

Calendar No. 109

117TH CONGRESS }
1st Session }

SENATE

{ REPORT
117-33

TO ENHANCE PROTECTIONS OF NATIVE AMERICAN TANGIBLE CULTURAL HERITAGE, AND FOR OTHER PURPOSES

JULY 28, 2021.—Ordered to be printed

Mr. SCHATZ, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 1471]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill, (S. 1471) to enhance protections of Native American tangible cultural heritage, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 1471 is to provide a framework to prevent the export of Native American cultural items, held in violation of current federal laws, for sale in foreign countries; to repatriate such items from individuals and organizations in possession thereof; and to improve coordination between federal agencies, Indian Tribes, and Native Hawaiian Organizations seeking to prevent the export, sale, and repatriation of such items. To this end, S. 1471 increases the maximum penalty for trafficking items of Native American cultural heritage in violation of current federal law. S. 1471 also establishes an interagency working group and a Native working group of Indian Tribes and Native Hawaiian organizations to ensure smooth implementation of the law and consistent communication between all relevant stakeholders.

NEED FOR LEGISLATION

The federal government has a unique and sacred duty to Indian Tribes and Native Hawaiians to assist in the protection of cultural heritage that is essential to preserving cultural, social, and religious traditions within their communities. S. 1471 provides explicit restrictions on the export of Native American cultural items in order to help curb illegal trafficking and sale of such items. Without such restrictions, a sophisticated and lucrative international black market trade in Native cultural heritage will continue to thrive and Native communities in the United States will continue to suffer.

For generations, Native American cultural items, including ancestral human remains, funerary objects, sacred objects, and objects of cultural patrimony, have been looted and sold, often in art auctions, to collectors in the United States and abroad. Although such items are traded and sold as art, in Native communities they are irreplaceable pieces of cultural heritage and indispensable to the preservation, continuation, and in some cases, revitalization of cultural and religious practices and traditions.

Since the passage of the *Native American Graves Protection and Repatriation Act (NAGPRA)* over 30 years ago, there has been increasing awareness among the public, and within the federal government, regarding the profound impact the loss of cultural heritage to international art markets has on Native communities. S. 1471 would ensure Native American cultural heritage items obtained in violation of existing federal law are not exported to foreign markets, and that cultural items discovered outside of the United States have a pathway to be returned to their home community and cultural context.

The theft of certain enumerated Native American cultural heritage items is a violation of either *NAGPRA*, the *Archaeological Resources Protection Act (ARPA)*, or both.¹ S. 1471 builds upon *NAGPRA* and *ARPA* by (1) filling an existing gap in federal legislation that prevents the trafficking and exportation of Native American cultural items and tangible cultural property from the United States for sale in foreign markets; (2) creating a mechanism for the voluntary return of cultural items to Native communities; and (3) improving the coordination between and among Native Americans, federal agencies, and international partners engaged in repatriation.

BACKGROUND

The *ARPA* addresses the taking of archaeological resources from federal and Indian lands through regulation of excavation permitting of archaeological resources on public and Indian lands.² *ARPA* requires that before the federal land manager issues a permit for excavation on Indian lands, for example, the consent of the Tribe must be obtained. As part of this process, if activities may result in the harm to, or destruction of, any cultural or religious site, the federal land manager must provide notice to any potentially af-

¹The Native American Graves Protection and Repatriation Act, Pub. L. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001 et seq.); Archaeological Resources Protection Act of 1979, Pub. L. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa et seq.).

²16 U.S.C. § 470cc.

fecting Indian Tribe.³ Applicants are also directed that a permit to excavate on Indian lands shall include any terms and conditions requested by the Tribe.⁴ Further, ARPA imposes civil and criminal penalties on the domestic transport, excavation, transportation, sale, exchange, removal, or damage archaeological resources, as defined in the Act, without such permit.⁵

NAGPRA addresses the need for Native Americans to repatriate ancestral remains, sacred objects, objects of cultural patrimony, and funerary objects from federal agencies and federally funded institutions. It also protects those items whether intentionally or inadvertently discovered on federal or tribal lands.⁶ In this regard, *NAGPRA* was intended to address the rights of lineal descendants, Indian Tribes, and Native Hawaiians to these cultural items, provide additional protections to Native American burial sites, and address trade in funerary and sacred items taken from tribal and federal lands.⁷ To do this, *NAGPRA* established a process for identifying⁸ and repatriating⁹ important cultural items and ancestral remains.

The enactment of both *ARPA* and *NAGPRA* were milestones in the federal effort to curb a variety of domestic threats to Native American cultural items, including theft, trafficking, and sale. Although these laws have created layers of protection in the United States, Indian Tribes and tribal advocacy groups have identified key shortcomings, notably the inability to prevent export of these items for sale in international markets. Two particular incidents involving the international sale and attempted sale of Native American cultural items illustrate this particular shortcoming.

In 2013, the Hopi, Pueblo, and Apache Tribes discovered that several *Katsinam*, commonly known as Katchinas, were to be sold at the EVE Auction House in Paris, France. *Katsinam* are “friends” of utmost importance to these Tribes’ cultural, social, and religious practices. The Tribes attempted to use diplomacy and the French legal system to repatriate the items, but both efforts failed and the auction proceeded. It was only because these items were purchased by anonymous private parties that many of the *Katsinam* were ultimately returned to their homelands. Similarly, the attempted sale of the “Acoma Shield,” also at the EVE Auction House, caused great harm to the Pueblo of Acoma. The Shield is a sacred, ceremonial item important to Acoma religious societies.¹⁰ Pueblo leaders assert that the “Shield” was stolen in a 1970s home robbery on Acoma lands. Decades later, in 2016, the shield surfaced at the EVE Auction House when it was scheduled for sale. Due to lack of legal recourse available to the Tribe, broad-scale diplomatic pleas from Indian tribes, executive branch officials, and members of Congress resulted in the EVE Auction House withdrawing the Shield from sale. Conversations between the consignor of the Shield and the Tribe ultimately led to its return to Acoma Pueblo.

³ 16 U.S.C. § 470cc(c).

⁴ 16 U.S.C. § 470cc(g)(2).

⁵ 16 U.S.C. § 470ee.

⁶ *NAGPRA*, *supra* n. 1.

⁷ S. Rep. No. 101-473, at 3, 5 (1990).

⁸ 25 U.S.C. § 3003.

⁹ 25 U.S.C. § 3005.

¹⁰ Legislative Hearing to Receive Testimony on S. 465 and S. 1400, 115 (2017) (Statement of the Honorable Kurt Riley, Governor of the Pueblo of Acoma).

Native American cultural items are vital to the continued existence and maintenance of Tribal cultural, religious, and social survival and continuance. The theft, trafficking, and illegal sale of these items has and continues to cause enormous harm to Native communities within the United States. The bill, S. 1471, contains measures that will address omissions in existing federal laws, provide needed protections against these activities, and improve agency coordination while meeting the federal government's trust responsibility.

LEGISLATIVE HISTORY

In the 114th Congress, Senators Heinrich, Flake, and Udall introduced the "*Safeguard Tribal Objects of Patrimony Act of 2016*" (i.e. S. 3127). The Committee held an Oversight hearing on "*The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items*," on October 18, 2016. No further hearings were held, and the Committee did not consider the bill prior to adjournment of the 114th Congress. Representatives Ben Ray Lujan and Michelle Lujan Grisham introduced H.R. 5854, the House companion to S. 3127. The bill was referred to the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. No further action on the bill took place prior to adjournment.

In the 115th Congress, Senators Heinrich, Flake, McCain, Schatz, Daines, Tester, Murkowski, and Udall introduced S. 1400, the "*Safeguard Tribal Objects of Patrimony Act of 2017*." On November, 8, 2017, the Committee held a legislative hearing to receive testimony on the bill. On May 16, 2018, the Committee ordered the bill reported favorably without amendment. No further action on the bill took place prior to adjournment.

In the 116th Congress, Senators Heinrich, Murkowski, Baldwin, Daines, Schatz, McSally, Lankford, and Udall introduced the bill, S. 2165. On June 24, 2020, the Committee held a legislative hearing to receive testimony on the bill. On July 29, 2020, the Committee ordered the bill reported favorably, with an amendment in the nature of a substitute, offered by Senator Udall, on behalf of Senator Heinrich. On December 18, 2020, S. 2165 passed the U.S. Senate with an amendment from Senator Udall by unanimous consent. The bill was sent to the House of Representatives and held at the desk. No further action was taken.

Senator Udall's amendment incorporated the concerns the Committee received in hearing testimony, as well as extensive feedback and technical assistance from the U.S. Departments of the Interior, State, Homeland Security, and Justice. Among other things, the substitute amendment added language noting that, in the event an item is found not to have a certification upon export, it will be detained and referred to the Secretary of the Interior to determine whether the item qualifies as an "Item Prohibited from Export." Should an item be deemed prohibited from trafficking under federal law (i.e. *NAGPRA* or *ARPA*), that law alone will trigger the repatriation process that applies until the item is returned to the appropriate Indian Tribe. The amendment created an exemption in the definition of "Item Requiring Export Certification" that allows Indian Tribes with a cultural affiliation to an item to issue certificates authorizing exportation, thereby allowing the exporter to

avoid the federal certification process entirely. Lastly, the amendment authorized \$3,000,000 in funding for each of the fiscal years 2021 through 2026 to carry out the provisions in the bill.

In the 117th Congress, Senators Heinrich, Murkowski, Cortez Masto, Crapo, Luján, Daines, Sinema, Rounds, Rosen, Lankford, Baldwin, and Sullivan introduced the bill, S. 1471. On May 26, 2021, the Committee held a business meeting to consider the bill and ordered the bill reported favorably without amendment. Representatives Leger Fernandez, Young, Davids, Cole, Pingree, Mast, Radewagen, and Bass introduced H.R. 2930, the House companion bill to S. 1471. The bill was referred to the House Judiciary Committee, Committee on Foreign Affairs, and the Natural Resources Subcommittee for Indigenous Peoples of the United States. On May 20, 2021, the Subcommittee held a hearing to receive testimony on the bill. No further action has been taken since that time.

SECTION-BY-SECTION ANALYSIS OF S. 1471 AS ORDERED REPORTED

Section 1. Short title

This section sets forth the title of the bill as the Safeguard Tribal Objects of Patrimony Act of 2021.

Section 2. Purpose

This section sets forth the purpose of the bill, most notably the following:

- To increase the maximum penalty for actions taken in violation of federal law;
- To stop the export, and facilitate the international repatriation, of cultural items prohibited from being trafficked by federal law;
- To establish a federal framework in order to support the voluntary return by individuals and organizations of items of tangible cultural heritage;
- To establish an interagency working group to ensure communication between federal agencies to successfully implement the bill; and
- To establish a Native working group of Indian Tribes and Native Hawaiian organizations to assist in the implementation of this Act.

Section 3. Definitions

This section sets forth the definitions to be used in the bill.

Section 4. Enhanced NAGPRA penalties

This section increases penalties for illegal trafficking in cultural items, in violation of *NAGPRA*, with the goal of aiding in deterrence and encouraging prosecution of illegal transportation, sale, or profit of ancestral human remains and cultural items.

Section 5. Export prohibitions; Export certification system; International agreements

This section explicitly prohibits the export, or attempted export, of Native American cultural items already prohibited from being trafficked under existing federal law. Section 5 also creates an accompanying export certification system and confirms the authority

of the President to retrieve items from other countries under an existing 1970 international treaty. This authority will help prevent the export of federally-protected Native American cultural items, and will facilitate their repatriation from abroad. Other countries are often unable to provide aid to Indian Tribes without an explicit export prohibition and accompanying export certification system.

Subsection (a) prohibits the export of cultural items trafficked in violation of *NAGPRA*, and Native American archaeological resources, the trafficking in which is prohibited by the *ARPA*. Section (a) creates a criminal penalty for such export, or attempted export, when a person knew, or reasonably should have known, the item was illegally taken, possessed, or sold. It also authorizes detention, forfeiture, and repatriation to the appropriate Indian Tribe or Native Hawaiian organization.

Subsection (b) prohibits export of a cultural item (defined under *NAGPRA*), or a Native American archaeological resources (defined under *ARPA*), without an export certification obtained from the Department of the Interior. This subsection also states that cultural items, and Native American archaeological resources, may receive an export certification when (1) they are not under ongoing federal investigation, (2) are not covered by *NAGPRA* or *ARPA*'s trafficking prohibitions, and (3) their export would not otherwise be unlawful.

Subsection (b) also requires exporters to submit applications to the Department of the Interior, and self-attest that an item is not prohibited from trafficking under *NAGPRA* or *ARPA* is sufficient evidence to support the application. It authorizes civil penalties for the export or attempted export of a cultural item without an export certification, as well as detention, and, when found to be covered by *NAGPRA* or *ARPA*'s trafficking prohibitions, authorizes forfeiture and repatriation. This subsection also prohibits the prosecution of an individual attempting to export a cultural item without a permit if that person, in accordance with Section 6, voluntarily returns, or directs the return of, a cultural item prior to the commencement of a federal investigation into the attempted export.

Subsection (c) reaffirms the authority of the President to enter into agreements with other countries regarding Native American cultural heritage items. The U.S. is a signatory to a 1970 international treaty under which countries may enter into agreements for the return of cultural property if the requesting country has an explicit export prohibition and certification system. The U.S. has enacted a federal statute under which it returns cultural property to other countries, but has not utilized the treaty to retrieve cultural property originating within its own borders.¹¹ The bill would allow the U.S. to utilize the mechanisms under the 1970 international treaty to retrieve Tribal cultural heritage items from abroad.

Section 6. Voluntary return of Tangible Cultural Heritage

This section creates a voluntary return framework through which individuals and organizations seeking to voluntarily return "Tangible Cultural Heritage," as defined in the act, may receive federal assistance in locating the Indian Tribes or Native Hawaiian organizations with a cultural affiliation to the items. Tangible cultural

¹¹ 19 U.S.C. §§ 2601 et seq.

heritage includes Native American human remains and culturally, historically, or archaeologically significant objects, resources, patrimony, or other items that are affiliated with a Native American culture. Tangible cultural heritage also extends beyond items protected under existing federal law.

Subsections (a) through (c) call on the Departments of the Interior, and State, to create the infrastructure to facilitate the voluntary return of tangible cultural heritage to Indian Tribes and Native Hawaiian organizations by individuals and organizations.

Subsection (d) clarifies that there will be no additional penalties or legal liabilities imposed beyond what is specified in the bill, and Subsection (e) directs the Department of the Interior to provide the individual, or organization returning the item, with tax documentation for a deductible gift.

Subsection (f) mandates that the voluntary return framework is not applicable to items subject to NAGPRA's repatriation process for federal agencies and museums.

Section 7. Interagency working group

Creates an interagency working group consisting of representatives from the Departments of the Interior, Justice, State, and Homeland Security. The function of the Working Group is to protect tangible cultural heritage, cultural items, and archaeological resources; facilitate repatriation of items illegally removed or trafficked in violation of existing federal law; and improve federal implementation of NAGPRA, ARPA, and other relevant federal laws. Federal agencies currently collaborate without statutory mandate, but a framework for their ongoing collaboration and mechanisms by which Indian Tribes and Native Hawaiian organizations can more easily interact with them are necessary.

Section 8. Native working group

This section creates a Native working group through which representatives of Indian Tribes and Native Hawaiian organizations advise the federal government regarding the sensitive issue of protection of Tribal cultural items and make requests for federal assistance.

Section 9. Treatment under Freedom of Information Act

This section creates an exemption from disclosure under the Freedom of Information Act for sensitive information provided under the bill.

Subsections (a) and (b) exempt from disclosure information submitted by Indian Tribes or Native Hawaiian organizations pursuant to the bill, and designated as sensitive or private. Also exempt is information submitted by any person pursuant to the bill that relates to a Tribal cultural heritage item for which an export certification is denied. In exempting this information, Indian Tribes and Native Hawaiian organizations are more likely to provide necessary sensitive information to the federal government, and information provided that may otherwise be used to authenticate an item will not increase that item's value on the black market.

Subsection (c) allows an Indian Tribe or Native Hawaiian organization to request from a federal agency its own information it provided under the bill.

Section 10. Regulations

This section directs the Department of the Interior to promulgate regulations implementing the bill, in consultation with the Departments of State, Homeland Security, and Justice, and after consultation with Indian Tribes and Native Hawaiian organizations.

Section 11. Authorization of appropriations

This section authorizes \$3,000,000 in funding for each of the fiscal years 2021 through 2026 to carry out the bill.

COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 27, 2021.

Hon. BRIAN SCHATZ,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1471, the Safeguard Tribal Objects of Patrimony Act of 2021.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

S. 1471, Safeguard Tribal Objects of Patrimony Act of 2021			
As ordered reported by the Senate Committee on Indian Affairs on May 26, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	*	*
Revenues	0	*	*
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	0	13	not estimated
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Under Threshold
* = between -\$500,000 and \$500,000			

S. 1471 would make it a federal crime to export Native American cultural items, archaeological resources, and objects of antiquity without proper authorization and would require exporters to obtain an export certification. Federal agencies would need to convene working groups to reduce trafficking and encourage repatriation of cultural heritage items. The bill also would direct the Department of the Interior (DOI) and the Department of State to designate liaisons to facilitate voluntary returns of unlawfully acquired items.

Those agencies would provide training to tribal organizations, collectors, and dealers concerning the new prohibitions.

S. 1471 would authorize the appropriation of \$3 million annually over the 2021–2026 period to carry out the bill’s requirements. CBO assumes that the bill will be enacted late in fiscal year 2021 and expects that federal agencies would begin incurring costs in 2022. Based on spending patterns for similar activities, CBO estimates, implementing S. 1471 would cost about \$13 million over that period, assuming appropriation of the authorized amounts.

In addition, S. 1471 would authorize DOI to charge fees to cover the costs of issuing export certifications. Those fees would be recorded as revenues and could be spent without appropriation. CBO expects the number of applications to be small and that the amount of fees collected and spent would be insignificant in each year.

People who violate the bill’s provisions could be subject to criminal fines. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation. CBO expects that any additional revenues and subsequent direct spending would not be significant because the legislation would probably affect only a small number of cases.

The costs of the legislation, detailed in Table 1, fall within budget functions 150 (international affairs), 450 (community and regional development), and 750 (administration of justice).

TABLE 1.—ESTIMATED INCREASES IN SPENDING SUBJECT TO APPROPRIATION UNDER S. 1471

	By fiscal year, millions of dollars—						2021–2026
	2021	2022	2023	2024	2025	2026	
Authorization	3	3	3	3	3	3	18
Estimated Outlays	0	2	2	3	3	3	13

S. 1471 would impose a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA), by requiring exporters of eligible Native American cultural items to obtain an export certification. According to the Government Accountability Office, fewer than 1,500 such items were identified at overseas auctions between 2012 and 2017. Using that information, CBO estimates that the number of affected exporters would be small; thus, the aggregate cost of the mandate would fall under the threshold established in UMRA for private-sector mandates (\$170 million in 2021, adjusted annually for inflation).

The CBO staff contacts for this estimate are Jon Sperl (for federal costs) and Lilia Ledezma (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1471 will have minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 1471.

CHANGES IN EXISTING LAW

On February 11, 2021 the Committee unanimously approved a motion to waive subsection 12 of rule XXVI of the Standing Rules of the Senate. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.

