

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