STATEMENT
OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

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Good afternoon Chairman Gallego, Ranking Member Cook, and Members of the Subcommittee. My name is Darryl LaCounte and I am the Director of the Bureau of Indian Affairs at the Department of the Interior (Department).

Thank you for the opportunity to provide testimony on behalf of the Department regarding S. 216, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act; H.R. 1312, the Yurok Lands Act of 2019; and H.R. 3846, the Safeguard Tribal Objects of Patrimony Act of 2019. Each of these bills is discussed below.

S. 216, Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act

S. 216, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act, would provide equitable compensation to the Spokane Tribe for the past and continued use of Spokane Tribal lands for the production of hydropower at Grand Coulee Dam. The bill explains how Congress in 1940 granted to the United States all right, title, and interest of the Spokane Tribe and Colville Tribes to certain tribal and allotted lands within their respective Reservations. As compensation for such use, the Secretary of the Interior at the time provided the Tribes with the sums of $4,700 and $63,000 respectively. In 1976, the Colville Tribes successfully amended claims pending before the Indian Claims Commission to seek compensation for the use of their lands by the Grand Coulee Dam project. Congress later ratified an agreement settling the Colville Tribes' claims for $53,000,000 plus $15,250,000 annually based on revenues from power from the Grand Coulee Dam project. However, because the Spokane Tribe had resolved a pending land claim with the Indian Claims Commission, unlike the Colville Tribes it had no pending claim to amend. Thus, despite experiencing the same effects as the Colville Tribes as a result of the construction and operation of the Grand Coulee Dam, the Spokane Tribe was not similarly compensated for the past and continued use of its Tribal lands.

It is this matter that S. 216 is intended to address by providing fair and equitable compensation to the Spokane Tribe for use of the Tribe's land for the generation of hydropower by the Grand

Coulee Dam. S. 216 does not relate to water claims against the United States or third parties. As written, the Department does not have a prospective role in the implementation of this bill. As such, the Department neither supports nor opposes it.

H.R. 1312, Yurok Lands Act

Under the H.R. 1312, the Yurok Lands Act of 2019, the Secretary of Agriculture shall transfer to the Secretary of the Interior administrative jurisdiction over approximately 1,229 acres in the Yurok Experimental Forest and Six Rivers National Forest. The Secretary of the Interior shall hold the land transferred in trust for the benefit of the Yurok Tribe. The land will not be eligible, or considered to have been taken into trust, for any gaming activity under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), or for old growth logging.

The bill also confirms the 2006 "Cooperative Agreement between the Department of the Interior and the Yurok Tribe for the Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin of California" and authorizes the Secretary to take such actions as are necessary to effectuate the agreement.

The Department supports the goals of H.R. 1312 and encourages other federal departments and agencies to enter into similar cooperative management agreements with tribes across the country when authorized. However, the Department acknowledges that other federal departments and agencies more impacted by this legislation has concerns and believes H.R. 1312 needs technical changes to address a number of issues identified by surrounding tribes. We stand ready to work with the sponsors and the Subcommittee to revise H.R. 1312 and strengthen this bill.

H.R. 3846, Safeguard Tribal Objects of Patrimony Act

The purpose of H.R. 3846 is to prevent the export of wrongfully acquired items of Native American cultural heritage – including sacred items and items of cultural patrimony – and to encourage repatriation of these items both domestically and abroad. The Department appreciates that H.R. 3846 is intended to strengthen the legal framework to achieve those ends. There are, however, a few technical concerns with the bill as currently drafted.

With or without Federal assistance, tribes have found it very difficult to stop sales in European auction houses. The cases in which agencies have been able to be most helpful have typically involved foreign museums from which tribes are seeking repatriation of cultural items as defined under the Native American Graves Protection and Repatriation Act (NAGPRA).

On occasion, applicable foreign law or a foreign museum's policy requires a formal communication from the U.S. government before the museum will agree to a tribe's request for repatriation. The State Department is the agency that sends that communication, but State relies on the Department to review the language in light of U.S. Indian law and policy, including

NAGPRA and other laws and programs relating to Native American cultural resources. Often, the museum will ask how the U.S. addresses repatriation in analogous situations within the United States; as the Department housing the National NAGPRA Program, we can provide that information. The Department has worked with multiple Interior bureaus and offices, as well as State, to provide such support in recent cases that resulted in a successful repatriation from Germany in 2018, and another from New Zealand earlier this year.

In all cases, we confront the fundamental reality that the foreign auction house or museum is within the jurisdiction of a foreign country, where the law of the United States has limited reach. Foreign laws that facilitate repatriation of illegally imported cultural property rely on an export certificate from the country of origin in order for the repatriation provisions to be utilized. The United States does not issue this type of export certificate. In the absence of a specific foreign law that supports repatriation and is accessible to interested parties in the United States, the U.S. government must rely on moral argument and diplomatic persuasion.

In August 2018, the Government Accountability Office (GAO) issued a report on agency efforts to assist tribes in repatriating cultural items from overseas auction houses. Of the three recommendations for the Department, we believe we have addressed two. First the requirement to publicize information on points of contact for tribes and the Native Hawaiian Community when seeking assistance with international repatriation. Second, advising that we adopt best practices for collaboration, including documenting and publicizing the Department's roles and responsibilities.

The GAO's third recommendation was that the Department develop an analysis of options for amending the legislative framework to improve the federal government's ability to assist tribes with international repatriation. The GAO noted that the current authority of the federal government to assist in this area is limited, emphasizing that there is no federal law explicitly prohibiting the export of Native American cultural items or regulating their export, and the U.S. does not provide for export certification along the lines envisioned under the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Cultural Property Convention). We are working to develop the Department's response to this recommendation.

H.R. 3846 can help address the GAO's third recommendation. The Department supports the provision in Section 5(a) that would prohibit the export of cultural items obtained in violation of NAGPRA and archaeological resources obtained in violation of the Archaeological Resources Protection Act (ARPA). The establishment of an explicit export prohibition is a useful step in communicating clearly to the public and to foreign governments the categories of Native American cultural heritage that are protected under U.S. law and prohibited from export.

We note that the utility of the proposed prohibition on exports of objects of antiquity obtained in violation of the Antiquities Act may be limited due to challenges in enforcement of the Antiquities Act relating to concerns about unconstitutional vagueness in the definition of the underlying offense (i.e. the definition of "object of antiquity" and "obtained in violation of NAGPRA"). Extension of the prohibition to encompass the export of cultural items obtained in violation of tribal law, analogous to the ARPA prohibition on trafficking of archaeological

objects obtained in violation of state or local law, could be useful; this would reinforce tribes' own efforts to protect their cultural resources.

We support the provisions for seizure and forfeiture of items found to be either without an export certificate or otherwise in violation of the provisions of the Act; such provisions are essential to support effective enforcement.

Section 5(b) calls for the creation of an export certificate program. The Department has deep reservations about inclusion of this section. We are not in a position to assess whether such a program would facilitate the ability of the U.S. government to invoke assistance with repatriation under foreign laws implementing the 1970 Cultural Property Convention. We defer to the Department of State for that assessment. However, the Department also has a number of specific concerns about this section.

The Department's first concern with section 5(b) is the lack of an authorization of appropriations for the new program. While section 5(b)(6) does allow for a fee to be charged to support the program, based on the Department's experience with other programs that provide for permitting of exports, additional staffing and other resources would be required to establish and operate the export certification program as proposed.

The Department's second concern about section 5(b) is that the export certification for cultural items imposes the main burden of compliance on tribes themselves, to the extent that tribal practitioners have cultural practices that require them to carry cultural items with them outside the United States, or other reasons to move items internationally for cultural, religious, scientific, or educational purposes. Museums and scientific institutions might also be affected to the extent they are involved in such exports (e.g. a loan of an item for an exhibit or research collaboration). We recommend the Act provide the opportunity for affected tribes to request exemptions from the certificate requirement, particularly for routine cross-border movements for ceremonial purposes.

The utility of section 5(b)'s export certification requirement for Native American objects of antiquity under the Antiquities Act is somewhat questionable. If this section is preserved, however, we suggest inserting an explicit provision for development of a more specific definition through the exercise of rulemaking authority established in the bill.

The Department also suggests adding penalties, including but not limited to forfeiture, for violations in instances where an export certification was required but not obtained by the exporter. Without this, there is little or no potential for enforcement against any illicit exports in the streams of commerce that are of the most concern, such as the art trade with Europe.

More generally, we believe further consideration should be given to alternative export measures. For example, establishing an export declaration requirement for a defined category of Native American tangible cultural heritage items including but not limited to NAGPRA items. Under this approach, anyone seeking to export an object of Native American cultural heritage from the United States would have to submit a declaration in advance of the planned export, which describes the item and its provenance. The declaration's information could be added to a

database, potentially building on existing systems, with the potential for agencies and tribes to review and have an opportunity to block illicit exports. This would increase transparency in the relevant market and allow for analysis to better understand the nature of the trade in which problematic exports may occur, including patterns in terms of destination markets and types of material being traded.

Section 7 requires the Secretary of the Interior to convene an interagency working group. Note, this already exists and is led by DOJ. It has an informal, staff-level structure and focus on information-sharing. We have no objection to continuing the existing interagency group as is, as any additional bureaucratic or procedural requirements could be duplicative and impede, rather than strengthen, its operation.

Section 8 directs the Secretary of the Interior to establish a tribal working group. We are concerned that functions envisioned for the working group would be duplicative of existing processes. For instance, the tribal working group, in its meetings, could make a formal request that the Department of State initiate diplomatic dialogue in support of repatriation. However, currently any tribe or Native Hawaiian organization may make such a request. All such requests have received responses. The bill creates an extra layer of bureaucracy and imposes a multi-party procedure to do what individual tribes already achieve with an email or phone call. The establishment and maintenance of such a group, would also be subject to the Federal Advisory Committee Act and require the diversion of staff time and other agency resources to service the working group.

Section 9 would establish an exemption from the obligation to disclose under the Freedom of Information Act for any information that tribes submit to the federal government pursuant to the Act. If such exemption is maintained, we suggest that the exemption be defined to encompass only that information designated by a tribe or Native Hawaiian organization as sensitive or private according to the custom, law, culture, or religion of the tribe or community.

In conclusion, the Department supports the spirit of H.R. 3846 and looks forward to working with the Committee on the important issue of preventing the export of wrongfully acquired items of Native American cultural heritage.

Conclusion

Mr. Chairman, thank you for the opportunity to testify today. I am glad to answer any questions the Subcommittee may have.