

# NAGPRA Regulations Prompt Valuation Questions for Repatriated Native American Cultural Objects

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In January 2024, photographs of sheets covering museum exhibitions circulated in the news after new regulations from the Native American Graves Protection Act (NAGPRA) came into effect, causing many American museums to close Native American related exhibits.<sup>1</sup> Under these regulations, museums and federal agencies are required to obtain free, prior, informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations to exhibit, access, or research human remains or cultural items,<sup>2</sup> or else face civil penalties.<sup>3</sup> In an effort to enhance the efficacy and enforcement of NAGPRA regulations, such institutions are now under a four-year deadline to take inventory of and prepare to repatriate human remains and funerary objects.<sup>4</sup> These regulations reflect a cultural shift regarding the urgency and gravity of returning cultural objects across public and private sectors.

objects raise the question—how do these restrictions affect the fair market value of these objects, including for purposes of establishing a donor's charitable income tax deduction?

This article will seek to answer that question by providing an overview of the IRS rules applicable to the donation of property, and an analysis of relevant tax court decisions. While not dispositive to the issue at hand, these authorities inform what considerations may apply to determine fair market value in this context and suggest what positions the IRS may assert.

## VALUING NONCASH DONATIONS GENERALLY

Generally, a collector may take an income tax deduction for a donation of a cultural object to a qualifying organization equal to that object's fair market

piece of property being valued, there are a set of factors to consider under this definition, but the relative applicability, weight, and depth for such a calculation will be specific to the piece of property being donated. IRS Publication 561 "Determining the Value of Donated Property" explains these factors in more detail, but certain considerations outlined in the Publication include: (1) the cost or selling price of the item; (2) sales of comparable properties (in the art context, usually auction sales data due to its public nature); (3) replacement cost; and (4) opinions of professional appraisers.<sup>6</sup>

The IRS imposes a higher degree of proof to substantiate a donor's valuation as the value of the claimed deduction increases. For deductions over \$5k, a qualified appraisal by a qualified appraiser is required.<sup>7</sup> For deductions of \$20k or more, such a qualified appraisal must be attached to a donor's IRS Form 8283 for the claimed deduction.<sup>8</sup> For deductions of \$50k or more, a donor can ask for a statement of value from the IRS after submitting the qualified appraisal and a \$7.5k fee.<sup>9</sup>

Additionally, for a single work that has been appraised at \$50k or more, the IRS examining agent or appeals officer must refer the case to the Art Appraisal Services (AAS) unit in the Independent Office of Appeals for possible referral to the IRS Commissioner's Art Advisory Panel (the Panel).<sup>10</sup> The Panel "assists by providing value recommendations regarding the acceptability of tangible personal property appraisals taxpayers submit to support the fair market value

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As a result, private collectors' ability to sell, donate, and lend for exhibition Native American cultural objects is encountering obstacles and uncertainty. Collectors who would otherwise donate such objects to museums for a charitable income tax deduction might instead repatriate them, and they might be surprised to discover that, similar to museums, a charitable income tax deduction is also provided for repatriating items to a receiving Native American tribe or Native Hawaiian organization. However, the legal and cultural restrictions on selling and displaying these

value at the time of donation.<sup>5</sup> The general definition of fair market value for this purpose is: "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." For each

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claimed on the wide range of works of art involved in income, estate, and gift tax returns."<sup>11</sup> While the decisions of the Panel are not binding on the IRS, as is discussed in the Sonnabend example in Section C below, the tax commissioner has relied on the valuations of the Panel in disputing a taxpayer's reported value.<sup>12</sup>

subject to NAGPRA to voluntarily repatriate such object. As a result, collectors may have been hesitant to acknowledge or promote cultural objects in their collections, having little guidance on how to repatriate their objects in compliance with NAGPRA without subjecting themselves to prosecution for violation of

donations, with the knowledge that they must exercise a codified duty of care<sup>22</sup> with respect to accepted cultural object donations.

Now, assume a collector determines that a Native American cultural object was likely owned in violation of NAGPRA. The collector could opt to repatriate the object to its Native American descendants, who could accept the repatriation as a donation to their nonprofit organization. Alternatively, the collector could attempt to donate the cultural object to a museum that is willing to interface with the Native American descendants to obtain the required consent. In either case, what should the collector expect as to the determination of the fair market value of the object for their charitable income tax deduction? If the item in question cannot by law be sold on the art market by the collector, how does one determine at what price a "willing" seller would be willing to sell such an object? Would such determination account for the price that a "willing" seller would be able to receive on an illicit, black market sale? Any purchaser would have to be similarly "willing" in this ill-advised sense.

## ANALOGOUS AUTHORITY ON FAIR MARKET VALUE DETERMINATIONS

The question of whether fair market value determinations should account for applicable legal or export restrictions has been litigated in two notable disputes against the Tax Commissioner. First, in *Sammons v. Commissioner*, the 9<sup>th</sup> Circuit was called on to decide whether public policy would prohibit or reduce a charitable deduction for artifacts donated to a museum because the artifacts contained protected bird feathers. The *Sammons* purchased a collection of objects from Native Americans, including notably "a rare Blackfoot Indian 'thunder pipe,' a medicine pipe of religious significance to the Blackfoot tribe" and containing (in the words of the court):

Items wrapped together in a single hide[:] a sacred medicine pipe, an ermine pelt, the bodies of two weasels, an effigy head of a crane, a bone dance whistle, deer bones, a feather bundle with hawk bells, other feathers, medicine wands used for

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For a nonprofit such as a museum or university with a collection, a charitable deduction may also be available to offset tax due with respect to unrelated business taxable income. For galleries and dealers holding cultural objects for sale, a charitable income tax deduction is limited to the lesser of the fair market value of the object on the day of donation or the donor's tax basis in the object, *i.e.*, the amount the gallery or dealer paid to acquire it. Therefore, the determination of fair market value may also be relevant to donors who hold objects as inventory.

## THE PROBLEM WITH VALUING OBJECTS SUBJECT TO NAGPRA

NAGPRA was first enacted in 1990 as a framework "to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony."<sup>13</sup> Thirty-two years after NAGPRA was enacted, Congress passed the Safeguard Tribal Objects of Patrimony (STOP) Act, which increased criminal penalties for NAGPRA violations.<sup>14</sup> The penalty of a fine for an individual who "knowingly sells, purchases, uses for profit, or transports for sale or profit cultural objects obtained in violation of NAGPRA" is a fine or imprisonment of up to one year, or both, and the STOP Act increased the penalty for subsequent violations from 5 to 10 years in prison.<sup>15</sup> Prior to the enactment of the STOP Act, there was no clear legal safe harbor for a person in possession of a cultural object

NAGPRA. In this context of uncertainty, a collector unsure of whether his or her object was taken in violation of NAGPRA may have preferred the anonymity that can be accomplished by donating the object to a museum over a more public open-market sale. Indeed, for years, Native American objects have been appearing in black markets<sup>16</sup> and public auctions in Europe, where foreign courts have refused to prevent their sale at the affiliated tribe's request.<sup>17</sup> The uncertainty continues as the proposed STOP Act regulations still await review and publication to take effect.<sup>18</sup>

Nevertheless, one overarching goal of the STOP Act is "to establish a Federal framework in order to support the voluntary return by individuals and organizations of items of tangible cultural heritage, including items covered by [NAGPRA]."<sup>19</sup> For instance, it provides a safe harbor for voluntary return<sup>20</sup> and supports a monetary incentive to voluntarily repatriate objects by stating that "the Secretary shall include provision of tax documentation for a deductible gift to an Indian Tribe or Native Hawaiian organization, if the recipient Indian Tribe or Native Hawaiian organization consents to the provision of tax documentation."<sup>21</sup> Thus, the previously described wary donor might have more certainty regarding his or her personal exposure. However, in the wake of the new NAGPRA regulations, museums may be more hesitant to accept such

gambling, braided sweet grass, a child's buckskin moccasin with medicine stones inside, a flute made from a rifle barrel and other artifacts.<sup>23</sup>

After donating the collection to a museum and claiming a charitable income deduction, the IRS disallowed the deduction and imposed a negligence penalty.<sup>24</sup> The IRS contended that because federal law prohibited the purchase or sale by an individual of certain bird feathers and appendages, the Sammons were prohibited from purchasing the artifacts, and thus could not have made a valid gift of the artifacts to the museum.<sup>25</sup> The IRS argued that permitting a charitable deduction in this context would frustrate public policy.<sup>26</sup>

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Despite having violated federal law, the 9<sup>th</sup> Circuit Court rejected the Commissioner's arguments.<sup>27</sup> First, the 9<sup>th</sup> Circuit Court concluded that although the Sammons may have violated federal law in purchasing the artifacts, the Sammons nevertheless had sufficient ownership in the artifacts to make the donation; while the government could institute proceedings to seek forfeiture of the artifacts under federal law, it was not the place of the IRS or the Court to declare an illegal contract void.<sup>28</sup> In response to the public policy argument, the 9<sup>th</sup> Circuit Court was unpersuaded, finding that donating to a museum was not a threat to the national policy of protecting endangered birds, nor would it incentivize "unscrupulous sellers" to "hunt, capture, and kill protected eagle species in an effort to manufacture 'ancient' artifacts that can be sold to collectors, unsuspecting or not, for spurious donations to charitable organizations." Therefore, the Sammons were entitled to a charitable tax deduction, and the

Court appears to have disregarded the illegality of owning and transferring the artifact in determining the value of the contribution.<sup>29</sup>

Questionable provenance or title of a work or object raises a similar issue—if a seller would be unable to sell it in an open market, does that imply it has no value? During World War II, Lt. Joseph Meador stole artwork, 9<sup>th</sup> century manuscripts, bejeweled and ivory-decorated religious containers, and reliquary objects.<sup>30</sup> Meador allegedly engaged in periodic sales of the stolen art during his lifetime for financial support, although he ultimately died still owning many items.<sup>31</sup> In TAM 9152005, the IRS asserted the Meador estate owed gift tax on the value of the items at his death, noting that the decedent's lack of title to the stolen property did not affect its inclusion in the decedent's gross estate.<sup>32</sup> On the valuation determination, a Meador estate representative argued that the illicit market would be the only market in which the stolen items could have been sold, and that market should not be recognized by the IRS for valuation purposes.<sup>33</sup> The IRS rejected that argument, noting the sales Meador made during his lifetime proved that the items had value.<sup>34</sup> As relevant to this discussion, the IRS stated that the fact that property can be sold only through an illicit market does not negate the existence of an identifiable market for the property that can be referenced to establish fair market value.<sup>35</sup>

The issue reappeared in the early 2010s. In contrast to the IRS' position in Sammons, and more similar to the IRS' position with the Meador estate, in this dispute, the IRS took the position that federal law restricting the ownership and transfer of cultural objects should be ignored in determining fair market value. In 1959, renowned artist Robert Rauschenberg combined a stuffed American bald eagle with various other materials to make the artwork entitled Canyon. When similarly-renowned gallerist Ileana Sonnabend passed away in 2007 with Canyon as an asset in her personal collection, both the Bald and Golden Eagle Protection Act ("BGEPA") and Migratory Bird Treaty Act banned the sale of the work. Accordingly, her

estate reported Canyon as having a value of \$0, with the corroborating support of three independent appraisals.<sup>36</sup>

However, the IRS Art Advisory Panel disagreed, finding the fair market value was \$65 million, which would have resulted in an estate tax of approximately \$29.2 million solely in respect to Canyon.<sup>37</sup> Furthermore, the IRS levied an \$11.7 million penalty for the substantial valuation understatement. The estate, took the dispute to tax court, with the parties ultimately settling with the estate agreeing to donate the work to the Museum of Modern Art without a corresponding charitable deduction and the IRS removing the estate tax assessment and penalty.<sup>38</sup>

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While a settlement was ultimately reached in Sonnabend, the IRS' position on the determination of fair market value was consistent with the Sammons and Meador estate precedents. Namely, the IRS asserted that Canyon's fair market value was not \$0 simply because the sale of Canyon would have been illegal under US law, or illicit.

#### FAIR MARKET VALUE DETERMINATIONS OF NATIVE AMERICAN AND NATIVE HAWAIIAN CULTURAL OBJECTS AFTER NAGPRA

If the existing precedent warns that fair market value is not categorically \$0 for cultural objects held in violation of the law, what factors should be considered in determining the fair market value of such objects? Determining fair market value is not an exact formula and will almost necessarily involve subjective



judgements, where reasonable minds may differ.<sup>39</sup> However, *Sammons* and other public examples involving works of artistic value might indicate what the IRS would look to.<sup>40</sup> In *Sammons*, the 9<sup>th</sup> Circuit Court affirmed the Tax Court's finding that the price the taxpayers paid for the collection of the artifacts, less than one year prior to their donation thereof, was the best indicator of fair market value.<sup>41</sup> In the *Meador* estate ruling, the IRS concluded that the determination should attempt to ascertain "the highest price that would have been paid at that time whether in the discreet retail market or the legitimate art market."<sup>42</sup>

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### A tax dispute concerning the fair market value of an object subject to NAGPRA has yet to surface.

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The Internal Revenue Manual, which sets forth certain operating parameters for IRS employees and auditors, instructs that in valuing personal property all factors should be considered, including, specifically:

- An analysis of relevant public and/or private sales around the valuation date;
- The market (or trend) conditions near the valuation date;
- The market demand for the subject property and the importance of the property and its relationship to its relevant artist/type/group, etc.;
- The effects of condition, style, quality, medium, artist or culture, provenance, restorations, and rarity; and
- Notably, the effects of relevant contractual or legal restrictions.<sup>43</sup>

So, what is a collector to do in light of the uncertainty and room for disagreement? The stakes of getting it wrong can be quite high, as demonstrated by the asserted taxes and penalties from the authorities discussed in this article. As noted above, a qualified appraisal is required for all noncash donations in excess of \$5k, but should the appraiser be permitted to lower the value of Native American or Native Hawaiian cultural objects to account for the fact that a

donee qualified organization may ultimately have to repatriate the object, or not display the cultural object if the requisite consent is not obtained? Even if an appraiser were to ignore the legal restrictions imposed by NAGPRA, the enactment of NAGPRA and the STOP Act may significantly change or limit the market for Native American or Native Hawaiian cultural objects, making comparable sales data integral for a fair market value calculation hard to come by.

One option would be to submit an art valuation request to the AAS, and in turn the Panel, to obtain a valuation that the IRS is most likely to accept. However, the IRS has the discretion to reject requests if the object is valued below \$50k.<sup>44</sup> It is unclear whether the Panel has encountered many requests regarding cultural objects; as of 2023, there were only two Panel subcommittees between the 17 Panel members:<sup>45</sup> one for Fine Arts and another for Decorative Arts, neither of which would seem to capture the specific cultural goods discussed herein.<sup>46</sup> The most recent public recommendation by the Panel involving restricted objects was for Canyon, which ultimately escaped court review.

Collectors should be able to take some comfort from the discussion regarding the negligence penalties asserted in the *Sammons* case. While only binding in the 9<sup>th</sup> Circuit, the Court in *Sammons* reversed the Tax Commissioner's negligence penalty, finding that when a taxpayer "exercises due care in obtaining an appraisal and presents 'some proof' in support of the asserted fair market value, reasonable reliance on a valuation report does not amount to negligence."<sup>47</sup> The *Sammons* Court relied in part on a 1986 decision involving a valuation of pre-Columbian artifacts in *Biagiotti v. Commissioner*, where the negligence penalty was reversed because the taxpayers "had no reason to question their expert's ability or reliability."<sup>48</sup>

### CONCLUDING THOUGHTS AND ALTERNATE SOLUTIONS

While there is substantial authority in the form of regulations, case law, and IRS pronouncements regarding the determination of fair market value in the context of charitable donations, questions

remain regarding whether that existing body of law is fitting to the unique case of cultural objects, specifically cultural objects that are subject to federal prohibitions. A tax dispute concerning the fair market value of an object subject to NAGPRA has yet to surface.

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Additionally, the concept of valuing a cultural object by its fair market value might raise normative questions for the law. For example, the traditional definition of fair market value (i.e., the willing buyer and willing seller construct) might not be the best valuation method for such objects. The traditional fair market value analysis could fail to reflect the origin culture's own calculation of the value of the object, such as its religious, spiritual, historical, or personal significance. Placing a monetary market value on something potentially invaluable would seem offensive to most who believe in some way or another that some objects are not for market at all, i.e., sacred.<sup>49</sup> The collector or appraiser may not be fully aware of this significance. Should the most appropriate and respectful way to conduct any appraisal include consulting the origin culture when receiving the donation? The new NAGPRA regulations support a similar concept, requiring that museums and other federal agencies consult with lineal descendants, Indian Tribes, or Native Hawaiian organizations on the appropriate storage, treatment, or handling of human remains or cultural items.<sup>50</sup>

### End Notes

<sup>1</sup> Jacobs, J. and Small, Z., Leading Museums Remove Native Displays Amid New Federal Rules, *The New York Times* (Jan 26, 2024) Available at: <https://www.nytimes.com/2024/01/26/arts/design/american-museum-of-natural-history-nagpra.html>.

<sup>2</sup> 43 CFR § Section 101(d)(3).

- <sup>3</sup> 43 CFR § Section 101(d)(3).
- <sup>4</sup> *Op. cit.*, 43 CFR Section 10.10.
- <sup>5</sup> In certain circumstances, a collector's charitable deduction may be limited to cost basis. The rules regarding whether a donor is entitled to a charitable deduction based on fair market value or cost basis are complex and depend on the particular tax situation of the particular donor. Such rules are beyond the scope of this article.
- <sup>6</sup> The U.S. Tax Court once ruled for the avoidance of doubt that employing a group method of valuation according to tribal association when objects are of varied quality and value fails to employ "the degree of particularity necessary to assist in [the Court's] determination of value." See *Johnson v. Comm'r*, 85 T.C. 469, 478–79 (1985).
- <sup>7</sup> 6 CFR § Section 1.170A-16(d)(ii). A "qualified appraiser" is an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed. IRS rules require that the individual: (1)(A) has earned an appraisal designation from a generally recognized professional appraiser organization, or (B) has met certain minimum education requirements and has 2 or more years of experience; (2) regularly prepares appraisals for which they are paid; and (2) is not an "excluded individual" (i.e., the donor or donee or employees or parties related to the donor or donee). 26 CFR § Section 1.170A-17(b).
- <sup>8</sup> IRS Publication 561, *Determining the Value of Donated Property* (Dec. 2024).
- <sup>9</sup> *Ibid.*
- <sup>10</sup> IRS Publication 5392, *The Art Advisory Panel of the Commissioner of Internal Revenue: Annual Summary Report for Fiscal Year 2023* (Jun. 2024).
- <sup>11</sup> *Ibid.*
- <sup>12</sup> Cohen, P. "Art's Sale Value? Zero. The Tax Bill? \$29 Million." *The New York Times*, (Jul. 12, 2022) Available at: <https://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html>.
- <sup>13</sup> Inouye, D., "Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony," US Senate Select Committee on Indian Affairs (1990) (US Senate Report 101-473)
- <sup>14</sup> STOP Act of 2021, P.L. 117-258, 12/21/2022 codified at 25 U.S.C. 3071 *et seq.*
- <sup>15</sup> 18 U.S.C. § 1170.
- <sup>16</sup> H. Con. Res. 122, 114th Congress (2015–2016).
- <sup>17</sup> Smith, D., Native Americans implore France to halt artifact sale: 'It harkens to slave auctions,' *The Guardian*, (May 25, 2016) Available at: <http://theguardian.com/us-news/2016/may/25/native-american-france-sacred-objects-auction-smithsonian>.
- <sup>18</sup> U.S. Dept. of the Interior Indian Affairs. "Safeguard Tribal Objects of Patrimony (STOP) Act – Notice of Proposed Rulemaking." Available at: <https://www.bia.gov/service/tribal-consultations/safeguard-tribal-objects-patrimony-stop-act-notice-proposed-rulemaking#:~:text=The%20draft%20proposed%20rule%20reflects,Register%20is%20the%20official%20regulation>.
- <sup>19</sup> 25 U.S.C. 3071 § Section 2(4).
- <sup>20</sup> *Ibid.* at § Section 3073(b)(5)(D).
- <sup>21</sup> *Op. cit.* at 25 U.S.C. 3071 § Section 6(e).
- <sup>22</sup> 43 CFR § Section 101(d).
- <sup>23</sup> *Sammons v. Comm'r*, 838 F.2d 330, 333 (9<sup>th</sup> Cir. 1988).
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Op. cit.*, *Sammons v. Comm'r*, 838 F.2d p. 334–335.
- <sup>26</sup> *Ibid.*, p. 335.
- <sup>27</sup> The Commissioner's argument relied in part on the fact that a violation of the statutes could result in forfeiture of the protected object. The court found the possibility of forfeiture insufficient but implied that if the government had initiated proceedings against Sammons for forfeiture, this argument would be considered differently. A similar argument put forth by the Meador estate possessing stolen artworks was rejected on the reasoning that, for estate value purposes, what is in a decedent's estate depends on the decedent's *economic* equivalent of ownership, not technical legal title. See TAM 9152005.
- <sup>28</sup> *Sammons*, 838 F.2d at 336.
- <sup>29</sup> Note that the decision did ultimately reduce the claimed value of the charitable donation, but the rationale for reducing the value of the donation was centered on skepticism surrounding an over-inflated valuation.
- <sup>30</sup> TAM 9152005 (Aug 30, 1991).
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Op. cit.* TAM 9152005.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Op. cit.* TAM 9152005.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> Melbinger, C. The Sonabend Estate and Fair Market Valuation of Canyon, *University of Pennsylvania Law Review* 163 no. 1 (2015): 239–266. Ileana Sonabend did not shy away from disclosing her possession of Canyon during her lifetime; to the contrary, she sent it on loan for exhibit at the Metropolitan Museum of Art. Because the bald eagle in the work was taken before BGEPA came into effect, her possession and transport (with a permit from Fish and Wildlife Services) of the work was legal.
- <sup>37</sup> Melbinger, *supra* note 23, at 243.
- <sup>38</sup> *Ibid.*, p. 264.
- <sup>39</sup> For example, in *Sammons*, the spread of appraisal values submitted by Sammons ranged from \$422,410 up to \$548,380 across three appraisals, whereas the appraisal submitted by the Commissioner indicated a fair market value of between \$66,000 – \$100,000. This wide range demonstrates the potential for disputes in this determination.
- <sup>40</sup> In Sonabend, the IRS allegedly relied on "*Robson v. Commissioner*, assessing sales figures from 'comparable' works of art, and highlighting the availability of markets outside North America for Canyon." Melbinger, *supra* note 23, at 248. However, due to the ultimate settlement, the court did not opine on these considerations.
- <sup>41</sup> *Sammons*, 838 F.2d at 337.
- <sup>42</sup> TAM 9152005.
- <sup>43</sup> IRM 4.48.3. (Sep. 22, 2020).
- <sup>44</sup> IRM 4.48.2.3 (November 12, 2023).
- <sup>45</sup> IRS Publication 5392 (Jun. 2024). The Panel can have up to 25 members.
- <sup>46</sup> *Ibid.* If the Panel sees an uptick in requests for valuing objects covered by NAGPRA, since it has spots to add new members, might it add specialists from native groups covered by NAGPRA?
- <sup>47</sup> *Sammons* at 337.
- <sup>48</sup> *Ibid.*
- <sup>49</sup> In the footnotes of the *Sammons* decision, the Court notes the danger of disrespecting sacred objects such as the pipe: "The holder of the pipe may transfer possession of it only by means of a special ceremony. Desecrating the pipe is reputed to lead to the death of its owner. The Stuart who originally assembled the collection bearing his name failed to accord the thunder pipe its due respect and after improperly displaying the contents of the thunder pipe bundle, he broke his leg and died from a resulting infection. His widow, Laura Stuart, sold the thunder pipe without following the proper ceremony and within one month of the sale, Mrs. Stuart choked to death while dining with friends."
- <sup>50</sup> 43 CFR § Section 101(d)(1).