

**TESTIMONY OF JACOB H. LONETREE  
PRESIDENT OF THE  
HO-CHUNK NATION  
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS  
ON  
THE INDIAN ARTS AND CRAFTS ACT OF 1990  
MAY 17, 2000**

Honorable Members of the Committee

It is indeed an honor to appear before you upon the invitation of Chairman Nighthorse Campbell to present testimony on the Committee's oversight of the Indian Arts and Crafts Act of 1990 (the "Act" or "IACA").

It has been ten years since the passage of this act which is vitally important to the protection of Indian artisans and craftspeople.

The Act requires that products that purport to be Indian made indeed be Indian made. It provides a valuable tool to preserve the cultural integrity and commercial value of these products of Native American hands and spirits.

**THE IMPORTANCE OF NATIVE AMERICAN ARTS AND CRAFTS**

The term "arts and crafts" does not do justice to the cultural creations about which we speak. I attach as Exhibit 1 to this testimony a statement of the Ho-Chunk Nation Traditional Court composed of Clan Elders describing the depth of cultural meaning and importance of these items. These works embody the culture and identity of a people, and reflect personal and family history. They are a fundamental means of expression as to who we are as Native Americans and as members of our respective Tribes.

Native American Arts and Crafts also have an important economic place in Indian Country. Many individuals and families rely on the production and sale of these items for their livelihood. The Ho-Chunk Nation is developing an enterprise to provide an outlet for these artists of the Ho-Chunk Nation and other tribes. We call this enterprise the Wonk Sheek Trading Company, our language's term for "Native Peoples". We are actively seeking to set up distribution channels for this enterprise as part of our economic development and diversification efforts. The Ho-Chunk Nation has been represented in trade missions to Germany and we have discussed this and other development issues with commercial interests from Japan. We know that the market for authentic Indian arts and crafts is international.

## **IMPACT OF COUNTERFEIT GOODS**

The cultural integrity and economic viability of authentic Indian arts and crafts are threatened by the substantial market in counterfeit Indian products. Many of these products are imported and almost all are cheaply priced and of inferior quality. I attach a copy of the articles appearing in the April 8, 1998 issue of USA Today describing this problem as Exhibit 2. Unfortunately, the problem is still as real today. If anything, its scope may have expanded.

## **INDIAN ARTS AND CRAFTS ACT OF 1990**

Congress provided a powerful tool to deal with this problem through the Indian Arts and Crafts Act of 1990. The reason that the problem has not been adequately dealt with is the lack of enforcement of that law. Although there are powerful criminal and civil deterrents to counterfeiting Indian goods contained in the law, the public enforcement mechanism has not been used. The reasons for that lack of enforcement should be addressed by the Indian Arts Board and U.S. Department of Justice. However, the fact of non-enforcement is clear. It is only through the private right of action authorized by the Act that this law has begun to have life. The Ho-Chunk Nation is proud of its collaboration with Native American Arts, Inc. to pursue the enforcement of the Act.

## **BACKGROUND OF NATIVE AMERICAN ARTS**

In 1996, Native American Arts, Inc., an Indian arts and crafts organization was organized by members of the Ho-Chunk Nation to market and distribute only authentic Native American made arts, crafts, and jewelry. It is headquartered in the Chicago, Illinois area. The authenticity of the Native American made products was to be a main selling point along with high quality. After the operation was launched, it was determined that the market place was being flooded with imitation Indian products being sold as authentic. Retailers and wholesale suppliers falsely suggested or falsely represented that their products were authentic Indian-made products when they were not. Subsequent investigation revealed that many of the imitation products were made in Mexico, China, and the Far East.

In addition, Native American Arts tried to get retail space in shopping malls around Chicago and on some occasions was turned down because other retailers in the same mall were selling competing Indian products. It was later determined that some of those retailers were selling imitation Indian products as being authentic.

## **SUMMARY OF PRIVATE ENFORCEMENT PROGRAM RESULTS**

Native American Arts originally filed lawsuits directly as an "Indian arts and crafts organization" under the Act. A Federal District Court in the Northern District of Illinois ruled that the action must be brought by either an Indian tribe or the U.S. Government on behalf of the Indian arts and crafts organization.

In a major effort to address the problem and to advance its cultural and economic interests, the Ho-Chunk Nation then brought suit as a representative Plaintiff for and on behalf of Native American Arts, Inc. The Ho-Chunk Nation has now brought twelve lawsuits under the IACA in the Northern District of Illinois. Three of the twelve cases are still pending and nine have been resolved through settlement. The exact terms of the settlements are confidential under court orders which we must honor. But the public record reveals that we have secured injunctions against nine of the defendants. Those injunctions prohibit any future violation of the Indian Arts and Crafts Act. Some of the injunctions provide detailed provisions for prominent disclaimers that some Indian style products are non Indian-made. One injunction provides for detailed continuing oversight of the defendant's marketing methods regarding Indian style goods.

These actions are expensive and difficult cases brought after extensive investigations. But they can and have been effective.

### **JUDICIAL PRECEDENT**

We have secured several key judicial rulings under the Indian Arts and Crafts Act including defending its constitutional validity, and several additional rulings involving discovery issues. The key judicial rulings are Ho-Chunk Nation et. al. v. Village Originals, Inc. 25 F. Supp. 2d 876 (1998), 1998 U.S. Dist. LEXIS 17921 and Ho-Chunk Nation et. al. v. Nature Gifts, Inc. 1999 U.S. Dist. LEXIS 3687 (N.D. Ill. 1999).

Those rulings rejected constitutional challenges to the Indian Arts and Crafts Act based upon First Amendment free speech grounds. These rulings held that the statute regulated only false advertising and false representations which are outside any constitutional protection. These opinions also held that the IACA is a strict liability statute and that the defendant need not intend to violate the IACA. In so ruling, the courts drew an analogy to the Lanham Act. Now, under this case law, if the defendant displays, offers, or sells products falsely suggested to be Indian-made products, they are liable without regard to their intent.

Native American Arts, Inc. v. J.C. Penney Company, Inc., 5 F. Supp. 2d 599 (1998), is the case where Judge Castillo ruled that an action under the IACA on behalf of an Indian arts and craft organization must be brought by a tribe or the federal Government. Previously, the suit was brought directly by and in the name of Native American Arts, Inc. It was because of this ruling that suits were brought thereafter by the Ho-Chunk Nation on behalf of Native American Arts, Inc. In Ho-Chunk Nation et. al v. J.C. Penney, Inc., Judge Kocoras issued a ruling on the application of claims against suppliers as Third-party Defendants. 1999 U.S. Dist. LEXIS 10716 (N.D. Ill. 1999). Judge Kocoras also denied a summary judgment motion by J.C. Penney Company, Inc. at 1998 U.S. Dist. LEXIS 17536 (N.D. Ill. 1998).

### **ADDITIONAL TESTIMONY**

Our attorney who prosecuted these cases, Michael Patrick Mullen of the Chicago law firm of Mullen & Foster has submitted to this Committee written testimony on behalf of Native American Arts, Inc. Among other things, that testimony discusses technical problems involved in enforcing the statute and contains some suggestions for improvements to the Indian Arts and Crafts Act.

The Committee may wish to refer to that testimony for discussion of technical aspects of prosecuting cases under the statute and to consider the suggested improvements.

### **OTHER ISSUES**

There are other issues affecting cultural integrity and economic viability of Native American traditional products and creations which deserve attention under existing law and, possibly, through new legislation. Bootlegging of Native American music is one. Misleading advertising and misrepresentations on the Internet are another. It is gratifying to have the value of Native American cultures recognized, but there are many who find it easy to misuse and distort cultural elements for their own gain.

### **CONCLUSION**

Our efforts have had a beneficial impact in the marketplace for Indian arts and crafts. Some suppliers and retailers now use prominent disclaimers if they sell Indian style products which are not Indian-made. Those disclaimers now appear in catalogs and advertising materials, on the Internet and at point of sale locations. However, we believe that much more needs to be done. The marketplace is still saturated with imitation Indian style products falsely suggested to be Indian-made. This wrongful conduct continues to displace authentic Indian-made products in the marketplace and undermines the price and quality of authentic Indian goods. It also displaces job opportunities for Native Americans and results in continued economic hardship to Native Americans. We intend to remain vigilant regarding this problem and will pursue additional enforcement of the Indian Arts and Crafts Act where appropriate.