

Kurt Riley, Governor
Raymond J. Concho, Jr., 1st Lt. Governor
Robert T. Garcia, 2nd Lt. Governor
Jonathan Sims, Tribal Secretary
Christopher J. Garcia, Tribal Interpreter



25 Pinsbaari Drive
P. O. Box 309
Acoma, NM 87034
Telephone: (505)552-6604
Fax: (505)552-7204

PUEBLO OF ACOMA
OFFICE OF THE GOVERNOR

Written Testimony of Governor Kurt Riley
Pueblo of Acoma
Before the
Senate Committee on Indian Affairs

Field Hearing on the Theft, Illegal Possession, Sale, Transfer and
Exportation of Tribal Cultural Objects

Albuquerque, NM
October 18, 2016

On behalf of the Pueblo of Acoma ("Pueblo" or "Acoma"), please accept this written testimony for the field hearing on the "Theft, Illegal Possession, Sale, Transfer and Exportation of Tribal Cultural Items" held by the Senate Committee on Indian Affairs on Tuesday October 18, 2016 in Albuquerque, New Mexico. Acoma is deeply appreciative of the time taken by the Committee in devoting its attention to this important issue. Acoma has a great deal of experience in both combating illegal trafficking of its protected cultural objects and in seeking repatriation of those objects. The Pueblo is grateful for the opportunity to share this experience with you.

1. Acoma's Background on the Protection of Cultural Objects

The cultural objects Acoma is attempting to protect are difficult to fully describe and publicly identify because of their sacred and confidential ceremonial use. However, the objects the Pueblo has an interest in protecting are those that are central to our cultural belief system and way of life. They are very different from the beautiful works of art created by our tribal artists and potters. While our cultural objects may have some intrinsic artistic value, their purpose is very different. Under Pueblo of Acoma traditional law, it is illegal for any member, who may have these cultural objects in their care to sell or remove the object from the Pueblo of Acoma¹.

¹ Different types of Acoma cultural objects may be stored, cared for, or used differently depending on what the object is. For example, some cultural objects may be cared for and stored by individuals or families in their homes. Other times, different cultural objects may be cared for and stored in communal buildings, called kivas, by specific

They also qualify as protected cultural objects under federal law, especially as cultural patrimony under the Native American Graves Protection and Repatriation Act (“NAGPRA”), and therefore may not be alienated by any individual. Many collectors have argued that these objects were lawfully acquired and can be legally sold. This is a false statement and mischaracterization of how Acoma law and federal law treat these objects. Under Acoma and federal law, the Pueblo itself effectively owns the objects in question.²

A current and public example of Acoma’s efforts to protect its important cultural objects can be seen in the Pueblo’s effort to prevent the sale and auction of a ceremonial shield being auctioned in Paris, France, in late May. In this instance, the Pueblo believes the shield was stolen from the shield's caretaker in the 1970s, and was eventually exported overseas. Unfortunately, this incident is only one of many that the Pueblo has actively dealt with in recent years. Some of the earliest recorded incidents of the Pueblo’s efforts involve federal criminal convictions handed down just after the passage of NAGPRA in 1990. In *United States of America v. Brian Garcia and Gerald Garcia*, 92-515 JC (D.N.M. 1992), two Acoma brothers pled guilty to illegal trafficking of Acoma cultural patrimony in violation of NAGPRA and other federal criminal law. The Pueblo of Acoma worked closely with the United States Attorney's Office to verify the provenance of the objects taken. This case represents the degree and extent that Acoma treats this issue by pursuing the federal conviction of our own people. Later in 1999, a set of historic Catholic priest robes cared for by Acoma, dating from the time of the Pueblo Revolt, left the Pueblo. They were recovered along with a number of Hopi objects of cultural patrimony. An Acoma Bureau of Indian Affairs (“BIA”) Special Agent investigated a tribal art and antique dealer, and that investigation led to his conviction and the recovery of these objects. See *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999). For Acoma, these two cases, some of the earliest and most important federal criminal convictions, demonstrate the Pueblo's commitment to the protection of its cultural objects.

Later, in the 2000’s, as national and international auction houses began to expand and reach more collectors through the internet, Acoma became significantly more involved in attempting to

societies or clan groups. Other times, these objects may be placed outside in the open at sacred sites. Objects are put in special places to be left there permanently, not unlike the San Ildefonso Pueblo object at issue in the case of *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996), or the repatriation of the Zuni War Gods in the late 1980s (a well known example of the removal of cultural objects from area shrines).

² The clearest analogy to describe Acoma law is the legal concept of property rights being a "bundle of sticks." For Acoma, some members may have rights of possession, but they do not have the right to sell an object of cultural patrimony. In fact, traditional law dictates what is to happen to a cultural object if a caretaker can no longer care for the object. The right to sell an object of cultural patrimony, although not contemplated in Acoma traditional law, would be exclusively reserved to Acoma itself. Certainly, the Pueblo has never exercised this right. Acoma's traditional law closely mirrors the definition of "cultural patrimony" defined under NAGPRA found at 25 U.S.C. Section 3001(3)(D).

identify and recover its cultural objects. In 2006, the Pueblo of Acoma worked diligently with its legal counsel for the return of historic wooden beams and doors from the San Estevan del Rey Mission Church.³ A national auction house had possession of the wooden beams along with nearly 50 other sensitive Acoma cultural patrimony objects. All were returned. With the increased availability of auction house catalogues on the internet, the Pueblo regularly attempts to monitor and respond to auctions involving its cultural objects. The consistent monitoring has led to discovering otherwise inaccessible or unknown art and antique gallery inventories. However, this monitoring practice may only be scratching the surface. We do not know the exact number or the kind of cultural objects that may be out there; we do know there are many, and any is too much.

In 2015, the Pueblo of Acoma uncovered a disturbing number of its cultural objects for sale in a variety of contexts. They were being sold in locations locally, nationally, and internationally. Across 10 separate incidents; 24 separate Acoma cultural objects were identified as being available for sale, or having already been sold. Of these 24 objects, the Pueblo was only successful in securing the return of only 11 of these objects. Just this year, the Pueblo of Acoma has encountered and identified 15 Acoma cultural objects for sale, or having already been sold. The Pueblo was successful in recovering only 9 of these objects. Acoma has actively worked closely with its sister tribes, such as Laguna, Jemez, and the Hopi Tribe in informing them of sacred cultural objects that Acoma has encountered, which may be culturally significant to them.

The Pueblo of Acoma wishes to highlight a very significant point. The Pueblo asks this Committee to not to think of these sacred and ceremonial objects in property right terms like title and “ownership.” If these objects are merely treated like other pieces of property, their true significance is lost. Instead it is important to move beyond the Western view of property rights and consider this issue as one of human and cultural rights, unique and Indigenous to the Native people of this country.

2. Support for the STOP Act

The Pueblo of Acoma fully supports the passage of the Safeguard Tribal Objects of Patrimony (“STOP”) Act, S. 3127 and H.R. 5854. The STOP Act makes changes to existing federal statutes that strengthen the ability of tribes to protect their important cultural objects. Existing federal statutes include NAGPRA, 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170; the Archaeological Resource Protection Act (“ARPA”), 16 U.S.C. §§ 470aa-470mm; and the Antiquities Act, 16 U.S.C. §§ 431-433 repealed and re-codified at 54 U.S.C. §§ 320301-320303, 18 U.S.C. § 1866. The STOP Act’s provisions increase penalties under NAGPRA, create an explicit prohibition on

³ The San Estevan del Rey Mission Church sits atop the mesa at the Pueblo of Acoma. Founded in 1629, it is still cared for and maintained by the Acoma people.

exportation of protected Native American cultural objects, and provide for limited immunity for individuals voluntarily repatriating objects. These provisions are designed to both keep Native American cultural objects with tribes where they belong and to facilitate the return of those that have left tribal possession. The STOP Act also calls on the Federal government with the help of a tribal working group, to conduct studies designed to protect Native American cultural objects.

Current federal law does not adequately address and protect the hundreds of cultural objects that have been trafficked from the United States to overseas markets. A quick look at past auction catalogues of places like the Eve Auction House in Paris, France, where the Acoma shield was to be sold, quickly reveals the sheer enormity of Native American cultural objects that have left the country.⁴ Most of these objects are likely subject to their respective tribal laws and other federal laws. Put simply, countries like France have become a safe haven for this illegal market where the most sensitive of cultural objects are sold to the highest bidder, and tribes have no recourse. The STOP Act is an important tool to close the door on the illegal trafficking of our important cultural objects and send a message that this illegal practice will not be tolerated.

3. Addressing Criticisms of the STOP Act

The Pueblo of Acoma is aware that the STOP Act has come under criticism by a small segment of the representatives of the Native American Indian art and antique industry. Predominantly this has been from public statements by organizations like the Antique Tribal Arts Dealer Association, Inc. (“ATADA”). We would like to take this opportunity to address and dispel some of the major arguments ATADA has made.

MYTH: The STOP Act is not necessary as current federal law already prohibits the exportation of protected cultural objects.

⁴ The French auction of Native American sacred objects and artifacts has been widely reported since at least 2013. See Tom Mashberg, *Secret Bid Guides Hopi Spirits Home*, NEW YORK TIMES, (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html>; Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, NEW YORK TIMES, (June 29, 2014), <http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-objects-continues-despite-us-embassys-efforts.html>; SeaAlaska Heritage Institute, *Secret Bidder Saves Sacred Object from Auction for Alaska Natives*, INDIAN COUNTRY TODAY, (Sept. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/09/06/annenbergs-foundation-returns-sacred-object-alaska-natives-156764>; AP, *Navajos Reclaim Sacred Masks at Auction*, CBS NEWS, (Dec. 16, 2014), <http://www.cbsnews.com/news/navajo-indians-buy-back-sacred-masks-in-france-auction/>; Reuters, *Hopi Sacred Masks Auction in Paris Despite Protests*, REUTERS, (June 11, 2015), <http://www.reuters.com/article/us-france-auction-masks-idUSKBN0OR1DG20150611>.

RESPONSE: It has been argued that criminal provisions of the federal statutes cited in the STOP Act already prohibit the exportation of protected cultural objects through the use of the term “trafficking.” While it is arguable that “trafficking” may incorporate “exportation,” in reality, it is clear that this language is not being interpreted in this manner. In the Pueblo’s most recent effort to recover the Acoma shield, France cited directly to United States law and pointed to the absence of explicit exportation prohibitions on cultural objects like the shield in its reasoning for not halting the auction initially. This has resulted in the Pueblo attempting to halt auctions of its protected cultural objects abroad without success, including pursuing legal actions and filing the necessary complaints.⁵ Clear language stating that exportation of protected cultural objects is prohibited is needed to provide a necessary tool for tribes and the United States to use to prevent cultural objects from leaving the country, and negotiate the return of cultural objects illegally exported.

MYTH: The STOP Act does not provide clarity or notice regarding which objects qualify as protected.

RESPONSE: It has been alleged that the STOP Act does not provide the necessary clarity to define what objects are protected. This is inherently a criticism of the underlying laws that the STOP Act relies upon. It is important to note that the STOP Act does not create protections or penalties for *any* object that is not *already* protected under existing federal law. The STOP Act applies to “Native American cultural objects,” which include objects meeting the following definitions: “cultural objects” under NAGPRA, 25 U.S.C. §3001(3); “archaeological resources” under ARPA, 16 U.S.C. § 470bb (1); and “objects of antiquity” under the Antiquities Act, *See* 18 U.S.C. § 1866(b). However, “Native American cultural objects” only include such objects when the object is “Native American” as that term is defined in NAGPRA, 25 U.S.C § 3001(9).

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

⁵ The Pueblo of Acoma previously unsuccessfully attempted to halt the sale by the Eve Auction House of the shield and other Acoma cultural objects by the Christophe Joron-Derem Auction House in 2015 in Paris, France. Fortunately at that time, the shield did not sell and became available again for sale in 2016. However, the other important Acoma cultural objects were sold and are gone forever.

Further, Congress has already closely considered this issue, including debate with competing testimony from tribes, museums, and private collectors. For example, at the time of the passage of NAGPRA, the Select Committee on Indian Affairs resolved to “[c]arefully consider[] the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe...” See S. Rep. No. 101-473, at 4 (1990). For "sacred object" the Committee determined that it is much more than an object being "imbued with sacredness in the eyes of a Native American[.]" but rather the object must have been used in a traditional religious ceremony or ritual, and have a religious significance or function when possessed by a Native American. *Id.* at 5. For "cultural patrimony" those objects must have ongoing "historical, traditional, or cultural importance[.]" inalienable by any individual." *Id.* As examples, the committee listed cultural patrimony such as Wampum belts of the Iroquois and the Zuni War Gods. *Id.* The Pueblo of Acoma believes the intention of statutes like NAGPRA as interpreted by Congress and the courts, was to clearly value tribal culture and law that ultimately dictates the function, treatment, and distinction of what is considered “sacred” or “cultural patrimony.” The *mens rea*, or knowledge/intent, element of NAGPRA's criminal provision balances this consideration with the protection of the unwitting consumer who may unintentionally violate federal law. Instead the Pueblo's concern lies more so with those individuals who do know they are in violation of tribal and federal law, or who have enough prerequisite knowledge and information to pause and find out the legal status of a cultural object.⁶

In order to more effectively protect its important cultural objects, and provide well-intentioned dealers with guidance, a way to provide more notice and clarity regarding which objects are protected may be useful. It is important this idea be formulated by tribes and structured to function within tribal legal and traditional systems. Therefore, the Pueblo is considering various methods to provide greater clarity. These ideas include the following actions:

- Create a system where collectors can receive a letter from a tribe before purchasing or selling an object certifying that the tribe does not deem the object protected. If a prosecution were later initiated, the certification would serve as *prima facie* evidence that the object is not protected for purposes of that specific tribe.
- Create a certification system, by establishing a method for collectors to submit an inquiry by email or phone to receive a referral to the cultural representative of a tribe likely to have a cultural connection or be knowledgeable or aware of an object the collector is considering purchasing.

⁶ See e.g. *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999) (suggesting that sufficient knowledge of Native American Art and NAGPRA should imply that individuals may “have to inquire further or consult an expert when... purchas[ing] the objects” and stating “one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”).

- Create regional networks of experts, at designated regional academic institutions or museums, to whom collectors could reach out to with questions and receive similar referrals to the appropriate tribal cultural representative for further information.

It is paramount that if collectors or dealers are unsure if an object is from a particular tribe, they should simply contact the tribe for more information. We believe the ideas outlined above will alleviate some of the confusion collectors or dealers encounter when they do not know the cultural affiliation or legal status of the objects they are buying or selling.

To create a comprehensive list of protected cultural objects is impractical and inappropriate. There are 567 federally recognized tribes, each with its own objects meeting the criteria for existing federal protection. More important, traditional knowledge about the existence and treatment of cultural objects may be diffused through the community. For the Pueblo of Acoma, no one person or group knows comprehensively the entire scope and inventory of cultural objects within the Pueblo. Instead, the appropriate individuals or groups that interact within a particular living culture may keep this knowledge separately. Therefore, it may be impractical, and culturally inappropriate, to require tribes to divulge information in its entirety regarding protected cultural objects. In addition, this divulgence may only fuel the market for rare and desirable objects given their esoteric nature. Finally, such a list may unintentionally give a presumption of completeness that *only* the objects on this list are protected.

MYTH: The amnesty window will cause unwarranted return of objects lawfully owned.

RESPONSE: The STOP Act is designed to explicitly prohibit exportation of protected objects, thereby making it easier to establish that their sale overseas is illegal. The proposed Act will facilitate their return through legal channels. The amnesty window is designed to allow open dialogue between tribes and collectors or dealers regarding what specific objects may be protected under federal law. It creates a venue for dialogue and communication that groups like ATADA imply they need. The amnesty window provides an opportunity for repatriation of cultural objects without fear of having unintentionally violated the law.

Further, it is clear from Acoma's own experiences that federal and tribal enforcement of statutes through the judicial process is extremely expensive and time consuming. Tribes are not always able to invest or commit the necessary resources to seek the repatriation of culturally significant objects. They are not always able to convince federal law enforcement officials to invest their own resources to repatriate objects on a tribe's behalf. Additionally, some individuals who have protected objects in their possession and know they are protected may want to return the objects without undergoing judicial action. For these reasons, voluntary repatriation of protected objects is essential, and the amnesty window encourages the amicable resolution among all parties.

MYTH: The STOP Act will damage businesses and Native artists.

RESPONSE: In the Pueblo's experience, the vast majority of inventories held by collectors or dealers are of no concern to the Pueblo. Acoma is fairly certain that only a very small segment of an individual's collection may be protected. Provisions like the amnesty window are meant to provide an opportunity for open dialogue, amicable resolution and repatriation of the small segment of objects that are protected. This process will hopefully provide greater clarity for the market and boost consumer confidence.

Furthermore, Native American artists are generally not creating objects that are considered protected under federal law, or under the proposed STOP Act. The Pueblo of Acoma does support and encourage its community members and other tribal artisans to create art forms and other exceptional expressions of their tribal culture – whether it is by pottery, paintings, weavings, jewelry, or other mediums. These pieces of art should be celebrated and shared with the world. These are *not* the objects that the Pueblo feels need federal legal protection.

MYTH: The STOP Act will deprive museums of important resources in cultural education.

RESPONSE: The STOP act provides additional support and protection for the very objects that are considered core to a museum's mission – to give meaning and understanding to a living tribal culture. While it is important to protect a museum's resources, of even greater importance is the need to protect the very cultures a museum seeks to educate and inform the public about. The cultural objects that the Pueblo is interested in protecting are essential to the Pueblo's continued cultural survival and a way of life that has existed and sustained us since we first stepped into this world.

The Pueblo has placed tremendous importance on "cultural education." This inherent tribal value comes from the ability to control and care for significant and highly sacred cultural objects. This value is then passed on through ceremonial practice and use along with lengthy explanations and admonitions. The continued unfettered passage of cultural knowledge especially to Acoma's next generation cannot be understated. We encourage dialogue with museums or institutions that may have these concerns, and applaud those institutions and museums that not only recognize this important value but, support our efforts to protect our cultural objects. We strongly suggest that museums work with tribes, to build a cultural education framework for our nation's citizens in collaboration with tribes - not by using sacred and ceremonial tribal objects in a blasphemous or deleterious manner.

4. Support for Funding

The Pueblo of Acoma seeks and fully supports an appropriation to fund a Cultural Items Unit within the Department of the Interior to investigate violations of NAGPRA, ARPA, and related

statutes.⁷ Often times, cultural objects that are trafficked or put up for sale have a brief and limited time for action before they are sold and possibly disappear forever. The Pueblo has experienced, to its dismay, instances where seeking federal assistance for such an emergency has gone unanswered, only to watch as an object disappeared. The development of a Cultural Items Unit is essential to curbing the illegal trafficking of protected cultural objects. The placement of this unit within the Department of Interior is significant as officers and special agents with the Bureau of Indian Affairs are often the “first responders” to crimes in Indian Country. The Pueblo has begun to establish a regional relationship with its local Bureau of Indian Affairs Office and United States Attorney’s Office to investigate crimes related to removal and trafficking of its protected cultural objects. However, we understand this relationship is not uniformly shared or established in other regions of the country. The creation of a Cultural Items Unit within the BIA would be similar to the Federal Bureau of Investigation Art Crimes Unit and the United States Fish and Wildlife Service special agents who are trained specifically for investigations within their respective areas of expertise; a similar model is needed for the specialized investigation of cultural object crimes.

As a result of increased investigation into these types of crimes, the Pueblo of Acoma calls for Congressional support for increased appropriations for the United States Attorney’s offices to cover the cost of criminal and civil actions taken to protect cultural objects, especially in the southwestern part of the United States where so many Indian tribes are located. Acoma also believes it is important for funding to be made available for tribes to strengthen their tribal courts and update their law and order codes specific to their own cultural protection laws. This increase in resources will only assist the United States Attorney’s Office in bringing stronger cases against those who violate current federal laws protecting cultural objects.

Since the introduction of the STOP Act there has been a surge of interest in this issue, resulting in increased contact between Acoma and various collectors and dealers. Acoma seeks to build and expand its positive relationships with this community. When they return these objects home it is a joy for us. We are extremely thankful. We do not want to have to rely on the law and the courts to secure their return, but it must be emphasized that the law must set forth the values of the United States and its Native peoples and because of that, we fully support the STOP Act. The Pueblo looks forward to working with the Committee, generating good will with those who have supported the Act, refining it as needed, and finally by securing its ultimate passage.

⁷ See House Report 114-632 (recommending the appropriation of \$1,000,000 for the development of a Cultural Items Unit within the Department of the Interior).