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Pueblo of Acoma Testimony for the House Indigenous Peoples of the United States Subcommittee Legislative Hearing on H.R. 2930 May 20, 2021

Introduction. Thank you Chairwoman Leger Fernández, Ranking Member Young, and Members of the Subcommittee for the opportunity to provide testimony on H.R. 2930, "to enhance protections of Native American tangible cultural heritage, and for other purposes," also known as the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021. The demonstrated need and widespread support for this bill across Indian Country cannot be overstated. H.R. 2930 marks the third bill introduced in a Congressional session in which the STOP Act has been advanced—and we sincerely hope that it will be the one to finally become federal law in 2021.

Opening Remarks. My name is Brian Vallo, and I am the Governor of the Pueblo of Acoma, located in northwestern New Mexico. My Pueblo has, regrettably, developed an expertise on the subject matter of this legislation—the illegal trafficking of our tribal cultural heritage items and the fight to have those items repatriated, especially across international borders. From our veteran experience, we have learned where traffickers take advantage of gaps in federal law to illegally export and sell our heritage on the international market. The STOP Act firmly closes these gaps.

As a key and foundational matter, the Pueblo asks that the Subcommittee not think of cultural heritage items in property rights terms, like title and ownership. We, of course, have significant claims and arguments that can be asserted as to such items being tribal property; however, if these items are treated in that way, their true significance is woefully lost. These are items of such incomparable status that no individual person has a legal right to hold title to them under Pueblo and federal law. They are the heritage of an entire people and an inseparable part of the community. In this way, it is important for the Subcommittee to move beyond the Western view of property rights and consider the STOP Act as advancing human and cultural rights.

I. Acoma Pueblo's Experience in Fighting for Our Cultural Heritage and the Story of the Acoma Shield

Acoma Pueblo's intimate familiarity with the illegal export of our material heritage is long, beginning with the pillaging of our communities by the first conquistadors and continuing, uninterrupted, into the present day by foreign auctioneers. We have fought across the generations to stem this unbearable loss. Many people view our cultural heritage as beautiful works of art or as talismans of a past culture they would like to own. Others seek to gain profit by trafficking in

our sacred items, and they know that these items are extremely difficult to retrieve once they are exported abroad. A quick look at past auction catalogues of places where Pueblo cultural heritage has been sold reveals the sheer enormity of tribal cultural heritage that has left the country.¹

Whatever intrinsic beauty these items possess and whatever monetary value they may generate for traffickers, that is not their intended purpose. These items are essential to our way of life. Our material heritage is vital to our culture, our traditional calendar, our societies, our families, and our identity as Pueblo people. It also helps us to transmit our Pueblo worldview to our young people. So important are these items of cultural heritage that, under our traditional law, no one person may own them. Rather they belong to the community under the tending of caretakers who cannot legally sell them or physically remove them from the Pueblo. We have prioritized protecting our tangible cultural heritage because we believe that, without their presence, we cannot continue our way of life.

The Pueblo has fought back against many instances of trafficking in our home State of New Mexico, across the country, and overseas. Among our most recent battles was the effort to regain an important ceremonial shield (often referred to as "the Acoma Shield"), which was set to be auctioned in Paris, France in 2015 and then again in May of 2016. The Acoma Shield was stolen from its caretaker in the 1970s and was eventually exported overseas. We engaged in difficult, closely negotiated discussions with the auction house and the individual consigner who claimed to hold title—all with the fierce support of our Congressional Delegation, federal agency officials and law enforcement, Indian Country, and the general public. Through these discussions, and backed by litigation filed by the federal government that resulted in a warrant, we were able to halt the illegal sale of the Acoma Shield. *Over 40 years after it was torn from our community, the Acoma Shield finally returned home in November of 2019.*

The joy of our Pueblo in welcoming the Acoma Shield home is without measure. A physical and spiritual absence in our community has been filled. Our people and the Acoma Shield upon reunion shared a deep contentedness impossible to put into words. The story of the Acoma Shield's return is illustrative of how cooperation, both internationally and domestically, can be effectively wielded to facilitate the protection and repatriation of tribal cultural heritage. It is multifaceted success story in federal-tribal partnership, in cooperative engagement, in redressing historic injustice, and in healing.

¹ 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*, NY TIMES, (Dec. 16, 2013), <https://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*, NY TIMES, (June 29, 2014), <https://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items-continues-despite-us-embassy-efforts.html>; SeaAlaska Heritage Institute, *Secret Bidder Saves Sacred Object from Auction for Alaska Natives*, (Sept. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/09/06/annenbergs-foundation-returns-sacred-object-alaska-natives-156764>; *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/>; *Hopi Sacred Masks Auction in Paris Despite Protests*, REUTERS, (June 11, 2015), <https://www.reuters.com/article/us-france-auction-masks/hopi-sacred-masks-auctioned-in-paris-despite-protests-idUSKBN0OR1DG20150611>. The Government Accountability Office published a report recognizing the prevalence of this trafficking, discussed further below.

And yet, the story of the Acoma Shield's return is also a story of the shortcomings in existing federal law that continue to cause profound harm to tribal nations and which must be addressed to fully protect our tangible heritage. Through our fight to regain the Acoma Shield, we were told—and experienced first-hand—time and again that current federal law fell short of providing the tools necessary for the international repatriation of cultural patrimony.

We have had to rely on good faith negotiations to facilitate the return of other items, including domestically. In 2006, for instance, 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.² A national auction house had possession of the wooden beams along with nearly 50 other items of cultural heritage belonging to the Pueblo. The auction house, unlike the situation with the Acoma Shield, facilitated negotiations between the consignor and the Pueblo, and nearly all items were returned without incident. These conversations happened domestically, and this likely played a role in the smoother repatriation efforts.

The Acoma Shield and San Esteban del Rey Mission Church are just two of an untold number of instances in which we have fought for the return of our Pueblo heritage. The ledger of loss is so long and the entries so vast that even we do not know the full extent taken from our community. While some items have been successfully returned pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170,³ countless items have not, and they may never return home.

Since 2015, we have devoted an increasing amount of internal resources to export prevention and repatriation efforts in response to a disturbing availability of our cultural heritage items for private sale. Our sacred items were and are still being sold in locations locally, nationally, and internationally without our consent. We actively monitor auctions and other sales venues in which these items may be trafficked. When we identify such an item, we seek its return, however, this is only sometimes successful. We fear that our increased monitoring is driving the market underground, increasing black market activity hidden from the public eye. However, our biggest concern and lesson learned from this ongoing and tiring work is the inability of the federal government to intervene as these items travel from domestic to international markets, where opportunities for civil negotiation evaporate and the likelihood of their return home becomes almost impossible.

II. Gaps and Challenges in Existing Federal Law

² The San Esteban 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.

³ 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. In 1999, another example involved a set of historic Catholic priest robes cared for by the Pueblo that dated to 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 who is also a member of Acoma investigated a non-Indian tribal art and antique dealer, leading to his conviction and the recovery of the items.

Not All Items of Cultural Heritage are Protected. It is important to understand that existing federal law protects only specific types of items associated with tribal nations. Most items are not protected because they lack the requisite cultural importance. And, due to strict provenance requirements, even many items that *do* possess the necessary cultural importance and are highly sensitive to our community are still not protected. For example, NAGPRA and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470m, 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 timeframes. Although tribal nations 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 that are federally protected if they do not meet these statutory standards. As a result, many items that are of deep cultural significance to a tribal nation may be left vulnerable under existing law.

Red Herring Focus on Theft. An item of cultural heritage need not be stolen to qualify for federal protection barring its sale and even possession. Rather, under both Pueblo and federal law, the Pueblo itself effectively "owns" the item in question once it is identified as culturally significant sufficient to meet the relevant statute's definition of covered items. If the item meets the statutory standards for protection under federal law—including NAGPRA or ARPA—their removal from tribal or federal land and trafficking is illegal.

Inability to Tap into Operational International Repatriation Mechanism. There exists an international mechanism that has been in operation for decades through which countries can request the return of cultural property from one another. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is a 1970 international treaty to which the United States is a party. When a signatory nation acts domestically to prohibit export of particular cultural heritage items originating within its borders and to create an export certification system association with that prohibition, it can call upon other signatories to control imports of those items and to facilitate their repatriation.

Critically, while the United States has enacted the Convention on Cultural Property Implementation Act through which it repatriates covered items to other countries, it *has not* enacted an explicit export prohibition nor export certification system for the tribal cultural heritage items for which it prohibits trafficking domestically—namely, items protected under NAGPRA or ARPA. It is for this very reason that the Acoma Shield did not return home expeditiously but instead took years of less formal negotiations and eventually came home through voluntary return. The STOP Act would fill these gaps.

Export Restrictions and Certification System. The path from obtaining an item of cultural heritage to its illegal sale overseas is winding. Myriad individual sellers, transporters, galleries, and auction houses, among other actors and business venues, may be involved in the processing of each item. Domestically, our Pueblo has learned from its experience that U.S. Customs and Border Protection is likely the singular entity through which cultural heritage items are funneled for exportation. The exportation restrictions and certification system—and the availability of export certification applications to tribal nations—that are proposed in the STOP Act are thus critical for the centralized monitoring of attempted exports of cultural heritage items that have been illegally removed from their communities.

Reliance on Voluntary Returns. Because of the lack of export controls, and other weaknesses in federal law, we must often rely on heavily negotiated voluntary returns to bring our cultural heritage items home. Under federal law, tribal nations, like other governmental entities, are treated as non-profit entities for tax purposes. Acoma Pueblo has used this to our advantage to incentivize individuals who are considering returning an item of tribal cultural heritage. Paperwork and information are provided for these individuals to seek a tax deduction, and the returned item is treated as a donation to the Pueblo. Voluntary return may take place even for items not fitting into the restrictive limitations of current federal law. There is no guarantee that this arrangement will be successful in each instance and, regrettably, too often it is not. The STOP Act facilitates voluntary returns by helping to point people to the relevant tribal nation and facilitating tax deductions.

III. Broad and Bipartisan Support for the STOP Act

The Pueblo of Acoma fully supports the passage of the STOP Act of 2021, H.R. 2930 // S. 1471. It is a bipartisan bill with significant support from Indian Country and beyond. The bill was reintroduced in the 117th Congress with bipartisan co-leads and cosponsors in both the House and the Senate. As of May 18, over twenty-five tribal nations, national and regional tribal organizations (including the All Pueblo Council of Governors, Association of Village Council Presidents, and Native American Rights Fund), and non-tribal organizations (such as the Society for American Archeology, Sealaska Heritage, the Association of American Indian Affairs, the National Association of Tribal Historic Preservation Officers, and National Trust for Historic Preservation) have provided letters of support for the legislation. The National Congress of American Indians also celebrated reintroduction of the bill, as indicated in the New Mexico Congressional Delegation's press statement. This list continues to steadily grow.

The STOP Act represents the culmination of a broad-based, multi-year effort to prevent the international trafficking in tribal cultural heritage. The bill has been developed with significant expert contributions from agency officials, tribal representatives, art dealers, and others. In fact, the Senate Committee on Indian Affairs solicited technical assistance comments from many federal agencies before markup in the last Congress, and that Committee was able to hone the bill even further.

The STOP Act also represents the fulfillment of Congress's express intent in this area. In 2016, a joint resolution entitled the Protection of the Right of Tribes to stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, H. Con. Res. 122, was passed in support of the development of explicit export restrictions on tribal cultural heritage. It calls for the implementation of several protection measures to actualize this goal and facilitate repatriation. Two years later, at Congress's request, the Government Accountability Office released a research report in citing the ongoing problems in the international trafficking of tribal cultural heritage.⁴

⁴ *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, Government Accountability Office (Aug. 6, 2018), <https://www.gao.gov/products/GAO-18-537>.

In the 116th Congress, significant momentum was achieved around the bill. In 2020, the previous iteration of the STOP Act passed the Senate following a markup on hotline and unanimous consent. We understand that, on the House side, the bill was cleared for passage by all three committees to which it had been referred (i.e., this Subcommittee, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, and the House Foreign Affairs Committee). The White House also signaled support for the bill last year. Time on the legislative calendar ran out, unfortunately, before we could see the bill over the finish line.

Now *five* years out from the PROTECT Patrimony Resolution and on the heels of the previous Congress's energetic progress, the time for enacting the STOP Act is here. Passage of H.R. 2930 would, finally, turn past congressional *intent* into present congressional *action* in resolving the persistent threat that trafficking poses to Indian Country.

IV. STOP Act Stopgaps – How It Will Strengthen Existing Federal Law

The STOP Act places an emphasis on stopping the export and facilitating the return of protected cultural heritage items trafficked internationally, where we have been the most powerless to secure their repatriation. The STOP Act sets out to accomplish this pursuant to two main goals: (1) ending the export of tribal cultural heritage items already prohibited from being trafficked under federal law and facilitating the international repatriation of such items; and (2) facilitating federal agency coordination to advance these efforts and the voluntary return of such items more broadly.⁵

The STOP Act would allow the United States to use the existing international mechanism under which countries request the return of their cultural patrimony. It would explicitly prohibit the export of tribal cultural heritage items whose trafficking is already prohibited under NAGPRA or ARPA.

It would also create an export certification system where an exporter seeking to export an item that qualifies under NAGPRA or ARPA as a cultural item or Native American archaeological resource must apply for a certification. Only those items not prohibited by NAGPRA or ARPA from being trafficked—usually demonstrated through the exporter's self-attestation—are eligible to receive a certification and thereafter be exported.⁶ As discussed earlier, in the Pueblo's experience, preventing the exportation of prohibited items of cultural heritage dramatically increases the chances of their recovery. The STOP Act's export prohibition and accompanying export certification process would limit export of federally protected cultural heritage items and put in place the tools necessary to secure their international repatriation under the existing treaty discussed above.

⁵ It should be noted that there are other very serious issues with the limitations of NAGPRA and ARPA as they function domestically, but the STOP Act does not seek to address those. Rather, the STOP Act only seeks to put the tools in place that are necessary to retrieve from abroad items that are already protected domestically.

⁶ Many items that qualify as a cultural item or Native American archaeological resource are nonetheless not prohibited by NAGPRA or ARPA from being trafficked, in part due to the restrictive provenance requirements tied to the federal statutes.

The STOP Act uses existing federal definitions and legal limitations that have been in place for decades—seeking only to control the export of items that are illegal contraband domestically and facilitate their international return. Federal courts have long upheld the current federal framework for defining federally protected tribal cultural heritage.⁷ Further, federal courts have stated that those engaging in the sale and trafficking of protected items are deemed to possess a certain level of knowledge of whether an item qualifies as protected.⁸ Still, the STOP Act calls on the Department of the Interior in consultation with tribal nations to produce a Federal Register notice providing additional clarity and notice. It also encourages tribal nations to issue indigenous artists receipts that they may use when selling their art in order to demonstrate the items are not federally protected tribal cultural heritage. Under no circumstance would an individual have an item forfeited or face criminal penalties if the cultural heritage item is legally held under federal law.

Further, the STOP Act would pave the way for smoother dialogue to facilitate returns. It would create a framework for the federal government to work with individuals and entities on the voluntary return of cultural heritage to tribal nations, regardless of whether those items are legally held or not. It would also create formal bodies through which federal agencies can interact with each other and with tribal representatives on the complicated and cross-jurisdictional issue of repatriation.

Additionally, the STOP Act would increase penalties under NAGPRA to encourage deterrence and prosecution.

V. Beyond the STOP Act – Tribal Cultural Heritage Protections in Other Contexts

The STOP Act is critical to protecting tribal interests. It will close gaps in existing federal law and enable the United States to avail itself of a key repatriation mechanism under international law. It will substantially advance our country's protection of tribal tangible cultural heritage. There are, however, other aspects of protecting tribal cultural heritage that must be properly accounted for under federal law. These include, for instance, the need to preserve our linguistic heritage and protect our sacred landscapes, among others.

As Acoma people, we are deeply connected to the landscapes of the southwest on which our Ancestors have resided for innumerable generations. This connection—which extends beyond the imposed borders of our modern-day Reservation—is etched into our collective histories and memories, and it lives today in our ways of life and expressions of Pueblo cultural identity. One of these central cultural landscapes is the area surrounding Chaco Canyon, a UNESCO World Heritage Site recognized for its remarkable cultural resources. Despite the sacred and cultural importance of these resources to our Pueblo and other tribal nations, the Greater Chaco Region is increasingly threatened with irremediable harm due to oil and gas development. The federal government's current oil and gas leasing system must be changed so that proper protocols are in place—and enforced—to protect these sacred landscapes. In addition, looting and vandalism are

⁷ 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).

⁸ 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).

major concerns impacting the preservation of culturally significant landscapes, and we have called for greater protections of sites such as Bears Ears National Monument and the lands to its east. Our Pueblo has provided detailed testimony on this issue, and on sacred landscapes broadly, and we would welcome the opportunity to discuss this priority with you further. We firmly believe that holistic approaches that address tribal cultural heritage from all perspectives is needed. Additionally, protecting and better managing sacred landscapes can help protect individual items of tribal cultural heritage that may populate a landscape from looting, destruction, and vandalism.

The RESPECT Act, which is also the subject of today's legislative hearing before this Subcommittee, also touches upon a complementary, pivotal area in the protection of tribal interests: effective federal consultation with tribal nations. Too often, federal agencies rely on cursory "consultations" that do not provide tribal leaders with a meaningful opportunity to engage with, let alone substantively provide input on, federal policies and actions impacting their interests. True tribal consultation is only possible when both parties understand that the relationship between tribal nations and the federal government is a government-to-government relationship based on mutual respect. Clear consultation processes are of utmost importance to strengthening this relationship. To that end, it is essential that consultation be meaningful, regular, and well-informed. More specifically, meaningful includes engaging with tribal leaders at the beginning of policy development rather than after decisions are made. It also means providing tribal leaders with early and adequate information so that we have time to review materials, reflect on proposals and offer comments in response. The RESPECT Act seeks to advance federal practices for effective consultation. We applaud this much-needed effort and look forward to working with the Subcommittee further on the legislation's development.

Conclusion. The continued trafficking, theft, and illegal sale of items of tribal cultural heritage poses an existential threat to our Pueblo beliefs and identity. The intimate relationship we share with these items can be found in other tribal communities across the country, as is the shared pain of their loss when items are trafficked domestically and internationally.

We are encouraged, however, by the recent surge in action around the protection of tribal cultural heritage, which has resulted in increased contact between the Pueblo and various collectors and dealers. The return of the Acoma Shield was a moment of unprecedented joy in our community—a happiness following over 40 years of sorrow that could have been avoided with export controls and other protections for tribal cultural heritage. We hope that no other tribal nation will have to undertake such an arduous journey as ours in fighting for the return of the Acoma Shield. Regrettably, we know that far too many tribal nations have shared in similar experiences and will continue to do so as long as glaring gaps in our federal laws exist.

Passage of the STOP Act would send the clear message that the United States both recognizes and actively treats the international repatriation and protection of tribal cultural heritage as a national priority. The Pueblo of Acoma looks forward to working with Congress on achieving this historic milestone in the 117th Congress. Dawa'ee, thank you.