. That lack of transparency is damaging the relationships that we need to build with the Indian Health Service so we can fix the problems of health care for Indian Country.

When we do not get the data we ask for, we have to make our observations on the data that we do collect that is being given to us by our research. When IHS is not giving us that data, our observations are they are using this money to channel into other areas. As the Senator said, without having a budget formula, without having a plan, they are bandaiding this and taking money from our service units.

We have people with meth addiction, depression, and opioid use who are requesting mental health services and they are being turned away. We have \$2.2 million you are going to funnel from other service units when you could have used that money. IHS could have used that money and sat with the tribe and looked at our tribe's needs.

They need mental health counseling, they need to expand their service room so they can counsel these people. It is hurting us. Meth is hurting us. It is taking dollars away from people who need prosthetics for diabetes. I could go on and on and on with real life examples, Senator.

I appreciate it. I apologize for the passion I have with the Indian Health Service. It is a treaty obligation. We fully support our South Dakota Senator, as we do the Senate Committee on Indian Affairs.

I want to thank you for your time. I will answer any questions you have.

Thank you.

[The prepared statement of Mr. Flute follows:]

PREPARED STATEMENT OF HON. DAVE FLUTE, CHAIRMAN, SISSETON WAHPETON  
OYATE OF THE LAKE TRAVERSE RESERVATION

### **I. Introduction**

Good Afternoon, Mr. Chairman, Mr. Vice Chairman, Senator Heitkamp and Members of the Committee, and Honored Guests. My name is David Flute, and I am the Chairman of the Sisseton-Wahpeton Oyate. I am pleased to testify in support of S. 465, Independent Outside Assessment of the Indian Health Service. Thank you for the opportunity to testify today.

As Native Americans, it is important for us to have respect for our Native Nations, treaty rights, and Indian lands because our right to self-governance and self-

determination on our Reservations is the essence of Freedom and Liberty for us. Indian Health Care is an important treaty right, and we gave up millions of acres of land to non-Indian immigrants in return for our permanent homeland. Indian health care is intended to make our homelands, livable homes, but the Indian Health Service (IHS) has not lived up to its mandate. IHS Administration is failing the Sisseton Wahpeton Sioux Tribe and the Great Plains Region, so we need Congress's help to turn the IHS around and provide good, reliable health care for our Native people. The introduction and passage of S. 465 is an important step towards that goal.

Senator Rounds is providing important leadership on the Indian Health Service for Native Americans in the Senate, as he did as Governor of the State of South Dakota to make the government accountable to the people. We thank him and the Committee for all of your hard work.

We also support the passage of S. 1400, the Safeguard Tribal Objects of Patrimony Act to protect our Tribal Cultural Items from wrongful transfer and sale.

## **II. Background: The Sisseton-Wahpeton Sioux Tribe**

The Sisseton-Wahpeton Oyate (meaning Sisseton-Wahpeton Dakota Nation and we have been known historically as the Sisseton-Wahpeton Sioux Tribe) original homelands were in Minnesota, North and South Dakota. The Sisseton-Wahpeton Sioux Tribe is signatory to the 1851 Treaty with the Sisseton-Wahpeton Bands of Dakota Sioux (Traverse des Sioux) and the 1867 Lake Traverse Treaty, which set aside the Lake Traverse Reservation as our "permanent home"—

Beginning at the head of Lake Travers[e], and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

The Lake Traverse Reservation is located in the Northeastern part of South Dakota and a small portion of southeastern corner of North Dakota. The reservation boundaries extend across seven counties, two in North Dakota and five in South Dakota.<sup>1</sup>

Our 1867 Treaty continues our "friendly relations with the Government and people of the United States." Our Treaty also recognizes our people's right to self-government and to adopt "laws for the security of life and property," to promote the "advancement of civilization" and promote "prosperity" among our people.

Today, we have a total of 14,000 tribal members located throughout the United States and others serving overseas in the Armed Forces. Among the Sisseton-Wahpeton Sioux Tribe, we have maintain our treaty alliance with the United States, and we are rightfully proud of our volunteer service to the United States through the military. We are proud of our service to the United States through the military. Woodrow Wilson Keeble, one of our most respected tribal members, served in World War II and in Korea and was posthumously awarded the Congressional Medal of Honor by President George W. Bush.

## **III. IHS Realities, Medical and Administrative Issues**

The Indian Health Care administered by the IHS is *rationed medical care* for American Indians. Although Indian health care is based upon treaty obligations, American Indians have poor health and suffer premature death when compared with the general public. Our American Indian life expectancy that is 4.2 years less than Americans overall.

Our people die at higher rates than other Americans from alcoholism (552 percent higher), diabetes (182 percent higher), unintentional injuries (138 percent higher), homicide (83 percent higher), and suicide (74 percent higher). American Indians suffer from higher mortality from cervical cancer (1.2 times higher); respiratory disease (1.4 times higher); and maternal deaths (1.4 times higher). Our health care disparities in the Great Plains are greater than these national disparities.

*Indian Nations Need Equity In Per Patient Health Care Funding:* Per patient annual health care spending: Medicare \$12,042. National health care spending is \$7,713. Veterans Affairs \$6,980. Bureau of Prisons \$5,010. IHS spends only \$2,849

<sup>1</sup> Under the Allotment Policy, significant tribal lands were sold as surplus lands against our wishes, but under the modern Indian Self-Determination Policy, Congress affirmed our efforts to recover those portion of our homelands, and treats our recovered Indian trust lands as "on-reservation" acquisitions within the original boundaries of the Lake Traverse Reservation. Public Law 93-491 (1974).

per patient. The National Tribal Budget Workgroup estimates full funding for IHS would cost \$30.8 Billion compared to the actual \$4.8 Billion FY 2016 IHS Budget.

*Real Life Situation at Sisseton Wahpeton:* Without equity in per patient funding, Indian Health Service patients will present for urgent care at the CDP [Coteau des Prairies] emergency room. The IHS does not pay for urgent care in an ER. They only pay for the Priority I emergencies. This results in bills going unpaid and turned over to collection agencies. It is difficult for lay people to determine how urgent or emergent their situation is. Maybe their child could wait for IHS to be open, but how can the average person know?

*Indian Nations Need Telemedicine.* Telemedicine requires technological investment. In the long run, telemedicine will provide greater access to proper medical care at reduced cost. Legislative support including authorization for appropriations, pilot projects, and dedicated funding will speed implementation. As a model for successful use of telemedicine being used today, health care providers in non-native rural hospital emergency rooms throughout eastern South Dakota, use eER, ePharmacy and eICU technology in Critical Access Hospitals throughout the state to extend Hospital emergency, pharmacy and internal medicine services to rural, geographically isolated communities.

*Indian Nations Need Competitive Pay for Physicians and PAs.* IHS must increase pay for its Physicians and increase overall efforts to recruit and retain physicians. Congress should also remember that our Physician Assistants (PA) also need increased competitive pay. PAs have been recognized by Congress and the President as crucial to improving U.S. health care. Congress has recognized our PAs as one of three healthcare professions in primary care. For all medical professionals, Physicians, Physician Assistants and Nurse Practitioners, as well as Registered Nurses, scholarships and loan forgiveness should be increased to improve recruitment of these medical professionals to the IHS.

Our Sisseton Wahpeton Tribal Government staff provided the following statement to give you specific examples of problems with access to Physicians and Physicians assistants.

*Real Life Situation at Sisseton Wahpeton:* One of the biggest issues with our health care is the fragmentation of services between IHS (which provides primary medical, dental, mental health, optometry, and physical therapy), Coteau des Prairies Health Care System (private facility in Sisseton that has an emergency department, OB delivery unit, and home health care services), Tribal Health Programs, and tertiary care facilities (where patients are typically sent for surgery and specialty care services). The IHS employs the Improving Patient Care model, which empanels patients to provider teams. However, the majority of the provider positions are vacant and filled with temporary staff (temporary doctors, physician assistants, and nurse practitioners who are contracted for short periods of time). As a result, there is also lack of continuity in care for our patients. People often do not know who their provider is. And the providers are not there for them when they are really sick. When they are really sick they present at the emergency room, and many who have an alternate resource, such as Medicaid or Medicare, stay with the provider at the private facility that is there for them in an emergency and who is familiar with their condition. IHS is sort of the "fair weather" friend type of provider to patients and often not substantively there for them when the going is tough.

*Keep Our IHS Facilities Open.* HHS must direct CMS and IHS to coordinate on IHS and tribal hospital, emergency room, and clinic staffing to ensure proper certification of our Indian country health care facilities. CMS and IHS should collaborate to provide technical assistance, emergency funding and temporary staffing when necessary to keep facilities open as long term operational plans are developed and implemented. Accordingly, S. 465 should include a study of CMS closures of IHS facility and a plan for CMS to assist IHS facilities to stay open with CMS training, technical assistance, and temporary staffing.

*IHS Purchased/Referred Care—A Top Priority.* The IHS is organized to provide only basic emergency and clinical care at tribal hospitals and clinics. In regard to Purchased/Referred Care (PRC), the IHS explains:

Because IHS programs are not fully funded, the PRC program must rely on specific regulations relating to eligibility, notification, residency, and a medical priority rating system. The IHS is designated as the payor of last resort meaning that all other available alternate resources including IHS facilities must first be used before payment is expected. These mechanisms enhance the IHS to stretch the limited PRC dollars and designed to extend services to more Indi-

ans. This renders the PRC program to authorize care at restricted levels and results in a rationed health care system. . . .

In short, IHS Purchased/Referred Care is limited and unless a patient will lose life or limb, services are denied. We need more funding for access to specialized care—especially high demand services such as respiratory care and psychiatric care. IHS medical denials are resulting in *unwarranted deaths, disease and injury* and ruining our people financially.

*Medicare-Like Rates.* Medicare-Like Rates must be applied to all outpatient care and referrals. S. 465 should be amended to study a requirement that medical providers to accept Medicare-Like Rates from the IHS and tribal governments.

*Maximize Third-Party Revenue.* The IHS must be able to bill third-party insurance when patients have coverage, and Congress should enact legislation to enhance the IHS billing system to make sure that Third-Party Insurers do not evade responsibility. Then our Third Party Revenue must stay at home to reimburse and enhance the facility that generated the funds through patient services. This is an extremely important aspect of the S. 465 study.

*Cut HHS/IHS Bureaucracy.* Central Office and Regional Office staff should be cut back with resources reallocated to Indian country. PHS Commission Corps medical providers should be sent to the field to practice medicine in Indian country.

#### **IV. S. 465, Independent Outside Assessment of the Indian Health Service**

S. 465, the Independent Outside Assessment of the Indian Health Service should be enacted into law. It is essential for Health Care funding to be effectively and efficiently used to provide patient care, promote health and positive community health outcomes to raise the standard of wellness and the life expectancy of Native Americans. S. 465 seeks to take those initial steps towards efficiency, efficacy, accountability, and transparency.

*Cooperation and Coordination with GAO.* The Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. GAO's Mission is to support Congress and "help improve the performance and ensure the accountability of the federal government for the benefit of the American people" by providing "information that is objective, fact-based, nonpartisan, non-ideological, fair, and balanced." Under S. 465, HHS Office of Inspector General should conduct its review in cooperation and coordination with GAO. Hence, Section 2(b)(1) should start with the phrase, "In cooperation and coordination with the GAO," before "The Inspector General."

*Consultation and Coordination with Indian Tribal Governments.* In carrying out its responsibilities under this statute, HHS OIG and GAO should be directed to consult and coordinate with Indian nations and tribes in accordance with the principles of Executive Order 13175, concerning the formulation of the study, findings of the draft report, and the submission to Congress. HHS and GAO are familiar with the Executive Order and have policies to ensure compliance with its requirements.

*Contracting with State and Local Health Care Institutions.* The Snyder Act provides authority for the IHS to contract with State and local institutions for supplementary provision of governmental services to Indian country. The IHS explains:

Snyder Act authorized funds "for the relief of distress and conservation of health. . . [and] for the employment of. . . physicians. . . for Indian tribes throughout the United States." (1921). Transfer Act placed Indian health programs in the PHS. (1955)

The appropriation to IHS by Congress to provide medical services and health care programs are made available through the Snyder Act of 1921. . . .

The term Purchased/Referred Care (PRC) originated under BIA when medical health care services were contracted out to health care providers. In 1955 the Transfer Act moved health care from BIA to the Department of Health Education & Welfare and established the IHS.

The PRC funds are used to supplement and complement other health care resources available to eligible Indian people. The funds is used in situations where: (1) no IHS direct care facility exists, (2) the direct care element is incapable of providing required emergency and/or specialty care, (3) the direct care element has an overflow of medical care workload, and (4) supplementation of alternate resources (i.e., Medicare, private insurance) is required to provide comprehensive care to eligible Indian people.

S. 465's study should include the possibility for development of better IHS strategies for partnering with local health facilities, rather than simply paying third party billing.

*Recommendations from Tribal Staff on Relations with Local Third Party Health Care Providers:* The intent when we were planning for the Sisseton Wahpeton Health Center was for the IHS medical providers to get South Dakota licensed and credentialed and privileged at Coteau des Prairies Hospital. Sisseton IHS and Coteau des Prairies Hospital could have (and still could or should) enter into a partnership whereby the providers are cross-privileged and SIHS could use the resources appropriated by Congress for OUR PEOPLE to provide 24/7 urgent care services at that facility. However, there has been no initiative (as in motivation or effort) for the SWIHS to pursue a partnership, which would put IHS in the driver's seat as the true primary care coordinators for patients that are empaneled to the various provider teams. The benefit of a partnership would be: (1) continuity of care for our patients; (2) Tribal members would not be stuck with bills for non-emergencies; (3) IHS could cover expenses from other accounts, such as third party, instead of PRC (which are very precious); (4) CDP would not be caught with the big accounts receivable that (we understand) they have been complaining about; and (4) our patients wouldn't need to be made to feel like second-class patients (uninsured) when the reality is that health care is a Federal treaty and trust responsibility. The Sisseton IHS is probably the biggest payor and source of revenue for the Coteau des Prairies Hospital. IHS should leverage that buying power through partnership contracts so that the Indian patients are treated like other health care customers when they go to CDP and they are provided quality care, instead of sometimes being shuffled back to IHS or made to feel they are being "turned away."

*How Dual Patients Are Handled.* The IHS explains that: "It is the policy of the Indian Health Service to charge Medicare and Medicaid for services provided to beneficiaries of the IHS program who are enrolled in Medicare and Medicaid. See Social Security Act Section 1911 [42 USC 1396j], Section 1880 [42 USC 1395qq]." For IHS patients, who have private insurance or are eligible for Medicaid reimbursement, the IHS should be engaged in third party billing, and the receipts from third party billing inure to the benefit of the IHS facility, which generates the billed services. By statute, the IHS must keep the proceeds of the third party billing at the IHS or tribal facility that generates the revenue, but in the Great Plains, our Tribes have experienced problems with IHS seeking to use Hospital & Clinics funding to cover special projects in other elsewhere, to cover budget shortfalls in other areas, and even to settle labor disputes! As a result, Sisseton Wahpeton Third Party collections were expended to replace regular IHS operating funding when the revenue should have been available for Sisseton Wahpeton facility improvement.

Whenever funds are available from Sisseton-Wahpeton IHS Third Party Collections, these revenues should be remitted to the Tribe or its facility in accordance with the Indian Health Care Improvement Act, which directs that the Secretary of HHS is acting as an agent for the Tribal Government when collecting Medicare and Medicaid fees from covered patients. We are entitled to "100 percent pass through of payments" due to our facilities to be used for health care facilities and service improvement. 25 U.S.C. sec. 641(c)(1)(A). Our IHS Region was wrongly going to divert our Medicare and Medicaid collections away from our Service Unit. *IHS must follow the law by making our Medicare and Medicaid fees available for services, equipment and improvements at our Service Unit.* This Third Party Billing Issue was a concern for the entire Great Plains Region. The Act's provisions should include a reference to this law and a study of IHS compliance with existing law.

## **V. Conclusion**

The Sisseton Wahpeton Sioux Tribe maintains our alliance with the United States as a friend and ally of our Indian nation. We ask you to work with us to promote Indian Self-Determination and effective Federal and tribal government. The Indian Health Service has much to answer for because its bureaucracy has kept the doors closed on their operations. Our Native people need good, reliable health care, and the delivery of such health care requires funding, foresight, planning, and the recruitment and retention of solid personnel—the Physicians, PAs, and Nurses—equipment, and facilities. Working together, Congress and our Indian nations can improve the Indian Health Service and Indian health care. Let's build a partnership based upon objective facts and good, reliable, professional medical service through the enactment of S. 465.

Finally, I would like to express Sisseton Wahpeton Sioux Tribe's support for S. 1400, the Safeguard Tribal Objects of Patrimony Act. Traditionally, our Native people were spiritual people, who integrated our reverence for the Creator into our everyday lives. The United States, from the 1880s through 1978, enacted laws and regulations and kept them on the books to outlaw Native American religion and cultural observances. My father, together with many of our tribal leaders nationwide,

worked with Congress to secure enactment of the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, to secure the Freedom of Religion to Native Americans. S. 1400, which protects our Tribal Cultural Items from wrongful transfer outside the Native American community is a further step towards full Religious Freedom for Native Americans.

The CHAIRMAN. Thank you, Chairman Flute.  
Governor RILEY.

**STATEMENT OF HON. KURT RILEY, GOVERNOR, PUEBLO OF  
ACOMA**

Mr. RILEY. [Greeting in native tongue.]

Chairman Hoeven, Vice Chairman Udall and members of the Committee, tribal leaders and guests, my name is Kurt Riley, I am the Governor for the Pueblo of Acoma. The Pueblo of Acoma greatly appreciates this opportunity to present on S. 1400, the STOP Act.

During my time as Governor, the Pueblo has fought to recover many sensitive cultural items that illegally left our lands. Under traditional Acoma law, no one person may own these items whether they belong to the community as a whole and are looked after by their caretakers who cannot sell them or remove them from the Pueblo.

These items play significant roles within our culture, our traditional calendar, our societies, our families and our way of life. Most importantly, they are critical to how we pass our identity down to our children. Their loss threatens our cultural survival.

The best known of our fight in this effort is to regain the Acoma Shield which was set to be auctioned in Paris in 2016. The Shield was stolen some years ago but current members of the Pueblo still remember its use in our societies. It is not by chance that the Shield was shipped from the southwest to Paris for sale. It could have been publicly offered for sale in the southwest where Federal domestic laws would have supported our claim.

With the help of our congressional delegation, Federal agency officials, Indian Country and the general public, the Paris sale was blocked. This was a rare success. Ironically, however, we still do not have the Shield.

A big part of the problem is that the United States does not have an explicit ban on the export of these items. Foreign governments, including France, have consistently told the Pueblo and Federal officials they will not facilitate return of our cultural heritage because the United States' laws do not explicitly prohibit their exportation.

The STOP Act contains an explicit ban. It should be emphasized that this ban is narrowly drawn. The STOP Act only applies to items obtained in violation of NAGPRA, the Archaeological Resources Protection Act or the Antiquities Act. So far, the ban to apply a violation of one of these laws has yet to have already occurred.

Despite its narrow scope, the STOP Act will send a clear message about American values and will provide an essential tool for securing the cooperation of foreign countries when sensitive cultural property appears in auction houses and elsewhere overseas. In addition to a ban, the STOP Act increases the penalty for violation of NAGPRA and encourages a system of voluntary return. We are



hopeful about voluntary return. Our experience is that when dealers and collectors get to know us and we get to know them, many issues of concern are resolved and sensitive items do come home. Still, there are always those who just do not care. Lastly, the STOP Act creates a tribal working group to advise the Federal Government. This group is needed to maintain the Federal Government's focus on this issue and to provide professional expertise as matters of identification and such arise.

I am happy that Assistant Secretary Tahsuda is testifying today. The Department of the Interior has been a great ally in these efforts. Notably, Secretary Zinke was one of the co-sponsors of the Protect Patrimony Resolution which passed in the Congress last year. That resolution condemns the illegal trafficking in tribal cultural patrimony and calls for an explicit export ban.

I thank you, members of the Committee, for giving me the opportunity to share Acoma's experiences. I would especially like to thank the New Mexico Congressional Delegation for their steadfast support on this important matter that is very important to the Pueblo Acoma.

I would be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Riley follows:]

PREPARED STATEMENT OF HON. KURT RILEY, GOVERNOR, PUEBLO OF ACOMA

On behalf of the Pueblo of Acoma (Pueblo), please accept this written testimony for the full committee hearing on the Safeguard Tribal Objects of Patrimony (STOP) Act of 2017, S. 1400, and other bills held by the Senate Committee on Indian Affairs on Wednesday, November 8, 2017. The Pueblo appreciates the opportunity to present on this important topic to the Committee and your staff. We have a great deal of experience in both combating illegal trafficking of our protected tribal cultural heritage and in seeking repatriation of those items. The Pueblo is grateful for the opportunity to share this experience with you.

**I. The Pueblo's Experience Related to the Protection of Tribal Cultural Heritage**

The Pueblo has developed expertise in the protection of tribal cultural heritage, especially across international borders. Unfortunately, this expertise came out of a necessity to protect our community and our cultural heritage, essential to our way of life. Many people view our cultural heritage 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.

Our items of cultural heritage have significant roles to play within our culture, our traditional calendar, our societies, our families, and our way of life. Our cultural heritage also helps us honor and uphold our values and teach those values to our young people. So important are these items of cultural heritage that, under the Pueblo's traditional law, no one person may own them. Rather they belong to the community and are cared for by their caretakers, who cannot sell them or take these items from the Pueblo. We have prioritized protecting the Pueblo's items of cultural heritage because we believe that, without their presence, we cannot continue our way of life.

The Pueblo has fought many instances of trafficking in our cultural heritage, including in New Mexico, across the country, and overseas. One well-known example is our fight to regain an important ceremonial shield (Acoma Shield), which was most recently set to be auctioned in Paris, France in May of 2016. The Acoma Shield was stolen from its caretaker in the 1970s and was eventually exported overseas. Although we had the unprecedented success of halting the auction—with the help of our congressional delegation, federal agency officials, Indian country, and the general public—we have not yet been able to bring the Acoma Shield home. The Acoma Shield is just one of hundreds of items of cultural heritage that have illegally left our community and been trafficked into various markets.

Some of the earliest recorded incidents of the Pueblo's efforts to regain its cultural heritage involve federal criminal convictions handed down just after the 1990 passage of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1 170. In *United States v. Brian Garcia and Gerald Garcia*, 92–515 JC (D.N.M. 1992), two Pueblo brothers pled guilty to illegally trafficking the Pueblo's cultural heritage in violation of NAGPRA. The Pueblo worked closely with the United States Attorney's Office to verify the provenance of the items sold. This case represents the importance with which the Pueblo treats this issue, even pursuing the federal conviction of our own people. Later, in 1999, another example in *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), involved a set of historic Catholic priest robes cared for by the Pueblo, dating from the time of the Pueblo Revolt. They were recovered along with many Hopi items of cultural heritage. A Bureau of Indian Affairs (BIA) special agent investigated a non-Indian tribal art and antique dealer, leading to his conviction and the recovery of the items.

Later, in the 2000s, as national and international auction houses began to expand and reach more collectors through the Internet, the Pueblo became significantly more involved in attempting to identify and recover its cultural heritage. In 2006, the Pueblo worked diligently with its legal counsel for the return of historic wooden beams and doors from the San Esteban del Rey Mission Church.<sup>1</sup> A national auction house had possession of the wooden beams along with nearly 50 other items of cultural heritage belonging to the Pueblo.

In 2015, the Pueblo began devoting more of its resources to addressing this issue, as it observed a disturbing number of its cultural heritage items for sale in a variety of contexts. They were being sold in locations locally, nationally, and internationally. Across 10 incidents, 24 separate Pueblo cultural heritage items were identified as being available for sale or having already been sold. Of these 24 items, the Pueblo was only successful in securing the return of 11.

This year in 2017, the Pueblo has so far encountered and identified eight cultural heritage items for sale or as having already been sold. The Pueblo was successful in recovering five of these items. We believe the decrease in number over the past two years is due to our efforts to retrieve our cultural heritage items from public sales. However, we are unsure whether this represents an actual decrease in market activity or instead represents an increase in black market activity hidden from the public eye.

## II. Steps the Pueblo Has Taken to Combat Trafficking

### *System for Identifying Protected Items of Cultural Heritage*

It is important to understand that existing federal laws protect only specific types of items associated with tribes. Most items are not protected. NAGPRA, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa–470m, and the Antiquities Act, 16 U.S.C. §§ 431433 repealed and re-codified at 54 U.S.C. §§ 320301–320303, 18 U.S.C. § 1866, have specific statutory standards for the items they protect. Generally, they must meet a threshold level of cultural significance and must have been taken from specific lands within specific time periods. Although tribes are involved in determining which items are protected, *see United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999), they cannot claim items are protected if they do not meet these statutory standards.

The type of cultural items the Pueblo is attempting to protect are difficult to fully describe and publicly identify because of their sacred and confidential ceremonial use. However, the items are those that are central to our cultural belief system and way of life. They are very different from the beautiful works of art created by our tribal artists and potters. While our items of cultural heritage may have some intrinsic artistic value, their purpose is very different.

The Pueblo's statutes allow for the inclusion of traditional law. Under the Pueblo's traditional law, it is illegal for any member, who may have these cultural heritage items in their care, to sell or remove these item from the Pueblo.<sup>2</sup> These cultural

<sup>1</sup> The San Estevan del Rey Mission Church sits atop the mesa at the Pueblo. Founded in 1629, it is still cared for and maintained by the Pueblo's people. It was declared a National Landmark and also listed on the National Register of Historic Places in 1970.

<sup>2</sup> Different types of the Pueblo's cultural heritage may be stored, cared for, or used differently depending on what the item is. For example, some cultural heritage items may be cared for and stored by individuals or families in their homes. Other times, different cultural heritage items may be cared for and stored in communal buildings, called kivas, by specific societies or clan groups. Other times, these objects may be placed outside in the open at sacred sites. Items are put in special places to be left there permanently, not unlike the San Ildefonso Pueblo object at issue in the case of *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996), or the repatriation of the Zuni War Gods in the late 1980s (a well known example of the removal of cultural objects from area shrines). *See also* in 5, *infra*.

heritage items are often considered sacred, and many are used publicly and privately in ceremonies. The Pueblo has used this law to establish that specific items are considered tribal cultural heritage, which aids in establishing their protection and facilitating prosecution under federal law.<sup>3</sup>

The Pueblo also has in place a system tribal representative use for identifying whether an item is from the Pueblo and whether it qualifies as protected tribal cultural heritage. The Pueblo, through its Tribal Historic Preservation Office, has created an Advisory Board to assist and consult on cultural matters. The Advisory Board is staffed with knowledgeable cultural practitioners, many of which are current or former religious leaders within the community.

To protect the Acoma Shield, federal agencies first needed information from us to establish that this was qualified as protected under existing federal law. When the Acoma Shield first came up for auction, Pueblo cultural practitioners identified it, recognizing its construction, iconography, and usage as a ceremonial and sacred item. Needing further information, the Pueblo worked with its community and cultural leaders to find out as much information as possible about how this left the Pueblo. While an object of cultural heritage need not be stolen to be protected by federal law, we learned that the Acoma Shield was stolen in the mid 1970's from a home in "Sky City," our ancestral mesa-top village.<sup>4</sup> We were extremely fortunate to locate an individual who had a living memory of the Acoma Shield and immediately recognized it. Working with Department of Justice special agents, we obtained affidavits from tribal members to establish the facts surrounding the Acoma Shield's theft and information about its cultural significance. These affidavits were used to establish that the Acoma Shield qualified for protection under federal law.

Many collectors have argued that these items were lawfully acquired and can be legally sold. This is a false statement and mischaracterization of how Pueblo and federal law treats these items. Under Pueblo and federal law, the Pueblo itself effectively owns the items in question.<sup>5</sup> They need not be stolen to qualify for protection. Instead, if they meet the statutory standards for protection under the Pueblo's laws and federal statutes—including NAGPRA, ARPA, and the Antiquities Act—their removal from tribal or federal land and trafficking is illegal.

Therefore, the Pueblo asks this Committee to not think of these sacred and ceremonial objects in property rights terms, like title and ownership. The Pueblo has significant claims and arguments to be made that, by possessing ownership, items of tribal cultural heritage are forms of tribal governmental property; but if these objects are merely treated like other pieces of property, their true significance is lost. Instead, it is important to move beyond the Western view of property rights and consider this issue as one of human and cultural rights.

#### *Monitoring Market*

With the increased availability of auction house catalogues on the Internet, the Pueblo regularly attempts to monitor and respond to auctions involving its cultural heritage items. Subscriptions to a wide variety of auction catalogues, online gallery websites, and auction websites (like Ebay) allow for scanned listings of sensitive items belonging to the Pueblo or our sister pueblos. The Pueblo also attempts to attend local antique or art conventions, and to visit local galleries and pawn shops, where we often discover questionable and sensitive cultural heritage items for sale.

This consistent monitoring has led to discovering, otherwise inaccessible or unknown art and antique gallery inventories. However, this monitoring practice may only be scratching the surface. We do not know the number of cultural heritage items that may be out there. Aside from tribes' own work, there is no other system for monitoring the trafficking of tribal cultural heritage.

#### *Relationships with Federal Officials*

The Pueblo has also worked to create close relationships with federal officials who can help when a protected item of cultural heritage is identified as being trafficked

<sup>3</sup>See *United States v. Brian Garcia and Gerald Garcia*, 92–515 JC (D.N.M. 1992); *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999) discussed *supra*.

<sup>4</sup>At the time, the Pueblo did not have an established police force, and it was unclear, but unlikely, whether the caretaker ever made any criminal report to BIA officials, who would have had jurisdiction over crimes in Indian country.

<sup>5</sup>The clearest analogy to describe the Pueblo's law is the legal concept of property rights being that of a "bundle of sticks." For the Pueblo, some members may have rights of possession, but they do not have the right to sell an item of cultural heritage. In fact, traditional law dictates what is to happen to a cultural heritage item if a caretaker can no longer care for the item. The right to sell an item of cultural heritage, although not contemplated in the Pueblo's traditional law, would be exclusively reserved to the Pueblo itself. Certainly, the Pueblo has never exercised this right. The Pueblo's traditional law closely mirrors the definition of "cultural patrimony" defined under NAGPRA, 25 U.S.C. § 3001(3)(D).

domestically or abroad. We work closely with a Southwest Regional Enforcement Officer from the BIA's Office of Justice Services and have also made contacts within the Department of State and Department of Justice. In some instances, we have facilitated communication between these federal agencies. Thankfully, these federal officials have been instrumental in the Pueblo's efforts to regain its items of cultural heritage.

#### *Voluntary Return*

Under federal law, like other governmental entities, tribes are treated as non-profit entities for tax purposes. The Pueblo has used this to our advantage in attempting to incentivize individuals who are considering returning an item. Paperwork and information are provided for these individuals to receive a tax deduction and the returned item is treated as a donation to the Pueblo.

### **III. Support for the STOP Act**

The Pueblo fully supports the passage of the Safeguard Tribal Objects of Patrimony (STOP) Act, S. 1400. Through our experiences, we have learned many hard lessons, first hand, in attempting to protect our cultural heritage. One lesson the Pueblo learned is that existing federal laws are not enough. The proposed STOP Act strengthens these federal laws in areas we believe need it most. Particularly, the STOP Act places an emphasis on facilitating the return of protected items trafficked internationally, where we have been the most powerless to gain the repatriation of our cultural heritage. These provisions are designed to keep tribal cultural heritage items with tribes and to facilitate the return of those that have left tribal possession.

Current federal law does not adequately address and protect the hundreds of cultural items that have been trafficked from the United States to overseas markets. A quick look at past auction catalogues of places where Pueblo cultural heritage has been sold quickly reveals the sheer enormity of tribal cultural heritage that has left the country.<sup>6</sup> For instance, 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 STOP Act is an important tool to close the door on the illegal trafficking of our important cultural heritage items and send a message that this illegal practice will not be tolerated.

#### *Increased Penalties*

The STOP Act's provisions 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.

#### *Export Restriction*

The STOP Act's provisions would also explicitly prohibit the exportation of tribal cultural heritage obtained in violation of NAGPRA, ARPA, or the Antiquities Act. This is needed because foreign governments, including France, have consistently told the Pueblo and federal officials that they will not facilitate return of our tribal cultural heritage because United States law does not explicitly prohibit its exportation. This is due in part to a 1970 international treaty entitled the "UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" in which signatories agreed to protect each other's cultural heritage when exportation of such cultural heritage is illegal in the originating country.

To be clear, the STOP Act's prohibition applies only to items that were already protected under NAGPRA, ARPA, or the Antiquities Act. The art industry has been operating under the definitions of these laws for decades. The STOP Act does not

<sup>6</sup>The French auction of tribal cultural heritage has been widely reported since at least 2013. See, e.g., Tom Mashberg, *Secret Bid Guides Hopi Spirits Home*, NEW YORK 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*, NEW YORK TIMES, (June 29, 2014), <http://www.nytimes.com/2014/06/30/warts/design/sale-of-hopi-religious-items-continues-despite-us-embassyefforts.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-idUSKBNOOR1DG20150611>.

make illegal the export of any items that were legal to sell domestically. Further, the Act does not extend to items that were not already protected under federal law.

The Protection of the Right of Tribes to stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, a 2016 joint resolution, supports congressional development of an explicit restriction on exportation. Additionally, congressional representatives have requested the Government Accountability Office research international trafficking in tribal cultural heritage. Thus, Congress has already indicated its interest in resolving the problem of illegal exportation.

#### *Federal Framework for Voluntary Return*

Third, the STOP Act would create a framework for the federal government to work with individuals or organizations to facilitate the voluntary return of cultural heritage to tribes. It would call on the Department of the Interior and Department of State to designate a liaison for facilitating voluntary return as well as to hold trainings. It would also call on the Department of the Interior to create a referral system for directing individuals to the correct tribe for repatriation.

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 framework will provide well-intended individuals a mechanism to work collaboratively in returning tribal cultural heritage.

#### *Tribal Working Group*

Last, the STOP Act creates a tribal working group to advise the federal government on issues related to protection of tribal cultural heritage. The working group would work with other federal agencies and committees spread throughout the federal government that deal with tribal cultural heritage issues. We hope the working group will lead to more collaboration.

#### **IV. Addressing Criticisms of the STOP Act**

The Pueblo is aware that the STOP Act has come under criticism by a small segment of art dealers. Predominantly this criticism has come from the Antique Tribal Arts Dealer Association, Inc. (ATADA). We would like to take this opportunity to address and dispel the main arguments ATADA is currently making.

*MYTH: The STOP Act is redundant because NAGPRA and ARPA already prohibit the trafficking of and 18 U.S.C. 554 already prohibits the exportation of protected tribal cultural heritage.*

#### **RESPONSE**

The STOP Act is consistent with, but does not duplicate, existing statutes. No federal statute clearly and explicitly prohibits the act of exporting protected tribal cultural heritage. Existing statutes could be interpreted to prohibit and penalize export of tribal cultural heritage, but these statutes have not been effective in preventing export and convincing foreign countries to aid in repatriation.

Section 554 of Title 18 imposes criminal penalties on any person who “exports. . . any merchandise, article, or object contrary to any law or regulation of the United States.” This provision has not been used by the federal government to prohibit the export of tribal cultural heritage. Further, some courts applying Section 554 in other circumstances have found that export must already be illegal under another separate statute for Section 554’s penalties to apply.

NAGPRA bars transporting for sale, selling, and purchasing certain cultural items. 18 U.S.C. § 1 170. ARPA bars transporting, selling, and purchasing certain archaeological resources, including in some cases in foreign commerce. 16 U.S.C. § 470ee(b)(1)-(2), (c). The Antiquities Act protects objects of antiquity from unlawful appropriation, excavation, injury, and destruction. 18 U.S.C. § 1866(b). None contains an explicit export restriction.

As discussed previously, foreign officials have told the Department of State and tribes that without a United States statute explicitly and clearly prohibiting export of tribal cultural heritage, they have limited authority to facilitate return. In the Pueblo’s most recent effort to recover the Acoma Shield, France cited directly to United States law and explicitly pointed to the absence of exportation prohibitions on tribal cultural items in its reasoning for not halting the auction. This has resulted in the Pueblo attempting to halt auctions of its protected cultural items abroad through foreign agency processes without success, including filing a formal protest with France’s Conseil des Ventes that was denied.

Legally and politically, we cannot stem the tide of illegal international trafficking without an explicit export restriction. The STOP Act will provide clarity in domestic law, removing a stumbling block for the Department of State and tribes as they seek return of tribal cultural heritage from abroad.

*MYTH: The STOP Act's protections may be unconstitutional and could harm the Indian art market due in part to a lack of clarity regarding which items are protected.*

#### RESPONSE

It has been alleged that the STOP Act does not provide the necessary clarity to define what objects are protected. This is inherently a criticism of the underlying laws that the STOP Act relies upon. It is important to note that the STOP Act does not create protections or penalties for any object that is not already protected under existing federal law. Therefore, the STOP Act cannot qualify as a regulatory taking.

Instead, increased penalties under the STOP Act are limited to “cultural items” already protected by NAGPRA, 25 U.S.C. §3001(3). Additionally, the export restriction is limited to “cultural items” removed unlawfully under NAGPRA, “archaeological resources” removed unlawfully under ARPA, 16 U.S.C. § 470bb(1), and “objects of antiquity” removed unlawfully under the Antiquities Act, *see* 18 U.S.C. §1866(b). The export restriction only applies to these items when they are “Native American,” as that term is defined in NAGPRA, 25 U.S.C. §3001(9). Although the STOP Act’s voluntary return provisions could be read broadly, they have no legal consequences and are meant only to create a framework for individuals seeking to return any items they have and would like to return.

Further, existing federal laws require a defendant to have knowingly engaged in activity made illegal under NAGPRA or ARPA to receive a penalty—thereby, requiring that the individual knew or should have known the object was protected. *See* 18 U.S.C. § 1170; 16 U.S.C. §470ee(d). Courts have stated that those engaging in the sale and trafficking of protected items are deemed to possess a certain level of knowledge, whether an item qualifies as protected. *See, e.g., United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999); *United States v. Carrow*, 119 F.3d 796, 803–04 (10th Cir. 1997). This is no different than other situations where persons who hold themselves out as having specialized knowledge are held to a higher standard of care in dealing with others. The STOP Act’s export restriction maintains this knowledge requirement.

The definitions incorporated into the STOP Act are legally sufficient. Courts have routinely upheld these definitions as not unconstitutionally vague, even when law enforcement officials or courts look to tribal law or tribal representatives to determine whether items qualify for federal protection. *See, e.g. United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999) (upholding NAGPRA); *United States v. Carrow*, 119 F.3d 796 (10th Cir. 1997) (upholding NAGPRA); *see also United States v. Austin*, 902 F.2d 743 (9th Cir. 1990) (upholding ARPA); *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (upholding Antiquities Act); but *see United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (finding Antiquities Act unconstitutionally vague).

Congress has already closely considered this issue, including competing testimony from tribes, museums, and private collectors. For example, at the time of the passage of NAGPRA, the Select Committee on Indian Affairs resolved to “[c]arefully consider[] the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe.” *See* S. Rep. No. 101–473, at 4 (1990). Congress structured the definitions of the items protected by NAGPRA to create the necessary flexibility that allows tribes to apply their own standards and framework and ensure that items necessary for their cultural survival are protected. The intention of existing federal law, as explained by Congress and interpreted by the courts, was to clearly value tribal culture and law as ultimately dictating the function, treatment, and distinction of which items are considered protected.

It is paramount that, if collectors or dealers are unsure if an item qualifies as protected tribal cultural heritage, they contact the tribe for more information. To create a comprehensive list of protected cultural heritage items is impractical and inappropriate. There are 567 federally recognized tribes, and each has its own objects that meet existing federal laws’ definitions to qualify as protected. Within a tribe, traditional knowledge may be held in a diffused way. This makes it next to impossible to list all items considered protected because, as dictated by tribal law and custom, the totality of such cultural knowledge may not be held by one person, but rather only parts of such knowledge may be held by individual people separately. The idea of creating lists is troubling to many tribal leaders, especially where it may be culturally inappropriate to divulge information regarding protected objects without a significant reason, and tribal religious leaders may not be willing to do so. Additionally, making the public aware that an item qualifies as protected may drive the price of that item up and make it more desirable to buy and sell in the black market. Last, creating a list of protected items may create a presumption of completeness that only items on the list are protected.

If Congress determines it necessary to amend the STOP Act to provide additional clarity regarding which items are protected, especially regarding the export restriction provision, the Pueblo could support a permitting system. The Pueblo requests tribes and tribal organizations be involved in drafting any such provision.

*MYTH: The STOP Act will result in United States Customs and Border Protection agents seizing all items associated with tribes.*

#### RESPONSE

For the reasons discussed above, we believe the STOP Act contains the necessary clarity regarding which items qualify as protected and thus as subject to the export restriction. Further, the STOP Act authorizes the Attorney General and the Secretary of Homeland Security, in consultation with the Secretary of the Interior, to prescribe rules and regulations to carry out the export restriction. Any guidelines necessary for Customs and Border Protection Customs agents should be created through such rules and regulations and not statute.

#### V. Conclusion

Since the introduction of the STOP Act, there has been a surge of interest in this issue, resulting in increased contact between the Pueblo and various collectors and dealers. The Pueblo seeks to build and expand its positive relationships with this community. When they return these items home, it is a joy for us. We are extremely thankful.

We do not want to be forced to rely on the law and the courts to secure the return of tribal cultural heritage. However, it must be emphasized that the law must set forth the values of the United States and its Native peoples. Because of that, we fully support the STOP Act. The Pueblo looks forward to working with the Committee, generating good will with those who have supported the STOP Act, refining the STOP Act as needed, and finally securing its ultimate passage.

The CHAIRMAN. Thank you, Governor Riley.

I will turn to Senator Heinrich first. I understand you have another obligation. Would like to proceed with your questions?

Senator HEINRICH. Thank you very much, Mr. Chairman.

Governor Riley, it has been more than a year and a half now since your Pueblo first discovered that the Acoma Shield was on the auction block in Paris, France. That was far from the first time something like this has happened.

Could you tell us a little bit about whether you are aware of additional cases before or since then of sacred items being sold internationally? Is this a one-off issue or is this something you see a great deal?

Mr. RILEY. Mr. Chairman, Vice Chairman Udall, Senator Heinrich, thank you for the question.

Members of the Committee, before I came to the hearing today, I did send out word through the All Pueblo Council of Governors network asking my fellow governors if there were any instances of items that were sold from their pueblos since 2016. The answer was a resounding yes. This is not just a one-time occurrence. It continues to today.

Senator HEINRICH. How urgent is it for your Pueblo and tribes across the Country for the Federal Government to take some concrete action to stop these auctions? Particularly, do you believe we should wait for the GAO study before taking action on this?

Mr. RILEY. Again, thank you.

It is urgent. I cannot express how urgent it is to me. The Shield must come home.

This is my second term as a governor. It is an appointed position. We do not run for these offices. Since it has been so long, members of the Committee, especially the religious people in my community, have expressed, please, just bring it home. It is not that easy.

The sense of urgency is there within my community and, I am sure, across Native America as we all realize, just in the small survey that I did just recently, these cultural items are continuing to leave and go across the seas to be sold. There is a sense of urgency.

Should we wait for the GAO report? In my opinion, actions can be taken now without the GAO report. However, I think once the GAO report comes out, it will only confirm what we know, as Native tribes, Pueblos and Nations in this Country, that it is happening and it is still happening today.

Senator HEINRICH. Mr. Tahsuda, I find it deeply troubling to learn that almost ten months into a new Administration that the Department of the Interior itself has not looked into what policy changes are necessary to stop the trafficking of sacred tribal objects.

In your testimony, you say the department is waiting to hear from the GAO before forming a policy on this subject. Surely your staff already has the information necessary to develop a position on this issue. In fact, the Department of the Interior was engaged in an extensive tribal consultation process just last year to hear from tribes on this issue.

I, too, look forward to hearing the GAO's analysis. I hope we can learn from it. I hope it recommends additional solutions. I also hope that the department is not abdicating its responsibilities to tribes by declining to develop its own plans to solve this problem given what we know.

Can you share with us any changes the department has made or intends to make to help stop the export of these objects or any policy ideas or recommendations you would like to make on this topic?

Mr. TAHSUDA. I think the department, under current authorities, has been involved in efforts in the past. I think the Governor alluded to that. We obviously will try to do everything we can.

I agree with the Governor this is hugely important, as tribal history and culture are woven into American history and culture. It is obviously important and should be important to all of us but that means we need to get it right, I think. That is the reason we want to wait for the GAO report.

The full responsibility is not just in our hands. We have the Department of Justice and the State Department which have roles in this. We want to make sure, with the end result, we have all the tools in hand that we need to be able to protect our tribal history, culture and objects of cultural heritage.

We want to do it the right way so that our actions are defensible, that we can proceed with prosecutions and not have any questions under constitutional or criminal law, questions that could arise and hinder our efforts to protect that.

Senator HEINRICH. Senator Udall and I have some experience with this. While I have to go to another commitment, I suspect he may have some additional questions based on our direct experience with these issues.

Thank you.

The CHAIRMAN. Does that complete all the questions you have, Senator?

Senator HEINRICH. It does, Mr. Chair.

The CHAIRMAN. I would like to begin with Ms. Fowler.



Senator Rounds referred to the issue I am going to ask about in my first question. Last week, the Department of Health and Human Services notified the Indian Health Service hospital located on the Pine Ridge Reservation, which was recently surveyed by CMS, and from the CMS survey, they determined the hospital would be placed in immediate jeopardy status and terminate the hospital's provider agreements effective November 18.

That means IHS will no longer be able to bill Medicaid for services received at that facility. My question is, since we were notified last week of this announcement, would you provide this Committee with an update on how IHS is working to improve upon and address those survey results and make sure the Pine Ridge IHS hospital retains its certification?

Ms. FOWLER. Certainly. I will share what I can. It is not my area of expertise so I may have to provide an update to you at a later time or in writing.

As I mentioned in my testimony, we did take immediate action. We immediately performed a root cause analysis to evaluate the situation and began addressing some of those immediate issues we thought needed to be addressed most urgently such as the staffing levels for the emergency department. We are considering our next action in light of notice of termination.

The CHAIRMAN. My question specifically goes to the improvements that need to be made and whether or not Pine Ridge will retain its certification. Do you know the answer to that?

Ms. FOWLER. As I understand it, the termination will occur. At this point, there is not an action that would halt the termination. We are considering our next steps at this point in time.

The CHAIRMAN. Would you please provide the Committee a report on those next steps so that we know what they are?

Ms. FOWLER. We can do that.

The CHAIRMAN. Thank you.

The Senate bill, as proposed by Senator Rounds, requires a private entity to conduct an audit of the IHS. That would cover a wide range of areas. Senator Rounds has also been developing a substitute amendment and working with IHS to do that.

That would provide that the Inspector General of the Department of Health and Human Services would do the actual assessment of IHS.

My question is, would the Inspector General of HHS be able to complete that assessment within the given time frames? Are there particular aspects of that study you feel should be given priority?

Ms. FOWLER. I am not able to speak about the Inspector General's ability to perform the assessment. I will comment that we are happy to provide technical assistance on specific provisions of the bill in response to your last question.

The CHAIRMAN. Do you have any areas that should be prioritized, in your opinion?

Ms. FOWLER. The specific areas that are referenced in the bill, we have engaged with the GAO and the Office of Inspector General on several audits, assessments, and evaluations during the past three years. This is the type of technical assistance we would like to provide in reviewing the bill with you.

The CHAIRMAN. Chairman Flute, talk about areas of priority for the study in terms of making sure that we address the problems at IHS and try to come up with solutions that can make a qualitative difference in the health care services they provide?

Mr. FLUTE. We would like to see CMS not just close down the facilities if they are not meeting the performance standards, but also get them up to speed, give them the technical assistance they need, such as Pine Ridge which is all news to us.

The accountability and transparency we are looking for all goes back to consultation and good communication with the tribes. Tribes are trying to help figure out what is going on in all areas.

I apologize to you, Mr. Chairman. In my opinion, there is no one that is greater than the other. It all has to do with quality of service. We are just not getting the answers. Consultation is not there. We try to reach out and communicate and we just do not get the answers we are looking for.

I don't know if that answers your question, but we do support the bill. Great Plains does and the United Tribes of North Dakota. We support the bill and are just trying to get the answers and figure out why do we have a high turnover rate of leadership?

It is unfortunate that the third-party collections, being a veteran myself, not to highlight myself, but being able to get services at the Fargo VA, I would rather choose to go to the VA, as do my friends who are Iraqi and Afghanistan veterans, as I am, who work at the Indian Health Service.

They work at the Indian Health Service. They would much rather go to the VA and travel to Fargo and Sioux Falls to get the quality service that they receive at the VA. It is unfortunate that our tribal members are not veterans. They have to go to the Indian Health Service.

They are being refused and turned away because IHS says we don't have the purchase referred care dollars to deal with your heart condition because you are not quite at the point of loss of life or limb.

They send them to the other hospitals where now they are being charged, the tribal member who is living on low income, working at local establishments, Taco John's, or Dairy Queen at minimum wage. The single mother is being charged and now her credit is being damaged.

Those payments are not being made from IHS in a timely manner. There is just so much, Mr. Chairman. I don't know if I answered your question but we support this bill to try to get a handle on this. We do support the efforts of the Senate.

The CHAIRMAN. Vice Chairman Udall.

Senator UDALL. Thank you, Mr. Chairman.

Governor Riley, you mentioned in your testimony the trouble in fully describing cultural items publicly because of their sacred and confidential ceremonial use. Having worked with Pueblos for a very long time, this is something which I am very familiar and greatly respect that tradition.

However, critics have pointed to this confidentiality as the root of the problem since some art collectors and dealers may not know or be able to identify the cultural significance of the items.

As you know, the STOP Act facilitates voluntary returns. Are there other more effective ways to respect confidentiality while also ensuring repatriation of these items that may have inadvertently made their way to the market?

Mr. RILEY. Thank you, Senator, for the question.

I can only speak for myself and maybe some experiences with my tribe. Along the way, we have really experienced the development of a relationship with these dealers. I have approached some of these dealers myself, gone to their shops, and once we explain to them the cultural significance of some items, at that point, they are sometimes voluntarily returning an item to us.

On occasion, however, because of their perception of an investment or value to that item, we offer documentation that they can submit. We do not put a dollar value on an item. However, they can use that as compensation, if you can all it compensation, since tribes are considered a 105(c)(3), so they are making a donation to the tribe.

Lastly, however, if we do not develop a very good relationship, we have to play hard ball. I have presented my credentials as a tribal leader and advised the owner that if they do not voluntarily return an item, we can take the steps necessary to have to proceed to using laws to obtain the return of that item. It is their choice. I would say 95 percent of the time, you develop that type of relationship.

Another example is, on eBay, which everyone knows about, we have gone through a process where we identify and confirm an item should be returned to the Pueblo. Our contacts at eBay immediately shut down the auction, connect us to the consignor and we work out things. There are other ways.

I had a conversation earlier that some items become gray, which is art, which is antiquity or an item of cultural heritage. That is when it becomes much more difficult to develop that type of relationship. The STOP Act provides that voluntary return.

I think if we had those amenable conversations, items would come back. However, the exportation of the item is where that gap is present currently. As dealers, they are knowledgeable and know that sometimes these items may be questionable, I cannot confirm, but they also know if it is in violation of existing law, they cannot be sold within the U.S.

That is the incentive to transport that item across the seas where we would have, as Pueblo, a much more difficult time, once it leaves the U.S., to get those items back. A very good example of that is the Acoma Shield.

Senator UDALL. Thank you very much.

Mr. Tahsuda, you were unable to provide an official position on the STOP Act in your testimony but you did state the department believes an essential element to combating theft of cultural heritage is vigorous enforcement of NAGPRA.

Yet, earlier this summer, Secretary Zinke suspended all NAGPRA Review Committee activities. The Review Committee is "an important enforcement mechanism under NAGPRA established by Congress to monitor and review the implementation of the inventory and identification process and repatriation activities." That is a quote from the statute.

Notably, the Review Committee provides Congress and the department with recommendations as to how agencies can better enforce NAGPRA. How can the department adequately enforce NAGPRA when Secretary Zinke put the Review Committee on hiatus indefinitely?

Mr. TAHSUDA. Thank you, Vice Chairman.

I think it is a bit of a complicated question. We have done some review of several FACA committees of which this is one. That has been part of the process. The committee is there and will be operating but my understanding is we wanted to make sure the committee was operating within the law and that the membership adequately reflected the intent of the law.

There are a number of open slots that need to be filled. I think that is part of the process that is going on, but the committee will be constituted to do its job.

Senator UDALL. The problem with this is that is the entity to do the enforcement. If you are putting this in hiatus indefinitely, you have stopped the enforcement activities. I have a real doubt. I would like to know and I am going to ask you to put in the record in a question, what authority he has to put this in hiatus indefinitely? I just don't see how.

The Congress has urged you to act. It is your responsibility to act. I do not think you can say oh, we are going to indefinitely postpone it. The message should go to the Secretary that he reconvene the Review Committee and continue its statutorily mandated mission, which is I think tremendously important.

I have gone over here. Mr. Chairman, I have several other questions.

The CHAIRMAN. We will have another round.  
Senator Cortez Masto.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,  
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. I appreciate the conversation today. Let me start with S. 1400.

Governor Riley and Chairman Flute, it is my interpretation, after reading the language, that I think the STOP Act remains consistent with Federal statutes. In fact, it goes further to explicitly state a prohibition of knowingly exporting or transporting protected tribal cultural artifacts, artifacts that under current domestic law, are illegal.

Is it the position of your tribes, and the dozens of other tribal leaders who have sent in support letters, that this bill aims to clearly and plainly elevate tribal heritage under the same protection for interpretation internationally, yes or no?

In other words, the intent of this bill is to elevate the tribal heritage, your culture and the items you believe are significant to return and are important to have specific litigation or specific enforcement?

Mr. FLUTE. Yes, I think it would enhance our culture and heritage, especially for our youth. Tribal languages are on some lists of being lost but tribal languages are strongly connected to artifacts and those sacred objects that are out on the black market or different types of websites for sale.

Yes, it would enhance and bring awareness to our culture and our language, especially for our youth to reconnect and identify with themselves who they are.

Senator CORTEZ MASTO. Governor, I will ask you the same thing because I also see the Antique Tribal Arts Dealers Association has concerns about the bill because they claim it criminalizes art but what is art to them is something different to you. Can you please explain why it is so different to tribal communities across this Country and why returning tribal artifacts is so important?

Mr. RILEY. Senator, I thank you for the question.

It is very difficult to answer that question and I have answered that question on numerous occasions. These items are not pieces of art. They were made and created for a certain purpose within our cultural societies and our cultural calendar. Unfortunately, it is not recognized anywhere else but within our own tribal communities.

To answer the previous question, it does raise the status of these items and being able to be recognized internationally at the same level of other world countries and other world cultures. I think there has been a long time in not being recognized as such.

The United States had treaties with other countries to prohibit items from coming into this Country. They do not have laws, however, concerning exporting items of cultural heritage to other countries. That is the big difference.

Senator CORTEZ MASTO. That is the point. Excuse me, I only have so much but that is the point because this legislation is very specific about elevating these artifacts. It is consistent and not redundant with the law. It is very specific and we do it all the time in making it very specific and identifying in the law what we want to enforce and protect. In this particular case, it is those cultural artifacts, correct?

Mr. RILEY. Correct. I just want to add one little piece of information. Who is the cultural expert here? Whenever you ask that, it is the individual Pueblos, tribes and Nations who are experts of their own culture rather than someone else who has studied our culture. They are not experts.

Senator CORTEZ MASTO. Thank you.

I know my time is running out. I have additional questions as well. I can defer and wait.

Thank you.

The CHAIRMAN. I can pick up on your line of questioning with Governor Riley.

You talked about how these cultural objects are difficult to describe, publicly identify and so forth, because they are sacred and confidential. I guess the question for collectors or auction houses that have these artifacts and cultural items, how do we make sure they are not unintentionally trafficking or selling some of these items, not realizing the cultural significance? How do we identify that and make sure we are making them aware in a way that is open, transparent, fair and sensitive?

Mr. RILEY. Thank you for that question.

I think there have been incidences where children of collectors have inherited the collections of their parents. They, in turn, maybe do not have the same interest of collecting and as a result,

they want to dispose of these somehow and put them up for auction.

I would think that would be considered unknowingly trying to sell an item. We understand that. As I said before, I think if we raise the awareness of these items possibly being considered sacred items by various Pueblos, tribes and Nations, to provide a means to reach out.

If they don't know, they could contact the local university or other individuals who study these kinds of objects to at least guide them in a direction. We, at the Pueblo Acoma, are always open to such inquiries and have done that on behalf of other Pueblos.

We have purchased a lot of items, knowing that it does not contain all of our items of cultural patrimony, but we, in turn, reach out to other sister Pueblos. On occasion, we get approached and none of it is ours but we do closely communicate with each other to provide that opportunity for someone else to identify their items of cultural property and we return them.

I think the awareness this bill has produced could be, in turn, perceived as being a way of those individuals who, in their opinion, are not knowledgeable about selling these items, there is always that opportunity to communicate with the local tribes to really identify who is the rightful owner of that cultural item.

The CHAIRMAN. Secretary Tahsuda, we have to find a way to make improvements in IHS. That is what this legislation that Senator Rounds has put forward is all about.

In your opinion, what can we do to start making concrete improvements in the services IHS delivers?

Mr. TAHSUDA. Chairman, that is not something that we handle at the Bureau of Indian Affairs but certainly I think we are all supportive of doing our jobs and delivering services to our constituents better, Indian tribes and Indian people. However, we can do that in a better way is what we are all aiming for.

The CHAIRMAN. Certainly, IHS is part of the HHS but it has to be a huge concern to you because we are talking about health care in Indian Country. That is why I am asking for your opinion on what can be done?

Mr. TAHSUDA. I think overall, the effort the President has directed all the agencies to do to find better ways to streamline decision making and to empower as further down the line as you can.

I am very fortunate to work for Secretary Zinke. He brings kind of a military mindset to this in which he repeatedly talks to us about providing the tools to empower the soldiers on the line to make the decisions they have to make in the immediate moment. I think at the end of the day, that is what we can do.

What tools do we need or can we find better tools to do that and can we empower the people on the line doing the job to correctly do the job?

The CHAIRMAN. Thank you.

Vice Chairman Udall.

Senator UDALL. Thank you, Mr. Chairman.

This question is to Ms. Fowler. It is obvious there needs to be increased transparency and accountability within IHS. I am concerned though that this bill, S. 465, would farm out Congress' oversight and fiduciary obligations.

As I said in my opening statement, the entire Federal Government has a trust responsibility to the tribes. This includes the Inspector General's office, GAO and OMB. As I understand it, many of these areas of study included in this bill should already be tracked and accounted for.

These are pretty simple yes or no questions. Is the IHS capable of providing this Committee with information on the current and projected IHS user population by service area and service unit?

Ms. FOWLER. The Indian Health Service is able to provide the current user population. We do not project user population but we do project service population. We ought to be able to provide that.

Senator UDALL. Are you able to provide available medical services offered at each IHS service unit and the most frequent services they receive PRC requests for?

Ms. FOWLER. Yes.

Senator UDALL. The service's use of Buy Indian authority and its progress implementing the recommendations of GAO 15-588?

Ms. FOWLER. Yes.

Senator UDALL. Within the next 30 days, please provide that information to the Committee, if you could.

Ms. FOWLER. Certainly.

Senator UDALL. The idea of taxpayer money going to private companies to dig for information this Committee should be able to get from Federal agencies already strikes me as wasteful and duplicative. I think we can handle this in a much better fashion.

Let me shift now to Mr. Tahsuda. In last year's overnight field hearing on cultural patrimony, the Department of the Interior testified it was going to hold listening sessions and government-to-government consultations on international repatriation issues, specifically at the White House Tribal Nations Conference.

I sent a letter to the President in March urging him to continue the tradition of holding the White House Tribal Nations Conference. I have yet to receive a response to that letter.

After Secretary Zinke testified before this Committee on the Administration's priorities, I sent him questions for the record and included a question about the future of the conference. Again, I have yet to receive a response to those questions nearly seven months after they were sent. In fact, I was recently informed that the Committee has not received answers to any member questions for QFR since April.

As the most senior political appointee in Indian Affairs currently at Interior, do you agree direct interaction between tribal leaders and senior government officials with the decision-making authority is critically important?

Mr. TAHSUDA. Thank you, Vice Chairman.

To answer your last question, yes, it is very important that we have good communication. I am not sure about the status of questions that you or any other member has sent. I would say, as a former staff member here on the Hill and actually for this Committee, I understand the importance for you to get responses from us for information we may have that you do not.

That is my personal commitment to get you the information that is helpful to you. We can look and see what the status is. I apologize. Obviously, I do not answer for the Secretary but if there are

outstanding questions about testimony he gave previously, I am happy to look into that and find out what the status is. I would have to look into that.

Senator UDALL. We have many from all members, both sides, outstanding questions I think really need to be answered. I hope you will convey that to the Secretary.

Thank you.

Mr. TAHSUDA. Yes.

Senator UDALL. Thank you, Mr. Chairman.

The CHAIRMAN. I agree that it is important we get the responses.

Senator CORTEZ MASTO.

Senator CORTEZ MASTO. Thank you, Mr. Chairman.

Let me follow up with Mr. Tahsuda.

What role does the department have to protect the rights of tribes to stop the illegal export of culturally important artifacts? What role do you play?

Mr. TAHSUDA. We have a number of agencies within the department that play a role. I would say, in part, that is what makes the answers a little complicated on how to improve it.

As the Vice Chairman mentioned, the NAGPRA committee has a role in helping to identify objects of cultural patrimony under that law. I cannot give you a comprehensive answer. If you would like a more comprehensive answer or have specific questions, I can answer that.

Senator CORTEZ MASTO. My specific question is what is the role? Are you there to help with the identifying repatriation or not? I do not mean to be argumentative. I am just trying to understand.

My understanding is your role is there to assist and help. That is not happening and it is being put on hold right now. I am just trying to understand what you believe your role is. It doesn't sound like there is a specific answer to it or it is too complex, or you don't know.

Mr. TAHSUDA. I am sorry. Maybe I didn't understand your question properly.

We do have a role. There have been some high-profile cases in past years.

Senator CORTEZ MASTO. Is the role to help stop the illegal export of culturally important artifacts?

Mr. TAHSUDA. We have a role in protecting those. The question of the exportation and the fact there is not a law on the books to assist us that we could enforce is a problem.

Senator CORTEZ MASTO. The STOP Act would put the law on the book to help you enforce it or help the enforcement of it. You would support it?

Mr. TAHSUDA. Yes, we support being able to protect these very valuable and important parts of our tribal and national history.

Senator CORTEZ MASTO. That is why I am asking because the STOP Act does that. It makes it very specific and gives you the tools you need to continue to help support and protect those artifacts. You would support it?

Mr. TAHSUDA. I think you could say the concept we support. We want to find an effective way to protect this but the actual tools that are there are what I think not just us, but the other departments involved in this overall effort, are trying to identify and the



GAO is trying to work through with us. We want to have the right tools to do this the right way.

Senator CORTEZ MASTO. Thank you.

Governor Riley, let me jump back quickly to our conversation because I want to make something clear as well.

Indian art is economically important across the Country. Buyers, collectors and gallery owners provide a boost in the economy and directly benefit tribal artisans. Some folks have said that the STOP Act would negatively impact Native artists by deterring buyers from buying legitimate Indian arts and crafts out of fear that it could be deemed an item of cultural patrimony.

Governor, I am sure you have members of your tribe that depend on the income generated from Indian arts and crafts sales. Are you concerned about the impact the STOP Act could have on Native artists' livelihoods?

Mr. RILEY. No, I am not concerned about whether or not the STOP Act would impede economic, I guess, commercialization of items that were meant to be sold commercially. I think that is just a fear being put out there publicly.

As artisans, I think that relationship already exists where buyers and artisans continue to have that type of relationship. Sometimes these are long term relationships. If there is a change in the law and you are not violating it, that relationship will continue.

Artisans will continue to produce arts for commercial sale. However, they are very aware that certain items which they do not make themselves and attempt to sell could be questionable. I am of the opinion that the STOP Act would not inhibit those artisans from continuing their work or continue their livelihood.

Senator CORTEZ MASTO. Thank you.

I notice I am just out of time. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to thank the witnesses for being here today. We appreciate it very much.

The hearing record will be open for two weeks and members can submit questions for follow up. Secretary Tahsuda, it is important that we work with you to get those responses.

Again, thanks to all our witnesses. We appreciate your being here and providing testimony today.

The hearing is adjourned.

[Whereupon, at 4:16 p.m., the Committee was adjourned.]



# A P P E N D I X

## PREPARED STATEMENT OF JOHN MOLLOY, PRESIDENT ATADA <sup>1</sup>

Mr. Chairman, my name is John Molloy and I am President of ATADA. Our organization, formerly known as the Antique Tribal Art Dealers Association, represents antique and contemporary art dealers, art collectors, and private museums. I am taking this opportunity to share the concerns of all ATADA members, especially the 52 who are constituents of the Committee's members, with S. 1400, The STOP Act.

The revised Safeguard Tribal Objects of Patrimony Act of 2017 (S.1400, H.R.3211) ("STOP Act") will not achieve its primary goal—the return of important cultural objects to Native American tribes and Native Hawaiian organizations—because the proposed legislation is fatally flawed. The problem of loss of tribal cultural heritage will not be solved by passing constitutionally suspect legislation or creating a new, unwieldy, and expensive federal bureaucracy. It will be solved on the community level, through education and the promotion of cultural understanding.

ATADA, the primary organization for art dealers and collectors of Native American art in the United States, has taken important steps to formalize changes to accepted business practices (which most Native American art dealers had already independently adopted), and began intensive community educational work to build understanding and respect for Native American concerns over the loss of cultural heritage. In 2016–2017, ATADA adopted bylaws forbidding trade in items in current ceremonial use,<sup>2</sup> established due diligence guidelines to protect buyers and sellers,<sup>3</sup> and initiated public education programs<sup>4</sup> as well as establishing a truly voluntary return program for lawfully owned ceremonial objects that has already brought dozens of important ceremonial items from collectors back to tribes in the last year.<sup>5 6</sup>

This entirely voluntary program was initiated by ATADA before any federal proposal was suggested, and is the model from which the flawed federal program in the 2017 STOP Act was conceived. Even vocal proponents of the STOP Act have publicly acknowledged that ATADA's Voluntary Returns Program will probably do more to bring sacred objects back to tribes than any federal interdiction program.<sup>7</sup>

### II. The STOP Act: A Summary of Issues

The STOP Act does not identify what items would be blocked from export. Tribes hold that identification of sacred items is proprietary knowledge and may not be shared. Governor Riley of the Acoma Pueblo made this fact crystal clear in his testimony to this Committee last year when he stated: The cultural objects Acoma is attempting to protect are difficult to fully describe and publicly identify because of

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<sup>1</sup>ATADA, formerly known as the Antique Tribal Art Dealers Association, is a professional organization established in 1988 in order to set ethical and professional standards for the art trade and to provide education for the public. ATADA membership has grown to include hundreds of antique and contemporary Native American and ethnographic art dealers and collectors, art appraisers, and a strong representation of museums and public charities across the U.S., dedicated to the promotion, study and exhibition of Native American history and culture. [www.atada.org](http://www.atada.org), email [director@atada.org](mailto:director@atada.org), PO Box 45628, Rio Rancho, NM 87174.

<sup>2</sup>ATADA Bylaws, Article X, Trade Practices, Ethics, And Guarantees. <https://www.atada.org/bylawspolicies/>

<sup>3</sup>ATADA Bylaws, Article XI, Due Diligence Guidelines. <https://www.atada.org/bylawspolicies/>

<sup>4</sup>ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.

<sup>5</sup>ATADA Bylaws, Article X, ATADA Guidelines Regarding the Trade in Sacred Communal Items of Cultural Patrimony. <https://www.atada.org/bylaws-policies/>

<sup>6</sup>A Journey with Ceremonial Objects, <https://committeeforculturalpolicy.org/a-journey-with-ceremonialobjects/>

<sup>7</sup>For example, the comments of Gregory Smith, speaking on a panel, "At the Forefront of Repatriation: New Policy and Impact Beyond the United States," School for Advanced Research (SAR), April 19, 2017, [https://sarweb.org/?2017iarcss\\_repatriation-p-past\\_events](https://sarweb.org/?2017iarcss_repatriation-p-past_events), Santa Fe, New Mexico, and again at the ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.

their sacred and confidential ceremonial use. The result is that the STOP Act makes it illegal to export certain items without identifying them, so a citizen has to guess whether his actions were legal or illegal, which would violate the Fifth Amendment's due process clause of the U.S. Constitution and create dangerous legal uncertainties for private owners of a wide range of American Indian art and artifacts.

The STOP Act states that it is official U.S. government policy to return ALL "items affiliated with a Native American Culture" to the tribes, which would include commercial jewelry, ceramics and other legal possessions.

The STOP Act will discourage the sale of all Indian art and artifacts, generate consumer confusion that will damage legitimate art dealers and tribal artisans, and create a bureaucratic nightmare for the tribes and their collaborators. It will harm regional economies, especially in Southwest. In New Mexico, for example, cultural tourism accounts for approximately 10 percent of jobs and about the same revenue as mining, a major state industry. Acoma Governor Kurt Riley acknowledged in testimony submitted in regard to the earlier STOP Act, that "the vast majority of inventories held by dealers or collectors are of no interest to the Pueblo," yet he proposes a pre-purchase certification system for persons who wish to collect Indian art, "establishing a method for collectors. . . to receive a referral to a cultural representative of a tribe likely to be knowledgeable or aware of an object the collector is considering purchasing."<sup>8</sup>

The STOP Act is unnecessary and redundant. "Trafficking" in violation of NAGPRA or ARPA is already unlawful, and 18 U.S.C. § 554 already prohibits export from the United States of any object contrary to any law or regulation of the United States, while maintaining the Due Process protections that are likely voided by enforcement of the STOP Act.

ATADA's Voluntary Returns Program is a better, more effective model, which has returned dozens of important ceremonial items to tribes in its first year.

### III. Background

It is the legitimate policy of the tribes that they, and no one else, should determine which cultural objects are inalienable from their communities, as this right is intrinsic to tribal sovereignty. But many tribes also believe that photographs, identifying characteristics, and descriptions of ceremonial objects cannot be disclosed to persons who do not have the right and authority to know about such sacred matters, not even to all tribal members. Therefore, many tribes refuse to make information public that would enable outsiders to know whether he or she possesses a ceremonial object considered inalienable to the tribe.

Tribes also acknowledge that non-tribal members only possess a fragmented understanding of sacred objects of Indian cultural heritage. So, while some objects, such as certain ceramics and masks may be deemed sacred to a tribe and therefore inalienable cultural property, a nearly-identical ceramic or mask may not be considered sacred, and therefore may be freely traded by tribal members and non-tribal members alike. But still, the knowledge necessary to delineate between these sacred and non-sacred object can remain a closely guarded secret and inappropriate to publicize.

Tribal secrecy may be well justified as necessary for the health and well-being of the tribe. But when enacting legislation that hinges upon the definition of "What is inalienable because it is sacred?" and imposing severe penalties, the lack of specific, public information about what makes an object inalienable is a prohibitive legal barrier to both the exercise of due process and the STOP Act's goal to return sacred objects.<sup>9</sup>

There is no question that certain items are regarded as inalienable precisely because they are sacred to the tribal community. This circumstance raises potential Establishment Clause issues with the STOP Act. Should the Federal Government be involved in determining what is 'sacred' to any religion? It is accepted as a fundamental principle of government in the U.S. that the Federal Government is a secular government and does not affiliate with or advance a specific religion.

<sup>8</sup> Written Testimony of Governor Kurt Riley, Pueblo of Acoma, Before the Senate Committee on Indian Affairs Field Hearing on the Theft, Illegal Possession, Sale, Transfer and Exportation of Tribal Cultural Objects, Albuquerque, NM, October 18, 2016, p.8.

<sup>9</sup> There is no question that certain items are regarded by tribes as inalienable precisely because they are 'sacred' objects. This circumstance raises potential Establishment Clause issues with the STOP Act. Should the Federal Government be involved in determining what is 'sacred' to any religion? The First Amendment's *Establishment Clause* prohibits the government from making any law "respecting an establishment of religion," not only forbidding the government from establishing an official religion, but also prohibiting government actions that unduly favor one religion over another.

The information gaps about objects' cultural relevance and when these objects entered the stream of commerce pose impossible constitutional and practical challenges to the enforcement of the STOP Act. The United States legal system is premised on the idea that a citizen must have fair notice of our laws and an opportunity to be heard. As the Supreme Court has stated, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violate the first essential of due process law."<sup>10</sup>

The items that tribes most urgently seek to repatriate from non-tribal possessors are ceremonial objects and objects of cultural patrimony that tribes claim as inalienable tribal property.<sup>11</sup> These sacred items are also precisely the objects that many tribes say it is impossible to identify or discuss publically according to tribal customary laws. As such, notice of what items are claimed by the tribes cannot be divulged to non-tribal owners. The lack of fair warning means that a seizure or forfeiture of property would be based upon information that cannot be disclosed, which would be a blatant violation of due process of laws.

While a failure to provide for due process is a fatal flaw, the STOP Act has other serious weaknesses. The STOP Act creates no framework for administration or enforcement of tribal claims. It does not provide for management of cultural objects, nor does it include a permitting system for objects deemed lawful to export, nor does it provide any funding. It provides no standard for identification of items of cultural patrimony, such as a list or database of ceremonial items. Nor does it set for any standards of evidence for tribal claimants or means of appeal for the owners of disputed objects.

The STOP Act's suggested voluntary returns program also adopts a grossly overbroad definition of "cultural heritage." It establishes a federal policy of encouraging the return of countless legally and rightfully owned objects purely because they have some association with Native American culture. Not only does this infringe upon traditional notions of private property rights, it is also expected to overwhelm governmental and tribal resources, as many objects may be returned that Native American tribes did not wish to repatriate in the first place.

For example, under NAGPRA, human remains and sacred items are cultural items that the tribes feel are essential for repatriation. However, some museums routinely deem very common objects that are widely publicly traded without tribal objections as "unassociated funerary objects" under NAGPRA,<sup>12</sup> as there are no clear legal definitions. Some museums return multitudes of very common objects. Other museums continue to display items that the museums themselves catalog as 'ceremonial' and resist returning them as not justified under NAGPRA. There simply is no standard under NAGPRA.

Exacerbating the existing lack of definition, the voluntary returns program outlined in the STOP Act encourages the return of any and all objects to tribes, regardless of whether they are covered by NAGPRA or ARPA, calling upon tribes to consult and accept anything that is returned. The STOP Act's call for return of "items affiliated with a Native American Culture" would include everything sold by Native American artisans in the past—and today.

Under ARPA, virtually everything made more than 100 years ago is covered by the term "archaeological resource,"<sup>13</sup> but only the age and original location of an object makes it lawful or unlawful to own. Moreover, ARPA's rolling date continually expands the number of items covered under it. Sacred associations are irrelevant under ARPA.

The STOP Act's voluntary returns program taints both the antique and contemporary Indian markets, which are major contributors to local economies and irreplaceable sources of income to tribal artisans, particularly in the American West. The total Indian art trade is estimated to be valued between \$400–800 million a year. The annual Santa Fe Indian Art Market brings over 170,000 tourists to New Mexico a year. The city of Santa Fe estimates that the market brings in \$120 million each year in hotel and restaurant revenue alone. Native artisans, many of whom rely on the Indian Art Market for as much as half of their yearly income, are also concerned that such a vague law will "taint" the entire American Indian

<sup>10</sup> *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

<sup>11</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013, § 3001(3)(c)-(d) (1990).

<sup>12</sup> See, for example, the 2007 NAGPRA repatriation of 10,857 cultural items in the control of the Burke Museum, including groundstone tools, stone beads, stone carvings, knives, mortars, pestles, pipes, stone chisels, sculptures, and pendants and one bag containing over 200 seeds. Notice of Intent to Repatriate Cultural Items: Thomas Burke Memorial State Museum, University of Washington, Seattle WA 72 Fed. Reg. 29,174 (May 24, 2007).

<sup>13</sup> 16 U.S.C. § 470bb(1).

art market in the eyes of the public. The recent experience of Alaska Natives, in which sales of Native-carved walrus ivory dropped by as much as 40 percent following the elephant ivory ban, offer ample evidence of the significance of the threat the STOP Act poses to Native American artisans and many tribal economies.<sup>14</sup>

But the damage to native artisans and the legitimate markets inflicted by the the U.S. policy outlined in the voluntary returns program extends beyond mere reputational harm- it could also open the federal government to due process claims of taking private property without just compensation. Instituting a policy that encourages the return of all Native American objects could severely diminish the fair market value of any Native American object, and make such objects unsellable, as buyers and sellers of Native American objects may become fearful of the repercussions should they not abide by the United States policy. Today, a “good” provenance can make the difference between a valuable object and one of little worth, or that cannot be sold at all. By instituting a policy that calls for the return of all objects with a Native American provenance, the United States government could make all objects of Native American origin unsellable and therefore commercially worthless.

#### IV. The Distribution and Circulation of Native American Artifacts

There are millions of Native American “cultural objects” in private ownership today; but many have no ownership history, or “provenance.” Many objects have circulated for decades in the marketplace, or even for the last 140 years. For most of the 140 years in which there has been an active trade in Indian artifacts, provenance and ownership history had no legal or practical effect on the market.

The best records of early collections of Native American cultural objects are from museum sources. Harvard’s Peabody Museum expeditions included the Hemenway Southwestern Archaeological Expedition (1886–1894), which brought thousands of Zuni and Hopi artifacts from Arizona and New Mexico. In 1892, the leader of the Hemenway Expedition paid the trader Thomas Keam \$10,000 for a huge collection that included over 3000 ceramics.<sup>15</sup> The materials in the collection were either bought by Keam and his assistant Alexander Stephen from Hopi or found in explorations of abandoned Hopi towns. Smaller, but still very substantial collections were also made by Keam for the Berlin Ethnological Museum, The Field Museum in Chicago, and the National Museum of Finland. Keam also sold widely from his trading post to collectors and tourists from across the United States.<sup>16</sup> The materials collected by Keam and sold to the Peabody Museum were sourced from “throughout Arizona, the San Juan region of the southern confines of Colorado and Utah. They were exhumed from burial places, sacrificial caverns, ruins and from sand dunes in the localities of ancient gardens.”<sup>17</sup> During the same years and throughout the early 20th century, private collectors purchased from the same sources that supplied museum collectors, with the 1880s and 1890s being referred to as “the heyday of the commercial pothunter.”<sup>18</sup>

Tens of thousands of cultural objects have entered the stream of commerce decades before the first U.S. cultural property legislation was enacted, the American Antiquities Act of 1906 (Antiquities Act).<sup>19</sup> Artifacts without provenience were dug up and sold to good faith purchasers long after enactment of the Antiquities Act in 1906.

Today, the sources of cultural objects in the market and in private collections vary greatly. While many objects were taken from tribes by the U.S. government, or sold after individuals adopted Christianity, others were sold in the 1960s-1980s, when Indian ceremonial objects were avidly collected by non-Indians who admired Native American social and environmental perspectives, or who responded to the aesthetic and creative qualities of Indian objects. Indian artifacts were sold (with or without permission of the community) because of the increasing economic values of tribal artifacts and the comparative poverty of many tribal communities.

<sup>14</sup>Zachariah Hughes, “Ivory Ban Hurts Alaska Natives Who Legally Carve Walrus Tusks,” <http://www.npr.org/2016/11/24/503036303/ivory-ban-hurts-native-alaskans-who-legally-carve-walrustusks>.

<sup>15</sup>Edwin Wade et al., *America’s Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890–1894*, 9, (1980) (See also pages 18, 25, 26, 39) and Edwin Wade et al., *Historic Hopi Ceramics* 84 (1981).

<sup>16</sup>Edwin Wade et al., *America’s Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890–1894*.

<sup>17</sup>*Id.* at 15

<sup>18</sup>Annual Report of Jesse L. Nusbaum, Department Archeologist and Superintendent of Mesa Verde National Park to the Secretary of the Interior, Dep’t of Interior, 6–7 (1929).

<sup>19</sup>American Antiquities Act of 1906, 16 U.S.C. §§ 431–433. The Antiquities Act of 1906’s undefined use of the term “object of antiquity” was held to be unconstitutionally vague and legally unenforceable in the Ninth Circuit, which includes Arizona, where the Navajo, Hopi, and Zuni lands are located. *U.S. v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974) (discussed *infra*).

In the last twenty-five years, awareness of tribal concerns and the harmful destruction of archaeological sites has changed everything, as attitudes have changed very much among art collectors, museums, and the general public. There is increased respect for both the sovereign rights of tribal communities and the importance of retaining sacred objects for the health of these communities. Most recently, there is a commitment on the part of art dealers and professional organizations such as ATADA, to work directly with tribal representatives to find solutions that truly serve Native American interests.

**STOP Act II is redundant legislation, already covered under U.S. law**

In fact, the increase in NAGPRA penalties for illegal export in the STOP Act is not a new idea. Proponents of the STOP Act ignore laws already on the books that completely meet their needs. Existing law, 18 U.S.C. § 554(a), already provides that:

Whoever fraudulently or *knowingly exports* or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or *object contrary to any law or regulation of the United States* or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States, *shall be fined under this title, imprisoned not more than 10 years, or both.*<sup>20</sup>

This existing law applies the same scienter as the STOP Act (“knowingly”), covers objects protected by NAGPRA and ARPA (“object contrary to any law or regulation of the United States”)<sup>21</sup> and already employs the same heightened penalty that STOP seeks to impose (fine or imprisonment not to exceed 10 years). This is precisely the goal that STOP was meant to achieve.<sup>22</sup>

The penalty for violating any federal law has a long legal history of requiring due process. STOP will shift the enforcement and penalty to the unique nature of cultural property enforcement where burden of proof is shifted from the government to the importer or exporter.

In contrast to 18 U.S.C. § 554(a), the existing law, the STOP Act represents a step further in advocating enforcement that rejects the fundamental principles of Due Process.

**The STOP Act’s Export Prohibition Violates Due Process Because Its Drafting Does Not Provide Adequate Notice or Procedures for an Individual to Be Heard When Their Property is Being Deprived**

Before an individual is deprived of their property right, Due Process requires that the Government grant an individual both (1) Notice and (2) Opportunity to be heard.<sup>23</sup> But the STOP Act provides no such notice of prohibited conduct or procedures controlling the export controls of Native American-affiliated objects. As a result, we must assume that the default statutory standards apply.<sup>24</sup>

**The STOP Act’s definitions fail to provide any sort of notice of what conduct is prohibited because it fails to provide any clarity as to what is considered “sacred.”**

The STOP Act’s export prohibition fails to adequately clarify for both private individuals and CBP agents of what objects are “sacred” and therefore prohibited from export and fails to provide any guidance as to how the definitions and export controls can be enforced without becoming arbitrary and discriminatory.

If a statute is overbroad, then it is unconstitutionally void for vagueness and therefore a denial of due process because it fails to provide sufficient notice of the prohibited conduct: “[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can un-

<sup>20</sup> 18 U.S.C. § 554(a) (emphasis added).

<sup>21</sup> As previously discussed, nothing in the language of ARPA or NAGPRA suggests that “trafficking” or “transport” of covered items does not include export.

<sup>22</sup> The STOP Act’s desire to impose a 10-year jail sentence for violations of less than \$1 value, is grossly disproportionate to the offense. While proportionality is often rejected as the basis for a claim of excessive fines or cruel and unusual punishments, it seems impossible to conceive that the Federal Government would wish to impose such harsh penalties. Not to mention that the Federal Government is inviting a bureaucratic nightmare by failing to provide a minimum value threshold for such violations or any other such procedures to protect against selective enforcement of its own overly broad legislation.

<sup>23</sup> *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>24</sup> 19 U.S.C. § 1600.

derstand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>25</sup>

The STOP Act and its underlying legislation fail to provide any clarification to differentiate between ceremonial and non-ceremonial objects, and would presumably leave the definition of “Native American cultural items” up to the U.S. Customs and Border Protection (CBP) and most likely tribal consultants for each and every Native American-affiliated object sought to be exported.

There is a long history of finding broad definitions of “cultural heritage” and “antiquity” unconstitutionally vague. The Ninth Circuit found the Antiquities Act of 1906’s definition of “antiquity” to be unconstitutionally vague because “the word ‘antiquity’ can have reference not only to the age of an object but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge.”<sup>26</sup> The complexity of determining protected “ceremonial objects” under NAGPRA goes beyond a mere minimum age threshold like ARPA and many of international legislation.<sup>27</sup> Instead, in some tribes, objects of antiquity include objects that are no more than three or four years old.<sup>28</sup>

NAGPRA’s definition of “cultural item” has been met by many criticisms as unconstitutionally vague in its twenty-seven-year history.<sup>29</sup> To determine what is considered a “ceremonial object” under NAGPRA, there is still no standard criteria among the tribes and/or museums that could provide the public or the CBP with any guidance about what should be repatriated.

Outlining a list of protected objects may provide a more fair and reasonable notice to individuals, but would be nearly impossible to employ under the STOP Act. For example, the Convention on Cultural Property Implementation Act (CPIA) requires the Secretary of the Department of the Treasury, upon entering into an agreement with a State Party or emergency action, to publish a descriptive list designating categories of archaeological or ethnological material subject to import restrictions under a specific agreement, so long as each listing is “sufficiently specific and precise to ensure that:

- (1) the import restrictions under section 2606 of this title are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2) *fair notice is given to importers and other persons as to what material may be subject to such restrictions.*<sup>30</sup>

But the closely guarded nature of many Native American sacred traditions prevent the creation of a similar list. Although a few (mostly northeastern U.S.) tribes have created list of items that they wish to have repatriated, most feel it is not appropriate to do so. Many southwestern U.S. tribes, including the Acoma, Laguna, Hopi, and Navajo, have stated that they cannot and will not reveal such information, as the only persons with a specific religious authority with the tribal community are permitted to possess such knowledge. As such, this information is not appropriate to share with anyone outside the tribes, including academic committees, the public, and law enforcement.<sup>31</sup> It is their right and choice to withhold information that is not proper to share with outsiders, but this right does not diminish the

<sup>25</sup> *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

<sup>26</sup> *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974).

<sup>27</sup> For example, ARPA, Egypt and Afghanistan protect objects greater than 100 years old. 16 U.S.C. § 470bb; Egyptian Law on the Protection of Antiquities, art. 1 (1983); Law of May 20, 2004 (Law on the Preservation of the Historical and Cultural Heritage) art. 2(a) (Afghanistan).

<sup>28</sup> *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

<sup>29</sup> In *U.S. v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), the Ninth Circuit Court of Appeals held that NAGPRA was not unconstitutionally vague in defining “cultural patrimony” which may not be stolen and traded, and that a knowledgeable dealer in the specific circumstances of that case had adequate notice of its prohibitions. However, the range of objects claimed as ceremonial now claimed by certain tribes is unprecedented, and a dealer could not be expected to have knowledge as to which objects acquired prior to passage of NAGPRA could be deemed inalienable, much less a private owner. “The court [in *U.S. v. Corrow*, 119 F.3d 796, (10th Cir. 1997)] acknowledged conflicting opinions, between orthodox and moderate Navajo religious views, regarding the alienability of these particular adornments.” Deborah F. Buckman, *Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act (25 U.S.C.A. § 3001–3013 and 18 U.S.C.A. § 1170)*, 173 A.L.R. FED. 765 (originally published 2001).

<sup>30</sup> 19 U.S.C. § 2604 (emphasis added).

<sup>31</sup> Governor for the Pueblo of Acoma Kurt Riley notes that “Our traditions and cultural laws often restrict us from publicly discussing some of these items that are sacred and used in ceremony, known and understood for the most part by my Acoma people.” *The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 27, 29 (Oct. 18, 2016) (Statement of Hon. Kurt Riley, governor, Pueblo of Acoma).



United States Constitution's requirement that individuals receive sufficient fair notice and due process when they may be deprived of their private property.

Similarly, the solution to "ask the tribes" or provide a tribal hotline,<sup>32</sup> though a facially reasonable proposal, would be equally unfeasible in follow through. A hotline would impose an impossible burden on tribal organizations to (expeditiously) consult on potentially hundreds of thousands of Native American objects in private circulation. And if the exporter or CBP wishes to consult on a particular object, which of the 567 federally registered tribes should they call? Should they instead call the NAGPRA committee designated under NAGPRA,<sup>33</sup> even though the committee does not have authority under NAGPRA and nothing is provided for such consultation in the statute? Or should they consult the "Tribal Working Group" established in STOP Act's other provisions?<sup>34</sup> Ultimately, it is unclear whether anyone would even be able to obtain the information necessary to understand whether the object is sacred or not, even after determining who the proper contact should be.

Under the circumstances described above, one can only conclude that the STOP Act could not be implemented without raising legal challenges for denial of due process to U.S. citizens in possession of cultural objects potentially subject to forfeiture. Due process requires fair notice of conduct that is forbidden or required. If a non-tribal U.S. citizen owner of a cultural objects has no notice that a particular object is claimed, then due process is not met. If a cultural object is claimed as an inalienable object by a tribe that deliberately withholds information on how sacred objects can be identified, then due process is not met.

**STOP Act II unconstitutionally violates Due Process because it provides no procedures for an individual's opportunity to be heard**

Due process requires precision and guidance so that those enforcing the law do not act in an arbitrary and discriminatory way.<sup>35</sup> The STOP Act presumably only permits an opportunity to be heard after seizure. There is nothing in the STOP Act permitting a preemptive certification process that would alleviate the administrative burden on the CBP and prevent uninformed seizures of individuals' private property.

Furthermore, the STOP Act fails to provide any guidelines or forethought as to either the time or manner of hearing for exporters to dispute seizure of their Native American-affiliated property. STOP sets forth no potential procedures to control administration of STOP's export prohibitions such as (1) a maximum holding period for the seized object, which was suggested in the previous incarnation of the Act;<sup>36</sup> (2) a licensing or certification system like the CPIA; (3) any standards of evidence (4) a list of actual items that are likely subject to export restrictions. All of these fail to give any advance notice of an opportunity to be heard so they may proactively avoid seizure or argue against seizure of their property.

**The STOP Act will not pass constitutional muster, nor can it reasonably be administered. ATADA is committed to working with tribes for better solutions**

ATADA believes it is crucial to honor Native American traditions, to ensure the health and vitality of tribal communities, and to respect the tribes' sovereign rights. We also believe it is important to preserve the due process rights of U.S. citizens and to promote the trade in Native American arts that sustains many tribal and non-tribal communities in the American West and across the country. The STOP Act is ill-conceived legislation that will achieve neither goal and it should not be passed into law.

ATADA is working diligently with tribal officials to craft more realistic and effective solutions that bring us together in mutual respect and understanding. We are committed to learning from the tribes and pursuing a path that meets their primary goal of repatriation of key ceremonial objects as well as maintaining a legitimate trade, academic access, and preservation of the tangible history of the First Americans.

I would like to thank the Committee on behalf of the over fifty ATADA members in the states that Committee members represent for the opportunity to present tes-

<sup>32</sup>As suggested by Ann Rogers, Esq., when speaking at CLE International Visual Arts & the Law Conference, Santa Fe, NM July 28–29, 2016.

<sup>33</sup>25 U.S.C. § 3006(b).

<sup>34</sup>Safeguard Tribal Objects of Patrimony Act of 2017, H.R.3211, 115th Cong. § 5, (2017).

<sup>35</sup>See *United States v. Williams*, 553 U.S. 285, 306 (2008).

<sup>36</sup>Written Testimony submitted on October 18, 2016 to the U.S. Senate Committee on Indian Affairs by Ms. Honor Keeler, Director of the International Repatriation Project of the Association on American Indian Affairs.

timony. ATADA requests the Committee to focus on and to carefully consider all the concerns raised regarding the impact of this legislation before proceeding further.

PREPARED STATEMENT OF TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE,  
U.S. DEPARTMENT OF JUSTICE

The Department of Justice appreciates the opportunity to submit a written statement regarding S. 1400, the Safeguarding Tribal Objects of Patrimony Act of 2017 (STOP Act), and the Department's efforts to combat these activities and protect Native American cultural resources.

We strongly support the goal of the legislation, which is stopping the export of sacred Native American items, and increasing penalties for stealing and illegally trafficking tribal cultural patrimony. The vandalism, theft, and looting of Native American relics and artifacts is unfortunately not uncommon. Driving this in part is a lucrative market. Individuals in the United States and abroad are often willing to pay substantial amounts of money for objects like spiritual headdresses, sacred funeral objects, and sometimes even human remains. Since 2013, there have been at least six auctions of Native American cultural patrimony in France alone. Several U.S. tribes, including the Apache, Hopi, Navajo, and Acoma Pueblo, have appealed to the U.S. Government, French authorities, and the auction houses themselves to delay the sales of potentially significant tribal patrimony so that a thorough consultation with tribal authorities and experts might determine the provenance of specific items. To date, these efforts have been largely unsuccessful. One reason for this is the fact that auction houses typically publish the catalogue of items only a few weeks in advance of the auction, leaving little time for potentially interested parties and U.S. government agencies to identify specific objects of concern and engage in further inquiries about the objects. Additionally, efforts by tribes to stop the auctions through litigation in French courts have not succeeded as neither tribes nor their representatives have been able to gain standing to bring a challenge.

In an effort to curb these activities, the STOP Act would:

1. Increase the penalties (from a maximum of five years to a maximum of 10 years) for criminal violations of the Native American Graves Protection and Repatriation Act (NAGPRA);
2. Explicitly prohibit the export of Native American items "obtained in violation" of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act;
3. Direct the Secretaries of Interior and State to designate liaisons to facilitate the voluntary return of cultural objects to the tribe or Native Hawaiian organization with a "likely cultural affiliation" and to provide trainings and workshops to assist in that facilitation, including the use of third-party experts; and
4. Direct the Secretary [of the Interior] to convene a tribal working group consisting of tribes and Native Hawaiian organizations to advise the federal government on the return of, elimination of illegal commerce in, and repatriation of tangible cultural heritage.

We believe that legislation aimed at stopping the export of sacred Native American items can be a useful tool in curbing the sale of these items abroad so that they can be returned to tribes. For example, this legislation criminalizes knowing "export or otherwise transport" of Native American cultural items (defined by reference to existing definitions in NAGPRA, ARPA, and the Antiquities Act) that were "obtained in violation of" those statutes. Under current law, NAGPRA and ARPA both prohibit the "transport" of resources obtained in violation of those laws and effectively prohibit the export of items obtained in violation of NAGPRA.<sup>1</sup> Other federal statutes also provide penalties for exporting objects obtained in violation of other criminal statutes and the criminal provisions of ARPA may apply to some objects obtained in violation of NAGPRA. While this bill would provide helpful clarification that the export of all items obtained in violation of NAGPRA and ARPA is prohibited, it may not prohibit any export or transfer of Native American cultural

<sup>1</sup>ARPA prohibits the trafficking in "foreign commerce" of resources obtained in violation of state and local law, but does not reference "foreign commerce" with respect to its prohibition on the trafficking of archeological resources excavated or removed from federal lands in violation of ARPA's provisions or other federal law. See 16 U.S.C. § 470ee(b), (c). Instead, the trafficking provision applies to items "transport[ed]" if the resource was removed from federal lands in violation of ARPA. *Id.* § 470ee(b). Similarly, NAGPRA prohibits the knowing "transport[]" for sale or profit" of Native American human remains and cultural items. 18 U.S.C. § 1170(a), (b).

items that is not already prohibited by other statutes. It is possible that with an explicit export control, the United States could more easily invoke Article 9 of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* to seek assistance from other States Parties (e.g., France), including the control of imports and international commerce in Native American cultural objects, thus opening up potential legal pathways for their recovery and repatriation should such objects be discovered at auction or subject to other commercial activity. However, we have concerns that, as currently drafted, the bill would not accomplish the broader goal of curbing the sale of tribal cultural heritage abroad.

While penalty increases might seem like an effective deterrent, we do not feel that insufficient penalties are the root of the issue and we would note that five-year penalties are standard for most property crimes. The persons who are engaged in these activities know the loopholes and insufficiencies in the existing statutes and they know how to use those loopholes to avoid prosecution. Tightening up the language in the existing statutes would likely have more effect to curb the illegal trade than stronger penalties.

Under the existing statutes, it is often difficult to know whether items were “obtained in violation” of NAGPRA and ARPA. Prior to the enactment of the existing statutes, these items were obtained, traded, bought, and sold legally and the market is flooded with items. It is difficult to distinguish an illegally obtained object from a legally obtained object, so without knowledge of how the item in question was obtained it is difficult to prosecute violations. It is also difficult to prove that the items were removed from public or tribal lands as opposed to other lands (as required by ARPA), and that the objects at issue meet the respective definitions of archaeological resource (as required by ARPA to be over 100 years old) or qualify as sacred objects or objects of cultural patrimony (as required by NAGPRA). Additionally, some courts have found that objects removed from federal or tribal land prior to the date of enactment of the applicable statute are not subject to the statutes’ requirements. One way to expand the impact of the bill, other than to amend the underlying statutes to address burden-of-proof issues, would be to additionally prohibit the export of items obtained in violation of tribal cultural property laws (similar to the Lacey Act), some of which may go beyond the protections of NAGPRA and ARPA. Additionally, the legislation could be expanded to prohibit the export of goods embezzled from tribes in violation of 18 U.S.C. § 1163.

Additionally, as drafted, we note that the bill requires a “knowing” standard for criminal prosecution, which could be interpreted to require that one must know that the item was obtained in violation of the specified statutes. This would make prosecutions very difficult. Instead, we would recommend that the provision be revised to read, “It shall be unlawful for any person to export or otherwise transport from the United States any Native American cultural object knowing that it was obtained unlawfully.”

We also note that the bill provides solely criminal penalties for violations of the export prohibition. We would recommend that it be expanded to include a seizure and forfeiture provision, to facilitate the return of the items to the tribes to which they belong.

Lastly, we recommend that the legislation also provide for protection from disclosure (e.g. FOIA exemption) of information supplied by tribal authorities for purposes of law enforcement, for training and workshops, to obtain Federal assistance with repatriation, or for purposes of the development or implementation of rules and regulations.

Perhaps a more effective way to address the problem would be to prohibit the export of all objects of Native American cultural heritage (categories of which could be identified in the statute or created through a separate administrative process) without a permit or authorization and provide for an agency such as the Department of Homeland Security or the Department of the Interior to implement a permit program, in consultation with tribes and interagency participation. Such a scheme would not reference violations of NAGPRA or ARPA, but would be a standalone program similar to that established by New Zealand, Australia, and Canada. See also 50 C.F.R. pt. 22 (eagle feather permitting scheme regulated by Interior). This approach would also greatly simplify publicizing this prohibition with domestic and foreign audiences. This permit system could also be implemented by a commission, established by the Department of the Interior in consultation with the Department of Justice, which would develop regulations by which the commission would issue permits for the export of Native American cultural heritage objects. Commission membership could include representatives of federally recognized tribes and individuals with an expertise in Native American culture, archaeology, and legal matters related to the trafficking of cultural items.

The permit process would regulate, and in most cases prohibit, the export of Native American cultural items. Additional criminal penalties (which generally require some level of mens rea) would only apply to knowing exports of (or attempts to export) such items without a permit. Thus, an individual would only be subject to criminal sanctions if s/he knowingly attempted to avoid the permitting process.

The Department of Justice supports the efforts of Congress and the leadership of the New Mexico delegation on these important issues over the decades, but as the recent international auctions demonstrate, there are still significant challenges and we hope to work with Congress in addressing those challenges. Thank you for the opportunity to provide input on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017.

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PREPARED STATEMENT OF PETER K. TOMPA, EXECUTIVE DIRECTOR, GLOBAL  
HERITAGE ALLIANCE

Mr. Chairman, my name is Peter Tompa. I am testifying on behalf of the Global Heritage Alliance (GHA).<sup>1</sup> The GHA's mission is to foster appreciation of ancient and indigenous cultures and the preservation of archaeological and ethnographic artifacts for the education of the American public.

The GHA wishes to express a number of concerns with this well-meaning legislation, whose goals and objectives we share. As currently written, STOP will fail to achieve these goals. At the same time, it will have significant negative consequences for the legitimate trade in Native American artifacts, undercutting both its avowed purpose and threatening an individual's right to due process. Nevertheless, the GHA stands willing to work with the bill's sponsors to ensure the bill accounts for our concerns.

**If History is any Guide, the STOP Act Will Encourage Customs to Shift the Burden of Proof Administratively on to the Exporter to Demonstrate that the Property was Lawfully Removed from Federal or Indian Lands**

STOP builds on the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470aa-470mm; Public Law 96-95 and The Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. 101-601, 25 U.S.C. 3001 et seq. ARPA and NAGPRA place the burden of proof on the federal government to prove that an individual was aware of the illegal nature of the underlying crime. ARPA and NAGPRA also require the government to prove the defendant was aware of the facts and circumstances that constitute the crime. In some circuits, it means that the government must prove the defendant knew the item was an archeological resource that was illegally excavated. This presents a significant challenge to the government, since it must prove that the current possessor knew of the illegal conduct.<sup>2</sup>

The same considerations apply to civil forfeitures made pursuant to these statutes. Requiring the government to prove the elements of its case under the preponderance of the evidence standard applicable to civil forfeitures provides property owners with protection from government seizure of property whose origin is unknown.<sup>3</sup> Given the hundreds of thousands of items that are not in violation of ARPA or NAGPRA but lack documentation, this is a significant protection to collectors and small businesses that deal in Native American artifacts.

However, current enforcement of another "cultural property" statute, the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 et seq. (CPIA), should raise red flags about how the STOP Act may be enforced in practice. The CPIA authorizes the imposition of import restrictions on "designated" archaeological and ethnographic objects illegally removed from their country of "first discovery" after the effective date of the restrictions. 19 U.S.C. § 2606. The CPIA explicitly places the burden of proof on the government to make out each of these elements. 19 U.S.C. § 2610. Unfortunately, despite the CPIA's plain meaning, implementing regulations place the burden of proof on the importer, not the government, to prove the negative, i.e., that the object was exported from its country of first discovery before the date import restrictions were imposed. Given the modest value of most imported cultural goods and the high cost of legal services, in practice this usually means that the importer defaults and the government is able to forfeit the property

<sup>1</sup>For more about GHA, see its website, <http://global-heritage.org/>

<sup>2</sup>*The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 12 (Oct. 18, 2016) (Statement of Tracy Toulou, Director of Tribal Justice, U.S. Department of Justice).

<sup>3</sup>Civil forfeitures under ARPA and NAGPRA should be governed by the provisions of the Civil Asset Forfeiture Reform Act of 2000, which also places the burden of proof on the government. 18 U.S.C. § 983(c).

without a fight. The implementing regulations thus make it easy for the government to prevail over collectors and small businesses, wrongfully denying them the protections Congress intended.

If STOP becomes law, regulatory authorities will have a similar incentive to ensure whatever the legislative intent, the burden of proof is placed on the individual, not the government. The problem is that prosecutors will have a difficult time proving that items are stolen, “and from where they might have been taken.”<sup>4</sup> With trade of Native American objects active since the nineteenth Century, the absence of provenance information for the vast majority of objects, and the STOP Bill’s all-inclusive definition of “cultural objects,” it would be almost impossible for U.S. Customs and Border Protection (CBP) to expeditiously decide whether an object can be exported or not. As a result, CBP may require exporters to make certain evidentiary showings to demonstrate that their object is not stolen. In other words, with no procedures in place, there is nothing stopping the CBP from employing a similar burden-shifting mechanism to enforcement of the STOP Act. And like the challenges facing importers under the CPIA, it is almost impossible to prove (or disprove) that a Native American-affiliated object was found on private lands, federal lands or tribal lands.

Even worse than the CPIA, which incorporates only time and location considerations, the STOP Act adds the challenge of evaluating whether the object is “sacred,” a fatal flaw to providing fair notice to the individual that their property may be subject to export restrictions. As part of an individual’s opportunity to be heard, this could place an even greater burden on the individual to demonstrate to CBP that an object does not fit within STOP Act’s definitions of “Native American cultural heritage,” an even more burdensome requirement than that placed on importers under the CPIA.

#### **The STOP Act’s Vague Definitions and Procedures will Lead to Selective Enforcement of the Export Prohibitions**

As a result of the lack of fair notice to both the CBP and individuals, the CBP will likely be tasked with enforcing legislation where they have no means of carrying out informed and uniform enforcement. Where inherently vague statutory language permits selective law enforcement, there is denial of due process.<sup>5</sup> In striking down a flag desecration statute in *Smith v. Goguen*, the Supreme Court noted that flag desecration statutes are often void for lack of notice because these statutes fail to acknowledge that “what is contemptuous to one man may be a work of art to another.”<sup>6</sup> Similarly, the STOP Act fails to distinguish that “what is ceremonial to one tribe may be a work of art to another.”

Even if Native American tribes do become involved in defining what is “sacred” and therefore unexportable, interpretations will likely be incongruent and lead to disparate results depending on which tribe is contacted or the level of the tribal liaison’s expertise. For example, the Antique Tribal Art Dealers Association (“ATADA”) has a policy that attempts to return certain objects to Native American tribes. In implementing that policy, ATADA has conferred with designated tribal cultural heritage experts. In this process, it has happened that only an expert within a tribe could identify one of several similar objects as being important to the tribe, while the non-tribal layperson, although very experienced, could not have made the determination.

The bottom line is that the legislation as currently drafted, although seeking worthy objectives, erodes individual due process rights by encouraging Customs to reverse the burden of proof, something that will inevitably result in an uncompensated taking. Such abuses may well be unavoidable under the STOP Act given the unique challenges that the STOP Act will place upon law enforcement. Governor Kurt Riley of the Acoma Pueblo aptly summed up the problem before this Committee last year when he stated: *The cultural objects the Acoma is attempting to protect are difficult to fully describe and publicly identify because of the sacred and confidential ceremonial use.*

Given the task of protecting a few secret and undefined items in the midst of a vastly greater number of legal items with no provenance, there can be little doubt

<sup>4</sup> *The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 24 (Oct. 18, 2016) (Statement of Cheryl Andrews-Maltais, Senior Advisor to the Assistant Secretary-Indian Affairs, U.S. Department of the Interior).

<sup>5</sup> *Smith v. Goguen*, 415 U.S. 566, 576 (1974) (finding that a Massachusetts flag desecration statute prohibiting “contemptuous” treatment of the U.S. flag was unconstitutionally vague and overly broad because it failed to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that are criminal and those that are not.)

<sup>6</sup> *Goguen*, 415 U.S. at 574.

that the enforcement result will mirror CPIA import restrictions that reverse the burden of proof. Such a state of affairs will violate Due Process and threaten the legality and value of significant numbers of legal items without providing significant, effective protection to sacred items.

### **Conclusion**

In summary, the GHA asks the Committee to address these real and valid concerns as part of the legislative process. As proposed, the legislation threatens uncompensated takings without offering a clear path to achieve the legislation's stated objectives. Allowing law enforcement to shift the burden of proof is unfair to owners of legal objects. Moreover, there is a real danger that the law will become unenforceable. By treating so many objects as potentially tainted, federal authorities will be unable to provide comprehensive or consistent enforcement and are likely to miss the most important illegal objects. In addition, a presumption of guilt combined with the difficulty of proving an object is legal will drive legitimate participants out of the market, reduce transparency, and harm all legitimate trade, and the cultural understanding it brings.

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PREPARED STATEMENT OF HON. MARK N. FOX, CHAIRMAN, MANDAN, HIDATSA AND  
ARIKARA NATION OF THE FORT BERTHOLD RESERVATION

### **Introduction**

Chairman Hoeven, Vice Chairman Udall and Members of the Senate Committee on Indian Affairs, the Mandan, Hidatsa and Arikara Nation (MHA Nation) appreciates the opportunity to provide this testimony on the following bills:

- S. 1870, the "Securing Urgent Resources Vital to Indian Victim Empowerment Act" (SURVIVE Act);
- S. 1942, "Savanna's Act;" and
- S. 1953, the "Tribal Law and Order Reauthorization and Amendments Act of 2017."

As you know, the MHA Nation is working to ensure long-term benefits from the significant oil and gas development on our Fort Berthold Indian Reservation which sits in the middle of the Bakken Formation. However, our communities have also experienced many social impacts from this rapid development on and near our Reservation. Impacts include high rates of traffic accidents on our rural roads, increased incidences of violent crime, and the presence of organized crime such as drug and human trafficking. Our communities are now facing a crisis that stems from drug addiction and violence.

The increased populations and related social issues are straining our tribal justice infrastructure. For example, from 2013 to 2015, the MHA Nation District Court saw its caseload grow by over 2,000 percent, with total case numbers in 2015 similar to that of Bismarck, which has a population of around 67,000 people. Our total population is less than one-tenth that with 6,300 people over our one million-acre Reservation. We are managing this caseload with no influx of resources to increase capacity in our tribal courts or to investigate increased cases of sex trafficking. Our members repeatedly report feeling unsafe in their own homes, and many of our citizens have witnessed firsthand the terrifying realities of sex trafficking.

Drug trafficking and addiction on our Reservations have also reached epidemic proportions. Though it is a general medical clinic, our Elbowoods Memorial Health Center uses 90 percent of its contract health budget for drug-related health care issues. In addition, 90 percent of the drug and alcohol related cases are beyond the scope of our local drug treatment center's services and must be referred to other facilities. The MHA Nation has taken a strong stand in support of our citizens by beginning to build a drug treatment facility in Bismarck, but we must ensure that our current facilities and staff on the Reservation are supported in their lifebuilding work to combat addiction.

The effects that addiction and sexual violence are having on our children underscore the long-term impacts of this current crisis. From January 2013 to August 2015, 132 newborns were born addicted to meth and other drugs. In 2014 alone, 85 babies (three years and younger) were exposed to drugs. These children are often removed from their homes for their protection, but are placed in an overburdened system. Many Indian children are placed in homes off the Reservation, separated from vital cultural connections and community support networks. These issues are cyclical, as foster children are at a very high risk of experiencing trauma, and even being recruited for sex trafficking.

We hold our children sacred and families sacred. Now is the time to support our tribal justice systems. The MHA Nation strongly supports passage of S. 1870, S. 1942 and S. 1953. We looking forward to working with you to support and find solutions for our overwhelmed social services and criminal justice infrastructure to address the increased needs of our citizens in response to boomtown development.

**S. 1870, the “Securing Urgent Resources Vital to Indian Victim Empowerment Act”**

The MHA Nation strongly supports the expansion of types of victim assistance, services, and infrastructure that would be funded under the S. 1870, the “Securing Urgent Resources Vital to Indian Victim Empowerment Act” (SURVIVE Act). Victims of crime, especially those whose victimization includes months or years of sexual assault and rape, require multiple types of services such as counseling, medical care, safe housing, and legal assistance. Opening up existing funding sources to increase tribal resources for all of these services will allow the MHA Nation to build our infrastructure to match the current need, including trainings for law enforcement and service providers, as well as building a networked system of services coordinated so all clients receive access to services.

The rural location of our Fort Berthold Indian Reservation serves as a challenge to deliver services to all those in need, especially in a confidential and safe manner. Enhanced funding in tandem with privacy protections will go far to assure victims that they are not risking their safety nor will they face shame or embarrassment by reporting sexual violence. Especially as relates to sexual violence, the MHA Nation supports enhanced attention to placing Sexual Assault Nurse Examiners on and near Indian communities to collect information and evidence that can lead to prosecutions at the tribal and federal levels.

Furthermore, the MHA Nation is committed to providing our members with services that are culturally tailored and speak to their Mandan, Hidatsa, and Arikara identity. Increasing funding for tribally delivered services creates the opportunity for us to ensure that our own cultural and spiritual values are at the core of all our programming.

**S. 1942, “Savanna’s Act”**

The MHA Nation greatly appreciates Senator Heitkamp’s sponsorship of S. 1942, “Savanna’s Act” and strongly supports its passage to improve coordination across jurisdictions to collate tribal, federal, state and local law enforcement data. This type of inter-jurisdictional data collection would streamline existing efforts and facilitate much needed cross-deputization of tribal, local, and state officers to provide safety for everyone living on our rural reservation. We also hope that improved data collection efforts lead to increased dialogue about expanding tribal jurisdictional grants in the Violence Against Women Act to allow tribes to prosecute human trafficking crimes committed by non-Indians on tribal land.

The MHA Nation views data collection at every level as a necessary step to provide for healthy Indian communities on our Fort Berthold Indian Reservation. Data drives our understanding of the types of crimes occurring in our communities, which then equips our tribal law enforcement, social services, and victim services to better meet the needs of affected individuals and families. The dearth of available data and research specific to violence against Native American women is deplorable because it does not provide an accurate picture of the trauma faced by these victims and their communities, nor does it provide resources for adequate investigation and prosecution of these heinous crimes.

For example, while evidence suggests Native women experience human trafficking at a higher proportion than the general population, there were just 14 federal human trafficking investigations in Indian Country from 2013–2015 resulting in only two prosecutions. Collecting disaggregated data is a strong step towards matching the reality as seen by our tribal service providers to the numbers necessary to increase research, prosecution, and funding.

The MHA Nation urges passage of Savanna’s Act for another reason: to prevent the exact crime that cut short Savanna Greywind’s life. Federal attention is necessary to effectively combat violence against women, which too often ends in cases of missing and murdered Native women. Protocols that enhance coordination and provide for early intervention in these cases must be developed to protect Native women. Our tribal service providers have a close understanding of the needs of their clients and the MHA Nation welcomes federal consultation that uses these perspectives for the development of standardized protocols.

Finally, we need data on missing and murdered Native women to quantify the social impacts of rapid development that is unique to our Reservation. The influx of oil industry workers on and near our lands changed the fabric of our community

and having accurate data is one way to engage in dialogue with the oil and gas industry regarding responsibilities they have while operating on our Reservation. In this way, we can harness the benefits of economic development while also providing the attendant safety and services infrastructure necessary to keep our communities thriving for generations to come.

**S. 1953, the “Tribal Law and Order Reauthorization and Amendments Act of 2017”**

The MHA Nation greatly appreciates Chairman Hoenes’s sponsorship of S. 1953, the “Tribal Law and Order Reauthorization and Amendments Act of 2017” and strongly supports passage of the bill. However, much more needs to be done to solve, or even put a real dent in, the public safety crisis on our Fort Berthold Indian Reservation and across Indian Country. Most important, Congress must provide the funding needed for adequate law enforcement in Indian Country. We genuinely fear that the re-authorization of the public safety “needs assessment surveys” called for in S. 1953 will remain nothing more than another academic exercise that does not result in any real change. The extreme shortage of law enforcement officers in Indian Country, and especially on our Reservation, has been well known to Congress and Federal agencies for more than thirty years, yet nothing has changed. The MHA Nation and other tribal communities currently experience more drug and gang activity and more unprosecuted crime than ever before even though similar federally funded needs assessments surveys have been submitted to Congress since 2011.

As noted above, the significant increases in populations and activity on our Reservation from oil and gas development have long surpassed the capacity of our law and order programs. Even now, ten years after oil and gas development took off on the Reservation, the Bureau of Indian Affairs (BIA) is not able to staff our current law enforcement program to meet our most basic needs. This has left our community unprotected, our officers over-worked to the breaking point, and our courts struggling to provide the most basic services required by applicable law. While increased funding will not solve every law enforcement problem, it is necessary to hire, train and retrain additional officers and to give our tribal courts a fighting chance to address some very real problems.

The MHA Nation also needs real and immediate support for alcohol and drug treatment programs. S. 1953 is not the first bill to find that “drugs and alcohol remain key contributors to Indian Country Crime,” yet federal alcohol and drug treatment programs remain disjointed, overly bureaucratic, and seriously underfunded. As a result, if a tribal programs and services do not fit into the proper federal program box, assistance is simply unavailable. When federal assistance is available, individual tribes get pennies when dollars are needed—in addition to a stack of federal regulations limiting our ability to address local problems.

We also want to highlight the MHA Nation’s serious need for law enforcement and detention facilities, and for funding to operate those facilities after they are constructed. Police officers cannot function without a police station, dispatch center and a jail. Tribal courts cannot function without a court house and records storage. The MHA Nation was forced to spend its own funds to build a new space for our tribal law enforcement program and tribal court, yet todate BIA has not contributed any funds to even help operate this facility. This is wrong and violates the United States’ treaty and trust responsibilities to the MHA Nation.

We appreciate your consideration of these overarching issues as S. 1953 moves forward and Congress prepares to pass appropriations bills for the agencies that fund tribal law enforcement and justice programs. In addition, the MHA Nation has the following specific comments on the provisions of S. 1953.

*Section 102—Integration and Coordination of Programs*

While the MHA Nation supports efforts to better coordinate law enforcement, substance abuse and mental health efforts, it is important to keep in mind that all of these programs are already severely underfunded. It is also important to remember that not all substance abuse and mental health problems lead to criminal activity. Thus, for both of these reasons, moving substance abuse and mental health money from health clinic programs to the law enforcement programs creates a whole new set of problems.

MHA also has serious concerns about the implied idea of moving BIA law enforcement activities from the Department of the Interior to the Department of Justice. We have already seen what happened, in the past, when Indian law enforcement money was transferred to Justice for on-reservation FBI efforts. Those dollars simply disappeared!

We have also seen what happened when Justice assumed the lead for detention and court construction, without tribal consultation or approval. What was once a se-



verely underfunded, but nonetheless workable program, has all but ceased to exist, as has all money for operating and maintaining tribal court buildings. With the BIA, we at least know whom we are dealing with and an agency that understands its trust responsibility. At Justice, tribal programs will be nothing more than a tiny problem that never attracts the attention needed. In short, we don't believe that moving a program from one agency to another can solve staffing and funding shortages.

We also note that while the relationship between BIA public safety and justice programs and Justice funded efforts has improved, it remains disjointed, and largely unworkable. This is because, on-reservation crime and justice occur in unique jurisdictions, involve tribal as well as federal laws, and impact areas that are different than those that Justice is accustomed to. For example, the Justice crime data collection system is designed to track felonies, while tribal police systems deal largely with misdemeanors.

Finally, while we support making federal prisons available to tribes to address some limited needs, such as the need to house detainees with serious medical conditions or mental health issues, federal prisons should never be seen as a substitute for well run, comprehensive, tribal detention facilities.

#### *Section 103—Data Sharing with Indian Tribes*

The MHA Nation supports the continued use and expansion of the federal criminal database. This system is of particular importance to us because the oil and gas development in our area now forces our officers to deal with a highly transient population. We also strongly support the bill language which continues to give our public safety systems notice, when federal investigations are stopped, and when federal prosecutions are denied.

#### *Section 105—Federal Notice*

The MHA Nation strongly supports the bill language requiring tribal notice when tribal members are convicted in federal court. All too often, tribal members lose track of family members who leave the reservation. Far too many of these people suffer from, or succumb to, addictions or mental health problems and this notice can help those families reconnect and provide the support necessary for rehabilitation. In addition, our tribal courts often have open cases which involve persons who are in the federal system. This notice can help our courts better manage their dockets.

#### *Section 106—Detention Facilities*

The MHA Nation supports the possible use of detention funding to support alternatives to incarceration, however, we must emphasize again the severe underfunding of tribal detention programs and detention facilities. Unless additional resources are forthcoming, this expanded opportunity will merely force us to rob from one underfunded program to fund another.

The MHA Nation also notes that federal legislation, federal funding, and federal programs often confuse, or fail to distinguish between, the various detention needs that we face in our tribal communities. This is because the words "detention" and "incarceration" have different meanings in different circumstances, including:

- a 24 to 72 hour lock up of a violent person under the influence;
- a hold of a person charged with a more serious crime, who has yet to be arraigned, or convicted of a crime;
- an adult or juvenile sentenced to a short term detention of a few weeks; and
- a person sentenced for six months or more.

With these on the ground differences, it is very frustrating when Congress or federal officials suggest a new emphasis on funding "alternatives to incarceration," when that term only applies to one or possibly two of the categories of detention referenced above.

The MHA Nation also emphasizes that some alternatives to incarceration, like house arrest and ankle bracelets, simply do not work on most reservations. For example, in remote areas of our Reservation law enforcement may have limited ability to receive a signal from an ankle bracelet because of a lack of Internet connections. And, even worse, no officer available to respond to that ankle bracelet signal if, for example, a domestic abuser decides to violate the terms of release.

#### *Section 107—Reauthorization for Tribal Courts Training*

The MHA Nation strongly supports the reauthorization of the Office of Justice Support to provide tribal governments and tribal justice systems with the resources and training needed.

*Section 108—Amendments to the Indian Civil Rights Act*

The MHA Nation supports the amendments clarifying when a jury trial would be required, but notes generally that the requirements for jury trials amounts to unfunded federal mandate. Federal budgets for our court has never been increased to accommodate requirements of the Tribal Law and Order Act and the Violence Against Women Act.

On a related issue, the MHA Nation opposes existing language in 25 U.S.C. 1304(d)(3)(B) suggesting that tribal jury pools are not impartial unless non-Indians are included. Throughout the United States, jury pools are merely composed of the citizens of the jurisdiction whose laws were violated. This system and presumption of fairness should be afforded to tribal courts. Instead, the language of 25 U.S.C. 1304 (d)(3)(B) suggests that the system for selecting tribal court juries is unfair. This presumption of unfairness undermines the tribal justice systems. To resolve this issue and promote tribal justice systems we ask that the phrase, “including non- Indians,” be deleted from 25 U.S.C. 1304 (d)(3)(B).

*Section 109—Public Defenders*

The MHA Nation supports the creation of tribal liaisons within Federal Public Defender’s districts and for the appointment of such tribal liaisons in consultation with the tribes in those districts.

*Section 110—Offenses in Indian Country: Trespass on Indian Land*

The MHA Nation supports the proposed amendment to 18 U.S.C. § 1165, but suggests that tribal courts will require additional assistance and training if this provision is ultimately adopted. In addition, given our limited number of law enforcement officers, we also need federal enforcement of tribal court exclusion orders. The MHA Nation needs to have individuals who threaten the peace and well-being of our community removed from our Reservation quickly and permanently.

*Section 111—Resources for Public Safety in Indian Communities; Drug Trafficking Prevention*

The MHA Nation strongly supports continuing the Shadow Wolves Division and applauds their efforts on behalf of their tribal nations and the United States of America.

*Section 112—Substance Abuse Prevention Tribal Action Plans*

The MHA Nation believes strongly that Indian tribes are in the best position to decide how best to deal with substance abuse in their communities. At the same time, tribes cannot run effective prevention programs when federal funding is limited and the programs that they flow through lack the flexibility to allow tribes to implement what we recognize to be effective strategies.

*Section 201—Federal Jurisdiction over Indian Juveniles.*

The MHA Nation feels strongly that juveniles should never be tried as adults, except in the most unique circumstances.

*Section 202—Reauthorization of Tribal Youth Programs*

The MHA Nation strongly supports the continuation of the summer youth program and encourages its expansion.

We also strongly support the continuation and expansion of emergency shelter grants. All too often, we find juveniles in need of supervision, but we lack the resources to address that emergency on both a short and long term basis. These emergency shelter grants are important, but so is federal funding for the long-term placement of juveniles who, as repeat status offenders, need a supervised environment. If this assistance is not provided, the chances that these status offenders will end up before the criminal justice system increase exponentially.

*Section 203—Assistance for Indian Tribes Relating to Juvenile Crime*

While the MHA Nation was pleased to see that S. 1953 recommends increased federal coordination on juvenile crime, we must emphasis again, that technical assistance is not helpful if we lack the resources to implement those ideas.

We are highly supportive of the bill’s new requirement for tribal notice when a tribal juvenile is taking in by off-reservation law enforcement and/or the off-reservation criminal justice systems. Many tribal juveniles end up in those places because of a breakdown in family support, or a lack of substance abuse or mental health services. If we know about these situations, we can help.

The MHA Nation also supports the inclusion of tribal cultural and traditional practices in the juvenile justice system. Too often our traditional approaches are not

afforded the respect that they deserve, even though they have often shown themselves to be the most effective way of helping given individuals.

*Section 204—Coordinating Council on Juvenile Justice and Delinquency Prevention*

While the MHA Nation supports the continued operation of the Coordinating Council on Juvenile Justice, and the proposed inclusion of the Indian Health Service on this entity, we must point out that one of the reasons that Councils like this are not as effective as they could be, is because they fail to afford an appropriate role for tribal government. While we understand that this Coordinating Council is a federal entity, we must note that this Council could benefit greatly from the input of tribal leaders who live with these problems every day, and who see how and why federal programs are not as effective as they could be.

*Section 205—Grants for Delinquency Prevention Programs*

The MHA Nation supports the continuation and expansion of the juvenile delinquency grant program.

**Conclusion**

The MHA Nation strongly supports the efforts of Chairman Hoeven, Vice Chairman Udall, and Members of the Committee, in particular Senator Heitkamp, to introduce and consider bills that will support tribal law and order and justice systems. For too long the federal government has not fulfilled its law and order responsibilities on Indian lands. In this era supporting tribal sovereignty and self-determination, federal laws and programs need to be updated and supported so that Indian tribes can take the lead in providing law and order on our reservations. But, we cannot run these programs without adequate federal funding that matches the United States treaty and trust responsibilities to Indian tribes.

As our Fort Berthold Indian Reservation and our entire region faces significant population increases from oil and gas development on our Reservation, the MHA Nation sees the most dramatic side of these law and order issues every day. Areas like ours need additional support from Congress and federal budgets. Our Reservation is not only rural and remote, it is also large and seeing crime levels comparable to some cities. Federal law and order programs and funding should be flexible to address these situations.

Thank you for this opportunity to provide this testimony. The MHA Nation stands ready to assist the Committee in further consideration and passage of S. 1870, S. 1942, and S. 1953.

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PREPARED STATEMENT OF THE 23RD NAVAJO NATION COUNCIL (NNC)

On behalf of the 23rd Navajo Nation Council (NNC), I would like to thank the United States Senate Committee on Indian Affairs for the opportunity to present written testimony regarding the hearing on the Safeguard Tribal Objects of Patrimony Act (“STOP Act”) of 2017<sup>1</sup> as it relates to the Navajo Nation. Our history has been documented through historical items such as ceremonial items and paraphernalia, pottery and rugs, and land base. The importance of these ceremonial items is deemed invaluable and should be protected at all costs.

We also extend our gratitude to Senator Martin Heinrich and the several sponsors who introduced the STOP Act, and we seek to voice our support regarding the importance of this act. It is not only vital for Navajo people, but indigenous nations across the United States.

**I. Introduction**

In December 2016, the United States Congress (“Congress”) passed House Concurrent Resolution 122, the Protection of the Right of Tribes to Stop the Export of Cultural and Traditional Patrimony Resolution<sup>2</sup> (“PROTECT Patrimony Resolution”) to condemn the theft, illegal possession or sale, transfer, and export of tribal cultural items<sup>3</sup> of American Indians, Alaska Natives, and Native Hawaiians in the United States and internationally.

The PROTECT Patrimony Resolution compliments the United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cul-

<sup>1</sup> Safeguard Tribal Objects of Patrimony Act, S. 1400, 155th Cong. (2017)

<sup>2</sup> H.R. Con. Res. 122, 114th Cong. (2016) (enacted).

<sup>3</sup> *Id.* at § 4.

tural Property<sup>4</sup> (“Convention”) of 1970, which the United States Senate gave its unanimous advice and consent in 1972.

The Convention Article 2(1) states, “[t]he States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country’s cultural property against all the dangers resulting there from.”<sup>5</sup> The PROTECT Patrimony Resolution calls for the “development of explicit restrictions on the export of tribal cultural items,”<sup>6</sup> which the STOP Act would accomplish.

First, this report provides a background on Navajo Nation’s experience and effort to protect sacred cultural items that appeared in Paris, France. Second, this report discusses the current United States laws intended to protect sacred cultural items from leaving the Navajo Nation. Finally, this report highlights the importance of the STOP Act that the NNC favors.

## II. Background

The Navajo Nation’s stake in protecting sacred cultural items began in Spring 2014 when the Navajo Nation Historic Preservation Department, the Sacred Sites Task Force as a Subcommittee of the Naabik’oyáti’ Committee,<sup>7</sup> the Navajo Nation Human Rights Commission,<sup>8</sup> and the Navajo Nation Office of the President and Vice-President became aware of thirty (30) confirmed Navajo Yeibichei masks that would be auctioned off on June 27, 2014 by the Eve Auction House in Paris, France.

The Navajo Nation made every effort to prevent the auction of these thirty (30) confirmed Navajo Yeibichei masks, which are sacred items to the Navajo people, and have the sacred items returned to the Navajo Nation. The Navajo Nation met and spoke with the United States Department of State, United States Department of the Interior, United States Ambassador Keith Harper to the United Nations Human Rights Council,<sup>9</sup> United States Mission to the United Nations in New York, United States Mission of the United Nations and Other International Organizations in Geneva, and the Embassy of the United States in Paris on the importance of these sacred masks and their assistance to repatriate these sacred items without cost.

All efforts made by the Navajo Nation to prevent the auction and return of these sacred masks by the auction house were unsuccessful. On June 27, 2014, all but seven (7) confirmed Navajo Yeibichei masks were auctioned off and the remaining sacred masks would later be scheduled to be auctioned on December 15, 2014. The Sacred Sites Task Force then directed the Office of Navajo Nation Human Rights Commission to travel to Paris to recover the remaining seven (7) sacred masks from the Eve Auction House. This included purchasing them directly before they go to auction or bid on them directly when the auction takes place if purchasing them was not possible. On December 15, 2014, the remaining seven (7) sacred masks were successfully bided on and returned to the Navajo Nation.

In the of Fall 2015, the Eve Auction House owner reached out to the Office of Navajo Nation Human Rights Commission and communicated that he will be in possession of eighteen (18) Navajo Yeibichei masks, which will be scheduled for auction on December 7, 2015. The possession and auction of these Navajo Yeibichei masks was communicated to the Navajo Nation Historic Preservation Department, the Sacred Sites Task Force,<sup>10</sup> and Navajo Nation Office of the President and Vice-President. Through our efforts, we were able to work out an arrangement with Eve Auction House to not photograph, catalog, and publish the possession and auction of these sacred items as the Navajo Nation would be purchasing and repatriating them

<sup>4</sup> U.N. Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, No. 11806, U.N.T.S. 1972.

<sup>5</sup> *Id.* at art. 2(1).

<sup>6</sup> H.R. Con. Res. 122, *supra* note 2, at §4(4).

<sup>7</sup> Resolution of the Naabik’oyáti’ Committee of the Navajo Nation Council, NABIJY-51-12 (07/10/2012).

<sup>8</sup> See NAVAJO NATION CODE ANN. tit. 2, §921 (stating that the Commission “is organized to operate as a clearinghouse entity to administratively address discriminatory actions against citizens of the Navajo Nation and to interface with the local state and federal governments and with national and international human rights organizations in accordance with its plan of operation and applicable laws and regulations of the Navajo Nation.”)

<sup>9</sup> Letter from Ben Shelly, President, Navajo Nation, to Ambassador Keith Harper, U.N. Human Rights Council, Permanent Mission of the U.S.A (Aug. 13, 2014) (on file with the Navajo Nation Human Rights Commission)

<sup>10</sup> Resolution of the Naabik’oyáti’ Committee of the Navajo Nation Council, NABIMY-31-15 (05/28/2015).

directly. As a result, the Navajo Nation stakes on protecting sacred cultural items for monetary gain nationally and internationally increased.

### III. Laws Intended To Protect Sacred Cultural Items

The United States Government has already banned domestic trafficking on protected items of Native American tangible cultural heritage, including our ancestors and sacred cultural items.

The Antiquities Act of 1906 makes it illegal to appropriate or injure objects of antiquity taken from federal land without proper permission.<sup>11</sup> The Archaeological Resources Protection Act (“ARPA”) of 1979 makes it a crime to traffic in archaeological resources removed from public or Indian lands without proper permitting.<sup>12</sup> The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 makes it illegal to traffic in Native American cultural items, including human remains, removed from federal or tribal land without proper permitting and tribal consent.<sup>13</sup>

Currently, the existing federal laws, such as NAGPRA, does not go far enough to protect cultural sacred items. It is clear the penalties are not high enough and prosecutions not frequent enough to deter criminals. NAGPRA does not explicitly make exportation unlawful and those who currently possess protected cultural sacred items fear prosecution if they repatriate the objects. For this reason, many indigenous peoples have found their cultural objects trafficked through black markets and these objects are essential for the cultural survival of indigenous nations.

### IV. Importance of the Safeguard Tribal Objects of Patrimony Act

With the introduction of the STOP Act, it would increase NAGPRA sentences and penalties from five to ten years and prohibit the exportation of cultural sacred items obtained in violations of NAGPRA, ARPA and the Antiquities Act.<sup>14</sup> However, the STOP Act does not expand categories of protected cultural heritage beyond cultural items, human remains, archaeological resources, and objects of antiquity as they are defined by and protected under current law.<sup>15</sup>

The STOP Act establishes a federal framework to “encourage the voluntary return of tangible cultural heritage to Indian tribes and Native Hawaiian organizations.”<sup>16</sup> In addition, the STOP Act provides for liaisons in the Departments of the Interior and State to facilitate the voluntary return,<sup>17</sup> training and workshops,<sup>18</sup> and establishes a referral program within the Department of the Interior by creating a “list of representatives from each Indian tribe and Hawaiian organization”<sup>19</sup> to assist in the “voluntary return of tangible cultural heritage.”<sup>20</sup>

Lastly, the STOP Act establishes “a tribal working group”<sup>21</sup> to advise the United States Government on the “return of tangible cultural heritage,”<sup>22</sup> ends the illegal trafficking of tribal cultural heritage,<sup>23</sup> and the return or repatriation of tribal cultural heritage.<sup>24</sup>

### V. Conclusion

The 23rd Navajo Nation Council urges the United States Senate to pass the S. 1400 to ensure protections for not only tangible cultural heritage, but the Navajo (Diné) Life Way. The illicit trade of Native American tangible cultural heritage poses a threat to cultural survival. Our sacred and cultural items are illegally being taken from our people, threatening the maintenance of our culture and tradition, and depriving us of the legacy we seek to leave for our future generations. Meanwhile, a lucrative market of our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad. The Navajo Nation is committed to preserving its cultural heritage and implores the Federal Government to aid us in repatriating our sacred items.

<sup>11</sup> 54 U.S.C. §§ 320301–320303 (1906), 18 U.S.C. § 1866 (2014).

<sup>12</sup> 16 U.S.C. §§ 470aa–470mm (1979).

<sup>13</sup> 25 U.S.C. §§ 3001–3013 (1990), 18 U.S.C. § 1170 (1994).

<sup>14</sup> S. 1400, *supra* note 2, at § 2(a).

<sup>15</sup> E-mail from Gregory A. Smith, Attorney, Hobbs, Straus, Dean & Walker, LLP, to Rodney L. Tahe, Policy Analyst, Office of Navajo Nation Human Rights Commission (Sept. 26, 2017, 08:25 MST) (on file with author).

<sup>16</sup> S. 1400, *supra* note 2, at § 4(a).

<sup>17</sup> *Id.* at § 4(b).

<sup>18</sup> *Id.* at § 4(c).

<sup>19</sup> *Id.* at § 4(d)(2).

<sup>20</sup> *Id.* at § 4(d)(1).

<sup>21</sup> *Id.* at § 5(a).

<sup>22</sup> *Id.* at § 5(b)(1).

<sup>23</sup> *Id.* at § 5(b)(2).

<sup>24</sup> *Id.* at § 5(b)(3).

We believe the STOP Act will help to end illegal trafficking of Native American tangible cultural heritage, and it will also bring home our sacred and cultural items that have been separated from our communities for far too long.

PREPARED STATEMENT OF VINTON HAWLEY, CHAIRPERSON, NATIONAL INDIAN HEALTH BOARD (NIHB)

### **Introduction:**

Chairman Hoeven, Vice Chairman Udall and Members of the Committee, thank you for holding this important hearing on S. 465 “The Independent Outside Audit of the Indian Health Service Act of 2017.” On behalf of the National Indian Health Board (NIHB)<sup>1</sup> and the 567 federally recognized Tribal nations we serve, I submit this testimony for the record.

The federal promise to provide for the health and welfare of Indian people was made long ago. Since the earliest days of the Republic, all branches of the Federal Government have acknowledged the nation’s obligations to the Tribes and the special trust relationship between the United States and Tribes. The United States assumed this responsibility through a series of treaties with Tribes, exchanging compensation and benefits for Tribal land and peace. The Snyder Act of 1921 (25 USC 13) legislatively affirmed this trust responsibility. To facilitate upholding its responsibility, the federal government created the Indian Health Service (IHS) and tasked the agency with providing health services to American Indians and Alaska Natives (AI/ANs). Since its creation in 1955, IHS has worked to fulfill the federal promise to provide health care to Native people, but has routinely been plagued by underfunding and mismanagement.

In passing the Affordable Care Act (ACA) (P.L. 111–148), Congress also reauthorized and made permanent the Indian Health Care Improvement Act (IHCIA). As part of the IHCIA, Congress reaffirmed the duty of the federal government to American Indians and Alaska Natives, declaring that “it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians—to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.”<sup>2</sup>

### **IHS Quality of Care Challenges**

But the promise made by the Federal Government and renewed by Congress over seven years ago has not been kept. Not only has funding for the agency always been woefully inadequate,<sup>3</sup> but as noted in the hearing on S. 465, and at countless other times before the Committee, health care provided at many IHS-operated facilities falls woefully short of safe, and effective care. Time and again, we learn of situations where a patient goes to their local IHS-service unit only to be misdiagnosed, not attended to and often cannot get the necessary referral to seek care elsewhere. Anywhere else in the country, this level of care would be completely unacceptable. However, in some places in Indian Country it is a fact of life. This must change.

This low level of care at some IHS-operated facilities has been well documented by other federal agencies as well. Over 7 years ago, this committee issued a report citing widespread mismanagement of the Great Plains region.<sup>4</sup> The Winnebago-Omaha Indian Hospital has not been able to bill the Centers for Medicare and Medicaid Services (CMS) since July 2015 due to deficiencies found there. The Rosebud Indian Hospital and Pine Ridge Indian Hospital have also been under investigation by CMS for failing to meet the conditions of participation by the agency.

NIHB commends the Senate Committee on Indian Affairs for the attention that it has given to improving the quality of care delivered at IHS facilities. The Committee has held numerous hearings on the topic and elevated these critical issues.

<sup>1</sup> NIHB is a 501(c) 3 not for profit, charitable organization providing health care advocacy services, facilitating Tribal budget consultation and providing timely information and other services to all Tribal Governments. Whether Tribes operate their own health care delivery systems through contracting and compacting or receive health care directly from the IHS, NIHB is their advocate. Because the NIHB serves all federally-recognized Tribes, it is important that the work of the NIHB reflect the unity and diversity of Tribal values and opinions in an accurate, fair, and culturally-sensitive manner. The NIHB is governed by a Board of Directors consisting of representatives elected by the Tribes in each of the twelve IHS Areas. Each Area Health Board elects a representative and an alternate to sit on the NIHB Board of Directors.

<sup>2</sup> Indian Health Care Improvement Act, §103(2009).

<sup>3</sup> In 2015, for example, funding per patient at IHS was just \$3,107 at IHS compared to the national average of over \$8,000.

<sup>4</sup> “In Critical Condition: The Urgent Need To Reform The Indian Health Service’s Aberdeen Area—Report of Chairman Byron L. Dorgan.” Senate Committee on Indian Affairs. December 28, 2010.

Legislation has been introduced in two consecutive Congresses to improve the situation at IHS, but has not been enacted into law. Yet, patients continue to suffer. As recently as November 3, 2017, the Pine Ridge Indian Hospital was given notice that it would no longer be able to bill CMS for failing to meet conditions of participation. This is simply inexplicable given that the agency has been addressing challenges with CMS at this facility since at least 2015. Clearly, more must be done to improve the care at IHS-operated facilities.

Tribes have continuingly expressed frustration at not being able to ascertain funding information for the agency, especially when direct service Tribes are interested in taking over operations. Without question, the IHS has much to account for when it comes to the health facilities that they operate directly.

#### **Recommendations on S. 465**

Given all these concerns, and the failure of IHS to improve the delivery of health services in some areas, it is not surprising that legislation has been introduced to provide more information about IHS and the agency's operations. However, NIHB and Tribes have a few concerns about the legislation that are detailed below. As Senator Udall noted at the hearing, Congress should use its current oversight authority to compel IHS (and the Department of Health and Human Services (HHS), when necessary) to provide the information currently outlined in this legislation. For example, information on the IHS patient population; Information Technology Strategies of the IHS; and process of the Service for carrying out construction and maintenance projects at medical facilities should all be readily available for IHS to provide.

The legislation, as amended, requires the HHS office of the Inspector General (OIG) to complete the assessment, but only allows 180 days to complete the study. According to OIG's 2017 work plan they already have plans to investigate IHS in 5 separate areas including management and hospital operations. Congress should fully evaluate the findings of those investigations before investing a significant amount of time and resources into an assessment of this nature. Furthermore, 180 days is not a sufficient time to complete the study given the wide breadth of information required. If OIG cannot complete the study in this time, it will be sent out to a private entity. The bill does not require the entity to have familiarity with the Indian health system. This is troubling because the Indian health system, is like no other health delivery system in the United States. Any assessor should be able to understand the unique historical background as well as the cultural aspects of working within Indian Country to ensure the most informed, objective report is produced.

Additionally, different operational divisions and agencies within HHS should share responsibility for helping to improve the quality of care in the IHS system. The Committee should compel the HHS to work with IHS to make improvements in the quality of care of IHS. Other federal agencies are well experienced in the delivery of quality health care services and should be tasked with engagement of the IHS to improve some of the challenges at IHS-operated facilities. For example, the Health Resources and Services Administration has significant expertise in health professional staffing in underserved areas, and could provide a valuable resource for IHS. While we understand that these agencies currently collaborate somewhat, it is critical all expertise is leveraged to the maximum extent possible. NIHB requests that the Committee use its current oversight authority to ensure better coordination between HHS agencies and the IHS.

NIHB also has heard from Tribes that the information asked for in this legislation is so comprehensive that it could consume an already overtaxed agency to answer the questions required by this assessment. While IHS itself would not be performing the assessment, and IHS resources would not be used to directly pay for the study, it would require significant time of IHS staff to answer the information required. In an agency where staffing of senior management is a well-documented challenge,<sup>5</sup> NIHB and Tribes remain concerned that an assessment of this nature would place severe strain on the agency, possibly at the expense of patient care. Instead, S. 465 should include language that would specifically state that IHS staff or funds would not be able to be reassigned to answer questions of the investigation at the expense of other operational duties.

In Section 2, paragraph (d)(2) we recommend adding "public health and environmental health services." Tribal communities continue to experience underdeveloped public health systems due to a lack of federal investment in public health infrastructure for Indian Country. This lack of public health services is a contributing reason

<sup>5</sup> See: "The Indian Health Service: Actions Needed to Improve Oversight of Quality of Care." Government Accountability Office. GAO-17-181. January 2017.

to the severe health disparities for AI/ANs. Therefore, we believe it is warranted that any investigation that includes access to medical services should explicitly look at public health as well.

In Section 2, paragraph (d)(4) the bill requires assessment into appropriate system wide access standard applicable to hospital care, medical services, and other health care furnished by and through the Service. This aspect should require the assessor to take into account geographic inconsistencies across the agency including access to medical staff, health facilities, and existing health disparities. All 12 areas of IHS are different, so while it is important to maintain a standard across the agency, the assessment should also consider how to account for this variation across the system.

#### *Self-Governance Impact*

Tribes welcome the changes to this legislation that would limit investigations to the IHS-operated facilities. Over 60 percent of the Indian health service appropriated budget is delivered directly to Tribes and Tribal organizations through contracts and compacts as authorized by the Indian Self Determination Education and Assistance Act (P.L. 93-638). Though the assessment called for in S. 465 would not directly impact those self-governance Tribes, the impacts could have great consequences on self-governance. For example, in Section 2, paragraph (d)(13) S. 465 requires the assessor to look into the lack of funding formula at IHS. These findings would undoubtedly impact all Indian health facilities throughout the country, including those operated by Tribes. A conversation of this nature should only occur with the full consultation and participation of Indian Country. Instead, NIHB recommends that the legislation be amended to include Tribal consultation on this and other aspects of the report.

The bill does not prescribe how the report that is produced will be used to improve current IHS practices, but does say the document will be available publicly. This, paired with the lack of Tribal consultation in the legislation, gives Tribes little opportunity to weigh in on how the report will be used or the potential harmful effects it could have on the Indian health system. We believe that the recommendations should be discussed in full collaboration with the Tribes on this legislation. Time and time again, Tribes in the Great Plains Area have noted the failure of IHS to come to engage them in consultation or important decisionmaking regarding the operation of the health facilities on their reservations. This will only compound this problem, and result in little change from IHS.

#### **Conclusion and Policy Recommendations**

NIHB welcomes the efforts of the Senate Committee on Indian Affairs to provide oversight the IHS-operated facilities. For too long, our people have suffered at the hands of mismanagement, negligence and underfunding. However, we continue to express reservations about S. 465 due to the resources it would take away from current IHS operations and lack of Tribal involvement outlined in the legislation. Again, we sincerely appreciate the work of the Committee to improve the delivery of health services at IHS-operated facilities, but caution on engaging in this assessment without further input and consideration by the Tribes.

We look forward to working with you on these and other proposals as we work towards our joint goal of improving the health of American Indians and Alaska Natives.

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PREPARED STATEMENT OF HON. TROY SCOTT WESTON, PRESIDENT, OGLALA SIOUX  
TRIBE

Thank you for this opportunity to provide testimony on behalf of the Oglala Sioux Tribe in support of S. 465, the Independent Outside Audit of the Indian Health Service Act of 2017. We also thank Senator Rounds for introducing the legislation, an important step towards increasing transparency at the Indian Health Service (IHS) and understanding its failures in providing effective and efficient care for our people. We support S. 465 but think it should focus on the Great Plains Area.

The Oglala Sioux Tribe is a sovereign nation and part of the Great Sioux Nation. In addition to the general trust responsibility to provide for Indian health care, the United States has a specific treaty obligation to provide health care to the Oglala Sioux people. The Sioux Treaty of 1868, known as the Fort Laramie Treaty, includes terms through which the United States promised to provide certain benefits and annuities to the Sioux Bands each year, including health care services, in exchange for the right to occupy vast areas of Sioux territory. Our Treaty remains in full force and effect, but the United States has not fulfilled its obligation to provide health care services, along with other benefits.



We are the largest tribe of the Great Sioux Nation, with more than 47,000 tribal citizens. Our Reservation, the Pine Ridge Reservation, spans more than 2.8 million acres, making it larger than the States of Delaware and Rhode Island combined. According to the U.S. Census Bureau, Oglala Lakota County on the western side of our Pine Ridge Reservation is the third poorest county in the United States. The unemployment rate on our Reservation is well over 70 percent and our high school dropout rate exceeds 60 percent. These statistics directly impact the health of our tribal members who have among the worst health indicators, access to care, and quality of care in the United States. For example, the average life expectancy on the Pine Ridge Indian Reservation is only 50 years, significantly lower than that of non-Indian Americans and among the lowest in the country.<sup>1</sup>

The state of Indian health care in the Great Plains Area, and specifically in our Reservation IHS facilities, is one of the greatest challenges facing our Reservation community. It is also an issue requiring federal attention and action on behalf of the United States. Accordingly, it is our position that the obligation of the federal government to provide adequate health care services to the Oglala Sioux people, who are some of the poorest and most disenfranchised in this Nation, is not only a moral responsibility, but a legal one. IHS is to provide adequate health care services to Native communities but it has not lived up to its mandate. The agency is currently operating in an unsatisfactory—even dangerous—manner and continually fails to meet basic federal standards for competency and quality of care.

This failure is alarmingly apparent on our Reservation and at the Pine Ridge Hospital where we are facing a crisis of care. On November 3, 2017, the Pine Ridge Hospital received a Termination Notice from the Centers for Medicare and Medicaid Services (CMS). CMS is terminating the Pine Ridge Hospital's provider agreement, effective November 18, 2017, based on the Hospital's failure to attain compliance with CMS Conditions of Participation (CoP) requirements for Emergency Services. CMS found that the Hospital's deficiencies limit its capacity to provide services at an adequate level and quality. CMS's termination of the Hospital's provider agreement terminates the Hospital's ability to provide Medicaid/Medicare services and bill for the same.

The IHS's failure to comply with the CMS CoP requirements is unacceptable. It is especially egregious given that this Termination Notice comes after a long string of CMS cited deficiencies at the Pine Ridge Hospital. IHS has a long history of inadequate quality of care at the Pine Ridge Hospital, set forth in detail in recent times in the 2010 Dorgan Report.<sup>2</sup> This latest CMS cited deficiency is particularly deplorable as CMS's onsite survey of the Hospital was part of IHS's effort to satisfy CMS's cited deficiencies from November and December 2015 and its effort to get out from under the Systems Improvement Agreement (SIA) it entered into in April 2016. IHS executed the SIA specifically to ensure compliance with the CoPs and facilitate the delivery of quality health care services at the Pine Ridge Hospital.

To say our Tribe is disappointed with the IHS is an understatement, but we are also severely frustrated and deeply concerned about the impacts the termination of the Hospital's provider agreement will have on the IHS's delivery of health care services to our people. The loss of Medicare/Medicaid reimbursements will have significant financial consequences for the Pine Ridge Hospital. Medicaid is critical to the Indian health system. In 1976, Congress authorized the IHS to bill Medicaid in an effort to provide badly needed resources to the chronically underfunded IHS. We have heard the IHS previously state that approximately 52 percent of our Pine Ridge Hospital's budget is from third party billing to Medicare and Medicaid. Regardless of that exact figure, the IHS undoubtedly needs Medicare/Medicaid funds to operate the Hospital, which already operates on a woefully underfunded budget. The Hospital simply cannot operate on its base budget alone, let alone address the alarming health care disparities on our Reservation.

We are thankful that Congress recently appropriated \$29 million to the Great Plains Area in emergency funds for IHS to use in addressing compliance with CMS standards. However, as Elizabeth Fowler, Deputy Director for Management Operations of the IHS, testified, our Hospital will still lose its certification and although IHS is considering next steps, she was unable to identify exactly what those were. Ms. Fowler agreed to provide the Committee a briefing paper on next steps. We look

<sup>1</sup>Joel Achenbach, "U.S. Life Expectancy Varies by More Than 20 Years From County to County," *Washington Post* (May 8, 2017); Laura Dwyer-Lindgren, et al. "Inequalities in Life Expectancy Among US Counties, 1980 to 2014: Temporal Trends and Key Drivers," *JAMA Intern. Med.* (May 8, 2017).

<sup>2</sup>In *Critical Condition: The Urgent Need to Reform the Indian Health Service's Aberdeen Area*, Report of Chairman Byron L. Dorgan to the Committee on Indian Affairs, 111th Cong. (Dec. 28, 2010) ("2010 Report").

forward to this information. In light of the longstanding and pervasive nature of IHS's substandard quality of health care in the Great Plains Area, we remain wary of a temporary fix and request that the IHS implement a root and branch approach to achieve lasting reform. A part of this root and branch approach must be transparency in how IHS is spending its funds.

The current crisis at our Hospital stems, in part, from ongoing problems: a staffing shortage, high turnover and an unqualified staff. Filling the copious vacancies at our Hospital is essential to help keep it open and improve its quality of care not only to satisfy CMS's CoP requirements but also to ensure that our members receive the health care they need and deserve. The position vacancy rates at our facilities are unacceptable. IHS is limited in its ability to attract qualified staff because it cannot compete with the private sector. To be on a level playing field with the private sector, IHS needs more funds and the flexibility to provide additional resources in compensation packages. In addition to an inability to attract staff, IHS cannot retain those it does hire. It is common for health care providers to only stay long enough to satisfy their temporary contract. Once their contract is up, they move on. The Tribe has continually expressed concern with IHS's inability to recruit, hire, and retain skilled medical staff.

In addition to qualified medical staff, we need trained, expert hospital administrators and administrative staff. Administrators must prioritize recruitment and a stable, well-managed work environment. Further, the administrative staff should be trained and proficient in third party billing to enable aggressive pursuit of third party collections, so no available health care funding is left on the table. This assumes our Hospital will be recertified by CMS, a necessary step for us. Limited funding for medical facilities and basic and necessary equipment is, of course, another challenge in recruitment and retention because these inadequacies make the staff's jobs much harder.

Third party resources are an increasingly important component of IHS funding. The Oglala Sioux Tribe would like to be assured that these resources have been effectively managed or used by the IHS to improve patient care. Under federal law, third party collections are primarily to be used "to achieve or maintain compliance with applicable conditions and requirements" of the Medicaid and Medicare programs. If there are amounts collected in excess of what is needed for this purpose, such collections shall be used "subject to consultation with the Indian tribes being served by the service unit. . . , for reducing the health resource deficiencies (as determined in section 1621(c) of this title) of such Indian tribes."<sup>3</sup> An audit of IHS should reveal whether third party collections have been and are being used for maintaining compliance or for reducing health resource deficiencies.

We have asked for congressional action regarding the IHS's unacceptable operations because Congress should act to ensure the proper provision of health care by the IHS to Indian tribes and fair access to Medicare and Medicaid by our people. S. 465 takes important steps towards determining how the IHS is using Indian health care funding. We support this legislation. Again, we believe the legislation should focus on the Great Plains Area. We do not want IHS resources expended in other Areas for audit purposes if those Areas are functioning properly and with transparency, and do not affect how the Great Plains Area operates. We also believe Congress could do more. Hence, we support the recommendations offered by David Flute, Chairman of the Sisseton-Wahpeton Sioux Tribe, to improve and strengthen S. 465. Indeed, efforts to improve transparency, accountability, and meaningful partnership and consultation with IHS should begin with S. 465. Thus, we support an amendment to S. 465 that would require the Department of Health and Human Services Office of Inspector General to meaningfully consult and collaborate with Tribes concerning the formulation of the study, findings of the report and the submission to Congress.

The chronic underfunding of the IHS and the neglect of treaty obligations over the years has and continues to take an enormous toll on our members' health and well-being. The IHS Great Plains Area has struggled for too long with lack of resources, poor administration, and the inability to retain qualified medical staff to serve at its service units. This all leads to substandard quality of care for our people. All we want is quality health care for our people. Certainly, this should not be an unachievable goal in the United States of America, especially when the United States of America bears treaty and trust responsibilities to us.

Thank you for your attention to this most important matter.

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<sup>3</sup>25 U.S.C. § 1641(c)(1)(B).

PREPARED STATEMENT OF KATE FITZ GIBBON, EXECUTIVE DIRECTOR, COMMITTEE FOR CULTURAL POLICY<sup>1</sup>

Mr. Chairman, my name is Kate Fitz Gibbon and I am the Executive Director of the Committee for Cultural Policy, a non-profit organization dedicated to educating the American public and urging an open discourse as the foundation of a balanced cultural policy in the US. The Committee for Cultural Policy supports museums and the museum mission to preserve, research, and display art and artifacts for the public benefit. We support the lawful circulation of art and artifacts, as Congress did in enacting the 1983 Convention of Cultural Property Act and the 1979 Archaeological Resources Protection Act (ARPA).

The Committee for Cultural Policy (CCP) has identified a number of key concerns with the STOP Act:

- The STOP Act will discourage collecting and trade of lawfully owned Native American objects, undermine cultural tourism, which is an economic mainstay of several Western states, and create legal uncertainties for the hundreds of thousands of Americans who have collected Native American art and artifacts for generations.
- The STOP Act fails to define the difference between ceremonial and non-ceremonial objects, and it leaves the definition of “Native American cultural objects” subject to export prohibitions open to new tribal interpretation for each Native American object seeking export. The knowledge of what is communally owned and inalienable is privileged information, and may be known only to initiates within each tribe.
- The Stop Act would violate the individual right to due process under the Fifth Amendment by making it illegal to export certain items without giving the individual proper notice of what items are illegal to export.
- The STOP Act is unnecessary because “trafficking” in violation of NAGPRA or ARPA is already unlawful, and 18 U.S.C. § 554 already prohibits export from the United States of any object contrary to any law or regulation of the United States, and imposes ten years’ jail time for a first offense.
- The STOP Act establishes as official U.S. government policy the return of all “items affiliated with a Native American Culture” to the tribes, which would include millions of objects currently in lawful circulation in the U.S., and millions more in American museums.

We have highlighted the following issues in the STOP Act that are of particular interest to American museums and the collectors that support them.

**1. The STOP Act makes it federal policy to encourage the return of all Native American-affiliated objects to tribes. This could damage cultural tourism, particularly in the West, eliminate a major form of art collecting and art appreciation, and destroy hobbyist activities that are legal, educational and give pleasure to hundreds of thousands of Americans**

The STOP Act’s federal returns program is based on a new and dangerous federal policy to encourage the return of all Native American-affiliated items to tribes, even when ownership and trade in such objects is perfectly legal. STOP Act fails to address what the repercussions will be for “collectors, dealers, and other individuals and non-Federal organizations that hold such heritage” who do not to engage in the returns program and attempt to sell or donate these legally-owned objects to a museum or other organization.

The “tangible cultural heritage” protected by the STOP Act’s returns policy extends beyond any individual’s reasonable expectations because this policy seeks to curb the trade of any “culturally, historically, or archaeologically significant objects, resources, patrimony, or other items that are affiliated with a Native American culture,”<sup>2</sup> regardless of an object’s legal title, cultural significance, economic value, or even the tribes’ desire to have the object returned. Is the STOP Act truly seeking to have every miniscule potsherd and arrowhead returned to Native American tribes? Every Native American ceramic pot, rug or bracelet?

To give just one example of the type of legal material affected by this provision of the STOP Act, the prohibition against trafficking in archeological resources in ARPA specifically excludes arrowheads found on the surface of the ground. Presi-

<sup>1</sup>The Committee for Cultural Policy, POB 4881, Santa Fe, NM 87502. [www.committeeforculturalpolicy.org](http://www.committeeforculturalpolicy.org), [info@committeeforculturalpolicy.org](mailto:info@committeeforculturalpolicy.org).

<sup>2</sup>H.R.3211, 115th Cong. § 3(5) (2017).

dent Jimmy Carter was just one of thousands of American hobbyists who have collected arrowheads legally since they were children. There are now hundreds of hobbyist groups of arrowhead collectors, with hundreds of thousands of members, who like President Carter, are enthusiastic collectors of arrowheads. These clubs may be found in every state in the U.S.

The adverse effects of the STOP Act's "voluntary" returns program and Tribal Working Group will affect not only private dealers and collectors, and private individuals, but also the Native American artisans who rely on the sale of their artworks to support their livelihood. Is that truly the outcome that the STOP Act seeks to achieve?

**2. The creation of a federal policy that encourages the return of all Native American-affiliated objects to tribes could deprive legally owned objects of their fair market value, amounting to a regulatory taking**

The STOP Act's adoption of a federalized return policy applying to all Native American affiliated objects policy will likely result in an insidious regulatory taking by destroying the value of American private property and threatening the collections of America's citizens, museums and cultural institutions, as well as the viability of many businesses and Native American artisans.

Supreme Court precedent recognizes two forms of takings for Fifth Amendment purposes: First, where the government requires permanent physical invasion of individual's private property, however minor, there must be just compensation.<sup>3</sup> Second, and more relevant to the STOP Act's dangerous effects, is where regulations completely deprive an owner of "all economically beneficial us[e]" of his or her property.<sup>4</sup>

In the seminal case on government takings, *Penn Central Transp. Co. v. New York City*, the Supreme Court outlined three main factors to determine whether there has been a taking within the scope of the Fifth Amendment: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with investment-backed expectations and (3) the character of the government action.<sup>5</sup> Later, in *Lingle v. Chevron*, the Court applied the *Penn Central* and other 'takings' jurisprudence to conclude that any taking inquiry "turns in large part. . . upon the magnitude of the regulation's economic impact and the degree to which it interferes with legitimate property interests."<sup>6</sup>

There is no disputing that individuals, ranging from private collectors to tribal artisans have legitimate private property interests in these objects. No regulations at the time of acquisition of this property would put the individual on actual or constructive notice that these objects would be subject to such broad oversight.<sup>7</sup> Thus, their investment-backed expectations would reasonably include the rights to buy, sell, and possess the item so long as the object was not illegally acquired in contravention of state or federal law, such as ARPA and NAGPRA. These are some of the most fundamental "sticks" that form legitimate property interests under United States law.

The impact on the economic value of these objects is both predictable and deleterious. The proposed federal voluntary returns policy fails to address what the repercussions will be for the individuals who do not to engage in the voluntary returns program and attempt to sell their property or even donate it to a museum or other organization. Instead, this policy creates a stigma on objects and individuals who do not comply with this "voluntary" returns program—a stigma that can completely diminish the market value of that object, denying the property owner of the right to earn a "reasonable return" on his or her property.<sup>8</sup>

The STOP Act's institution of a Tribal Working Group to provide recommendations regarding "the return on tangible cultural heritage by collectors, dealers, and other individuals and non-Federal organizations"<sup>9</sup> is further problematic. The Act creates an oversight group that is not limited to recommending the return of illegally removed or trafficked objects in violation of federal law. Rather, the Act delegates to this Tribal Working Group the right and responsibility to recommend the

<sup>3</sup>*Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538 (2005).

<sup>4</sup>*Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538 (2005) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

<sup>5</sup>*Penn Central Transp. Co. v. New York City*, 438, U.S. 104, 124 (1978);

<sup>6</sup>*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539–40 (2005) (citing *Penn Central Transp. Co. v. New York City*, 438, U.S. 104 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

<sup>7</sup>See e.g., *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000).

<sup>8</sup>*Penn Central Transp. Co. v. New York City*, 438, U.S. 104, 129 (1978).

<sup>9</sup>H.R. 3211, 115th Cong. §5, (2017).

return of any and all legally owned objects, regardless of whether those objects were part of the voluntary returns program. Collectors, museums, dealers, hobbyist groups, etc. have no voice.

How else will this Tribal Working Group find out about objects owned by collectors, dealers, and other private individuals, except by closely supervising the trade of Native American-affiliated items? Not only is this an exceptionally overbroad delegation of power, it will also contribute to a stagnation in the trade of Native American objects, as individuals will no longer be able to trade in these objects without constant fear that the Tribal Working Group may intercede and recommend the object be returned.

With such power granted to this Tribal Working Group, Native American-affiliated objects will likely become unsellable, as individuals and institutions will likely refuse to purchase or accept these objects because of the stigma now attached to these otherwise lawfully-owned objects. Such an adverse economic impact would eventually amount to a regulatory taking because the policy will deprive numerous collectors, dealers, and individuals of the fair market value of their property without any just compensation.

### **3. The STOP Act's Returns Program's Policy Also Contradicts ARPA's Intention That Private Collections Remain a Resource for Preservation and Study of Native American Culture**

While the intentions of the STOP Act's voluntary returns program are understandable—even admirable—the policy directly contravenes the very policies of ARPA and NAGPRA, which undergird the STOP Act itself. This policy acknowledges that American tribes do not have a superior right to all Native American-affiliated objects, simply because these are Native American in origin. Our country has had a long history of protecting private property rights. Native American art and artifacts collected by American citizens have long been interpreted as private property, and our constitution requires that certain due process requirements be met before they are taken away.

Art traders and the collecting community have been accused in the media of exploiting Indian culture, especially in light of the 2015 auction sales in Paris of sacred masks and statues belonging to the Native American Hopi tribe. The major Native American art trade organization ATADA has adopted bylaws forbidding trade in items in current ceremonial use,<sup>10</sup> established due diligence guidelines to protect buyers and sellers,<sup>11</sup> and initiated public education programs<sup>12</sup> as well as a truly voluntary returns program that has brought dozens of important ceremonial items back to tribes in the last year.<sup>13</sup>

But it should be remembered that the vast majority of the trade in Indian artifacts—virtually all the trade in current market—is completely legal, and that Congress deliberately excluded pre-existing privately held collections of artifacts from ARPA's prohibitions on trafficking, in part because they formed a valuable resource for academic study. ARPA's Findings and Purpose states:

"The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979."<sup>14</sup>

ARPA's legislative history reinforces this policy:

"The Committee is concerned that greater efforts must be undertaken by the Secretary and professional archaeologists to involve to the fullest extent possible non-professional individuals with existing collections or with an interest in archaeology. The potential benefit of this increased cooperation is enormous;

<sup>10</sup> ATADA Bylaws, Article X, Trade Practices, Ethics, And Guarantees. <https://www.atada.org/bylawspolicies/>

<sup>11</sup> ATADA Bylaws, Article XI, Due Diligence Guidelines. <https://www.atada.org/bylawspolicies/>

<sup>12</sup> ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.

<sup>13</sup> ATADA Bylaws, Article X, ATADA Guidelines Regarding the Trade in Sacred Communal Items of Cultural Patrimony. <https://www.atada.org/bylawspolicies/>

<sup>14</sup> 16 U.S.C. § 470aa(b).

there is a wealth of archaeological information in the hands of private individuals that could greatly expand the archaeological data base on this country.”<sup>15</sup>

Only objects excavated subsequent to 1979 or unlawfully possessed prior to 1979 are impacted by ARPA. Congress expressly intended private collections to serve as open resources:

”Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to October 31, 1979.”<sup>16</sup>

As applied in Section 4(a) of the STOP Act, the implementation of a voluntary returns program of all Native American-affiliated objects supports a blanket federal policy to completely end the trade, collection, preservation in institutions, museum holdings and any other form of possession of Native American art of all kinds by US citizens.

4. STOP Is Unprecedented and Untested Legislation as an “Export Law.” It is Radically Different from All Other Export Laws and Cultural Property Laws Around the World.

Typically, export laws in developing nations prohibit export of all cultural property, which includes everything from paintings to postage stamps over 50–100 years old. This is often the case where a nation has a history of colonial exploitation and also, very importantly, where the local economy is too weak to retain important art or manage resources. The US is by far the largest market in the world for Native American art. Laws in some totalitarian nations prohibit all export as a means of centralizing and controlling movement of property and sometimes as a means of limiting free expression of ideas. So, for example, books and historical documents are considered cultural property under these laws.

Laws in some developed nations (such as Great Britain or Canada) require a permit for export of items over a certain age and value. Permits are almost always granted, and when they are not granted, the law provides for systems (government grants, special purchases) to acquire the art for the nation at Fair Market Value. To be subject to export review, objects considered ‘ethnographic material’ must have a fair market value of \$3,000 if made by an “Aboriginal person.”

In the UK, an exporter is required to obtain a permit in order to export artworks and historic objects meeting criteria based on Fair Market Value, archaeological status or origin. The Arts Council’s Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA) advises the government on whether to retain an artwork or grant an export license. Permission to send the item out of the UK may be refused in order to allow time for repurchase of the artwork by a UK museum or charitable fund. Repurchases are usually supplemented by public donations.

Laws in other developed nations regulate export of all art in a national inventory, based on a specific list of identified objects that are restricted from permanent or temporary export. Each object subject to export restriction is individually cataloged. This is the case in Japan, where cultural property of different degrees of importance is documented and classified into categories from freely exportable to lawful for temporary export for exhibition purposes (just over 10,000 items in the entire history of Japanese art), to unlawful to export under any circumstances (about 1400 individual items, many in the Imperial collections).

Industrial nations also prohibit trade in very specific non-art commodities, either to protect industry or limit access to technology, for example nuclear or weapons technology.

STOP does not fit into any of these categories of existing laws. It’s not based on value, not on a list of objects, or defined types of items that cannot be exported. That means that there are no similar models, in the US or internationally, that we can look to and compare how other laws have worked in the past. That no such system has ever been tried in any other country should discourage the broad imposition of highly restrictive policies affecting virtually all Native American art.

## 5. Conclusion

The Committee for Cultural Policy urges that the Senate Indian Affairs Committee seriously consider alternatives to the STOP Act to find a cure for the serious concerns of the tribes. The answer cannot be found in the flawed legislation of the STOP Act. Instead, this Committee should consider as alternatives:

- legislation to more efficiently bring objects and ancestral remains already under federal government control back to the tribes, to ensure adequate funding

<sup>15</sup> H.R. REP. 96–311, \*12, 1979 US.CC.A.N. 1709, \*\*1714

<sup>16</sup> 16 U.S.C. § 470ee(f).

for National NAGPRA, to fund tribal cultural offices, and to develop tribal legislation to ensure that important cultural resources remain permanently in tribal hands;

- educating the public on tribal values;
- facilitating truly voluntary returns of important cultural objects;
- building tribal government capacities and cultural heritage institutions, and creating tribal organization(s) to accept voluntary donations.

I would like to thank the Senate Indian Affairs Committee for the opportunity to present testimony. The Committee for Cultural Policy respectfully requests the Senate Indian Affairs Committee to carefully consider all the concerns raised regarding this legislation and to reject the STOP Act as written.

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PREPARED STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY (SAA)

Dear Chairman Hoeven and Vice Chairman Udall,

The Society for American Archaeology (SAA) appreciates this opportunity to provide testimony on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017. This bill would enhance the United States' ability to prevent the export of tribal objects of cultural patrimony acquired in violation of the Archaeological Resources Protection Act (ARPA) or the Native American Graves Protection and Repatriation Act (NAGPRA), and to help prevent the sale of such items that have already been removed from US territory. While we do have concerns with certain provisions, we are hopeful that these issues can be resolved in the weeks ahead.

SAA is an international organization that, since its founding in 1934, has been dedicated to the research about and interpretation and protection of the archaeological heritage of the Americas. With more than 7,500 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states and many nations around the world.

**The need for the legislation in halting overseas auctions**

The looting of Native American archaeological materials and objects of cultural patrimony from federal and tribal land is a longstanding and multi-faceted problem and was a primary reason for the enactment of such statutes as the Antiquities Act, ARPA, and NAGPRA. SAA has consistently worked to end such looting and trafficking both at home and abroad. We have long stood against the buying and selling of objects out of archaeological context. As noted in our Principles of Archaeological Ethics, commercialization “. . . is contributing to the destruction of the archaeological record on the American continents and around the world. The commercialization of archaeological objects—their use as commodities to be exploited for personal enjoyment or profit—results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record.”

In recent years, numerous objects of great spiritual and cultural importance to Native American tribes have been put up for sale in European auction houses. SAA and other organizations, including the US government, have repeatedly asked foreign auction houses and governments to prevent these sales from going forward. For example, in Europe, there were highly publicized sales of objects affiliated with the Hopi and other Southwestern tribes in both 2012 and 2013. The sales went ahead, in spite of objections from tribal and preservation groups and the U.S. State Department. Foreign government officials asserted that the auctions could not be stopped because the US did not have a law specifically prohibiting the export of illegally procured Native American objects.

Section 2 of S. 1400 would close this gap by explicitly barring and setting penalties for the knowing export of Native American cultural items that were obtained in violation of ARPA, NAGPRA, or the Antiquities Act. It would also increase the maximum term of imprisonment for repeated violations of NAGPRA from five years to ten. These are simple and straightforward remedies that will not only help deter the export of illicitly acquired materials, but also give our government the crucial legal footing it needs to halt future overseas auctions of such pieces.

**Voluntary return of items**

Many objects important to Native American tribes were taken illegally, both prior to and after the enactment of the federal laws, and in some cases against tribal law. These objects may still be located in the US, or they may be overseas. In the US, NAGPRA provides a valuable and effective method of repatriating certain types of

articles held by federally linked institutions to lineal descendants and culturally affiliated tribes. No such mechanism exists, however, for objects and materials still in the United States but not covered by NAGPRA.

Sections 3 and 4 of S. 1400 attempt to address this matter by defining and establishing a mechanism of voluntary return of items of “tangible cultural heritage.” Under this language, it would become the official policy of the federal government for “collectors, dealers, and other individuals and non-Federal organizations” that hold such articles to return them—without threat of prosecution—to Indian tribes and Native Hawaiian organizations.

We find that enactment of these provisions, as currently worded, would be highly problematic for the following reasons:

Sec. 3(5)(B)’s current definition of Tangible Cultural Heritage will be interpreted to mean virtually anything of Native American origin, regardless of age or means of acquisition. This would pose dramatic practical problems in both interpretation and implementation. Every potsherd and arrowhead in archaeological collections can be considered “significant,” and thus subject to the Federal Government’s voluntary return policy.

Coupled with the broad definition of “tangible cultural heritage” in Section 3, Section 4 says that all non-federal museums and research institutions should return all of their Native American collections, regardless of the provenance of the items, the means of acquisition, or of the ongoing relationships that such facilities have with tribes. Thousands of cultural, natural history, and art museums that hold substantial collections of Native American items and that use them both for research and educational exhibits would be subject to this voluntary return policy of the United States, even though the objects in their collections were acquired legally, and even though many of these museums have excellent relationships with tribes and hold items in trust for them. Under such circumstances, research into our shared past would come to a halt.

It should also be stated that the Voluntary Return section of the bill is vague, convoluted and, in many ways, simply impractical. For example, the bill is not clear on how the referrals process would be effectuated from what consultation means under the bill, including how notice would be given to other tribes and Native Hawaiian organizations to the operation (selection, election, terms) of a new advisory working group. Moreover, the proposed bill provides no funding for a position at DOI to do the referrals, maintain the referral list, or make determinations of “likely” affiliation. It offers no funds for tribes to repatriate items or hire staff to handle the referrals, both of which can present a significant financial hardship. Additionally, it should also be stated that the “return” outcome envisioned in the bill would not be as straightforward as it might appear. For example, to which Apache or Cherokee or Yavapai tribe should an item known only as Apache, or Cherokee, or Yavapai go? Also, what about objects whose affiliation might be shared between tribes, or items that don’t have an associated modern tribe but are nonetheless Native American?

Furthermore, NAGPRA provides an established process for the repatriation of cultural items (human remains, sacred objects, funerary objects, and cultural patrimony) that are under the control of museums and universities that receive federal funds. We believe that cultural items, as defined by NAGPRA (including human remains), will cover the items at issue. As written, S.1400 provides a parallel process for the return of these same items from these same institutions, adding a legal conflict and leading to confusion without providing any additional protection or benefit with respect to these remains and items.

However, we appreciate the intent of Sections 3 and 4, and see the need for some kind of voluntary method for restoring to the tribes looted objects that are not covered by NAGPRA, and that are still in the U.S. We believe the language could be rewritten (1) to apply to “cultural items” as defined by NAGPRA (and embodied in Section 2 of the proposed law—eliminating the term “tangible cultural property”); and (2) to specify that the voluntary return policy does not apply to museums, universities, and other institutions that are subject to NAGPRA, only to dealers, collectors, and other organizations.

An alternative would be to eliminate Section 4 altogether and to convene a gathering of all stakeholders on this issue to create a new approach in separate legislation. In either case, it would be useful to add a provision authorizing more funding and staffing for law enforcement in the area of cultural resources and looting or illegal trafficking.

SAA strongly supports the export-related provisions of S. 1400, and stands ready to work with Senator Heinrich and the committee to remedy what we see as some serious problems and to help move this legislation forward.



## PREPARED STATEMENT OF HON. RUSSELL BEGAYE, PRESIDENT, NAVAJO NATION

Ya l'át'ééh Chairman Hoeven and Members of the Committee.

My name is Russell Begaye. I am president of the Navajo Nation. I want to thank the Committee, Chairman Hoeven, and Vice Chairman Tom Udall for holding this legislative hearing on an important matter that affects all of Indian Country.

The Navajo Nation supports S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act).

The Navajo Nation has been entrusted with the protection of funerary objects, sacred objects and objects of cultural patrimony since the beginning of time.

As the President of the Navajo Nation, this responsibility is not all my own. I am humbled and honored to share in this sacred responsibility with our past leaders, our current cultural teachers, and the medicine people who today lead our ceremonies and our sacred prayers. We believe that through their practice and use of our sacred objects, they restore balance, health, and spirituality to bring us together as Diné People. These sacred objects are central to our future as Diné people. These objects are as important as our language, as important as the four sacred Navajo mountains and as important as this land that we have lived on since time immemorial.

The United States government, Native American cultural and political leaders and the academic world have introduced many pieces of landmark legislation in the past hundred years to provide protection of tribal patrimonial items. To those cultural pioneers and leaders, we thankful to them for their work and advocacy on behalf of all Indian Nations. However, from time to time, we must revisit these cultural protection laws based on the ever-changing world and add protections that were unseen at the time these laws were enacted.

Today, we are here to show our support of the STOP Act to improve upon the body of cultural resource protection law, domestically and internationally.

The Navajo Nation is in full support of federal and legislative measures that address the illegal sale and trafficking of Native American cultural patrimony. We thank the lawmakers and the administrative officials for their leadership and support on these matters.

Before cultural resource protection laws were enacted, thousands of objects of cultural patrimony were taken, stolen and sold by people who had no right to sell them to European traders, collectors, museums and academic institutions. We recognize that the western concept of art, archeology, anthropology, and government encompasses a view of cultural patrimony as objects to be studied and admired for intellectual gain. We also acknowledge that there are individuals in academia who have spent their entire careers studying our people and that there are higher education institutions devoted to teaching their students about American Indians.

However, our people and our objects of cultural patrimony are not to be studied, hung on walls to be admired or cataloged and placed in storage bins in annexes across the world. Our sacred objects are not like the western concept of icons and statuary that are found in western churches, displayed in museums or sold at auction or traded on the black or open market.

Our medicine people sang and prayed over these sacred items in ceremonies for days, and in some cases, weeks. The raw materials used to create our sacred items are sacred themselves. Our people, our holy people, created these items for the benefit of our Nation. These items were created to maintain the sacredness and the wholeness of our people. Without them, we are not a whole people.

Museum curators, scientists, and collectors do not have the inherent knowledge, nor do they possess the right to care for these sacred objects in our sacred way. Curators, scientists, and collectors cannot care for these objects, nor can they restore balance into the lives of our people. These are sacred responsibilities that were bestowed upon by our holy people to our medicine people. Our medicine people possess the divine right to care for these objects. We believe that by utilizing our sacred objects in ceremonies—through our songs and our prayers—that balance, harmony and healing is restored to our communities.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a serious threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

For decades, the Navajo Nation has shared in the struggles with other tribal nations to recover the physical remains of our ancestors and the sacred objects they left behind. The Navajo Nation has litigated tirelessly over the shortcomings of

NAGPRA as recently as last year. We, as a sovereign nation, continue to struggle with utilizing current U.S. laws to protect our sacred objects and remains in the jurisdiction of your international counterparts.

Last year, the Navajo Nation recovered several ceremonial masks from a Paris, France auction, but not without extreme difficulty. The Paris Auction House refused to remove Navajo ceremonial masks from its sale, citing lack of explicit export prohibitions. The Nation eventually recovered 15 masks following monetary negotiations with the Auction House. Unfortunately for the Nation, the French people and their government did not understand, nor did they attempt to understand, our perspective—these objects were sacred and were not created to hang on walls of museums. France simply equated our interest in the return of these objects as a religious issue. France did not take into consideration that these ceremonial masks were integral to our very existence. Other nations have demonstrated a similar view.

Our most recent experience with the Paris Auction House, not dissimilar from all other repatriation efforts, is why the Navajo Nation passionately supports the STOP Act. Why should we, as Diné People, be forced to participate in a bidding process to retrieve items that were taken and sold by individuals who had no right to do so?

We must educate all about these issues—not just the French people, but also the European Union and other nations harboring our sacred objects and objects of cultural patrimony.

Our sacred artifacts and cultural items are an important part of the Navajo culture and beliefs. They provide us a sense of who we are and provide us sustenance for our physical, emotional and spiritual wellbeing.

We look forward to working with Congress and the Administration to enact current measures including the STOP Act of 2017—a bill that will prohibit the exporting of sacred Native American items and increase penalties for stealing and illegally trafficking tribal cultural patrimony.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. It is important to note, the STOP Act does not extend the reach of these three laws to the tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it increases the deterrent effect of current law, creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

By passing these cultural protection laws, Congress will take a major step in history in its endeavor to make the Navajo Nation and all tribes across the country whole after experiencing the erosion of their cultural identities. We are grateful to you, to the Committee members, and to the Committee staff for your work in drafting STOP. Your continued support for the recovery of our sacred objects will not only contribute to our *hózhó*, the beauty way of our life, but your support of S. 1400 will also ensure the survival of our People. The Navajo Nation and Indian Country are grateful for your service and long-term vision and wisdom on this matter. Thank you.

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PREPARED STATEMENT OF THE UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND (USET SPF)

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Senate Committee on Indian Affairs (SCIA) with the following testimony for the record of its November 8, 2017 legislative hearing on S.1400, *The Safeguarding Tribal Objects of Patrimony (STOP) Act of 2017*, and S.465, *The Independent Outside Audit of the Indian Health Service Act of 2017*.

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas.<sup>1</sup> USET SPF is

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Arosotook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY),

dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

#### **Safeguarding Tribal Objects of Patrimony Act of 2017**

USET SPF registers our strong support for the STOP Act of 2017. The protection of our sacred cultural items is essential to the survival of our cultures. For too long, USET SPF Tribal Nations, and Tribal Nations across the country, have faced the ongoing theft and commercial sale of our sacred cultural objects. These sales have occurred both nationally and internationally, despite current federal law aimed at protecting items of cultural patrimony. The desecration of our cultural objects, which often include human remains, must stop, and these items must be returned to our people.

Stronger penalties are urgently needed to deter the illegal conduct by which these sacred items are obtained and sold. The STOP Act of 2017 would make necessary changes to existing federal law by increasing penalties, explicitly prohibiting exportation of cultural items, and providing immunity for the voluntary repatriation of cultural objects. Further, the STOP Act calls upon the federal government to form Tribal working groups to advise and help federal agencies fully understand the scope of these problems and how to solve them.

USET SPF believes that stronger penalties will discourage illegal conduct and even lead to a dialogue with the holders of these cultural objects that will enable their safe return home. The ability of Tribal Nations to rebuild and create a healthy future depends, in large part, on how we are able to understand our respective pasts. Our cultural and sacred items provide a vital link to our history, our ceremonies, and our way of life.

USET SPF commends Senator Martin Heinrich, and cosponsors, for the introduction of the STOP Act and calls upon Congress for its swift passage.

#### **Independent Outside Audit of the Indian Health Service Act of 2017**

The manager's amendment to S.465, *The Independent Outside Audit of the Indian Health Service Act of 2017*, would require the Inspector General (IG) of the Department of Health and Human Services (HHS) to conduct an assessment of IHS' health care delivery systems and financial management processes at IHS direct-care facilities. If the IG does not conduct the assessment after 180 days, then HHS would be required to enter into one or more contracts with an independent, private entity to conduct the assessment. The assessment would focus on several issue areas including: the demographics and health care needs of the patient population, health care capabilities and resources, staffing levels and productivity health care providers, and information technology strategies, among others.

USET SPF appreciates Senator Rounds' and SCIA's efforts to address the ongoing health care delivery issues within the Great Plains Area and understands that S. 465 is a response to this crisis. However, we have a number of concerns with both the legislation as introduced and the Senator's proposed manager's amendment. USET SPF feels a broad, one-size-fits-all approach to addressing these problems is unwarranted. S. 465 seems to be a national response to regional, Area-specific concerns. Not all twelve IHS Areas are experiencing these same types of failures, and there are lessons to be learned from the best practices they employ. Yet, S. 465 does not examine best practices across the IHS system, and many of the issues the bill seeks to examine are currently being reviewed or have previously been reviewed by the Government Accountability Office (GAO) and other entities.

#### *Effect on Self-Governance Facilities and Indian Health System*

We acknowledge the Senator's work in responding to concerns with S. 465 by issuing a manager's amendment clarifying the assessment would apply only to IHS-run facilities. However, it is important to note that regardless of the assessment's scope, it has the potential to impact the entire Indian Health System. For example, all Tribal Nations utilize the Purchased/Referred Care (PRC) Program for the purchase of care outside of IHS and Tribal facilities. Both the bill and the manager's amendment seek a review of the authorities under which outside care is furnished. GAO is currently reviewing this program and providing its recommendations to IHS' PRC Workgroup. It is unclear, then, whether the review prescribed by S. 465 is necessary and what effect it might have on the implementation of GAO recommendations occurring at the time of passage. In addition, the Senator has indicated this

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Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

bill is designed to lay the groundwork for additional legislative action reforming IHS. Resulting legislation that seeks changes in funding levels, formulas, or management processes is unlikely to be limited to Direct Service units.

*Assessment of the Indian Health Service*

While USET SPF fully agrees that the devastating failures of the Great Plains IHS Area must be accounted for and fully addressed, an assessment of this magnitude, whether internal or external, is likely to divert much needed funding and/or attention away from patient care, a violation of the federal trust responsibility. IHS witness, Elizabeth Fowler, included this concern in her written testimony. Vital healthcare resources must be not be redirected to provide information that, in many cases, has already been provided to Congress and the public. We agree with IHS that 180 days is an insufficient timeframe for an internal assessment.

Additionally, we continue to have concerns that an external entity may not have experience with the Indian Health System, a requirement to interpret any data collected. The Indian Health System, while in some ways similar to Veteran's Affairs, is the only federal health care system operating in fulfillment of a legal and moral trust responsibility to its patients. Its purpose, goals, and processes reflect the unique nature of this responsibility. USET SPF contends that a majority of outside entities will not have the knowledge or perspective required to properly assess IHS. The language of S. 465 and its manager's amendment must reflect the need for any outside entity to have expertise in Indian Health.

*Continued Need for Tribal Consultation*

In addition, it is problematic that this bill was introduced without broad Tribal consultation. Legislation that attempts to address issues within IHS through Congressional action, or otherwise, must be accomplished through extensive Tribal consultation. It is similarly troubling that neither the bill as written nor the manager's amendment requires consultation with Tribal Nations during the assessment/audit process or prior to the issuance of the resulting report. Tribal Nations, the recipients of care provided by IHS, must provide guidance during the assessment and have the opportunity to comment on the results of any assessment. We must have the ability to dictate how the information in the report will be presented and utilized.

*Chronic Underfunding Contributes to Failures*

Further, although USET SPF supports innovative legislative solutions to improve the quality of service delivered by IHS, we continue to underscore the obligation of Congress to meet its trust responsibility by providing full funding to IHS. Any deficiencies that could be identified within IHS through an assessment are, at least in part, a direct result of the chronic underfunding of the Indian Health System. Providing quality healthcare can only be accomplished when programs within the Indian Health System are fully funded. USET SPF is deeply concerned by continued rhetoric suggesting that increased appropriations to IHS will not address problem areas. We continue to assert that it is disingenuous to fund a health system at just under 60 percent of identified obligation and expect that system to operate properly.

The U.S. has a legal and moral trust responsibility to Tribal Nations that has been reaffirmed time and time again and are the result of millions of acres of land and resources ceded to the U.S. to provide benefits and services in perpetuity to AI/ANs. The most recent reaffirmation of this trust responsibility was articulated in 2010 though the permanent reauthorization of the Indian Health Care Improvement Act when, "Congress declare[d] that it is the policy of this nation, in fulfillment of its special trust responsibilities and legal obligations to Indians to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." Until Congress fully funds the IHS, the Indian Health System will never be able to fully overcome its challenges and fulfill its trust obligations. At a minimum, S. 465 should examine how the underfunding of IHS contributes to its operational shortcomings.

USET SPF acknowledges the efforts of the Committee seeking to address the long-standing challenges at IHS. However, we believe that S. 465 is duplicative of current, governmental efforts and would redirect vital funding to private entities and away from patient care. While we stand with our brothers and sisters who are experiencing failures in health care delivery, we ask that the Committee strongly consider the national consequences of S. 465 and work with Tribal Nations to come to a resolution that is beneficial for all IHS Areas. USET SPF maintains that until Congress fully funds the IHS, the Indian Health System will never be able to fully overcome its challenges and fulfill its trust obligations.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS  
November 22, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUBMISSION OF COMMENTS FOR NOVEMBER 8, 2017 STOP ACT HEARING,  
S. 1400

Dear Chairman Hoeven and Vice Chairman Udall:

The Association on American Indian Affairs (AAIA) is honored and grateful for the opportunity to provide support to this bi-partisan legislation that is necessary to the continued revitalization of Native cultures and supports Tribal self-sufficiency and self-determination. The Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act) declares that the exportation of cultural items and archaeological resources *that are already protected from trafficking within the U.S.* is illegal. This assertion of law and policy through the STOP Act is desperately needed.

AAIA absolutely supports the STOP Act. The AAIA is the oldest non-profit organization working in Indian Country, founded in 1922 by Indian policy reformists such as John Collier who sought to end assimilationist and allotment policies of the late 19th and early 20th Centuries. For at least the last 50 years, AAIA has worked to support Tribal efforts for the protection of indigenous religions, languages, sacred sites, and the return of ancestors, their burial items, and other looted cultural items. AAIA assisted in the development and drafting of the National Museum of the American Indian Act (NMAI Act) and the Native American Graves Protection and Repatriation Act (NAGPRA). “Protection of Cultural Items” is a significant AAIA program. As part of this program, AAIA has worked with Tribal governments and spiritual leaders, as well as attorneys and advocates, to develop appropriate legislation to STOP the export of our indigenous culture overseas.

The journey home of ancestors, funerary objects, objects of cultural patrimony, sacred objects, and other archaeological items back to their origin and into the possession and control of American Indian Nations is a significant constitutional due process and Indian Commerce Clause issue, as well as a human rights concern. The *U.S. Congress has already determined* that federal law must support the special government-to-government relationship with Tribes through protection and repatriation of cultural items through NAGPRA. The *U.S. Congress has already documented* the terrible history of how Native Americans were dispossessed of their ancestors and cultural items when NAGPRA was drafted and enacted. Yet, the commercial perspective regarding the sale of “tribal antiquities” lags far behind US law and policy and is, unsurprisingly, threatened by the current legislation that you have proposed—and for which *there has only been positive support from Tribes, Indian organizations and Native peoples.*

All opposition to this bill comes from commercial dealers that are worried the exportation ban will eat into their sales of tribal antiquities. The Antique Tribal Art Dealers Association (ATADA) and non-profits supporting the agenda of commercial dealers including the Committee for Cultural Policy (CPP) and the Global Heritage Alliance (GHA), argue how the STOP Act is too broad, redundant and therefore unnecessary, and will harm the sale of legitimate American Indian art. Such comments from this opposition are misplaced and incorrect.

**The STOP Act Applies to What Is Currently Protected Under Law**

The STOP Act’s exportation restriction applies only to what Congress has deemed is illegal to traffic: NAGPRA “cultural items,” Archaeological Resources Protection Act (ARPA) “archaeologic resources,” and the Antiquities Act “objects of antiquity”. Commercial dealers who are in possession of these items cannot traffic them domestically already.

So why are commercial dealers concerned about their exportation? Commercial dealers are in fact in possession of human remains, funerary objects, objects of cultural patrimony, sacred items, archaeological resources and objects of antiquity that were looted prior to the enactment of these laws. *But for* the time period and tribal and federal restrictions of current cultural heritage law, commercial dealers would be in possession of illegally held cultural resource items that should be protected by Tribal or federal governments.

This does not mean that the STOP Act is too broad; instead, it puts the onus where it should be—on the commercial dealer—to prove that he or she holds the item properly under current law. Any legitimate dealer should have retained the history and context of an item—without it, the item should not be marketable and should be presumed to be obtained improperly. Commercial dealers are very sophis-

ticated and are experts on the items they hold so they can place a value on the item. Often, unfortunately, more profit can be gained by the sale of items held improperly.

While the STOP Act should place the burden on the holder of an item to prove ownership at the border, the STOP Act does not present a greater burden on the federal government or customs' agents because of federal agency expertise in protecting against the importation of cultural patrimony from other countries under the Convention on Cultural Property Implementation Act (CPIA) and is trained well through State Department programs.

In addition, the argument that Tribes will not give sacred information about items is a red herring because such information is not necessary to provide notice. One need only peruse a federal register notice for the Department of Homeland Security, US Customs and Border Protection and Department of the Treasury for import restrictions imposed on certain cultural patrimony to clearly understand that identifying Native American cultural resources will not be a burden on the federal government, or for providing notice.

For example, 2013 FR 14183–14185 provides the listing of archaeological resources protected against importation into the U.S. from Belize and, as listed, includes *broadly*:

- II. Stone—Objects in any type of stone, including jade, greenstone, obsidian, flint, alabaster/calcite, limestone, slate, or other.
  - A. Tools-forms such as points, blades, scrapers, hoes, grinding stones, eccentrics and, others.
  - B. Jewelry-forms such as necklaces, earplugs, pendants, beads, and others.
  - C. Monumental Stone Art-forms such as stelae, round altars, architectural elements, and others.
  - D. Vessels-forms such as bowls and vases.
  - E. Figurines-forms such as human, animal, and mythological creatures.
  - F. Masks-burial masks of variable stone composition.

Federal Register Notice for Belize attached hereto. There is no need to describe particular detail, or other information that is deemed sacred by Tribes. Again, the onus is on the person attempting to export the item to prove proper ownership; the burden is not on Tribes to give away sacred and protected information in order to give notice.

#### **The Legitimate Sale and Ownership of American Indian Art**

There have been no American Indian artists or American Indian artist associations that have rallied against the STOP Act. In fact, AAIA's work with American Indian artists has only found support for the STOP Act because it will actually increase the market in legitimate art. Only the commercial dealers—ATADA, CPP and GHA—argue that the STOP Act will diminish the sale of American Indian art. American Indian artists however, understand that American Indian art is easily distinguishable from cultural items, archaeological resources and objects of antiquity: simply, American Indian art is signed by the artist—prohibited cultural items are not signed with an individual artist's name. Neither have museums and federal agencies had this concern when repatriating NAGPRA cultural items. This is important for commercial dealers however, because they conflate "art" with "antiquities" and use these terms interchangeably in order to legitimize the sale of "antiquities" as "art."

Commercial dealers are in possession of human remains, funerary objects, objects of cultural patrimony, sacred objects and archaeological resources that they proclaim a commercial interest in. If those "antiquities," which are distinguishable from "art," are held legitimately and in accordance with current law, then commercial dealers should absolutely be able to prove it. If they are not, then the item should not be marketable.

#### **Improvements to the STOP Act**

AAIA absolutely supports the passage of the STOP Act as soon as it can be accomplished. However, it is worth noting that the STOP Act provides Congress an opportunity to fix other issues with current legislation. First, the Enhanced Penalty section could provide stronger deterrence against trafficking and improper export if the intent requirement was amended.

AAIA supports the increased penalty from 5 to 10 years. However, a significant issue of 18 USC 1170 is the intent requirement: "Whoever knowingly sells. . ." requires the individual to know that the act is illegal. Often, this requirement of knowledge of illegality can be most difficult to prove, and therefore the criminal penalty does not provide a deterrence effect for the trafficking of cultural items. Revising the penalty to include a general level of intent, such as intent to sell (instead

of the knowledge that the selling is illegal), and no requirement of intent (strict liability), would support Congress' efforts to end trafficking. These lower or no intent crimes could provide misdemeanor or 1–2 year penalties, depending on scope of the crime.

Second, the meaning of "Native American" under NAGPRA was weakened by the Ninth Circuit case of *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004). NAGPRA's definition of "Native American" "means of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. 3001(9). The court found that "is indigenous" meant that the human remains must be affiliated with a present-day tribe. AAIA in concert with the NAGPRA Review Committee, NAGPRA practitioners and Indian Tribes have sought to amend this definition, which is used expressly in the STOP Act, to state that Native American "is or was" indigenous to the United States in order to effectuate the intent of NAGPRA to protect graves and repatriate human remains.

Finally, outside of the STOP Act, AAIA and its membership are very concerned that the US Department of Interior Secretary Zinke has indefinitely suspended the NAGPRA Review Committee. This action occurred in May 2017 and there has been no expectation from the Department when the NAGPRA Review Committee will be able to fulfill its statutory mandate. Congress mandated that the NAGPRA Review Committee oversee and make decisions about the repatriation of human remains and other cultural and sacred items. If the Review Committee doesn't meet, museums and federal agencies are unable to fulfill certain legal responsibilities, and tribes are further delayed from the return of their ancestors and cultural items. The Act states that NAGPRA is based on the unique government-to-government relationship the federal government has with Tribes (sect. 3010). Zinke's suspension of all FACA committees is an overbroad action; though his intention is to make sure stakeholders have a say in what happens at Interior, *his action is actually preventing that with Tribes and NAGPRA*. Even worse, it is my understanding that a few Tribes have been working to get meetings about the suspension of the NAGPRA Review Committee with the Secretary (or his delegate on this issue), and have been rejected several times. I hope that you will see to it that the NAGPRA Review Committee be released from Secretary Zinke's suspension.

Thank you for your attention on these important matters that support Tribal self-determination and self-sufficiency. If you have any questions, please do not hesitate to contact me.

*Yakoke*—my Choctaw thanks,

SHANNON KELLER O'LOUGHLIN, *Executive Director*.

COQUILLE INDIAN TRIBE  
*North Bend OR, November 14, 2017*

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

Dai'sla! I am the Chairperson of the Coquille Indian Tribe. I write you today to request that you support S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The Coquille is a terminated-and-restored tribe headquartered in North Bend, Oregon. Our ancestral territory includes large areas of the Southern Oregon coast and interior, an area with a high percentage of federal land ownership and many documented and still undocumented cultural resource locations.

Even though current law offers protections, the illicit trade in Native American tangible cultural heritage continues to threaten tribal cultural survival. Sacred and cultural items are illegally taken from our peoples, threatening the restoration and maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. At the same time, international black market profiteers trade our irreplaceable cultural heritage, unfettered by export restrictions.

The STOP act raises the stakes for people that violate the Native American Graves Protection and Repatriation Act (NAGPRA) and prohibits people from exporting items obtained in violation of three key archeological and cultural resource laws: NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not change what acts are considered criminal—it merely imposes higher penalties and stops traffickers from exporting contraband. The STOP Act also enables the Federal Government to help to encourage the return

of tribal cultural heritage and engages a tribal working group to provide input on implementation.

The STOP Act of 2017 will help end illegal trafficking in my Tribe's tangible cultural heritage and restore possession of our sacred and cultural items that have been separated from my community for so long. I urge you to adopt the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

BRENDA MEADE, *Chairperson.*

THE HOPI TRIBE  
November 6, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR S. 1400, THE STOP ACT

Dear Chairman Hoeven and Vice Chairman Udall:

The Hopi Tribe strongly supports S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The STOP Act will help stem the pervasive and illegal trade of tribal cultural patrimony.

The Hopi people trace our history back thousands of years, making Hopi one of the oldest living cultures in the world. Today, Hopi is a vibrant and living culture. Hopi people, *Hopisisoni*, continue to perform our ceremonial and traditional responsibilities in our ancient language.

However, we face a new threat that strikes at the heart of our culture. This new threat is the continued sale of Hopi sacred objects across the United States and the globe. The issue is particularly bleak in Paris, France where we have fought to stop these sales with both public protests and lawsuits. We, unfortunately, have not succeeded.

It is our position that all of our sacred objects on auction were illegally taken from our jurisdiction and subsequently sold in the black market that thrives today. This illicit trafficking of tribal sacred objects must stop.

Therefore, the Hopi Tribe supports your current effort to enact the STOP Act, which will strengthen tribes' ability to protect their sacred objects, increase penalties and explicitly prohibit the marketing and trafficking of tribal sacred objects. We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act.

The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity.

Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Respectfully,

HERMAN G. HONANIE, *Chairman.*

THE NAVAJO NATION  
November 7, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:



I write to support S 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 ("STOP Act"). The Navajo Nation thanks you for introducing this forward thinking bill. This bill demonstrates the incredible team work between Congress and the Executive Branch, and their ability to come together for a bill that will enhance the protection and repatriation of our human remains, funerary objects, sacred objects and objects of cultural patrimony. In June 2016, the 23rd Navajo Nation Council passed a resolution in support of the Safeguard Tribal Objects of Patrimony Act.

Despite the current protections afforded by the law, the illicit trade in Native American tangible cultural heritage continues to pose a serious threat to our cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. It is important to note that the STOP Act does not extend the reach of these three laws to tribal cultural heritage not already specified, and thus does not criminalize any legal domestic activity. Instead, it increases the deterrent effect of current law while creating a structure for federal facilitation of the voluntary return of tribal cultural heritage and engaging tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. Our cultural heritages are not objets d'art to be traded as decorative items to be put in a collection case or on a mantle piece. On the contrary, these are living and breathing objects are used specifically for healing in our most sacred of ceremonies.

We support the swift passage of the STOP Act and thank the Committee for its attention to this important matter. We are grateful to you, to the Committee members, and to the Committee staff for your work in drafting STOP. Your continued support for the recovery of sacred tribal objects will do much to ensure the survival of our People.

Sincerely,

RUSSELL BEGAYE, *President.*

November 6, 2017

**PUEBLO OF LAGUNA**

Senator Martin Heinrich  
303 Hart Senate Office Building  
Washington, DC 20510

Senate Committee on Indian Affairs  
838 Hart Senate Office Building  
Washington, DC 20510

Re: Support for Safeguard Tribal Objects of Patrimony Act of 2017

Dear Senator Heinrich:

On behalf of the Pueblo of Laguna, I am writing in strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The Pueblo of Laguna ("Pueblo") is one of 19 Pueblos in New Mexico. Our Pueblo is one of the original Pueblos located in the State of New Mexico and we are located about 45 miles west of Albuquerque on Interstate 40. We have many sacred sites on our lands.

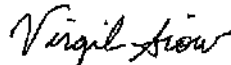
In recent years, the Pueblo has been vigilant in searching for any items of the Pueblo's patrimony which may be advertised for sale not only in the United States but in other countries as well. Since the beginning of 2016, we have located three items advertised for sale or auction at galleries located in Santa Fe and Scottsdale. We have worked with the galleries to have the three items successfully returned to the Pueblo. However, our experience has not always been successful. We are currently working with the Bureau of Indian Affairs, Office of Judicial Services, to recover items from a gallery in California.

Additionally, the Pueblo incurred significant cost to repatriate a ceremonial mask that was to be auctioned by a French auction house in 2014. The Pueblo paid around \$30,000.00 to purchase the item as it was a mask which had ongoing historical, traditional, and cultural importance central to our traditions, beliefs and customs. The Pueblo should not have to purchase an item that is rightfully ours, however the significance of the mask was such that we simply had no other choice.

The Pueblo supports the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibitions on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA) and the Antiquities Act. The Act does not extend the reach of these laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

It is our hope that stronger penalties will deter illegal conduct and even lead to a dialogue with the holders of these items that will enable their return home. Native American cultural objects must remain in tribal possession. The Safeguard Tribal Objects of Patrimony Act of 2017 serves this goal, and therefore we support the Act.

Sincerely,



Virgil Siow  
Governor

MIDWEST ALLIANCE OF SOVEREIGN TRIBES  
P.O. Box 265  
Gresham, WI 54128-0265  
715-787-4494 Office

November 1, 2017

Chairman John H. Hoeven, III  
Hart Senate Office Building, SH-838  
Washington, DC 20510-6450

Vice Chairman Tom Udall  
Hart Senate Office Building, SH-838  
Washington, DC 20510-6450

Re: Support for the Safeguard Tribal Objects of Patrimony Act of 2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the Midwest Alliance of Sovereign Tribes (MAST), we write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). MAST was founded in 1996 and represents the 35 sovereign tribal nations of Minnesota, Wisconsin, Iowa, Michigan and Indiana. Our mission is to advance, protect, preserve, and enhance the mutual interests, treaty rights, sovereignty, and cultural ways of life of the sovereign nations of the Midwest.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a grave threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

MAST believes the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home the sacred and cultural items that have been separated from tribal communities for too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,  
  
Sean R. Wolf Executive Director

MUCKLESHOOT INDIAN TRIBE  
Auburn, WA, November 6, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR S. 1400—THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY  
(STOP) ACT OF 2017

Dear Chairman Hoeven and Vice Chairman Udall:

The Muckleshoot Indian Tribe supports your Committee's upcoming hearings to consider the STOP Act, and we will support our Senators Murray and Cantwell to join as co-sponsors of this bill.

Opponents have claimed that the STOP Act would create new legal uncertainties regarding sale and export of Native American art and artifacts. However, the STOP Act is not intended to criminalize any additional activities, but simply increases the potential penalties for crimes under existing laws where cultural objects have been illegally acquired, including theft from archaeological heritage sites on federal or tribal lands. Investigation and federal prosecution of continuing crimes against native culture and patrimony has been woefully inadequate. And, significantly, the STOP Act encourages and creates opportunity for federal agencies and tribal governments to cooperate in identifying and seeking voluntary repatriation of cultural patrimony, including in private collections.

We encourage the Committee to further authorize, prioritize, and fund the tribes and federal law enforcement cooperative efforts to bring "thieves of time" who are profiting from such crimes to justice. Thank you for your consideration of this matter.

Respectfully,

ANITA MITCHELL, *Vice Chairperson.*

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS  
(NATHPO)

*Washington DC, November 7, 2017*

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the National Association of Tribal Historic Preservation Officers (NATHPO), we express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). NATHPO is a national organization of Tribal government officials who implement federal and tribal preservation laws. Membership is limited to federally-recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures, heritage, and practices. Tribal Historic Preservation Officers (THPOs) often conduct repatriation activities for their respective tribe.

The illicit trade in Native American tangible cultural heritage poses a grave threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening our cultures and traditions and deprive us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have for too long been separated from our communities.

Sincerely,

D. BAMBI KRAUS, *President.*

23RD NAVAJO NATION COUNCIL  
*October 31, 2017*

Chairman John Hoeven,

Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of Navajo Nation Council, I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2017. The illicit trade in Native American tangible cultural heritage poses a threat to Native American cultural survival. Our sacred and cultural items are illegally being taken from our people, threatening the maintenance of our culture and tradition, and depriving us of the legacy we seek to leave for our future generations. Meanwhile, a lucrative market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

The Navajo Nation is committed to preserving its cultural heritage. In December 2014 and December 2015, members of the Navajo Nation Council traveled to Paris, France to purchase and retrieve twenty-eight (28) sacred Navajo masks from the Eve Auction House. These masks are items of cultural patrimony and used in the *Tlééjé* (Nightway ceremony). We must continue to work together.

The Navajo Nation Council supports the STOP Act’s increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act, and the Antiquities Act. The STOP act does not extend the reach of these three laws to tribal cultural heritage that is not already protected; it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties so that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of items of tribal cultural heritage to their rightful owners. The Act also engages Tribes by establishing a working group to provide input on its implementation.

We believe the Safeguard Tribal Objects of Patrimony Act of 2017 will help to end illegal trafficking in Native American tangible cultural heritage. It will also bring home our sacred and cultural items that have been separated from our communities for far too long.

Sincerely,

LoRENZO BATES, *Speaker, Office of the Speaker.*

NATIONAL INDIAN HEAD START DIRECTORS ASSOCIATION  
*November 1, 2017*

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the National Indian Head Start Directors Association (NIHSDA), I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). NIHSDA has served as the voice for American Indian and Alaska Native Head Start programs for over 30 years. Representing 150 Indian Head Start and Early Head Start programs, NIHSDA advocates for the best interests of Native children and their families.

Indian Head Start programs are on the front lines of cultural preservation, providing an important resource for the transmission of Native languages, cultures, and ways of life to the next generation. Native cultures are grounded in ceremony, and the illegal trafficking in our sacred and cultural items and of our Ancestors threatens our very cultural survival. Unless our ways of life are protected, we lose a big part of what Indian Head Start has to offer the young children whom we serve. Yet, despite protections in current law, illegal trafficking in Native cultural heritage continues. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act’s increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources

Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

Because of the central importance of our Native American cultural heritage to the futures of our children, NIHSDA strongly supports the STOP Act of 2017. We urge the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Respectfully,

LEE TURNEY, *President.*

YUROK TRIBE  
*November 2, 2017*

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Aiy-ye-kwee' Chairman Hoeven and Vice Chairman Udall:

On behalf of the Yurok Tribe, I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The Yurok Tribe is a natural resources based tribe located in rural Northern California. We are the largest federally recognized tribe in California, with roughly 6,200 enrolled tribal members. The Yurok Reservation represents a small remnant of our Ancestral Territory, straddling the Klamath River one mile either side from the mouth at the Pacific Ocean to its confluence with the Trinity River, approximately 44 miles upstream. These are the lands Yurok people have inhabited since time immemorial. There are many culturally sensitive sacred areas, objects and graves of our ancestors remaining in known and unrecovered locations across our lands. Yuroks are deeply spiritual people, with a robust Cultural Department, including an active Tribal Historic Preservation Office, NAGPRA Office and Committee, Cultural Collections, Archeology, and Culture Committee. We follow well defined Tribal laws as well as traditional rules for the continued protection and practice of our traditions and customs.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a grave threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

THOMAS P. O'ROURKE, *Sr. Chairman.*

AFFILIATED TRIBES OF NORTHWEST INDIANS  
November 8, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the Affiliated Tribes of Northwest Indians (ATNI), I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). Formed in 1953 to serve Indian peoples, ATNI is a regional organization comprised of American Indians, Alaska Natives, and sovereign nations in the states of Washington, Idaho, Oregon, Montana, Nevada, California, and Alaska.

Preservation of tribal cultural values is one of our primary goals and objectives, and the illicit trade in Native American tangible cultural heritage poses a grave threat to our cultural survival. Sacred and cultural objects from Northwest Nations are highly sought after and are often illegally trafficked in a lucrative black market. Many people see the inherent beauty in our cultural objects and seek to collect them for their artistic value alone, not understanding that these objects are so much more than beautiful to us. The protection of our tangible cultural heritage is essential for our cultural survival. Current federal law aims to protect Native American tangible cultural heritage, but it remains insufficient to deter these items' removal, export, and sale or to provide a means of securing repatriation of stolen items.

Thus, ANTI supports the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation. ANTI believes the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home the sacred and cultural items that have been separated from tribal communities for too long. We urge the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

LEONARD FORSMAN, *President.*

PORT GAMBLE S'KLALLAM TRIBE  
November 1, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the Port Gamble S'Klallam Tribe I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The Port Gamble S'Klallam Tribe, originally known as the Nux Skiai Yem or Strong People, are descendants of the Salish people who have been well-established in the Puget Sound basin and surrounding areas since 2400 B.C. In the late 1930s, the Port Gamble S'Klallam reservation, located on the northern tip of the Kitsap Peninsula in Washington State, was established. Many of the Tribe's members, who total about one thousand, still live there today.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a grave threat to tribal cultural survival. Our

sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

JEROMY SULLIVAN, *Chairman*.

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NATIONAL CONGRESS OF AMERICAN INDIANS  
November 2, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest, and most representative organization of American Indian and Alaska Native tribal governments, we write to express our full support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017.

NCAI has two resolutions that support the intent of the STOP Act. The resolutions call on the United States to address the issues of the theft and illegal sale of tribal cultural heritage and assist international repatriation efforts (SD-15-075 and SAC-12-008). The intent of the STOP Act, to strengthen federal laws to protect our sacred and cultural items, is one of vital importance to NCAI and tribes all across Indian Country.

In particular, NCAI supports the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not criminalize any currently legal domestic activity because it does not extend the reach of these existing laws. This legislation increases the deterrent effect of current law with heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a much needed structure for the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation. Setting up this Federal voluntary return structure and working group will ensure that these important objects return to the tribes to which they belong.

NCAI believes the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from tribal communities for too long. We support the Committee's consideration of the STOP Act and encourage the Committee to work to pass this important legislation.

JAQUELINE PATA, *Executive Director*.

**Attachments**



## THE NATIONAL CONGRESS OF AMERICAN INDIANS—RESOLUTION #SAC-12-008

## TITLE: SUPPORT FOR INTERNATIONAL REPATRIATION

**WHEREAS**we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**NCAI member tribes, Native nations, and indigenous communities globally are facing a human rights violation whereby Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony were exhumed, excavated, stolen, exchanged, studied, or taken under duress, without the free, prior, and informed consent of Native nations and moved beyond the boundaries of Native Nations and the United States; and

**WHEREAS**this human rights violation is perpetuated through the continued possession, display, study, or profit from our ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony; and

**WHEREAS**the U.N. Declaration on the Rights of Indigenous Peoples has been signed by all nation-states of the U.N. and it supports international repatriation in Article 12, which states:

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned; and

**WHEREAS**the United States has consistently supported Native nations seeking to repatriate Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, through U.S. Congress when it passed the NMAI Act in 1989 and the NAGPRA in 1990, and international repatriation has more recently been supported by the United States in a Statement of the United States to the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples and the Organization of American States in 2008, which stated:

Indigenous peoples should be able to maintain, protect, and have access to their religious and cultural sites and should have the collective right to repatriation of their human remains, ceremonial object and cultural patrimony; and

**WHEREAS**an estimated 1–2 million Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony currently exist in international repositories; and

**WHEREAS**Native nations are experiencing difficulty locating ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony in international repositories due to various reasons, such as misidentification, no listed cultural affiliation, lack of available records from international repositories to Native nations; and no presently existing centralized notification system to Native nations; and

**WHEREAS**the NCAI member tribes and the national community of Native nations have prioritized the need for the investigation and implementations of legal protections to ensure the repatriation of all ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony taken, exhumed, excavated, exchanged, studied, and otherwise residing in repositories worldwide.

**NOW THEREFORE BE IT RESOLVED**, that the NCAI hereby supports the NCAI member tribes and other Native nations in their efforts to repatriate from international repositories; and

**BE IT FURTHER RESOLVED**, that the NCAI requests that the State Department, U.S. embassies, U.S. Senators, U.S. Representatives, and other U.S. governmental bodies make themselves available to assist Native nations in international repatriations, and that the U.S. government takes immediate action after consultation with Native nations to adequately address this five hundred-year-old, ongoing human rights issue; and

**BE IT FURTHER RESOLVED**, that the NCAI will advocate on behalf of its member tribes and other Native nations to ensure international repatriation is addressed nationally and internationally; and

**BE IT FURTHER RESOLVED**, that the NCAI urges President Obama and future Presidents of the United States of American to call on Congress to address international repatriation; and

**BE IT FURTHER RESOLVED**, that the NCAI will urge the U.N. to convene a special session and implement a formalized Working Group or Subcommittee comprised of indigenous community members to formally look into this human rights issue; and

**BE IT FURTHER RESOLVED**, NCAI will work with the Association on American Indian Affairs (AAIA) and other organizations to collaborate with Native nations in support of international repatriation; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

THE NATIONAL CONGRESS OF AMERICAN INDIANS—RESOLUTION #SD-15-075

TITLE: SUPPORT THE EFFORTS TO STOP THE THEFT AND ILLEGAL SALE OF PUEBLO CULTURAL PATRIMONY ITEMS BOTH DOMESTICALLY AND ABROAD

**WHEREAS** we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS** the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS** cultural patrimony is vital to the continued existence and maintenance of tribal culture and ways of life; and

**WHEREAS** tribes have been disproportionately affected by the theft, illegal sale, and alienation of their cultural patrimony; and

**WHEREAS** in recent years the Pueblos of Acoma, Laguna, and the Hopi Tribes have been particularly targeted by illegal traffickers; and

**WHEREAS** the illegal sale of these items of cultural patrimony have occurred domestically and internationally; and

**WHEREAS** the sale of tribal cultural patrimony is in violation of Federal and Tribal laws; and

**WHEREAS** the nature and descriptions of all tribal cultural patrimony is sensitive and to be treated with respect and confidentiality as appropriate.

**NOW THEREFORE BE IT RESOLVED**, that the National Congress of American Indians (NCAI) hereby supports the efforts of all tribal nations to stop the theft and illegal sale of all tribal cultural patrimony both domestically and abroad; and

**BE IT FURTHER RESOLVED**, that NCAI calls upon the Secretaries of the Department of the Interior, the Department of Justice, the Department of State, and the Attorney General of the United States to consult with the tribal nations in addressing the important issue of the theft and illegal sale of tribal cultural patrimony domestically and abroad, and to take affirmative action to stop these illegal practices; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

WIYOT TRIBE  
November 3, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of Wiyot Tribe, I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). The Wiyot Tribe has been on the Northern California Coast since time immemorial. We have been protec-

tors and stewards of lands that we live on. Which was once the home of our ancestors Giant Redwood Forests.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a grave threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act.

The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

TED HERNANDEZ, *Cultural Director*.

OGLALA SIOUX TRIBE  
November 7, 2017

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT OF  
2017

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the Oglala Sioux Tribe, I write to express our strong support for S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act). Our Tribe is part of the Great Sioux Nation with treaties with the United States of America. Our cultural patrimony and heritage is sacred to us. Just less than two weeks ago, we were forced to take swift action to prevent our sacred objects and items of cultural patrimony from being sold at a public auction.

Despite protections in current law, the illicit trade in Native American tangible cultural heritage continues to pose a grave threat to tribal cultural survival. Our sacred and cultural items are illegally taken from our peoples, threatening the maintenance of our cultures and traditions and depriving us of the legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our tangible cultural heritage thrives, and without explicit export restrictions many of our sacred and cultural items end up abroad.

We support the STOP Act's increased penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA) and its explicit prohibition on exporting items obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The STOP Act does not extend the reach of these three laws to tribal cultural heritage that is not already protected, and thus it does not criminalize any currently legal domestic activity. Instead, it merely increases the deterrent effect of current law by imposing heightened penalties and provides that traffickers may not export their contraband. Additionally, the STOP Act creates a structure for federal facilitation of the voluntary return of tribal cultural heritage and engages tribes through a working group to provide input on implementation.

We believe the STOP Act of 2017 will help end illegal trafficking in Native American tangible cultural heritage and bring home our sacred and cultural items that have been separated from our communities for far too long. We support the prompt passage of the STOP Act and thank the Committee for its attention to this important matter.

Sincerely,

TROY "SCOTT" WESTON, *President.*

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
HON. KURT RILEY

*Question 1.* You have said that the Committee should not think of sacred and ceremonial objects in property rights in terms like "title" and "ownership," and that it is important to move beyond the Western view of property rights and consider this issue as one of human and culture rights. Could you elaborate on this idea?

Answer. Items of tribal cultural heritage, including cultural patrimony and sacred objects, are so important to a tribe's culture and wellbeing that they are considered to belong to the tribe as a whole. All cultures possess such items. For the Pueblo of Acoma (Pueblo), our items of cultural heritage have significant and tangible roles to play in sustaining our culture, our traditional calendar, our societies, our families, and our way of life. Many of these items are considered to possess a life of their own, and specific Pueblo members are tasked as their caretakers, caring for the items for the benefit of the entire Pueblo. Many of these items are of paramount importance, as they are understood to have both physical and metaphysical roles for the continuity of our people and the world. Our cultural heritage also helps us honor and uphold our values and to teach those values to our young people. So important are these items of cultural heritage that, under Pueblo traditional law, no one person may own them. Rather, they belong to the community as a whole, and their caretakers cannot sell them or take them from the Pueblo. It is impossible to fully communicate the harm and pain that removal of these items brings, and the damage their removal causes to our people.

The global community already thinks of cultural heritage items in terms of human rights when considering those belonging to countries. This is evidenced by the outrage Americans would feel if the United States Constitution were sold. It is also evidenced by the international norms surrounding items of cultural heritage. For example, a 1970 international treaty entitled the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which the United States has signed onto, obligates its signatories to protect each other's cultural heritage when exportation of such cultural heritage is illegal in the originating country. The UN Declaration on the Rights of Indigenous Peoples, which the United States supports, recognizes Indigenous peoples' right to maintain their cultural property and ceremonial objects. It is time to bestow the same human rights concepts on Indian tribes' cultural heritage within the domestic United States legal framework.

Even under existing federal statutes, Indian tribes possess property rights to protected tribal cultural heritage. When an item qualifies for protection under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa–470m, or the Antiquities Act, 16 U.S.C. §§ 431–433 repealed and re-codified at 54 U.S.C. §§ 320301–320303, 18 U.S.C. § 1866, the item cannot be said to legally belong to its possessor. Instead, these statutes provide for tribal ownership. See 25 U.S.C. § 3002; 16 U.S.C. § 470gg(b), (c). Tribal law also often provides for tribal ownership.

*Question 1a.* Do you believe that passing the STOP Act will send a strong message that cultural items are different and warrant additional legal protections?

Answer. Passage of the STOP Act will send a clear message to the collector community, Indian tribes, and other countries that the United States understands its duty to protect items of tribal cultural heritage and will take measures to carry out this duty.

The STOP Act will strengthen existing federal statutes—NAGPRA, ARPA, and the Antiquities Act—that already signal the United States' understanding of the importance of tribal cultural heritage. It will also provide the framework for voluntary repatriation outside of the prosecutorial context, indicating the Federal Government's interest in facilitating return of tribal cultural heritage items as its main priority. In fact, in response to the introduction of the STOP Act, the Antique Tribal Art Dealers Association (ATADA) has already reacted by creating and implementing a voluntary repatriation program of its own.

Significantly, the STOP Act will also send a clear message internationally regarding the importance of facilitating the return of tribal cultural heritage that has been trafficked abroad. The 1970 UNESCO Convention discussed above is not triggered unless exportation of the item of cultural heritage is illegal in the originating country. The United States is a signatory to the treaty and has taken steps domestically

to uphold its treaty obligations. The Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601–2613, adopted import restrictions for protected cultural heritage from other countries. The CPIA, however, does not implement the exportation restrictions called for in the treaty. The CPIA does not make illegal the exportation of cultural heritage from the United States, including tribal cultural heritage. Thus, this provides other countries with an argument that the United States lacks the necessary exportation restrictions to trigger obligations under the treaty. The STOP Act's explicit prohibition on exporting already-protected items of tribal cultural heritage clearly signals to the international community that these items warrant legal protections.

*Question 2.* Since 1922, Santa Fe's Indian Market draws hundreds of Native artists and thousands of visitors to the city every year. Buyers, collectors, and gallery owners come to Indian Market to take advantage of the opportunity to buy directly from Native artists. For some, sales from Indian Market amount can amount to an artist's entire annual income. Are you concerned about the impact the STOP Act could have on Native artists' livelihoods?

Answer. The STOP Act will not negatively impact Native artisans' livelihoods. The STOP Act does not discourage all sales of Native art. It does not create protections or penalties for any object that is not already protected under existing federal law—meaning these items were already illegal to sell domestically. The STOP Act's increased penalties do not extend beyond items protected under NAGPRA, and its export restriction does not extend beyond items protected under NAGPRA, ARPA, and the Antiquities Act. The Native artisan and collector communities have been operating under these standards for decades.

It is important to understand that existing federal statutes protect only specific types of items associated with tribes. Most items are not protected. NAGPRA, ARPA, and the Antiquities Act have specific statutory standards for the items they protect. Generally, the items must meet a threshold level of cultural significance and must have been taken from specific lands within specific time periods. Although tribes are involved in determining which items are protected, they cannot claim items are protected if they do not meet these statutory standards.

The existing statutory standards within NAGPRA, ARPA, and the Antiquities Act are sufficiently clear, and they embody the clear intention of Congress. For example, when Congress enacted NAGPRA, it already considered the impact the statutory definitions in NAGPRA may have on tribal art, and it set forth its firm intention for statutes like NAGPRA to be a function of tribal understanding of an object's ongoing cultural and religious significance. *See, e.g.* S. Rep. No. 101–473, at 8–10 (1990). Courts have routinely upheld these standards, even when law enforcement officials or courts look to tribal law or tribal representatives to determine whether specific items meet the standards. *See, e.g. United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999) (upholding NAGPRA); *United States v. Carrow*, 119 F.3d 796 (10th Cir. 1997) (upholding NAGPRA); *see also United States v. Austin*, 902 F.2d 743 (9th Cir. 1990) (upholding ARPA); *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (upholding Antiquities Act); but *see United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (finding Antiquities Act unconstitutionally vague). Providing even further protection to collectors, prosecution is not available unless the defendant knowingly engaged in activity made illegal under NAGPRA or ARPA. See 18 U.S.C. § 1170; 16 U.S.C. § 470ee(d). And those engaging in the trafficking of cultural heritage items are expected to possess a certain level of knowledge regarding whether an item qualifies as protected. *See, e.g., United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999); *United States v. Carrow*, 119 F.3d 796, 803–04 (10th Cir. 1997). This is no different than other situations where persons who hold themselves out as having specialized knowledge are held to a higher standard of care.

The STOP Act's voluntary repatriation provision, which is structured to apply more broadly to items associated with tribes, does not have legal consequences. Instead, it merely provides a process for those who wish to return an item to a tribe. That this process is available will not legally affect whether a particular item qualifies as protected under NAGPRA, ARPA, or the Antiquities Act, including as amended by the STOP Act. Thus, it should not have negative impacts on the Native art market.

However, some have proposed a certification or permitting system for implementing the STOP Act's export restriction such that issues related to whether a particular object is federally protected do not require resolution at the border. We could support this. Creating such a system could provide more clarity to exporters as well as to Border Protection Customs agents about which objects are protected. Such a system is also called for by the 1970 UNESCO Convention. However, if a certification or permitting system is created, tribes should be involved in the drafting process. If the STOP Act is not amended to add such a provision, the STOP Act as

drafted already authorizes the Attorney General and the Secretary of Homeland Security, in consultation with the Secretary of the Interior, to prescribe rules and regulations to carry out the export restriction. Any guidelines necessary for Border Protection Customs agents could be created through such rules and regulations.

*Question 3.* Often many of the cultural items found in French auction houses or other international markets are excavated unlawfully in remote areas on both public and tribal lands. The Native American Grave Protection and Repatriation Act (NAGPRA) and the Archeological Resources Protection Act were designed to stop the trafficking of cultural items domestically, but do not protect the lands where these items are found. Are certain sites, such as Bears Ears and Chaco Canyon, worthy of increased federal protections?

Answer. In addition to items of tribal cultural heritage holding great cultural significance to tribes, locations themselves can also be very important to tribes. One way to protect tribes' sacred sites is through the Antiquities Act, which gives the Federal Government authority to declare certain areas with historic significance national monuments and to provide them federal protections as such. 54 U.S.C. § 320301. Another method for providing protection is placing the sacred site, if it is found eligible to be listed, on the National Register of Historic Places under the National Historic Preservation Act. 54 U.S.C. § 302706. These statutes are part of the federal government's framework for protecting tribes' cultural heritage, which is required by the federal government's trust responsibility to Indian tribes, and they must be implemented faithfully.

Additionally, NAGPRA, ARPA, and the Antiquities Act generally do not protect items removed from land that is not federal or tribal. *See* 25 U.S.C. § 3002(a); 16 U.S.C. § 470ee(a); 18 U.S.C. § 1866(b). All land within the United States once belonged to tribes, and our sacred sites and vast tracts of our cultural landscape are therefore spread throughout the country. Restrictions on movement and access to key resource areas and holy places for traditional cultural practices have limited our ability to protect these areas. Much of this land is now in state or private hands, and the sacred sites and items of cultural heritage on this land are not federally protected. Our limitations in accessing these places do not make them any less important for our communities. Thus, finding ways to protect these areas is doubly important.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
ELIZABETH A. FOWLER

**Oversight and Accountability**

*Question 1.* In your testimony, you stated that the Indian Health Service (IHS) has access to information that federal accountability organs needs in order to provide effective oversight of IHS. S. 465, however, would allocate federal taxpayer dollars to hire private contractors to conduct external audits of IHS to obtain this exact same information,<sup>1</sup> which is both wasteful and redundant. You additionally agreed to provide that information to the Senate Committee on Indian Affairs within 30 days. Please provide information on the current IHS user population, and projected service population, by Service Area and Service Unit.

Answer. Appendix 1 is a table of the current IHS user population estimates by service area and service unit for Fiscal Year (FY) 2017. The user population is defined as those patients that receive direct or contract healthcare services from an inpatient stay, outpatient visit, or a direct dental visit at an IHS or tribal facility during the previous three years. The user must also live within a Purchased Referred Care Delivery Area (PRCDA) to be counted in the user population.

Appendix 2<sup>2</sup> is a table of the IHS projected service population that is currently based on the 2000 census bridged-race file and consists of American Indians and Alaska Natives (AI/ANs) identified to be eligible for IHS services. The service population is estimated by counting AI/ANs who reside in a PRCDA and constitutes approximately 58 percent of all AI/ANs residing in the United States. These people may or may not use IHS health services. The ratio (58 percent) is obtained by dividing the service population by the total United States AI/AN population (service plus non-service), which data is provided in Appendix 3<sup>3</sup>.

<sup>1</sup>S. 465, 115th Cong. § 2(d)(1), (2), and (15).

<sup>2</sup>This table originates from vital event data provided by the National Center for Health Statistics (NCHS).

<sup>3</sup>A table of the current estimates of the projected 2018 IHS American Indian and Alaska Native service and non-service population of the United States, by state.

*Question 1a.* Please provide information on the current available medical services offered at each IHS Service Unit and the most frequent services for which they receive Purchased/Referred Care (PRC) requests.

Answer. Appendix 4 is a listing of current available medical services offered at each IHS Service Unit.

Appendix 5 is a listing of the top ten inpatient and outpatient services by diagnosis category authorized by each IHS Federal facility between the years 2014–2017.

*Question 1b.* Please provide information on IHS's use of Buy Indian authority, and its progress toward implementing the recommendations of GAO–15–588.

Answer. The Indian Health Service is committed to implementing GAO's recommendation to:

“Clarify and codify their policies related to the priority for use of the Buy Indian Act, including whether the Buy Indian Act should be used before other set-aside programs.”

IHS Acquisition staff, leadership and program officials recognize the importance of complying with Buy Indian Act responsibilities. IHS is in the process of updating its policies, including the Indian Health Manual (IHM), to clarify such responsibilities.

Currently, IHS is able to use Buy-Indian in an open market setting. The Buy Indian Act is not used, however, for Government-Wide Acquisition Contracts (GWACs) such as General Services Administration (GSA) Alliant, National Aeronautics and Space Administration (NASA) Solutions for Enterprise-Wide Procurement (SEWP), National Institutes of Health (NIH) National Institutes of Health Information Technology Acquisition and Assessment Center (NIHITAAC), etc. Because the use of GWACs is prioritized government-wide, IHS plans to reach out to GSA and other agencies under the Category Management program to consider the incorporation of IHS' Buy Indian responsibilities.

“Collect data on regional office's implementation of key requirements, such as challenges to self-certification.”

The IHS is also updating the Indian Health Manual to address challenges to self-certification. IHS currently collects data pulled from the Federal Procurement Data System—Next Generation (FPDS–NG) to identify contract actions issued under the Buy Indian Act set-aside. Once the updated policy is finalized, as identified in the draft IHM, IHS will begin collecting monthly, quarterly and annual data related to contract actions that deviate from the Buy Indian Act and any challenges to Indian Economic Enterprise (IEE) self-certifications.

“Include Buy Indian Act contracts as a part of IHS' regular acquisition review process.”

IHS recently conducted Acquisition Management Reviews (AMRs) for FY 2017 to ensure procurement integrity and standardization throughout IHS Acquisitions. IHS plans to continue these reviews and implement the requirements under the Buy Indian Act as regular elements conducted on both Acquisition Peer/Supervisor review of contract actions and annual AMRs.

IHS hit its highest mark ever under the Buy Indian Act during FY 2017 by obligating over \$19.5 million to IEEs. This is an increase from FY 2016 and FY 2015 which obligated just over \$3 million in each of those years. We expect that finalization of the IHS Buy Indian Act IHM will improve these numbers moving forward and support economic development in Indian Country.

*Question 2.* In your written testimony, you state that IHS has routine procedures for conducting statutorily required external audits and financial reporting.<sup>4</sup> Please briefly describe the types of independent financial auditing IHS completes each year.

Answer. The IHS complies with Office of Management and Budget (OMB) Circular A–11 which includes standard Federal budget execution and budgetary resource reporting requirements, including quarterly reports that are publicly available. The IHS is also included in the Department of Health and Human Services' (HHS or Department) annual Chief Financial Officers (CFO) Act audit that evaluates conformance with financial performance and disclosure standards and is performed by an external, nationally-known independent firm contracted by HHS. The Department publishes the results of these annual audits in the Agency Financial

<sup>4</sup>Statement of Elizabeth A. Fowler, “Legislative Hearing to Receive Testimony on S. 465 and S. 1400.” Senate Committee on Indian Affairs (Nov. 11. 2017), 6, at <https://www.indian.senate.gov/sites/default/files/HHS-IHS%20testimony%20S%20465%20SCIA%20hearing%2011-8-17.pdf>.

Report (AFR), which is prepared in accordance with requirements of OMB Circular A-136 and posted on the HHS website. For the 18th consecutive year, the Department obtained an unmodified (clean) opinion, meaning financial records and statements for FY 2017 were fairly and appropriately presented, and in accordance with Generally Accepted Accounting Principles (GAAP).

Additionally, as required by the Federal Managers' Financial Integrity Act (FMFIA) and OMB's Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*, the IHS evaluates internal controls and financial management systems on an annual basis. A contracted external firm is used by the IHS to conduct and assist with these robust internal evaluations. The IHS's resulting annual assurances are provided to HHS and included in the Department-wide reasonable assurance that the financial information contained in the HHS AFR is complete, reliable, and accurate.

*Question 2a.* Is there any overlap between the information already being audited and what would be required under S. 465?

Answer. Yes, existing audit and assessments conducted under the CFO Act, FMFIA, and OMB's Circular A-123 would overlap with assessments proposed under S. 465. For example, section (12)(B) contemplates "checks and balances" used "to assess potential fraud or misuse of amounts within the Service," which is a key focus of existing activities such as A-123 that specifically evaluates internal controls and the CFO Act audit that looks at accuracy and accountability related to financial performance and reporting. Section (13)(D) of the bill considers "the auditing or evaluation process used by the Service to determine whether amounts are distributed and expended appropriately, including" financial records and "whether any auditing or evaluation is conducted in accordance with generally accepted accounting principles or other appropriate practices." The IHS's financial statements and reporting are evaluated through FMFIA and A-123 and audited as part of the HHS' CFO Act audit, which tests for accuracy and conformance with GAAP.

*Question 2b.* What percent of available resources does the Inspector General of HHS use to review IHS operations?

Answer. The IHS would have to defer to the Department of Health and Human Services Office of Inspector General (OIG) for specific information on its available resources. However, the OIG's FY 2018 Congressional Justification indicates that \$76.5 million or 22 percent of its FY 2016 resources were directed toward HHS' Public Health and Human Services programs, and of this amount two percent or \$1.53 million was allocated for oversight efforts for IHS.

*Question 3.* You expressed concern in your written testimony with the significant financial resources that private audit contracts would require.<sup>5</sup> If the Secretary directs IHS to fund this cost, how would that affect health services to IHS patients?

Answer. The magnitude and detail of the assessments proposed by the bill would likely require significant resources. The Department of Veterans Affairs (VA) conducted a similar type of assessment in response to the Veterans Access, Choice, and Accountability Act of 2014, and expended nearly \$67 million in contractual costs alone. The IHS's existing budget could not support a project of this scale and potential cost without a reduction to direct health services.

Approximately 60 percent of the Agency's total \$5 billion budget authority is administered by Tribes and tribal organizations through Indian Self-Determination and Education Assistance Act (ISDEAA) agreements, and there is very little flexibility for reprogramming remaining resources to accomplish the proposed assessment.

\*The Appendix to this prepared statement has been retained in the Committee files\*

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
DAVE FLUTE

*Question 1.* Many of the resources expended by the Inspector General at the Department of Health and Human Services are devoted to combatting Medicaid and Medicare fraud. Is the HHS Inspector General's oversight activities enough to hold IHS accountable?

Answer. The HHS Inspector General's oversight activities are not enough to hold IHS accountable. The IHS operates in a bubble of no accountability. For example, although Federal statutes and executive orders require consultation on IHS budgets and funding for Indian Service Units, the IHS Great Plains Region took \$2.2 Million

<sup>5</sup>*Id.* At 7-8.



of our Sisseton Wahpeton Service Unit Funding for Hospitals and Clinics last year without notification or consultation with our Sisseton Wahpeton Sioux Tribe. Meanwhile, our Sisseton Wahpeton tribal members were denied medical services if they did not meet Priority 1, potential loss of life or limb. On May 9, 2018, at the HHS Secretary's Tribal Advisory Committee Meeting, HHS Secretary Alex Azar agreed to restore that funding to SWO by the end of Fiscal Year 2018, but without his personal intervention we have no confidence that IHS would have corrected their wrongful taking of our funds.

*Question 1a.* Should the Committee on Indian Affairs investigate ways to strengthen these independent reviews?

Answer. The Senate Committee on Indian Affairs should pass S. 465 to strengthen the independent review of the IHS.

*Question 1b.* Instead of paying for a one-time private assessment of the IHS, would it make more sense to create a division with the Office of Inspector General tasked with IHS oversight?

Answer. It would make sense to create an Office of IHS Treaty Rights, Trust Responsibility, Consultation and Accountability within the Office of the Secretary of HHS.

*Question 2.* IHS is funded at about 50 percent of need; this results in severe financial constraints and leads to life-threatening denial or deferral of care in some cases. Would directing money away from the IHS budget to pay for an audit be detrimental to the healthcare delivery for your tribal members?

Answer. Medical Service provided by the IHS has been prepaid by Indian tribes and tribal members through the cession of millions of acres of land, where America's major cities are located—for example, Minneapolis, MN, Fargo and Bismarck, ND, Sioux City, IA, Sioux Falls and Pierre, SD in our region. Through treaty, the United States agreed to provide medical services when these original Native lands were ceded. Accordingly, IHS should be fully funded—unless the United States prefers to return ceded lands.

*Question 2a.* Would additional resources need to be appropriated to cover that cost?

Answer. The IHS should receive full funding, so that our tribal members can receive the same level of health care through IHS as the general public is provided through Medicare. Medical care under the IHS should not be limited to coverage for Priority 1, loss of life or limb conditions, as it currently is because that violates our treaties with the United States and ignores the needs of Native peoples resulting in unnecessary suffering, injury, disease and death.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
JOHN TAHSUDA

**NAGPRA Enforcement**

*Question 1.* In your written testimony, you stated that the Department of Interior believes that “vigorous enforcement” of the Native American Graves Protection and Repatriation Act (NAGPRA) is an “essential element” to combatting theft of items of cultural heritage. However, earlier this year, Secretary Zinke suspended all NAGPRA Review Committee Activities indefinitely. The Review Committee plays an important role under NAGPRA—it was established by Congress “to monitor and review implementation of the inventory and identification process and repatriation activities.” Does Secretary Zinke have the authority to suspend the NAGPRA Review Committee? If so, what is the source of that authority?

*Question 1a.* What are the Secretary's reasons for suspending the Review Committee?

*Question 1b.* Does the Secretary have plans to reconvene the Review Committee so that it may pursue its statutorily mandated mission? If so, what are those plans?

Answer to 1, 1a, and 1b. The Department's ongoing review of advisory groups is critical to ensuring compliance with the Federal Advisory Committee Act. The Department is currently in the process of filling vacancies on the NAGPRA Review Committee. The NAGPRA Review Committee is not suspended and once they have quorum, they may meet following required public notice.

**Indian Country Recommendations**

*Question 2.* Over the past few years, tribal leaders have worked with federal agencies on a variety of specific recommendations to address protecting tribal patrimony, such as creating a multi-agency task force or working group that would develop a

comprehensive regulatory language and recommendations, seeking bilateral agreements with key foreign governments, and developing guidance for customs officials. Is the Department of the Interior aware of any of these recommendations?

*Question 2a.* If so, is the Department planning to take up any of these recommendations? Or if not, can I get your commitment that you'll follow up with tribal leaders and engage on this issue?

*Question 2b.* What is the Department currently doing to combat the export of illicitly acquire cultural items?

*Question 2c.* How is the Department engaging tribes to help repatriate their cultural heritage from abroad?

Answer to 2, 2a, 2b, and 2c. The Department is aware of these interests and continues to work internally and with other federal agencies to explore how best to address these challenging issues in a meaningful way.

#### **Protecting Cultural Heritage**

*Question 3.* The Department's Office of International Affairs is the primary point of contact for other agencies that conduct international activities, including the State Department. At an Albuquerque field hearing on this issue, I heard testimony that the lack of an explicit ban on items of cultural patrimony hindered the federal government's negotiations to stop the sale of the Acoma Shield and to bring it home. Would an explicit ban on the export of items of cultural patrimony help strengthen the federal government's hand in these types of negotiations?

Answer. The Department is continuing to assess an array of options as to how best to address the challenges associated with the export of cultural patrimony.

#### **Effective Congressional Oversight**

*Question 4.* Since the beginning of the 115th Congress, I have sent Secretary Zinke 10 letters (7 addressed directly to him; three to President Trump) and submitted six submissions (questions for the record) to the Department's hearing witnesses for response. I have not received a single response. At the November 8th hearing, you committed to me directly that you would address this unacceptable backlog of unanswered letters and QFRs. It has been two weeks since you made this commitment. What is the status of your review? What is the projected response time?

Answer. The Department continues to work through the pending requests you identify in your question. In fact, I understand that you have recently received a response to several of your letters. We are committed to addressing the backlog as expeditiously as possible.