

INDIAN ARTS AND CRAFTS AMENDMENTS ACT OF 2009

JANUARY 15, 2010.—Ordered to be printed

Mr. RAHALL, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 725]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 725) to protect Indian arts and crafts through the improvement of applicable criminal proceedings, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 725 is to protect Indian arts and crafts through the improvement of applicable criminal proceedings, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

In 1935, Congress enacted legislation to establish the Indian Arts and Crafts Board (49 Stat. 891). The Indian Arts and Crafts Board, an agency within the U.S. Department of the Interior, is responsible for promoting the development of American Indian and Alaska Native arts and crafts, improving the economic status of members of Indian tribes, and helping to develop and expand marketing opportunities for arts and crafts produced by American Indians and Alaska Natives.

The 1935 legislation adopted criminal penalties for selling goods with the misrepresentation that they were Indian produced. This

provision, currently located in section 1159 of title 18, U.S. Code, set fines not to exceed \$500 or imprisonment not to exceed six months, or both. Although this law was in effect for many years, it provided no meaningful deterrent to those who misrepresented imitation arts and crafts as Indian produced. In addition, “willful” intent was required to be proved, therefore, very little enforcement took place.

In response to growing problem of products misrepresented or erroneously represented as produced by Indians, Congress passed the Indian Arts and Crafts Act of 1990 (Public Law 101-644). This Act is essentially a truth-in-advertising law that prohibits misrepresentation in the marketing of Indian arts and crafts products within the United States. The law makes it illegal to offer, display for sale, or sell, any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian Tribe or Indian arts and crafts organization.

Under the Act, an Indian is defined as a member of any federally or State recognized Indian Tribe, or an individual certified as an Indian artisan by an Indian Tribe. The law covers all Indian and Indian-style traditional and contemporary arts and crafts produced after 1935. Some traditional items frequently copied by non-Indians include Indian-style jewelry, pottery, baskets, carved stone fetishes, woven rugs, kachina dolls, and clothing.

Despite these efforts, information from the Department of Justice indicates that very few cases relating to the sale of counterfeit Indian goods are investigated each year. A recent Wall Street Journal article referred to a “tsunami of cheap imported jewelry—designed to look like authentic Native American art—is flooding the Southwest United States”. The New Mexico State Attorney General’s Office has stated that at least 50 percent of the Indian jewelry on the New Mexico market is misrepresented in some way. The Indian Arts and Crafts Association reports that some of the fake Indian arts and crafts are “virtually indistinguishable” and that counterfeit Indian products have become “more sophisticated,” estimating that nationally, as much as 75% of the roughly \$1 billion of jewelry, pottery, rugs and other merchandise sold every year as authentic is not.

H.R. 725 seeks to address this continuing problem by strengthening the penalties associated with misrepresentation of Indian produced goods, and by empowering federal, tribal and local authorities to undertake investigations and enforcement. A Senate companion bill (S. 151) passed the Senate on July 24, 2009.

COMMITTEE ACTION

H.R. 725 was introduced on January 27, 2009 by Representative Ed Pastor (D-AZ). The bill was referred to the Committee on Natural Resources, and in addition to the Committee on the Judiciary. On December 2, 2009, the full Committee held a hearing on the bill.

On December 16, 2009 the full Natural Resources Committee met to consider H.R. 725. The bill was ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that this Act may be cited as the “Indian Arts and Crafts Amendments Act of 2009.”

Section 2. Indian arts and crafts

Subsection 2(a) amends Section 5 of the Act entitled “An Act to promote the development of Indian arts and crafts and to create a board to assist therein, and for other purposes,” (25 U.S.C. 305d) to authorize any federal law enforcement officer to conduct investigations of an offense involving the sale of any good that is misrepresented as an Indian produced good or product that occurs within the jurisdiction of the United States. Under current law, only employees of the Federal Bureau of Investigation (FBI) are authorized to conduct such investigations.

This subsection also provides that the Indian Arts and Crafts Board (the Board) may refer an alleged offense to any federal law enforcement officer for appropriate investigation. Further, it permits a federal law enforcement officer to investigate an alleged offense regardless of whether such officer receives a referral from the Board.

Subsection 2(a) further provides that the findings of an investigation of an alleged offense shall be submitted to a federal or state prosecuting authority; or to the Board. H.R. 725 provides that the Board may, upon receiving the findings of such an investigation, recommend to the Attorney General that criminal proceedings be initiated and provide such support to the Attorney General relating to the criminal proceedings as the Attorney General determines to be appropriate. This subsection also authorizes the Board to recommend that the Attorney General initiate a civil action.

Subsection 2(b) amends 25 U.S.C. 305e to specify the persons who may initiate civil actions for misrepresentation of Indian produced goods. These include the Attorney General, an Indian tribe, an Indian, or an Indian arts and crafts organization. The subsection makes further amendments regarding the disposition of amounts recovered in a civil action under this section.

Section 3. Misrepresentation of Indian produced goods and products

This section amends Section 1159 of title 18, United States Code, to clarify penalties resulting from violation of the Act. Under current law, the maximum penalties are the same for all offenders, regardless of the value of the goods. This section provides that, for goods that are offered or displayed for sale at a total price of \$1,000 or more, a first time violation by an individual will result in a fine of not more than \$250,000, imprisonment for not more than 5 years, or both.

In the case where a violator is other than an individual, (such as a company, group, or organization), this section provides that the violator shall be fined not more than \$1,000,000 for a first time violation. If the applicable goods are offered or displayed for sale at a total price of less than \$1,000, an individual shall be fined not more than \$25,000, imprisoned for not more than one year, or both, for the first violation. A violator who is other than an individual shall be fined not more than \$100,000. For subsequent violations

an individual may be fined, or imprisoned for not more than 15 years, or both. For a person other than an individual, the bill provides that for a subsequent violation they shall be fined not more than \$5,000,000.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. **Cost of Legislation.** Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. **Congressional Budget Act.** As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. **General Performance Goals and Objectives.** As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to protect Indian arts and crafts through the improvement of applicable criminal proceedings, and for other purposes.

4. **Congressional Budget Office Cost Estimate.** Under clause 3(c)(3) of rule XIII of the rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 725—Indian Arts and Crafts Amendments Act of 2009

H.R. 725 would allow any federal law enforcement officer to investigate the sale of counterfeit Indian art products. Under current law, only employees of the Federal Bureau of Investigation are authorized to conduct such investigations. Information from the Department of Justice (DOJ) indicates that very few cases relating to the sale of counterfeit Indian goods are investigated each year. CBO estimates that the cost of implementing H.R. 725 would not be significant because we expect that it would not appreciably change the workload of federal law enforcement officers or DOJ attorneys who would prosecute the cases.

H.R. 725 also would reduce the maximum penalties for offenders who market or sell counterfeit items priced at less than \$1,000. Under current law, the maximum penalties are the same for all offenders, regardless of the price of the goods. Criminal fines are re-

corded as revenues, deposited into the Crime Victims Fund, and later spent. CBO estimates that enacting H.R. 725 could reduce the amount of revenues deposited into the fund and direct spending from that fund, but any such effects would be insignificant given the small number of cases involved.

H.R. 725 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On May 5, 2009, CBO transmitted a cost estimate for S. 151, the Indian Arts and Crafts Amendments Act of 2009, as ordered reported by the Senate Committee on Indian Affairs on April 30, 2009. The House and Senate versions of the legislation are very similar, and the CBO cost estimates are the same.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

EARMARK STATEMENT

H.R. 725 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

ACT OF AUGUST 27, 1935

AN ACT To promote the development of Indian arts and crafts and to create a board to assist therein, and for other purposes.

* * * * *

[SEC. 5. (a) The Board may receive complaints of violations of section 1159 of title 18, United States Code, and refer complaints of such violations to the Federal Bureau of Investigation for appropriate investigation. After reviewing the investigation report, the Board may recommend to the Attorney General of the United States that criminal proceedings be instituted under that section.

[(b) The Board may recommend that the Secretary of the Interior refer the matter to the Attorney General for civil action under section 6.]

SEC. 5. CRIMINAL PROCEEDINGS; CIVIL ACTIONS.

(a) DEFINITION OF FEDERAL LAW ENFORCEMENT OFFICER.—In this section, the term “Federal law enforcement officer” includes a

Federal law enforcement officer (as defined in section 115(c) of title 18, United States Code).

(b) *AUTHORITY TO CONDUCT INVESTIGATIONS.*—Any Federal law enforcement officer shall have the authority to conduct an investigation relating to an alleged violation of this Act occurring within the jurisdiction of the United States.

(c) *CRIMINAL PROCEEDINGS.*—

(1) *INVESTIGATION.*—

(A) *IN GENERAL.*—The Board may refer an alleged violation of section 1159 of title 18, United States Code, to any Federal law enforcement officer for appropriate investigation.

(B) *REFERRAL NOT REQUIRED.*—A Federal law enforcement officer may investigate an alleged violation of section 1159 of that title regardless of whether the Federal law enforcement officer receives a referral under subparagraph (A).

(2) *FINDINGS.*—The findings of an investigation of an alleged violation of section 1159 of title 18, United States Code, by any Federal department or agency under paragraph (1)(A) shall be submitted, as appropriate, to—

(A) a Federal or State prosecuting authority; or

(B) the Board.

(3) *RECOMMENDATIONS.*—On receiving the findings of an investigation under paragraph (2), the Board may—

(A) recommend to the Attorney General that criminal proceedings be initiated under section 1159 of title 18, United States Code; and

(B) provide such support to the Attorney General relating to the criminal proceedings as the Attorney General determines to be appropriate.

(d) *CIVIL ACTIONS.*—In lieu of, or in addition to, any criminal proceeding under subsection (c), the Board may recommend that the Attorney General initiate a civil action under section 6.

SEC. 6.

(a) *DEFINITIONS.*—In this section:

(1) *INDIAN.*—The term “Indian” means an individual that—

(A) is a member of an Indian tribe; or

(B) is certified as an Indian artisan by an Indian tribe.

(2) *INDIAN PRODUCT.*—The term “Indian product” has the meaning given the term in any regulation promulgated by the Secretary.

(3) *INDIAN TRIBE.*—

(A) *IN GENERAL.*—The term “Indian tribe” has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(B) *INCLUSION.*—The term “Indian tribe” includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

(i) a State legislature;

(ii) a State commission; or

(iii) another similar organization vested with State legislative tribal recognition authority.

(4) *SECRETARY.*—The term “Secretary” means the Secretary of the Interior.

[(a)] (b) A person specified in [subsection (c)] *subsection (d)* may, in a civil action in a court of competent jurisdiction, bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States, to—

(1) * * *

* * * * *

[(b)] (c) In addition to the relief specified in [subsection (a)] *subsection (b)*, the court may award punitive damages and the costs of [suit] *the civil action* and a reasonable attorney's fee.

[(c)(1) A civil action under subsection (a) may be commenced—

[(A) by the Attorney General of the United States upon request of the Secretary of the Interior on behalf of an Indian who is a member of an Indian tribe or on behalf of an Indian tribe or Indian arts and crafts organization;

[(B) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization; or

[(C) by an Indian arts and crafts organization on behalf of itself, or by an Indian on behalf of himself or herself.

[(2) Any amount recovered pursuant to this section shall be paid to the individual Indian, Indian tribe, or Indian arts and crafts organization, except that—

[(A) in the case of paragraph (1)(A), the Attorney General may deduct from the amount recovered—

[(i) the amount for the costs of suit and reasonable attorney's fees awarded pursuant to subsection (b) and deposit the amount of such costs and fees as a reimbursement credited to appropriations currently available to the Attorney General at the time of receipt of the amount recovered; and

[(ii) the amount for the costs of investigation awarded pursuant to subsection (b) and reimburse the Board the amount of such costs incurred as a direct result of Board activities in the suit; and

[(B) in the case of paragraph (1)(B), the amount recovered for the costs of suit and reasonable attorney's fees pursuant to subsection (b) may be deducted from the total amount awarded under subsection (a)(2).

[(d) As used in this section—

[(1) the term "Indian" means any individual who is a member of an Indian tribe; or for the purposes of this section is certified as an Indian artisan by an Indian tribe;

[(2) subject to subsection (f), the terms "Indian product" and "product of a particular Indian tribe or Indian arts and crafts organization" has the meaning given such term in regulations which may be promulgated by the Secretary of the Interior;

[(3) the term "Indian tribe" means—

[(A) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services

provided by the United States to Indians because of their status as Indians; or

[(B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; and

[(4) the term “Indian arts and crafts organization” means any legally established arts and crafts marketing organization composed of members of Indian tribes.]

(d) *PERSONS THAT MAY INITIATE CIVIL ACTIONS.*—

(1) *IN GENERAL.*—*A civil action under subsection (b) may be initiated by—*

(A) *the Attorney General, at the request of the Secretary acting on behalf of—*

- (i) *an Indian tribe;*
- (ii) *an Indian; or*
- (iii) *an Indian arts and crafts organization;*

(B) *an Indian tribe, acting on behalf of—*

- (i) *the Indian tribe;*
- (ii) *a member of that Indian tribe; or*
- (iii) *an Indian arts and crafts organization;*

(C) *an Indian; or*

(D) *an Indian arts and crafts organization.*

(2) *DISPOSITION OF AMOUNTS RECOVERED.*—

(A) *IN GENERAL.*—*Except as provided in subparagraph (B), an amount recovered in a civil action under this section shall be paid to the Indian tribe, the Indian, or the Indian arts and crafts organization on the behalf of which the civil action was initiated.*

(B) *EXCEPTIONS.*—

(i) *ATTORNEY GENERAL.*—*In the case of a civil action initiated under paragraph (1)(A), the Attorney General may deduct from the amount—*

(I) *the amount of the cost of the civil action and reasonable attorney’s fees awarded under subsection (c), to be deposited in the Treasury and credited to appropriations available to the Attorney General on the date on which the amount is recovered; and*

(II) *the amount of the costs of investigation awarded under subsection (c), to reimburse the Board for the activities of the Board relating to the civil action.*

(ii) *INDIAN TRIBE.*—*In the case of a civil action initiated under paragraph (1)(B), the Indian tribe may deduct from the amount—*

- (I) *the amount of the cost of the civil action; and*
- (II) *reasonable attorney’s fees.*

[(e) In the event that] (e) *SAVINGS PROVISION.*—*If any provision of this section is held invalid, it is the intent of Congress that the remaining provisions of this section shall continue in full force and effect.*

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TITLE 18, UNITED STATES CODE

PART I—CRIMES

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CHAPTER 53—INDIANS

* * * * *

§ 1159. Misrepresentation of Indian produced goods and products

(a) * * *

[(b) Whoever knowingly violates subsection (a) shall—

[(1) in the case of a first violation, if an individual, be fined not more than \$250,000 or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than \$1,000,000; and

[(2) in the case of subsequent violations, if an individual, be fined not more than \$1,000,000 or imprisoned not more than fifteen years, or both, and, if a person other than an individual, be fined not more than \$5,000,000.]

(b) *PENALTY.—Any person that knowingly violates subsection (a) shall—*(1) *in the case of a first violation by that person—*(A) *if the applicable goods are offered or displayed for sale at a total price of \$1,000 or more, or if the applicable goods are sold for a total price of \$1,000 or more—*(i) *in the case of an individual, be fined not more than \$250,000, imprisoned for not more than 5 years, or both; and*(ii) *in the case of a person other than an individual, be fined not more than \$1,000,000; and*(B) *if the applicable goods are offered or displayed for sale at a total price of less than \$1,000, or if the applicable goods are sold for a total price of less than \$1,000—*(i) *in the case of an individual, be fined not more than \$25,000, imprisoned for not more than 1 year, or both; and*(ii) *in the case of a person other than an individual, be fined not more than \$100,000; and*(2) *in the case of a subsequent violation by that person, regardless of the amount for which any good is offered or displayed for sale or sold—*(A) *in the case of an individual, be fined under this title, imprisoned for not more than 15 years, or both; and*(B) *in the case of a person other than an individual, be fined not more than \$5,000,000.*(c) *As used in this section—*

(1) * * *

* * * * *

[(3) the term “Indian tribe” means—

[(A) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services

provided by the United States to Indians because of their status as Indians; or

【(B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; and】

(3) *the term “Indian tribe”—*

(A) has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b); and

(B) includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

(i) a State legislature;

(ii) a State commission; or

(iii) another similar organization vested with State legislative tribal recognition authority; and

* * * * *

ADDITIONAL VIEWS

H.R. 725 amends the Indian Arts and Crafts Act primarily to enable any law enforcement official to investigate and prosecute violations of the Act. Under existing law, the Act is generally enforced when the Indian Arts and Crafts Board refers complaints to the Federal Bureau of Investigation (FBI) for investigation, or when the FBI on its own initiative launches an investigation. Other law offices generally do not investigate violations of the Act, and the FBI's resources clearly must be prioritized with arts and crafts crime being secondary to such duties as investigating major crimes and terrorism threats.

After the legislative hearing on H.R. 725 within the Natural Resources Committee, it became clear that the Bureau of Indian Affairs' Office of Law Enforcement is contemplated to be the primary agency to investigate and enforce violations of the Act. To add clarity to the intent of H.R. 725, and to ensure that law enforcement officers without suitable background or experience in dealing with Indian tribes or with artists or counterfeit arts and crafts, do not become primary enforcers of this Act, it should be made clear through an amendment to H.R. 725 or through appropriate communications with the Administration that only qualified agencies, such as the BIA, are expected to have primary enforcement of this law. As currently drafted, H.R. 725 grants explicit authority to "any Federal law enforcement officer" to enforce the Act. This is an overly broad grant of authority. Clarification, either through amendment or administrative act, is needed as arts and crafts enforcement should not be a burden placed on "any Federal law enforcement officer," such as the Secret Service, the U.S. Capitol Police, or the many other law enforcement agencies with no duties related to arts and crafts.

DOC HASTINGS.

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