

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