



# Department of Justice

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**STATEMENT OF**

**TRACY TOULOU  
DIRECTOR  
OFFICE OF TRIBAL JUSTICE  
U.S. DEPARTMENT OF JUSTICE**

**BEFORE THE**

**UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

**FOR A HEARING CONCERNING**

**THE THEFT, ILLEGAL POSSESSION, SALE, TRANSFER AND EXPORT  
OF TRIBAL CULTURAL ITEMS**

**PRESENTED**

**OCTOBER 18, 2016**

**Statement of Director Tracy Toulou  
Office of Tribal Justice, U.S. Department of Justice  
Senate Committee on Indian Affairs  
Tuesday, October 18, 2016  
Albuquerque, NM**

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Senators Udall and Heinrich, my name is Tracy Toulou and I am the Director of the Office of Tribal Justice at the United States Department of Justice. The Department of Justice appreciates the opportunity to appear before you today to discuss the “Theft, Illegal Possession, Sale, Transfer, and Export of Tribal Cultural Items” and the Department’s efforts to combat these activities and protect Native American cultural resources. In the audience is my colleague Damon Martinez, the United States Attorney for the District of New Mexico, whose office is exemplary in their work on these important issues and on all Indian country issues.

Unfortunately, there is a long history of looting Native American cultural sites and theft of Native American cultural resources. Congress has passed various laws in an attempt to stop the looting and the thefts, but I thank you for holding this hearing because there is still work to be done.

The first significant Federal statute designed to protect archaeological and Native American cultural resources is the Antiquities Act of 1906. After decades of looting, desecration, and destruction of Native American sites in the Southwest, such as Chaco Canyon, the Antiquities Act was passed in part as an attempt to protect these sites. However, the ability of the United States to prosecute offenses under the Antiquities Act was significantly curtailed by the Ninth Circuit in the 1970s. An individual who stole several items, including twenty-three masks, from a medicine man’s cave on the San Carlos Apache Indian Reservation was prosecuted under the criminal provisions of the Antiquities Act. The masks had been made a few years earlier and left in the cave as part of an Apache religious ceremony, but were considered to be objects of antiquity because they were part of the long-standing religious and social traditions of the Tribe. The Act did not define the term, however, and the Ninth Circuit found it to be unconstitutionally vague because the defendant had no notice that a relatively new object could be considered an antiquity. Because of the Ninth Circuit’s decision, additional legislation was deemed necessary.

In 1979 Congress passed the Archaeological Resources Protection Act, or ARPA, which strengthened the preservation purposes of the Antiquities Act in several ways. Most importantly, ARPA provided more robust civil and criminal felony prosecution options. An ARPA violation can be either a felony or a misdemeanor and it can be pursued civilly when deemed appropriate. However, for ARPA to apply, it must involve an archaeological resource more than 100 years old, and with the exception of one of the trafficking provisions that applies to violations of state and local law, the theft or looting must occur on public lands for ARPA jurisdiction to attach. Such lands include Indian lands held in trust by the United States and Indian lands subject to the restriction against alienation imposed by the United States.

Although ARPA increased protection to archeological and historical sites, it left a hole in the protection of Native American human remains and associated funerary objects that were less

than 100 years old and not found on federal land. To address the gap with regards to human remains, Congress passed the Native American Graves Protection and Repatriation Act of 1990, or NAGPRA. Most of NAGPRA establishes procedures for the return of human remains, funerary objects, sacred objects, and items of cultural patrimony from museum collections to their representative Native American descendants. However, section 4 of NAGPRA amended the United States Criminal Code and created sanctions for the illegal trafficking in Native American human remains and cultural items. The penalties for trafficking are similar to those for violating ARPA, and NAGPRA includes penalties for a trafficker who “knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of” the Act. Sentencing guidelines provide an enhancement for cultural heritage resource crimes.

Some examples of successful prosecutions that the United States has brought pursuant to these statutes are for damaging and removing archeological resources from an historic Yakama Nation site, for the selling and transporting for sale of an Ancestral Puebloan cloud blower pipe, which was removed from public lands, and for the removal of a petroglyph from a sacred worship site of the Southern Paiute located on federal land. And I would like to highlight the work of the U.S. Attorney’s Office here in New Mexico for obtaining a guilty plea for felony violations of ARPA against an individual who excavated and removed several pieces of Mimbres pottery from BLM lands.

Despite these successes, there are still some challenges that the Department faces when prosecuting these cases. One of the major barriers that we face is the amount of acreage that needs monitoring on a regular basis is so vast and law enforcement resources spread so thin that many of the hardest-hit areas remain vulnerable. In addition, because most of these laws apply only to objects taken from federal or tribal lands, there are often challenges proving where the theft occurred. The Acts also require the United States to prove that the defendant was aware of the facts and circumstances that constitute the crime. In some Circuits, this may mean proving that the defendant knew that the item was an archaeological resource and illegally excavated. This is a significant challenge in many cases where the cultural item may have been passed into the possession of several different people and there is difficulty in proving that the current possessor knew of the illegal conduct. Finally, all three of the Acts are prospective laws which generally apply only to actions after their passage. The result is that the United States cannot prosecute the theft of the masks stolen from the San Carlos Apache Reservation that I mentioned at the beginning of my statement.

I want to close by quoting from former Senator Domenici’s statement at the 1979 Senate ARPA hearing:

In recent years, the rise in prices of prehistoric Indian artifacts and other archeological resources has created a large international demand. Professional looters have been active in the southwest and elsewhere pirating these sites on public lands, in some cases with bulldozers. Virtually tens of thousands of dollars worth of artifacts have been taken from public lands in New Mexico. Mimbres pots are being illegally dug out on consignment and sold in the international art market.

Unfortunately, the prices have only risen since that 1979 hearing. But beyond any dollar value is the religious and cultural importance of these items. I applaud the efforts of Congress and the leadership of the New Mexico delegation on these important issues over the decades, but as the recent international auctions demonstrate, there are still significant challenges and we hope to work with Congress in addressing those challenges. Thank you.