

Hon. Paul Fuhs, Commissioner
Department of Commerce
and Economic Development

February 4, 1994

661-94-0484

269-5100

Removal and resale of
fossilized ivory

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You have requested an opinion on the extent to which federal and state law permits Alaska Natives or non-Natives to either use fossilized ivory in the making of crafts for resale, or obtain fossilized ivory from state, federal, or private land for the creation of handicrafts. As explained below, Alaska Natives and non-Natives alike are generally permitted to obtain fossilized ivory from private lands with the permission of the landowner, but not from state or federal lands, absent a permit from the agency with land management authority. The removal and sale of fossilized ivory is subject to further restrictions, which are discussed below.

I. Applicable Federal Law

A. Archaeological Resources Protection Act

The Archaeological Resources Protection Act of 1979 ("ARPA") provides that no person may excavate, remove, sell, purchase, exchange, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated from "public lands or Indian lands" without a federal permit, or in violation of state law. 16 U.S.C.A. • 470ee (Supp. 1993). Section 3 of ARPA provides that

[n]onfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources [protected by the Act] unless found in an archaeological context.¹

16 U.S.C.A. • 470bb(1) (1985) (emphasis added).

¹ Section 3 further provides that no item is to be treated as an archaeological resource under ARPA unless such item is at least 100 years old. Fossils would appear to fall safely within that definition.

ARPA defines "public lands" to mean lands owned or administered by the United States as part of the national park system, the national wildlife refuge system, or the national forest system, and all other lands the fee title to which is held by the United States, other than Outer Continental Shelf lands or lands under the jurisdiction of the Smithsonian Institution. 16 U.S.C.A. • 470bb(3) (1985 and Supp. 1993). The Act defines "Indian lands" to include lands of any Indian tribe or individual, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States. 16 U.S.C.A. • 470bb(4) (1985).²

ARPA has also been held to extend to prohibit the removal of archaeological resources from private land without the permission of the landowner. In United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993), cert. denied, 1993 WL 441081 (U.S.), the court ruled that ARPA was not limited to the excavation or removal of archaeological resources from federal and Indian land, but that the Act is limited to cases in which the violation of state law is related to the protection of archaeological sites or objects. However, the court clarified that state laws prohibiting trespass and conversion are sufficient to trigger the penalties of ARPA because such laws have

objectives that include but are not exhausted in the protection of Indian artifacts and other antiquities.

Gerber, 999 F.2d at 1116.³

² ARPA defines "Indian tribe" for the purposes of the Act to include any Alaska Native village or regional corporation established by the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C.A. • 1601 (1986).

³ Although ARPA may have been intended to apply directly to

B. Native American Graves Protection and Repatriation Act

It is also conceivable that the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA"), 25 U.S.C. • 3001, could be applied to the removal or sale of fossilized ivory. NAGPRA prohibits the unauthorized excavation, removal or sale of "Native American cultural items" from federal and Indian lands.⁴ The Act defines "cultural items" as including human remains, as well as "funerary" objects, which are in turn defined as objects associated with the death rite or ceremony of a culture; "sacred" objects, meaning specific ceremonial objects associated with traditional Native American religious practices; and objects of "cultural patrimony" which means

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual

ANCSA lands, the Act itself defines "Indian lands" as those held in trust or restricted title. 16 U.S.C.A. • 470bb(4) (1985). Alaska Native allotments will generally qualify under this definition, as the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C.A. •• 270-1 to 270-3 (1986), provides that allotments "shall be inalienable and nontaxable until otherwise provided by Congress." ANCSA lands, in contrast, are held in fee title by corporations chartered under Alaska law. However, under the rationale of Gerber, ARPA may be made applicable because state law would prohibit the removal of fossilized ivory from ANCSA lands without the permission of the landowner. Moreover, Section 22(g) of ANCSA reserves to the United States a right of first refusal, to require any lands which were within a national wildlife refuge prior to being conveyed to a village corporation. 43 U.S.C.A. • 1621(g) (1986).

⁴ The Act defines "federal lands" as "any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971." 25 U.S.C.A. • 3001(5) (Supp. 1993). NAGPRA also defines "tribe" for its purposes as including any Alaska Native village, as defined in or established under ANCSA, which is eligible for federal benefits to Indians.

regardless of whether or not the individual is a member of the [Native group in question.]

25 U.S.C.A. • 3001(3) (Supp. 1993). Thus, NAGPRA could be foreseen to apply to any fossilized ivory item which could be classified as a "funerary" or "sacred" object, or as an object of ongoing historical or cultural importance to an identifiable Alaska Native group.⁵

In addition, federal laws prohibiting theft of or damage to "property of the United States" may be applied to the unauthorized removal of fossilized materials from federal public lands. 18 U.S.C.A. • 641 (1976) attaches criminal penalties to the theft or unauthorized use of any property or "thing of value of the United States" or any agency thereof,⁶ while 18 U.S.C.A. • 1361 (1989) prohibits "any depredation against any property of the United States...." These statutes have been successfully employed by federal agencies in prosecutions involving archaeological resources.

C. Indian Arts and Crafts Act of 1990

A further consideration under federal law is the Indian Arts and Crafts Act of 1990, 25 U.S.C. • 305. This statute provides that no person may display for sale or sell a good "in a manner which falsely suggests that it is Indian produced, an Indian product, or the product of a particular Indian tribe or Indian arts and crafts organization"⁷ Thus, regardless of

⁵ This suggests that the applicability of NAGPRA to the removal and sale of fossilized ivory objects may be quite limited. However, NAGPRA must be viewed as legislation passed for the benefit of Native Americans. As such, courts must construe any ambiguities in the terms of the statute liberally, in favor of the position most protective of Native rights claimed under the statute. Bryan v. Itasca County, 426 U.S. 373, 96 S. Ct. 2102, L. Ed. 2d 710 (1976). Therefore, any fossilized ivory object which can reasonably be deemed a "cultural item" is within the statute.

⁶ "Value" is defined by 18 U.S.C.A. • 641 (1976) to mean "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." Fossilized ivory which is excavated or removed for commercial purposes must be presumed to possess value.

⁷ This statute also defines "tribe" for its purposes as

the origin of a particular fossilized ivory object, it may not be falsely marketed as a Native product.

Under federal law, then, Alaska Natives and non-Natives alike may use fossilized ivory for resale, provided the ivory is neither obtained in violation of ARPA, NAGPRA or other applicable law, nor misrepresented as having been produced by a Native person or entity. Conversely, neither Alaska Natives nor non-Natives may use for resale a fossilized ivory product which was illegally obtained, or market the product as Native produced when in fact it was not.

II. Applicable State Law

Under Alaska law, the Alaska Historic Preservation Act ("the AHPA"), AS 41.35, reserves to the state title to all historic, prehistoric and archaeological resources situated on land owned or controlled by the state, including tide and submerged land. The AHPA defines "historic, prehistoric and archaeological resources" to include

deposits, structures, ruins, sites, buildings, graves, artifacts, fossils, or other objects of antiquity which provide information pertaining to the historical or prehistorical culture of people in the state as well as to the natural history of the state.

AS 41.35.230(4) (emphasis added). Fossilized ivory found on state-owned or state-controlled land can be reasonably expected to provide information pertaining to the natural history of the state. Such material is thus within the reach of the AHPA.⁸

The AHPA makes it unlawful for any person to "appropriate, excavate, remove, injure, or destroy" archaeological resources of the state without a permit from the commissioner of the Department of Natural Resources. AS 41.35.200(a). Nor may any person "possess, sell, buy or transport within the state, or offer to sell, buy or transport

including Alaska Native villages. 25 U.S.C.A. • 305e (Supp. 1993).

⁸ In addition, fossilized ivory items found on state lands in a cultural setting, such as within an historical or prehistorical Native cultural site, would appear to be well within the AHPA.

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within the state" archaeological resources taken in violation of the statute. AS 41.35.200(b). A person who violates the statute is guilty of a class A misdemeanor, and is also subject to civil penalties of up to \$100,000 for each violation. AS 41.35.210; AS 41.35.215.

III. Conclusion

In summary, applicable federal and state law provides that fossilized ivory may not be excavated, removed, sold, or exchanged, where it is found in an archaeological context, or under circumstances otherwise demonstrating that the material has significance to the cultural or natural history of the state, or to the cultural history of an identifiable Alaska Native group. While fossilized ivory may be removed and sold with the permission of the federal or state agency with management authority, or with the permission of the private landowner, an item made from fossilized ivory may not be falsely marketed as a Native handicraft, either by Alaska Natives or by non-Natives, regardless of its origin.

If you have further questions, please do not hesitate to contact this office.

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