

*Kurt Riley, Governor*  
*Raymond J. Concho, Jr., 1st Lt. Governor*  
*Christopher J. Garcia, 2nd Lt. Governor*  
*Marcus Leno, Tribal Secretary*  
*Elliott Sanchez, Jr., 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**

**Full Committee Hearing**  
**Safeguard Tribal Objects of Patrimony (STOP) Act of 2017, S. 1400**

**November 8, 2017**

On behalf of the Pueblo of Acoma (Pueblo), please accept this written testimony for the full committee hearing on the Safeguard Tribal Objects of Patrimony (STOP) Act of 2017, S. 1400, and other bills held by the Senate Committee on Indian Affairs on Wednesday, November 8, 2017. The Pueblo appreciates the opportunity to present on this important topic to the Committee and your staff. We have a great deal of experience in both combating illegal trafficking of our protected tribal cultural heritage and in seeking repatriation of those items. The Pueblo is grateful for the opportunity to share this experience with you.

**I. The Pueblo's Experience Related to the Protection of Tribal Cultural Heritage**

The Pueblo has developed expertise in the protection of tribal cultural heritage, especially across international borders. Unfortunately, this expertise came out of a necessity to protect our community and our cultural heritage, essential to our way of life. Many people view our cultural heritage as beautiful works of art, as talismans of a past culture they would like to own, or as items to trade for profit. Whatever intrinsic beauty these items possess, that is not their intended purpose.

Our items of cultural heritage have significant roles to play within our culture, our traditional calendar, our societies, our families, and our way of life. Our cultural heritage also helps us honor and uphold our values and teach those values to our young people. So important are these items of cultural heritage that, under the Pueblo's traditional law, no one person may own them. Rather they belong to the community and are cared for by their caretakers, who cannot sell them or take these items from the Pueblo. We have prioritized protecting the Pueblo's items of cultural heritage because we believe that, without their presence, we cannot continue our way of life.

The Pueblo has fought many instances of trafficking in our cultural heritage, including in New Mexico, across the country, and overseas. One well-known example is our fight to regain an important ceremonial shield (Acoma Shield), which was most recently set to be auctioned in Paris, France in May of 2016. The Acoma Shield was stolen from its caretaker in the 1970's and was eventually exported overseas. Although we had the unprecedented success of halting the auction—with the help of our congressional delegation, federal agency officials, Indian country, and the general public—we have not yet been able to bring the Acoma Shield home. The Acoma Shield is just one of hundreds of items of cultural heritage that have illegally left our community and been trafficked into various markets.

Some of the earliest recorded incidents of the Pueblo's efforts to regain its cultural heritage involve federal criminal convictions handed down just after the 1990 passage of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170. 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. This case represents the importance with which the Pueblo treats this issue, even pursuing the federal conviction of our own people. Later, in 1999, another example in *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), involved a set of historic Catholic priest robes cared for by the Pueblo, dating from 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 investigated a non-Indian tribal art and antique dealer, leading to his conviction and the recovery of the items.

Later, in the 2000's, as national and international auction houses began to expand and reach more collectors through the Internet, the Pueblo became significantly more involved in attempting to identify and recover its cultural heritage. In 2006, 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.<sup>1</sup> A national auction house had possession of the wooden beams along with nearly 50 other items of cultural heritage belonging to the Pueblo.

In 2015, the Pueblo began devoting more of its resources to addressing this issue, as it observed a disturbing number of its cultural heritage items for sale in a variety of contexts. They were being sold in locations locally, nationally, and internationally. Across 10 incidents, 24 separate Pueblo cultural heritage items were identified as being available for sale or having already been sold. Of these 24 items, the Pueblo was only successful in securing the return of 11.

This year in 2017, the Pueblo has so far encountered and identified eight cultural heritage items for sale or as having already been sold. The Pueblo was successful in recovering five of these items. We believe the decrease in number over the past two years is due to our efforts to retrieve our cultural heritage items from public sales. However, we are unsure whether this

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<sup>1</sup> 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.

represents an actual decrease in market activity or instead represents an increase in black market activity hidden from the public eye.

## II. Steps the Pueblo Has Taken to Combat Trafficking

### System for Identifying Protected Items of Cultural Heritage

It is important to understand that existing federal laws protect only specific types of items associated with tribes. Most items are not protected. NAGPRA, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa–470m, 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, 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 time periods. Although tribes 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 are protected if they do not meet these statutory standards.

The type of cultural items the Pueblo is attempting to protect are difficult to fully describe and publicly identify because of their sacred and confidential ceremonial use. However, the items 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 items of cultural heritage may have some intrinsic artistic value, their purpose is very different.

The Pueblo's statutes allow for the inclusion of traditional law. Under the Pueblo's traditional law, it is illegal for any member, who may have these cultural heritage items in their care, to sell or remove these item from the Pueblo.<sup>2</sup> These cultural heritage items are often considered sacred, and many are used publicly and privately in ceremonies. The Pueblo has used this law to establish that specific items are considered tribal cultural heritage, which aids in establishing their protection and facilitating prosecution under federal law.<sup>3</sup>

The Pueblo also has in place a system tribal representative use for identifying whether an item is from the Pueblo and whether it qualifies as protected tribal cultural heritage. The Pueblo, through its Tribal Historic Preservation Office, has created an Advisory Board to assist and consult on cultural matters. The Advisory Board is staffed with knowledgeable cultural practitioners, many of which are current or former religious leaders within the community.

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<sup>2</sup> Different types of the Pueblo's cultural heritage may be stored, cared for, or used differently depending on what the item is. For example, some cultural heritage items may be cared for and stored by individuals or families in their homes. Other times, different cultural heritage items may be cared for and stored in communal buildings, called kivas, by specific societies or clan groups. Other times, these objects may be placed outside in the open at sacred sites. Items 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). *See also* fn 5, *infra*.

<sup>3</sup> *See United States v. Brian Garcia and Gerald Garcia*, 92-515 JC (D.N.M. 1992); *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999) discussed *supra*.

To protect the Acoma Shield, federal agencies first needed information from us to establish that this was qualified as protected under existing federal law. When the Acoma Shield first came up for auction, Pueblo cultural practitioners identified it, recognizing its construction, iconography, and usage as a ceremonial and sacred item. Needing further information, the Pueblo worked with its community and cultural leaders to find out as much information as possible about how this left the Pueblo. While an object of cultural heritage need not be stolen to be protected by federal law, we learned that the Acoma Shield was stolen in the mid 1970's from a home in "Sky City," our ancestral mesa-top village.<sup>4</sup> We were extremely fortunate to locate an individual who had a living memory of the Acoma Shield and immediately recognized it. Working with Department of Justice special agents, we obtained affidavits from tribal members to establish the facts surrounding the Acoma Shield's theft and information about its cultural significance. These affidavits were used to establish that the Acoma Shield qualified for protection under federal law.

Many collectors have argued that these items were lawfully acquired and can be legally sold. This is a false statement and mischaracterization of how Pueblo and federal law treats these items. Under Pueblo and federal law, the Pueblo itself effectively owns the items in question.<sup>5</sup> They need not be stolen to qualify for protection. Instead, if they meet the statutory standards for protection under the Pueblo's laws and federal statutes—including NAGPRA, ARPA, and the Antiquities Act—their removal from tribal or federal land and trafficking is illegal.

Therefore, the Pueblo asks this Committee to not think of these sacred and ceremonial objects in property rights terms, like title and ownership. The Pueblo has significant claims and arguments to be made that, by possessing ownership, items of tribal cultural heritage are forms of tribal governmental property; but 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.

### Monitoring Market

With the increased availability of auction house catalogues on the Internet, the Pueblo regularly attempts to monitor and respond to auctions involving its cultural heritage items. Subscriptions to a wide variety of auction catalogues, online gallery websites, and auction websites (like Ebay) allow for scanned listings of sensitive items belonging to the Pueblo or our sister pueblos. The Pueblo also attempts to attend local antique or art conventions, and to visit

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<sup>4</sup> At the time, the Pueblo did not have an established police force, and it was unclear, but unlikely, whether the caretaker ever made any criminal report to BIA officials, who would have had jurisdiction over crimes in Indian country.

<sup>5</sup> The clearest analogy to describe the Pueblo's law is the legal concept of property rights being that of a "bundle of sticks." For the Pueblo, some members may have rights of possession, but they do not have the right to sell an item of cultural heritage. In fact, traditional law dictates what is to happen to a cultural heritage item if a caretaker can no longer care for the item. The right to sell an item of cultural heritage, although not contemplated in the Pueblo's traditional law, would be exclusively reserved to the Pueblo itself. Certainly, the Pueblo has never exercised this right. The Pueblo's traditional law closely mirrors the definition of "cultural patrimony" defined under NAGPRA, 25 U.S.C. § 3001(3)(D).

local galleries and pawn shops, where we often discover questionable and sensitive cultural heritage items for sale.

This 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 number of cultural heritage items that may be out there. Aside from tribes' own work, there is no other system for monitoring the trafficking of tribal cultural heritage.

### Relationships with Federal Officials

The Pueblo has also worked to create close relationships with federal officials who can help when a protected item of cultural heritage is identified as being trafficked domestically or abroad. We work closely with a Southwest Regional Enforcement Officer from the BIA's Office of Justice Services and have also made contacts within the Department of State and Department of Justice. In some instances, we have facilitated communication between these federal agencies. Thankfully, these federal officials have been instrumental in the Pueblo's efforts to regain its items of cultural heritage.

### Voluntary Return

Under federal law, like other governmental entities, tribes are treated as non-profit entities for tax purposes. The Pueblo has used this to our advantage in attempting to incentivize individuals who are considering returning an item. Paperwork and information are provided for these individuals to receive a tax deduction and the returned item is treated as a donation to the Pueblo.

### **III. Support for the STOP Act**

The Pueblo fully supports the passage of the Safeguard Tribal Objects of Patrimony (STOP) Act, S. 1400. Through our experiences, we have learned many hard lessons, first hand, in attempting to protect our cultural heritage. One lesson the Pueblo learned is that existing federal laws are not enough. The proposed STOP Act strengthens these federal laws in areas we believe need it most. Particularly, the STOP Act places an emphasis on facilitating the return of protected items trafficked internationally, where we have been the most powerless to gain the repatriation of our cultural heritage. These provisions are designed to keep tribal cultural heritage items with tribes and to facilitate the return of those that have left tribal possession.

Current federal law does not adequately address and protect the hundreds of cultural items that have been trafficked from the United States to overseas markets. A quick look at past auction catalogues of places where Pueblo cultural heritage has been sold quickly reveals the sheer enormity of tribal cultural heritage that has left the country.<sup>6</sup> For instance, countries like

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<sup>6</sup> 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*, 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,

France have become a safe haven for the illegal trafficking of sensitive tribal cultural heritage items, which are sold freely without recourse. The STOP Act is an important tool to close the door on the illegal trafficking of our important cultural heritage items and send a message that this illegal practice will not be tolerated.

### Increased Penalties

The STOP Act's provisions would increase criminal penalties under NAGPRA. This increase is needed to deter potential violators. It is also needed to encourage federal officers to initiate prosecutions, as increased penalties justify additional resources expended on a case.

### Export Restriction

The STOP Act's provisions would also explicitly prohibit the exportation of tribal cultural heritage obtained in violation of NAGPRA, ARPA, or the Antiquities Act. This is needed because foreign governments, including France, have consistently told the Pueblo and federal officials that they will not facilitate return of our tribal cultural heritage because United States law does not explicitly prohibit its exportation. This is due in part to a 1970 international treaty entitled the "UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" in which signatories agreed to protect each other's cultural heritage when exportation of such cultural heritage is illegal in the originating country.

To be clear, the STOP Act's prohibition applies only to items that were already protected under NAGPRA, ARPA, or the Antiquities Act. The art industry has been operating under the definitions of these laws for decades. The STOP Act does not make illegal the export of any items that were legal to sell domestically. Further, the Act does not extend to items that were not already protected under federal law.

The Protection of the Right of Tribes to stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, a 2016 joint resolution, supports congressional development of an explicit restriction on exportation. Additionally, congressional representatives have requested the Government Accountability Office research international trafficking in tribal cultural heritage. Thus, Congress has already indicated its interest in resolving the problem of illegal exportation.

### Federal Framework for Voluntary Return

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2014), <http://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*, INDIAN COUNTRY TODAY, (Sept. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/09/06/annenbergfoundation-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>.

Third, the STOP Act would create a framework for the federal government to work with individuals or organizations to facilitate the voluntary return of cultural heritage to tribes. It would call on the Department of the Interior and Department of State to designate a liaison for facilitating voluntary return as well as to hold trainings. It would also call on the Department of the Interior to create a referral system for directing individuals to the correct tribe for repatriation.

We have learned that many individuals would like to repatriate items but do not know where to start. We have also learned that the federal government lacks a systematic process for locating a tribe associated with an item and connecting the individual with a tribal representative. This framework will provide well-intended individuals a mechanism to work collaboratively in returning tribal cultural heritage.

#### Tribal Working Group

Last, the STOP Act creates a tribal working group to advise the federal government on issues related to protection of tribal cultural heritage. The working group would work with other federal agencies and committees spread throughout the federal government that deal with tribal cultural heritage issues. We hope the working group will lead to more collaboration.

#### **IV. Addressing Criticisms of the STOP Act**

The Pueblo is aware that the STOP Act has come under criticism by a small segment of art dealers. Predominantly this criticism has come from the Antique Tribal Arts Dealer Association, Inc. (ATADA). We would like to take this opportunity to address and dispel the main arguments ATADA is currently making.

MYTH: The STOP Act is redundant because NAGPRA and ARPA already prohibit the trafficking of and 18 U.S.C. § 554 already prohibits the exportation of protected tribal cultural heritage.

#### RESPONSE

The STOP Act is consistent with, but does not duplicate, existing statutes. No federal statute clearly and explicitly prohibits the act of exporting protected tribal cultural heritage. Existing statutes could be interpreted to prohibit and penalize export of tribal cultural heritage, but these statutes have not been effective in preventing export and convincing foreign countries to aid in repatriation.

Section 554 of Title 18 imposes criminal penalties on any person who “exports ... any merchandise, article, or object contrary to any law or regulation of the United States.” This provision has not been used by the federal government to prohibit the export of tribal cultural heritage. Further, some courts applying Section 554 in other circumstances have found that export must already be illegal under another separate statute for Section 554’s penalties to apply.

NAGPRA bars transporting for sale, selling, and purchasing certain cultural items. 18 U.S.C. § 1170. ARPA bars transporting, selling, and purchasing certain archaeological resources, including in some cases in foreign commerce. 16 U.S.C. § 470ee(b)(1)–(2), (c). The Antiquities Act protects objects of antiquity from unlawful appropriation, excavation, injury, and destruction. 18 U.S.C. § 1866(b). None contains an explicit export restriction.

As discussed previously, foreign officials have told the Department of State and tribes that without a United States statute explicitly and clearly prohibiting export of tribal cultural heritage, they have limited authority to facilitate return. In the Pueblo’s most recent effort to recover the Acoma Shield, France cited directly to United States law and explicitly pointed to the absence of exportation prohibitions on tribal cultural items in its reasoning for not halting the auction. This has resulted in the Pueblo attempting to halt auctions of its protected cultural items abroad through foreign agency processes without success, including filing a formal protest with France’s Conseil des Ventes that was denied.

Legally and politically, we cannot stem the tide of illegal international trafficking without an explicit export restriction. The STOP Act will provide clarity in domestic law, removing a stumbling block for the Department of State and tribes as they seek return of tribal cultural heritage from abroad.

MYTH: The STOP Act’s protections may be unconstitutional and could harm the Indian art market due in part to a lack of clarity regarding which items are 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. Therefore, the STOP Act cannot qualify as a regulatory taking.

Instead, increased penalties under the STOP Act are limited to “cultural items” already protected by NAGPRA, 25 U.S.C. §3001(3). Additionally, the export restriction is limited to “cultural items” removed unlawfully under NAGPRA, “archaeological resources” removed unlawfully under ARPA, 16 U.S.C. § 470bb(1), and “objects of antiquity” removed unlawfully under the Antiquities Act, *see* 18 U.S.C. § 1866(b). The export restriction only applies to these items when they are “Native American,” as that term is defined in NAGPRA, 25 U.S.C § 3001(9). Although the STOP Act’s voluntary return provisions could be read broadly, they have no legal consequences and are meant only to create a framework for individuals seeking to return any items they have and would like to return.

Further, existing federal laws require a defendant to have knowingly engaged in activity made illegal under NAGPRA or ARPA to receive a penalty—thereby, requiring that the individual knew or should have known the object was protected. *See* 18 U.S.C. § 1170; 16 U.S.C. § 470ee(d). Courts have stated that those engaging in the sale and trafficking of protected items are deemed to possess a certain level of knowledge, whether an item qualifies as protected.



*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). This is no different than other situations where persons who hold themselves out as having specialized knowledge are held to a higher standard of care in dealing with others. The STOP Act’s export restriction maintains this knowledge requirement.

The definitions incorporated into 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 items 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 Antiquities Act); *but see United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (finding Antiquities Act unconstitutionally vague).

Congress has already closely considered this issue, including 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). Congress structured the definitions of the items protected by NAGPRA to create the necessary flexibility that allows tribes to apply their own standards and framework and ensure that items necessary for their cultural survival are protected. The intention of existing federal law, as explained by Congress and interpreted by the courts, was to clearly value tribal culture and law as ultimately dictating the function, treatment, and distinction of which items are considered protected.

It is paramount that, if collectors or dealers are unsure if an item qualifies as protected tribal cultural heritage, they contact the tribe for more information. To create a comprehensive list of protected cultural heritage items is impractical and inappropriate. There are 567 federally recognized tribes, and each has its own objects that meet existing federal laws’ definitions to qualify as protected. Within a tribe, traditional knowledge may be held in a diffused way. This makes it next to impossible to list all items considered protected because, as dictated by tribal law and custom, the totality of such cultural knowledge may not be held by one person, but rather only parts of such knowledge may be held by individual people separately. The idea of creating lists is troubling to many tribal leaders, especially where it may be culturally inappropriate to divulge information regarding protected objects without a significant reason, and tribal religious leaders may not be willing to do so. Additionally, making the public aware that an item qualifies as protected may drive the price of that item up and make it more desirable to buy and sell in the black market. Last, creating a list of protected items may create a presumption of completeness that only items on the list are protected.

If Congress determines it necessary to amend the STOP Act to provide additional clarity regarding which items are protected, especially regarding the export restriction provision, the Pueblo could support a permitting system. The Pueblo requests tribes and tribal organizations be involved in drafting any such provision.

MYTH: The STOP Act will result in United States Customs and Border Protection agents seizing all items associated with tribes.

## RESPONSE

For the reasons discussed above, we believe the STOP Act contains the necessary clarity regarding which items qualify as protected and thus as subject to the export restriction. Further, the STOP Act authorizes the Attorney General and the Secretary of Homeland Security, in consultation with the Secretary of the Interior, to prescribe rules and regulations to carry out the export restriction. Any guidelines necessary for Customs and Border Protection Customs agents should be created through such rules and regulations and not statute.

## **V. Conclusion**

Since the introduction of the STOP Act, there has been a surge of interest in this issue, resulting in increased contact between the Pueblo and various collectors and dealers. The Pueblo seeks to build and expand its positive relationships with this community. When they return these items home, it is a joy for us. We are extremely thankful.

We do not want to be forced to rely on the law and the courts to secure the return of tribal cultural heritage. However, it must be emphasized that the law must set forth the values of the United States and its Native peoples. 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 STOP Act, refining the STOP Act as needed, and finally securing its ultimate passage.