

DEPARTMENT OF THE INTERIOR**Office of the Secretary****43 CFR Part 10****RIN 1024-AC84****Native American Graves Protection and Repatriation Act Regulations—Civil Penalties****AGENCY:** Department of the Interior.**ACTION:** Final rule.

SUMMARY: This final rule relates to regulations implementing the Native American Graves Protection and Repatriation Act of 1990 ("the Act" or "NAGPRA"). This section outlines procedures for assessing civil penalties on museums that fail to comply with applicable provisions of the Act.

EFFECTIVE DATE: This final rule becomes effective on May 5, 2003.

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SUPPLEMENTARY INFORMATION: On November 16, 1990, President George Bush signed the Act into law. The Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they are affiliated. Section 13 of the Act requires the Secretary of the Interior ("the Secretary") to promulgate regulations to carry out provisions of the Act [25 U.S.C. 3011]. Final regulations implementing the Act were published in the Federal Register on December 4, 1995, and went into effect on January 3, 1996. The final regulations had five sections reserved for later publication.

Section 9 of the Act authorizes the Secretary to assess a civil penalty against any museum that fails to comply with the requirements of the Act [25 U.S.C. 3007]. Such penalties must be assessed according to procedures established by the Secretary through regulation. An interim rule establishing civil penalty procedures was published in the Federal Register on January 13, 1997 (62 FR 1820), and went into effect on February 12, 1997. Written comments on the interim rule were solicited from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and members of the public. The extended period between the receipt of comments and publication of this final rule is attributed to

administrative processing delays and National NAGPRA program organizational changes. Despite the delay, the comments continue to be relevant as there has been no significant developments regarding NAGPRA civil penalties since publication of the interim rule.

Twenty-four written comments were received representing 28 organizations and individuals. These included one Indian tribe, four Native American organizations, eight museums, one university, three national scientific organizations, three state agencies, two Federal agencies, four other organizations, and two individuals. Several letters represented more than one organization. Comments addressed most of the interim rule. All comments were fully considered when revising the interim rule for publication as a final rule.

Primary Changes

There are two primary changes to the interim rule.

The first change concerns the relationship between the notice of failure to comply and the notice of assessment. As explained in the preamble of the interim rule, the administrative procedures for providing notice, holding a hearing, appealing an administrative decision, and issuing a final administrative decision were patterned after the regulatory procedures currently used in assessing civil penalties under the Archaeological Resources Protection Act (ARPA). Further consideration revealed a statutory distinction between the ARPA and NAGPRA civil penalty procedures, particularly regarding the relationship between the notice of failure to comply and the notice of assessment. ARPA specifies that no penalty may be assessed until the person who violates the ARPA is given notice and opportunity for a hearing [16 U.S.C. 470 ff (a)(1)]. Regulations implementing the ARPA civil penalty provisions require that the notice of violation include a proposed penalty amount, which may be addressed at the hearing [43 CFR 7.15 (b)(3)]. NAGPRA is different. Section 9 (a) of NAGPRA stipulates that both the determination and assessment of the penalty can occur only after the museum has an opportunity for an agency hearing [25 U.S.C. 3007]. The regulatory text has been revised to indicate that the notice of failure to comply must be issued first, followed by a period during which the museum may request a hearing. A notice of assessment may be issued after the first period for requesting a hearing has expired. The possibility of a second

hearing on the notice of assessment has been added to the regulations. Figure 1 outlines the civil penalty hearing and appeal process. If the museum consents, the Secretary may also combine the two notices, in which case the two opportunities for hearing will also be combined.

The second change concerns the amount of the per-day penalty that may be assessed if the museum continues to violate NAGPRA after the date of the final administrative decision on the notice of assessment. Several commenters considered the \$100-per-day amount too low. Others recommended that the Secretary should have some discretion depending on the nature of failure to comply and the human remains, funerary object, sacred object, or object of cultural patrimony in question. The amount has been changed from a set \$100 per day to a range not to exceed \$1,000 per day.

Section-by-Section*General*

Five commenters offered no specific changes to the text. Two commenters encouraged the Department of the Interior to remain flexible in its application of civil penalties and to refrain from penalizing museums that have attempted, in good faith, to comply with the Act. Whether a museum has failed to comply is determined under a strict liability standard. Mitigating factors, such as whether the museum has made a good faith attempt to comply, may be used by the Secretary to determine the penalty amount.

Paragraph 10.12 (a)

This paragraph outlines the Secretary's authority to assess civil penalties. Several comments concerned applicability of the rule to specific types of institutions. One commenter recommended amending the rule to apply to Federal agencies that fail to comply with provisions of the Act. One commenter recommended amending the rule to apply to non-Federally-funded institutions that refuse to return human remains, funerary objects, sacred objects, or objects of cultural patrimony controlled by a Federal agency or museum. One commenter recommended amending the rule to apply to museums in other countries that control human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Section 9 of the Act authorizes the Secretary to assess civil penalties on any museum that fails to comply with the requirements of the Act [25 U.S.C. 3007]. Section 2 (8) of the Act defines

a "museum" as any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony [25 U.S.C. 3001 (8)]. The definition of museum specifically excludes the Smithsonian Institution or any other Federal agency. The definition of museum is further clarified by regulation [paragraph 10.2 (a)(3) of this part]. The Act does not authorize the Secretary to assess civil penalties on a Federal agency that fails to comply with the Act. Section 15 of the Act does specifically grant the United States district courts jurisdiction over any action brought by any person alleging a violation of the Act, including violations by a Federal agency [25 U.S.C. 3013]. Institutions that do not receive Federal funds are not required to comply with the Act. However, human remains, funerary objects, sacred objects, and objects of cultural patrimony recovered from Federal lands generally fall under provisions of the Act regardless of where they currently are curated.

One commenter recommended amending the definition of the term "you" to exclude "the museum official designated responsible for matters related to implementation of the Act." The term is used in the rule only to advise the museum official designated responsible for matters related to implementation of the Act of actions that they may take in the notification and appeal process. Section 9 of the Act authorizes the Secretary to assess civil penalties on any museum that fails to comply with the requirements of the Act, not on an individual employee of that institution.

Paragraph 10.12 (b)

This paragraph defines the term "failure to comply."

Paragraph 10.12 (b)(1)(i) of this section stipulates that a museum has failed to comply if, after November 16, 1990, the museum sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony in violation of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act. Six commenters recommended inserting the word "knowingly" before the phrase "sells or otherwise transfers" to be consistent with the criminal provisions in section 4 of the Act [18 U.S.C. 1170]. The criminal provisions in section 4 of the Act require mens rea or criminal

intent. The civil penalty provisions in section 9 of the Act do not include such a requirement. Nothing precluded Congress from specifically requiring an element of knowledge or intent to the civil penalty provisions, but this was not done. The text has not been changed.

One commenter recommended deleting the phrase "or otherwise transfers," as this concept does not appear in the Act. Another commenter recommended clarifying that this phrase applies to transfers where the intent was avoiding compliance with the Act. This phrase is intended to identify instances where human remains, funerary objects, sacred objects, or objects of cultural patrimony are conveyed from one party to another, without reciprocal financial consideration, to avoid compliance with provisions of the Act. The phrase has been retained.

One commenter considered use of the term "in violation of" to be tautological, that is, defining a term with reference to itself. The term has been replaced with "contrary to provisions of."

One commenter recommended deleting the word "unlawful" referring to the sale or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Since museums may sell or otherwise transfer such items if they can prove a right of possession, the term has been retained to distinguish sales or transfers that violate provisions of the Act from sales or transfers of items for which the museum has right of possession.

One commenter recommended adding provisions to specifically prohibit the sale or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony across State lines. The criminal provisions of the Act already apply to the sale, purchase, use for profit, or transport for sale or profit of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony within the United States. Transfer across a State boundary is not a necessary element of this crime.

One commenter questioned whether assessing civil penalties on museums that acquire items that are otherwise widely available for sale to the general public might actually encourage the growth of private collections and restrict Federally funded institutions from adding to their collections. Section 4 of the Act makes it a crime under certain conditions to knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The rule in part provides an alternative

administrative mechanism to prosecute museums that violate these criminal provisions.

No comments were received regarding paragraphs 10.12 (b)(1)(ii), (b)(1)(iii), or (b)(1)(iv) of this section.

Paragraph 10.12 (b)(1)(v) of this section stipulates that a museum has failed to comply if it refuses to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization pursuant to the requirements of the Act. Two commenters requested clarification of the relevant requirements of the Act, particularly as it applies to disputes. The section has been rewritten to apply to any museum that, absent any of the exemptions specified at paragraph 10.10 (c) of this part, refuses to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization.

Paragraph 10.12 (b)(1)(vi) of this section stipulates that a museum has failed to comply if it repatriates human remains, funerary objects, sacred objects, or objects of cultural patrimony before publication of a notice in the Federal Register as required by the Act. One commenter pointed out that the regulations require publication of two separate types of notice, depending on the type of cultural item. Publication of a notice of intent to repatriate is required prior to repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony [paragraph 10.10 (a)(3) of this part]. Publication of a notice of inventory completion is required prior to repatriation of human remains or an associated funerary object [paragraph 10.10 (b)(2) of this part]. The text has been rewritten to refer to publication of the required notice in the Federal Register. Another commenter suggested deleting this section since the Secretary ultimately is responsible for publication of notices in the Federal Register, not the submitting museum. The Secretary is responsible for publishing the museum's notice in the Federal Register. However, as the regulations make clear, repatriation may not occur until at least 30 days after the notice is published [paragraphs 10.10 (a)(3) and (b)(2) of this part]. The section has been retained.

One commenter recommended that failure to adequately consult with the relevant lineal descendants, Indian tribe officials, and traditional religious leaders also should constitute a "failure to comply." Other sections of the

regulations already require museum and Federal agency officials to consult with Indian tribe officials and traditional religious leaders by the completion of the summary process [paragraph 10.8 (d)(2) of this part]. The regulations also require museum and Federal agency officials to consult with lineal descendants, Indian tribe officials, and traditional religious leaders at the point in the inventory process when investigation into the cultural affiliation is being conducted [paragraph 10.9 (b)(2) of this part], and prior to repatriation in order to determine the place and manner of repatriation [paragraph 10.10 (d) of this part]. Text has been added as paragraph 10.12 (b)(1)(vii) of this section specifically identifying as a failure to comply a museum official's failure to consult with lineal descendants, Indian tribe officials, and traditional religious leaders as required.

Text also has been added as paragraph 10.12 (b)(1)(viii) of this section specifically identifying as a failure to comply a museum official's failure to inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects as required in paragraph 10.10 (e) of this part.

One commenter asked whether failure to comply with regulations regarding the curation of Federally owned and administered archeological collections would constitute a failure to comply under 36 CFR Part 79. Federal agencies are responsible for the administration of all collections within their control, including Federal collections in the possession of non-Federal repositories. This includes the curation of archeological collections -- artifacts, objects, specimens, and other physical evidence -- that are excavated or removed under the authority of the Antiquities Act [16 U.S.C. 431-433], the Reservoir Salvage Act [16 U.S.C. 469-469c], the National Historic Preservation Act [16 U.S.C. 470-2], or the Archaeological Resources Protection Act [16 U.S.C. 40aa-mm]. Federal agencies also are responsible for completion of summaries and inventories, publication of notices, and other activities under the Native American Graves Protection and Repatriation Act [25 U.S.C. 3001 *et seq.*]. A Federal agency's failure to comply with curation regulations is a matter separate and unrelated to compliance with NAGPRA.

Paragraph 10.12 (b)(2) of this section stipulates that each violation constitutes

a separate offense. One commenter requested clarification of what would constitute separate violations. Determination of the number of separate violations of unlawful sale or transfer [paragraph 10.12 (b)(1)(i) of this section], refusal to repatriate [paragraph 10.12 (b)(1)(v) of this section], or repatriate prior to publication of the required notice [paragraph 10.12 (b)(1)(vi) of this section] will be based on the number of human remains, funerary objects, sacred objects, or objects of cultural patrimony involved. Determination of the number of separate violations of failure to provide summaries [paragraph 10.12 (b)(1)(ii) of this section], inventories [paragraph 10.12 (b)(1)(iii) of this section], notifications [paragraph 10.12 (b)(1)(iv) of this section], consultations [paragraph 10.12 (b)(1)(vii) of this section], or information regarding potentially hazardous human remains, funerary objects, sacred objects, or objects of cultural patrimony [paragraph 10.12 (b)(1)(viii) of this section] will be based on the number of lineal descendants, Indian tribes, or Native Hawaiian organizations involved.

Paragraph 10.12 (c)

This paragraph explains how to notify the Secretary of a failure to comply.

Paragraph 10.12 (c) of this section stipulates that any person may bring an allegation of failure to comply to the Secretary's attention. One commenter suggested requiring the person who makes the allegation to provide credible evidence of a failure to comply. Text has been added stipulating that allegations must be in writing, and should include documentation of the alleged failure to comply. This documentation might include evidence that: the museum has possession or control of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony; receives Federal funds; and has failed to comply with specific provisions of the Act. "Possession" is defined in paragraph 10.2 (a)(3)(i) of this section. "Control" is defined in paragraph 10.2 (a)(3)(ii) of this section. "Native American," "human remains," "funerary objects," "sacred objects," and "objects of cultural patrimony" are defined in paragraph 10.2 (d) of this section. "Receives Federal funds" is defined in paragraph 10.2 (b) of this section.

Paragraph 10.12 (d)

Paragraph 10.12 (d) of this section, designated paragraph 10.12 (c)(2) in the interim rule, explains what steps the Secretary must take upon receiving an allegation.

One commenter requested that the person making the allegation be notified that the allegation has been received. Text specifying this required action has been added to paragraph 10.12 (d)(1) of this section. Six commenters requested that the Secretary also be required to notify the museum that the allegation has been received. It is anticipated that the Secretary usually will notify the museum upon receipt of an allegation. However, this decision must be made on a case-by-case basis in order to avoid jeopardizing investigation of the alleged failure to comply or any other ongoing law enforcement investigation.

Paragraph 10.12 (d)(2) of this section, designated paragraph 10.12 (c)(2) in the interim rule, outlines the steps that the Secretary may take upon receiving an allegation of failure to comply. These include: (i) reviewing the alleged failure to comply; (ii) identifying the specific provisions of the Act with which the museum allegedly failed to comply; (iii) determining if the institution of a civil penalty action is in the public interest; and (iv) if appropriate, estimating the proposed penalty.

Seven commenters requested clarification of the procedures by which the Secretary will investigate an allegation of failure to comply. One commenter stressed that such an investigation must be conducted fully and fairly before the Secretary commences with the determination of the penalty. Investigation of an allegation of failure to comply must necessarily be done on a case-by-case basis. Paragraph 10.12 (d)(2) of this section outlines the basic steps necessary to complete such an investigation.

One commenter considered the language in paragraph 10.12 (d)(2)(i) of this section, designated paragraph 10.12 (c)(2)(i) in the interim rule, too vague and offered revised wording. One commenter objected that no provision was made to involve the alleging party in the process. Text has been added to this section to indicate that additional information may be requested from the person making the allegation, the museum that has allegedly failed to comply, and other parties. Subpoenas may be issued if the Secretary's request for information is resisted.

Section 9 (a) of the Act stipulates that the penalty may only be determined after the museum is provided with an opportunity for an agency hearing [25 U.S.C. 3007 (a)]. Paragraph 10.12 (c)(2)(iv) of the interim rule has been deleted.

One commenter objected to the investigatory procedure's being at the Secretary's discretion. Section 9 (a) of

the Act makes it clear that assessment of a civil penalty is completely at the Secretary's discretion [25 U.S.C. 3007 (a)]. However, consistent with the Department of the Interior's continuing responsibility to keep constituents and the general public informed of its activities [43 DM 1.1], the regulations require certain investigatory steps.

Six commenters requested that the Secretary be required to provide notification if, after consideration of the allegation, no further action will be taken. Text has been added as paragraph 10.12 (d)(3) of this section requiring notification of the person making the allegation and the museum if the available evidence does not show a failure to comply.

One commenter requested clarification of how long the Secretary might take in determining whether a museum has failed to comply. Generally, a civil penalty must be assessed within five years of when facts material to the failure to comply become known, unless the assessment: 1) is founded upon a tort on behalf of a Federally recognized Indian tribe [28 U.S.C. 2415 (b)], or 2) is intended to establish title to, or right of possession of, a human remains, funerary object, sacred object, or object of cultural patrimony [28 U.S.C. 2415 (c)], in which case a longer period may apply.

Paragraph 10.12 (e)

This section explains how the Secretary notifies the museum and potentially aggrieved parties if the alleged failure to comply is verified.

One commenter recommended that written notice of failure to comply be explicitly required. The word "written" has been inserted before phrase "notice of failure to comply" in paragraph 10.12 (e)(1) of this section.

Section 9 (a) of the Act stipulates that the determination of the penalty may only occur after the museum is provided with an opportunity for an agency hearing [25 U.S.C. 3007 (a)]. Paragraph 10.12 (e)(1)(iii) of this section has been deleted and subsequent sections renumbered.

Paragraph 10.12 (e)(1)(iii) of this section, designated paragraph 10.12 (e)(1)(iv) in the interim rule, has been revised to reflect the options available in paragraph 10.12 (f) of this section.

Paragraph 10.12 (e)(2) of this section allows the Secretary, with the consent of the museum, to combine the notice of failure to comply and notice of assessment.

Paragraph 10.12 (f)

This Paragraph outlines the actions that the museum may take upon receipt

of a notice of failure to comply. Four options were outlined in the interim rule: (1) seek informal discussions with the Secretary; (2) file a petition for relief; (3) take no action and await the Secretary's notice of assessment; or (4) accept the proposed penalty.

Paragraphs 10.12 (f)(1) and (f)(3) of this section have been retained. Paragraph 10.12 (f)(2) of this section described the process for filing a petition for relief of the penalty amount. Because the Notice of Failure to Comply will not necessarily include a determination of penalty amount, paragraph 10.12 (f)(2) of this section has been deleted and replaced with the option of requesting a hearing. The process for requesting a hearing is described in paragraph 10.12 (j) of this section. Paragraph 10.12 (f)(4) of the interim rule, which also dealt with the proposed penalty, has been deleted.

Paragraph 10.12 (g)

This paragraph, designated paragraph 10.12 (d) in the interim rule, explains how the Secretary determines the penalty amount.

Section 9 (b) of the Act stipulates that the amount of a penalty assessed must be determined taking into account, in addition to other factors: (1) the archeological, historical, or commercial value of the item involved; (2) the damages suffered, both economic and non-economic, by an aggrieved party; and (3) the number of violations [25 U.S.C. 3007 (b)].

The interim rule outlined a two-stage approach to implementing these statutory criteria. The first stage, outlined in paragraph 10.12 (g)(1) of this section, designated paragraph 10.12 (d)(1) in the interim rule, stipulated that the initial assessment is based on an amount equal to .25 percent of the museum's annual budget, or \$5,000, whichever is less, plus an additional sum determined after taking into account: (1) the archeological, historical, and commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony, including, but not limited to, consideration of their importance to performing traditional practices; (2) damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, the costs of attorney and expert witness fees, investigations, and administrative expenses related to efforts to compel compliance with the Act; and (3) the number of violations that have occurred. The second stage, outlined in paragraph 10.12 (g)(2) of this section, designated paragraph 10.12 (d)(2) in the interim rule, provided for an additional penalty

amount of \$100 per day if the museum continues to violate the Act after the date that the final administrative decision takes effect.

Five commenters considered the base penalty amount stipulated in paragraph 10.12 (g)(1) of this section, designated paragraph 10.12 (d)(1) in the interim rule, insufficient to encourage compliance. One commenter considered the base penalty amount too severe. While the base penalty amount of \$5000 or less might be considered overly modest by some, the Secretary is authorized to assess a penalty based on the sum of the listed factors. This amount might be substantial depending on the situation.

Three commenters requested clarification of the process by which the archeological, historical, or commercial value of the human remains, funerary object, sacred object or object of cultural patrimony in paragraph 10.12 (g)(1)(i) of this section, designated paragraph 10.12 (d)(1)(i) in the interim rule, will be determined by the Secretary. In calculating civil penalties, the Secretary will consider the value to be the benefit derived by the museum through control of the particular human remains, funerary object, sacred object, or object of cultural patrimony. This value can be calculated in a variety of ways. Archeological and historical values focus on the benefits derived by the museum through the study or exhibition of the human remains, funerary object, sacred object, or object of cultural patrimony. These values might include research fees and grants obtained to study the cultural items, admission fees or donations obtained for the public display of the human remains, funerary object, sacred object, or object of cultural patrimony, and royalties obtained from publication of information related to or images of the cultural items. Commercial value means the price a willing buyer would pay, and a willing seller accept, for the human remains, funerary object, sacred object, or object of cultural patrimony in the open market.

One commenter objected to using the value of the cultural item in calculating part of the penalty amount and the subsequent assumption that, after paying such a penalty, the museum also will be forced to relinquish control of the cultural item. The Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated. By failing to comply with the Act, the museum is depriving lineal descendants, Indian

tribes, and Native Hawaiian organizations of these rights. The value portion of the penalty calculation is intended to deprive the museum of any benefit derived through control of the particular cultural item. This assessment in no way reduces the lineal descendant's, Indian tribe's, or Native Hawaiian organization's right to the cultural item.

One commenter questioned whether the importance of a cultural item to performing traditional practices is a reasonable criterion for calculating its archeological, historical, or commercial value. We agree that consideration of the importance of a cultural item should not be used in calculating its archeological, historical, or commercial value. The phrase has been deleted.

One commenter requested clarification of how the damages suffered by aggrieved parties in paragraph 10.12 (g)(ii) of this section, designated paragraph 10.12 (d)(ii) in the interim rule, will be calculated. Section 9 (b)(2) of the Act stipulates that both economic and non-economic damages suffered by an aggrieved party be taken into account in determining the penalty amount.

Two classes of aggrieved parties must be considered. The first class consists of lineal descendants, Indian tribes, or Native Hawaiian organizations that are denied access, by the museum's failure to comply, to human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated. The museum's failure to comply with the Act denies these parties a property right that may result in both economic and non-economic damages. Economic damages might include expenditures by the aggrieved party to compel the museum to comply with the Act, such as the cost of activities taken after November 16, 1993, to compel the museum to complete the required summary. Non-economic damages might include loss of use of or damage to the cultural item. One commenter recommended that non-Federally recognized Indian groups also must be consulted in determining the penalty amount. The Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations. While a non-Federally recognized Indian group also may have a property interest in cultural item, the Act and these regulations do not directly address that interest.

The second class of aggrieved parties consists of the people of the United States who, due to the museum's failure to comply, are burdened with an obligation to investigate and, if appropriate, assess a civil penalty

against a museum that has failed to comply. This burden could include expenditures by the Department of the Interior related to assessing the archeological, historical, or commercial value of a cultural item and the economic and non-economic damages to the aggrieved lineal descendants, Indian tribes, or Native Hawaiian organizations.

Two commenters objected to including attorney's fees in calculating economic damages. One commenter cited the case of *Alyeska Pipeline Service Company v. Wilderness Society* [421 U.S. 247, 250 (1975)] in which the court found that parties must bear all of their own costs of litigation absent a specific fee-shifting statute. Another commenter recommended that a museum must be required to pay all attorney fees, expert witness fees, investigation costs, and any other expenses that are required to compel compliance if the museum was found to be in noncompliance. The example in paragraph 10.12 (g)(1)(ii) of this section, designated paragraph 10.12 (d)(1)(ii) in the interim rule, has been revised to omit explicit reference to attorney's fees and rewritten as "expenditures by the aggrieved party to compel the museum to comply with the Act." We recognize that such activities may in fact include expenditures for an attorney or other staff to prepare, review, and file documents, but do not intend that this category include litigation costs.

Two commenters considered requiring the museum to pay damages unreasonably punitive. Section 9 (b)(2) requires that both economic and non-economic damages to the aggrieved party must be taken into account in assessing the penalty amount. We consider this requirement a strong indication that Congress intended museums to comply with the Act. The damages component of the penalty amount is, in fact, purely compensatory, being explicitly based on the expenditures of the aggrieved parties. Punitive damages would be damages assessed over and above the compensatory amount, such as additional penalties based on the number of violations that have occurred as authorized in section 9 (b)(3) of the Act. Two commenters requested that museums lose Federal funding if they are identified as failing to comply with the Act. The legislative history of the Act indicates that although Congress considered such a penalty, loss of Federal funding was not included in the final bill. We generally are precluded from including a provision in regulation that previously was considered and rejected by Congress.

Three commenters requested clarification of the process by which an additional penalty amount will be assessed after the day that the final administrative decision takes effect if the museum continues to violate the Act. One commenter identified this provision as imposing prohibitive costs upon a museum that seeks judicial review of the final administrative decision. Another commenter considered the \$100-per-day penalty insufficient to compel compliance with the Act, recommending instead a flexible amount ranging from \$100 to \$10,000 per day. Another commenter considered this provision to be punitive rather than serving to compel further compliance with the Act. The drafters agree that the per-day assessment is in fact a punitive damage intended to compel compliance with the Act, but not based on any actual damage to an aggrieved party. The per-day assessment will not be imposed until the final administrative decision, providing ample opportunity to participate in an agency hearing, request a hearing before an administrative law judge, appeal the administrative law judge's decision, or comply with the Act. The penalty amount has been increased to \$1,000 maximum per day in order to provide the Secretary with some flexibility in tailoring a penalty to the situation.

Paragraph 10.12 (g)(4) of this section, designated paragraph 10.12 (d)(3) in the interim rule, outlined provisions by which the Secretary may reduce the penalty amount. Reasons for reducing the amount include: 1) the failure to comply is determined to be not willful; 2) the museum agrees to adequately mitigate the violation; 3) the museum demonstrates a hardship or inability to pay; or 4) the penalty would constitute excessive punishment under the circumstances.

The provision in paragraph 10.12 (g)(3)(i) of this section, designated paragraph 10.12 (d)(3)(i) in the interim rule, allows the Secretary to reduce the penalty if it is determined that the museum did not willfully fail to comply with the Act. Three commenters felt that the provisions did not go far enough. One commenter requested an explicit statement that a penalty must be imposed only on museums that willfully and knowingly fail to comply with the Act. Evidence of a good faith effort to comply with the Act must be considered when deciding whether the penalty amount should be reduced.

The provision in paragraph 10.12 (g)(3)(ii) of this section, designated paragraph 10.12 (d)(3)(ii) in the interim rule, allows the Secretary to reduce the penalty if the museum agrees to mitigate

the violation by, among other things, paying restitution to the aggrieved party or parties. One commenter felt that the Secretary should pay all actual damages to the aggrieved parties. Another commenter recommended that the Secretary seek an amendment to the Act that would permit the Secretary to distribute collected penalties via the NAGPRA grants program. Direct payment of restitution by the United States to an aggrieved party generally requires explicit statutory authority. Absent such authority, and when appropriate, the Secretary may mitigate the penalty amount when the museum agrees to pay restitution directly to that aggrieved party. In their 1995-1997 and 1998 reports to Congress, the Native American Graves Protection and Repatriation Review Committee recommended amending the Act to provide monies collected as civil penalties to the Secretary to further enforcement activities.

One commenter requested clarification of how hardship will be defined in paragraph 10.12 (g)(3)(iii) of this section, designated paragraph 10.12 (d)(3)(iii) in the interim rule. The sentence has been rewritten to clarify that the Secretary may reduce the penalty amount if the museum is unable to pay, provided that this factor will not apply if the museum has previously failed to comply with these regulations.

One commenter requested clarification of how excessive punishment will be defined in paragraph 10.12 (g)(3)(iv) of this section, designated paragraph 10.12 (d)(3)(iv) of this section in the interim rule. The eighth amendment to the Constitution of the United States prohibits excessive fines. A civil penalty might be considered excessive if it seriously impairs the museum's capacity of gaining a business livelihood.

One commenter questioned how the funds collected from the fines and penalties would be used. Another commenter questioned whether funds collected from civil penalty fines could be directed towards helping to bring museums into compliance or channeled into an account to fund Federal actions pertaining to the Act. Under the current statutory authority, civil penalties must be paid directly to the United States Treasury.

Paragraph 10.12 (h)

This paragraph, designated paragraph 10.12 (g) in the interim rule, explains how the Secretary assesses the penalty.

One commenter recommended text acknowledging that ongoing legal proceedings would be sufficient to delay a museum's response to a notice of

failure to comply. A museum may have recourse to the Federal courts regarding the Secretary's issuance of a notice of failure to comply. However, the Secretary is not bound by the status of ongoing litigation when assessing a civil penalty on a museum for failing to comply with the Act.

One commenter recommended that written notice be required if the Secretary concludes that the museum has not failed to comply. The phrase "in writing" has been added after the phrase "the Secretary notified you" in paragraph 10.12 (h)(3) of this section.

Paragraph 10.12 (j)

This paragraph, combining two paragraphs in the interim rule designated as 10.12 (h) and (i), describes how the museum may request a hearing regarding a notice of failure to comply or a notice of assessment.

One commenter recommended adding a provision that would allow for the involvement of lineal descendants, culturally affiliated tribes, and/or the complaining party or parties in the hearing process where appropriate. The involvement of lineal descendants, tribal representatives, or the complaining person may be necessary as determined by the parties in the hearing. Participation of these and other persons can be compelled by means of a subpoena [25 U.S.C. 3007 (d)]. Agency hearings generally are open to the public.

Paragraph 10.12 (h)(4)(iv) of the interim rule, which dealt with the amount of the civil penalty assessment, has been deleted.

Paragraph 10.12 (k)

This paragraph, designated paragraph 10.12 (j) in this interim rule, explains how a hearing decision may be appealed.

Paragraph 10.12 (l)

This paragraph, designated paragraph 10.12 (k) in this interim rule, explains what constitutes a final administrative action regarding a notice of assessment.

Paragraph 10.12 (m)

This paragraph, designated paragraph 10.12 (l) in this interim rule, explains how a museum pays the civil penalty. The sentence authorizing the Secretary to start civil penalty action in U.S. District Court without the authorization of the Attorney General of the United States has been deleted. In *Mehle v. American Management Systems, Inc.*, [01-1544 (JR), D. D.C. Nov 30, 2001] the district court ruled that the Attorney General must represent the United States, an agency, or officer thereof in

litigation, unless Congress has expressly directed otherwise. NAGPRA does not confer independent litigating authority on the Secretary.

Drafting Information

This final rule was prepared by Dr. C. Timothy McKeown in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8 (c)(7) of the Act.

Compliance with Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Order 12866)

This rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. We expect to assess civil penalties on a small number of museums that have failed to comply with the Act. The Secretary may exercise discretion to reduce the penalty amount if it seriously impairs the museum's capacity of gaining a business livelihood.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Section 9 of the Act delegates exclusive responsibility for implementing the civil penalty provisions to the Secretary. This rule has been reviewed by the U.S. Department of the Interior, Office of the Solicitor and the Office of Hearings and Appeals, and the U.S. Department of Justice.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs, or the rights or obligations of their recipients. Assessment of civil penalties under this rule is limited to museums that fail to comply with the requirements of the Act. Consistent with the legislative history of the Act, museums that have failed to comply continue to be eligible for Federal funds.

(4) This rule does not raise novel legal or policy issues. All substantive comments received on the interim rule have been addressed in the preamble and changes made in the regulatory text if necessary.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We expect to assess civil penalties on a small number of museums that have failed to comply with the Act. The Secretary may exercise discretion to reduce the penalty amount if it seriously impairs the museum's capacity of gaining a business livelihood.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804 (2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(1) Does not have an annual effect on the economy of \$100 million or more.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions;

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. We expect to assess civil penalties on a small number of museums that have failed to comply with the Act. The Secretary may exercise discretion to reduce the penalty amount if it seriously impairs the museum's capacity of gaining a business livelihood.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. Museums are only required to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony for which they can not prove right of possession [25 U.S.C. 3005 (c)]. This rule applies to museums that fail to comply with the administrative provisions of the Act.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does not meet the requirements of sections 3 (a) and 3 (b) of the order.

Paperwork Reduction Act

This final rule does not require an information collection of 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB form 83-I is not required.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249), the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), and 512 DM 2 we have evaluated potential effects on Federally recognized Indian tribes and have determined that there are no potential effects. NAGPRA makes provisions for the return to lineal descendants, Indian tribes and Native Hawaiian organizations of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Native American organizations participated in the drafting of this rule.

List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Hawaiian Natives, Historic preservation, Indians -- Claims, Museums, Reporting and record-keeping requirements.

■ In consideration of the forgoing, 43 CFR Subpart A is amended as follows:

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT REGULATIONS

■ 1. The authority citation for Part 10 continues to read as follows:

Authority: 25 U.S.C. 3001 *et seq.*

■ Part 10 is amended by adding § 10.12 to read as follows:

§ 10.12 Civil penalties.

(a) *The Secretary's Authority to Assess Civil Penalties.* The Secretary is authorized by section 9 of the Act to assess civil penalties on any museum

that fails to comply with the requirements of the Act. As used in this Paragraph, "failure to comply with requirements of the Act" also means failure to comply with applicable portions of the regulations set forth in this Part. As used in this Paragraph "you" refers to the museum or the museum official designated responsible for matters related to implementation of the Act.

(b) *Definition of "failure to comply."*

(1) Your museum has failed to comply with the requirements of the Act if it:

(i) After November 16, 1990, sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony contrary to provisions of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act; or

(ii) After November 16, 1993, has not completed summaries as required by the Act; or

(iii) After November 16, 1995, or the date specified in an extension issued by the Secretary, whichever is later, has not completed inventories as required by the Act; or

(iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, whichever is later, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or

(v) Refuses, absent any of the exemptions specified in § 10.10(c) of this part, to repatriate human remains, funerary object, sacred object, or object of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian; or

(vi) Repatriates a human remains, funerary object, sacred object, or object of cultural patrimony before publishing the required notice in the Federal Register;

(vii) Does not consult with lineal descendants, Indian tribe officials, and traditional religious leaders as required; or

(viii) Does not inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

(2) Each instance of failure to comply will constitute a separate violation.

(c) *How to Notify the Secretary of a Failure to Comply.* Any person may bring an allegation of failure to comply to the attention of the Secretary. Allegations must be in writing, and should include documentation

identifying the provision of the Act with which there has been a failure to comply and supporting facts of the alleged failure to comply.

Documentation should include evidence that the museum has possession or control of Native American cultural items, receives Federal funds, and has failed to comply with specific provisions of the Act. Written allegations should be sent to the attention of the Director, National Park Service, 1849 C Street, NW, Washington, D.C. 20240.

(d) *Steps the Secretary may take upon receiving such an allegation.* (1) The Secretary must acknowledge receipt of the allegation in writing.

(2) The Secretary also may:

(i) Compile and review information relevant to the alleged failure to comply. The Secretary may request additional information, such as declarations and relevant papers, books, and documents, from the person making the allegation, the museum, and other parties;

(ii) Identify the specific provisions of the Act with which you have allegedly failed to comply; and

(iii) Determine if the institution of a civil penalty action is an appropriate remedy.

(3) The Secretary must provide written notification to the person making the allegation and the museum if the review of the evidence does not show a failure to comply.

(e) *How the Secretary notifies you of a failure to comply.* (1) If the allegations are verified, the Secretary must serve you with a written notice of failure to comply either by personal delivery or by registered or certified mail (return receipt requested). The notice of failure to comply must include:

(i) A concise statement of the facts believed to show a failure to comply;

(ii) A specific reference to the provisions of the Act and/or these regulations with which you allegedly have not complied; and

(iii) Notification of the right to request an informal discussion with the Secretary or a designee, to request a hearing, as provided below, or to await the Secretary's notice of assessment. The notice of failure to comply also must inform you of your right to seek judicial review of any final administrative decision assessing a civil penalty.

(2) With your consent, the Secretary may combine the notice of failure to comply with the notice of assessment

described in paragraph (h) of this section.

(3) The Secretary also must send a copy of the notice of failure to comply to:

(i) Any lineal descendant of a known Native American individual whose human remains, funerary objects, or sacred objects are in question; and

(ii) Any Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony in question.

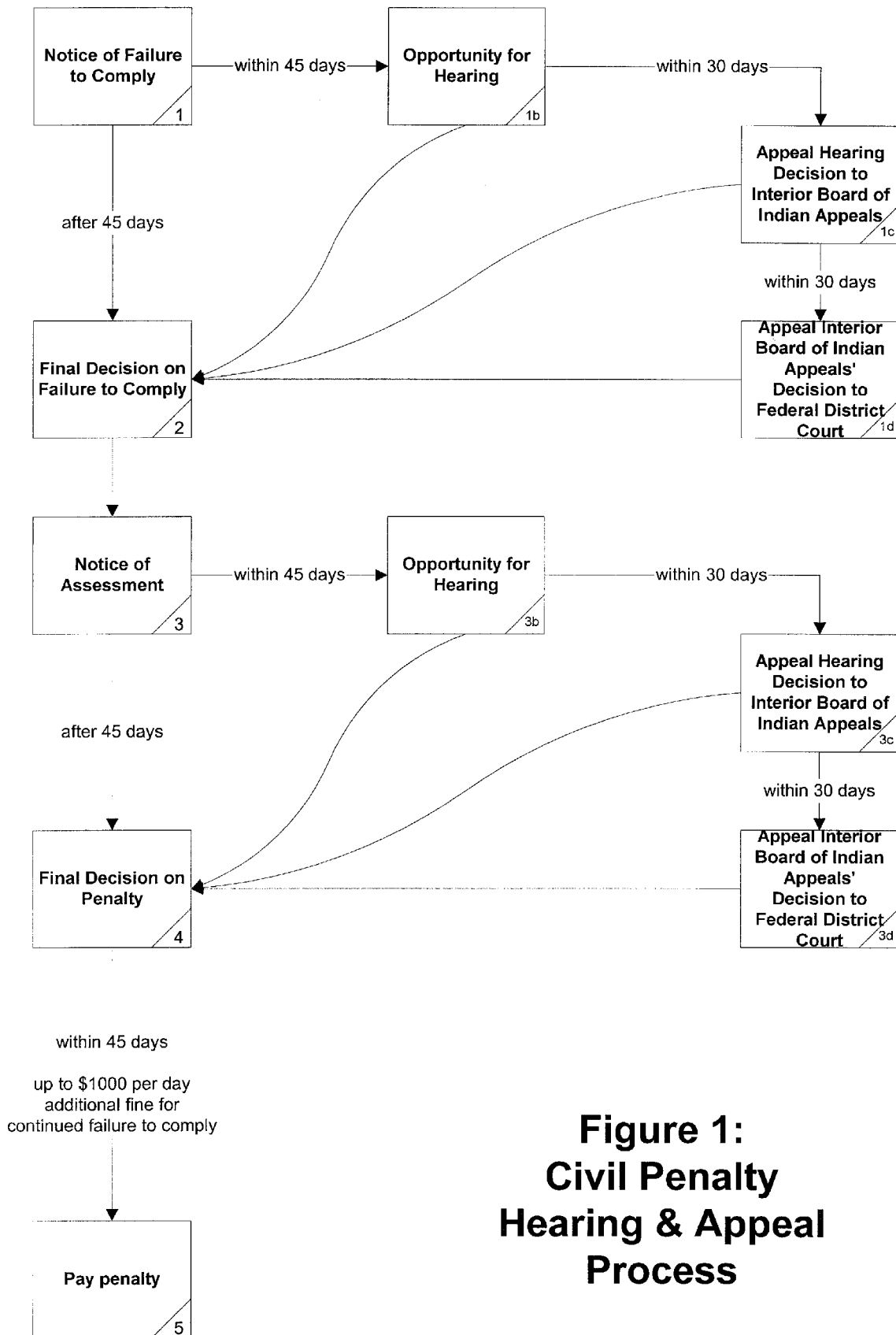
(f) *Actions you may take upon receipt of a notice of failure to comply.* If you are served with a notice of failure to comply, you may:

(1) Seek informal discussions with the Secretary;

(2) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process. Where the Secretary has issued a combined notice of failure to comply and notice of assessment, the hearing and appeal processes will also be combined.

(3) Take no action and await the Secretary's notice of assessment.

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**Figure 1:
Civil Penalty
Hearing & Appeal
Process**

(g) *How the Secretary determines the penalty amount.*

(1) The penalty amount must be determined on the record;

(2) The penalty amount must be .25 percent of your museum's annual budget, or \$5,000, whichever is less, and such additional sum as the Secretary may determine is appropriate after taking into account:

(i) The archeological, historical, or commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony involved; and

(ii) The damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, expenditures by the aggrieved party to compel the museum to comply with the Act; and

(iii) The number of violations that have occurred at your museum.

(3) An additional penalty of up to \$1,000 per day after the date that the final administrative decision takes effect may be assessed if your museum continues to violate the Act.

(4) The Secretary may reduce the penalty amount if there is:

(i) A determination that you did not willfully fail to comply; or

(ii) An agreement by you to mitigate the violation, including, but not limited to, payment of restitution to the aggrieved party or parties; or

(iii) A determination that you are unable to pay, provided that this factor may not apply if you have been previously found to have failed to comply with these regulations; or,

(iv) A determination that the penalty constitutes excessive punishment under the circumstances.

(h) *How the Secretary assesses the penalty.* (1) The Secretary considers all available information, including information provided during the process of assessing civil penalties or furnished upon further request by the Secretary.

(2) The Secretary may assess the civil penalty upon completing informal discussions or when the period for requesting a hearing expires, whichever is later.

(3) The Secretary notifies you in writing of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The notice of assessment includes:

(i) The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(ii) Notification of the right to request a hearing, including the procedures to follow, and to seek judicial review of

any final administrative decision that assesses a civil penalty.

(i) *Actions that you may take upon receipt of a notice of assessment.* If you are served with a notice of assessment, you may do one of the following:

(1) Accept in writing or by payment of the proposed penalty, or any mitigation or remission offered in the notice of assessment. If you accept the proposed penalty, mitigation, or remission, you waive the right to request a hearing.

(2) Seek informal discussions with the Secretary.

(3) File a petition for relief. You may file a petition for relief with the Secretary within 45 calendar days of receiving the notice of assessment. Your petition for relief may request the Secretary to assess no penalty or to reduce the amount. Your petition must be in writing and signed by an official authorized to sign such documents. Your petition must set forth in full the legal or factual basis for the requested relief.

(4) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process.

(i) In addition to the documentation required in paragraph (g) of this section, your request must include a copy of the notice of assessment and must identify the basis for challenging the assessment.

(ii) In this hearing, the amount of the civil penalty assessed must be determined in accordance with paragraph (h) of this section, and will not be limited to the amount assessed by the Secretary or any offer of mitigation or remission made by the Secretary.

(j) *How you request a hearing.* (1) You may file a written, dated request for a hearing on a notice of failure to comply or notice of assessment with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1923. You must enclose a copy of the notice of failure to comply or the notice of assessment. Your request must state the relief sought, the basis for challenging the facts used as the basis for determining the failure to comply or fixing the assessment, and your preference of the place and date for a hearing. You must serve a copy of the request on the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested) at the address specified in the notice of failure to comply or notice of assessment. Hearings must take place following procedures set forth in 43 CFR part 4, subparts A and B.

(2) Your failure to file a written request for a hearing within 45 days of

the date of service of a notice of failure to comply or notice of assessment waives your right to a hearing.

(3) Upon receiving a request for a hearing, the Hearings Division assigns an administrative law judge to the case, gives notice of assignment promptly to the parties, and files all pleadings, papers, and other documents in the proceeding directly with the administrative law judge, with copies served on the opposing party.

(4) Subject to the provisions of 43 CFR 1.3, you may appear by representative or by counsel, and may participate fully in the proceedings. If you fail to appear and the administrative law judge determines that this failure is without good cause, the administrative law judge may, in his/her discretion, determine that this failure waives your right to a hearing and consent to the making of a decision on the record.

(5) Departmental counsel, designated by the Solicitor of the Department of the Interior, represents the Secretary in the proceedings. Upon notice to the Secretary of the assignment of an administrative law judge to the case, this counsel must enter his/her appearance on behalf of the Secretary and must file all petitions and correspondence exchanges by the Secretary and the respondent that become part of the hearing record. Thereafter, you must serve all documents for the Secretary on his/her counsel.

(6) *Hearing administration.* (i) The administrative law judge has all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions under 5 U.S.C. 554-557.

(ii) The transcript of testimony; the exhibits; and all papers, documents, and requests filed in the proceedings constitute the record for decision. The administrative law judge renders a written decision upon the record, which sets forth his/her findings of fact and conclusions of law, and the reasons and basis for them.

(iii) Unless you file a notice of appeal described in these regulations, the administrative law judge's decision constitutes the final administrative determination of the Secretary in the matter and takes effect 30 calendar days from this decision.

(k) *How you appeal a decision.* (1) Either you or the Secretary may appeal the decision of an administrative law judge by filing a "Notice of Appeal" with the Interior Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1954, within 30 calendar days of the date of the

administrative law judge's decision. This notice must be accompanied by proof of service on the administrative law judge and the opposing party.

(2) To the extent they are not inconsistent with these regulations, the provisions of the Department of the Interior Hearings and Appeals Procedures in 43 CFR part 4, subpart D, apply to such appeal proceedings. The appeal board's decision on the appeal must be in writing and takes effect as the final administrative determination of the Secretary on the date that the decision is rendered, unless otherwise specified in the decision.

(3) You may obtain copies of decisions in civil penalty proceedings instituted under the Act by sending a request to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1954. Fees for this

service are established by the director of that office.

(l) *The final administrative decision.*

(1) When you have been served with a notice of assessment and have accepted the penalty as provided in these regulations, the notice constitutes the final administrative decision.

(2) When you have been served with a notice of assessment and have not filed a timely request for a hearing as provided in these regulations, the notice of assessment constitutes the final administrative decision.

(3) When you have been served with a notice of assessment and have filed a timely request for a hearing as provided in these regulations, the decision resulting from the hearing or any applicable administrative appeal from it constitutes the final administrative decision.

(m) *How you pay the penalty.* (1) If you are assessed a civil penalty, you have 45 calendar days from the date of issuance of the final administrative

decision to make full payment of the penalty assessed to the Secretary, unless you have filed a timely request for appeal with a court of competent jurisdiction.

(2) If you fail to pay the penalty, the Secretary may request the Attorney General of the United States to collect the penalty by instituting a civil action in the U.S. District Court for the district in which your museum is located. In these actions, the validity and amount of the penalty is not subject to review by the court.

(3) Assessing a penalty under this section is not a waiver by the Secretary of the right to pursue other available legal or administrative remedies.

Dated: December 16, 2002.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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