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Part II

**Department of the
Interior**

Office of the Secretary

43 CFR Part 10

Native American Graves Protection and
Repatriation Act; Interim Rule

DEPARTMENT OF THE INTERIOR**Office of the Secretary****43 CFR Part 10**

RIN 1024-AC48

Native American Graves Protection and Repatriation Act Regulations—Civil Penalties**AGENCY:** Department of the Interior.**ACTION:** Interim rule.

SUMMARY: This interim rule relates to one section of regulations implementing the Native American Graves Protection and Repatriation Act of 1990 ("the Act"). This section outlines procedures for assessing civil penalties upon museums that fail to comply with applicable provisions of the Act. Comments on this rule are requested.

DATES: Effective Date: This interim rule becomes effective on February 12, 1997. This interim rule will remain in effect until final regulations are adopted through general notice and comment rulemaking. However, written comments on this interim rule are solicited from Indian tribes, Native Hawaiian organizations, museums, Federal agencies and members of the public. Comments will be taken into account in developing a final rule. The Departmental Consulting Archeologist will accept written comments until April 14, 1997.

ADDRESSES: Comments (2 copies) should be addressed to: Departmental Consulting Archeologist, Archeology and Ethnography Program, National Park Service, Docket No. 1024-AC48, Box 37127, Washington, D.C. 20013-7127, or hand deliver comments to room 210, 800 North Capital Street, Washington, D.C. 20001.

FOR FURTHER INFORMATION CONTACT: Dr. Francis P. McManamon, Departmental Consulting Archeologist, Archeology and Ethnography Program, National Park Service, Box 37127, Washington, DC 20013-7127. Telephone: 202-343-4101. Fax: 202-523-1547.

SUPPLEMENTARY INFORMATION:**Background**

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 certain 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 to promulgate regulations to

carry out provisions of the Act. Final regulations implementing the Act were published in the Federal Register on December 4, 1995 (60 FR 62158). The final regulations had five sections reserved for later publication. This interim rule includes one section that was reserved in the final regulations. Section 10.12 develops procedures for assessing civil penalties upon museums that fail to comply with provisions of the Act. This section does not apply to Federal agencies. However, Federal agencies are subject to enforcement actions by aggrieved parties under section 15 of the Act.

Section-by-Section Analysis*Section 10.12*

Section 9 of the Act authorizes the Secretary of the Interior to assess a civil penalty against any museum that fails to comply with the requirements of this Act. This section defines procedures for assessing those civil penalties.

A "museum" is defined at 43 CFR 10.2 (a)(3) as any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and possesses or has control over Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony as defined in 43 CFR 10.2 (d). The phrase "receives Federal funds" is defined at 43 CFR 10.2 (a)(3)(iii) to mean the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum assistance in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is part of a state or local government or private university, and the state or local government or private university received Federal funds for any purpose, the museum is considered to receive Federal funds for purpose of these regulations. Although Federal agencies are not considered "museums" for purposes of civil penalties under this section, civil actions may be taken against Federal agencies to compel compliance with the Act in the United States District Courts under section 15 of the Act.

Section 9(b) of the Act identifies some of the criteria to be used by the Secretary in determining the amount of the civil penalty to be assessed. The Secretary has consulted the Native

American Graves Protection and Repatriation Review Committee which has recommended that the Secretary use a two stage approach to implementing these criteria. They recommend an initial assessment based upon the sum of three factors: (1) an amount equal to .25% of the museum's annual budget, or \$5,000, whichever is less; (2) damages suffered by any aggrieved party or parties, including, but not limited to, the costs of attorney and expert witness fees, investigations, and administrative expenses incurred by the aggrieved parties to compel compliance with the Act; and (3) the importance of the human remains, funerary objects, sacred object, or object of cultural patrimony to performing traditional practices by the aggrieved party or parties. The review committee recognizes that this initial assessment, and in particular that portion based upon the museum's annual budget, might be considered overly modest by some, but emphasizes that civil penalties should be used to ensure compliance instead of simply imposing large penalty amounts. The review committee considers .25% of the museum's annual budget, or \$5,000, whichever is less, an amount sufficient to compel compliance without inflicting undue damage, particularly on small institutions. We believe that a monetary standard is useful as it will lessen the need to make more difficult assessment determinations based on archeological, historical, and commercial value. As the law allows for establishment of civil penalties based on other factors as the Secretary considers appropriate, this formula will further the goals of the legislation. We have therefore adopted it. The review committee also recommended assessment of a subsequent penalty amount of \$100 per day after the date of the final administrative decision that the museum continues not to comply with the Act. We have also adopted this recommendation. In addition to the above factors, the commercial value of any human remains, funerary object, sacred object, or object of cultural patrimony may be assessed on any museum that, after November 16, 1990, sells or otherwise transfers such object in violation of the Act. The review committee also recommends that the Secretary double the penalty amount for subsequent failures to comply. We have included the number of violations that have occurred as a criterion in determining the penalty amount. The Secretary gave the review committee's recommendations careful consideration in developing the procedures outlined in this interim rule.

The administrative procedures for providing notice, holding a hearing, appealing an administrative decision, and issuing a final administrative decision are patterned after the procedures currently used in assessing civil penalties under the Archaeological Resources Protection Act. As a matter of general policy, the Secretary does not intend to institute civil penalty actions under this section for violations which occurred before the effective date of these regulations if the museum in question made a good faith effort to comply with the basic requirements of the Act.

Administrative Procedures Act

The Secretary of the Interior has determined under 5 U.S.C. 553 (b)(B) and 318 DM 6.4 (B)(1) that it is not in the public interest to delay the effective date of this regulation to accommodate notice and comment procedures. There are three reasons for this decision:

- (a) The requirements that the Act places upon museums as outlined in section 10.12 (b)(1) of these regulations are generally known and were established by statute in 1990 or by regulation in 1995;
- (b) Section 9 of the Act clearly outlines the limits of the Secretary's discretion in enforcing provisions of the Act; and
- (c) The administrative procedures for appealing the levy of a penalty as outlined in section 10.12 (e) through (l) closely imitate those already used under the Archaeological Resources Protection Act.

The civil penalty provisions of the Act are intended to assist in the protection and appropriate repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are of extreme importance to lineal descendants, Indian tribes and Native Hawaiian organizations. Loss of such items causes irreparable injury to the lineal descendants, Indian tribes, and Native Hawaiian organizations entitled to their repatriation under the terms of the Act. Delaying implementation of the enforcement procedures of this section to accommodate notice and comment procedures will likely result in further losses or in an inability to remedy, to the extent feasible, losses which have already occurred.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this

interim rule to the address noted at the beginning of this rulemaking. The National Park Service will review comments and consider making changes to the rule based upon an analysis of the comments.

If you wish the National Park Service to acknowledge receipt of your comments you must submit with those comments, a self-addressed, stamped postcard that includes the following statement: "Comments to Docket No 1024-AC48." The Departmental Consulting Archeologist will date stamp the postcard and return it to you. The Departmental Consulting Archeologist will consider comments received on or before April 14, 1997 before taking action on a final rule and may change the interim rule contained in this notice in light of the comments received.

Drafting Information

This interim rule was prepared by Dr. Francis P. McManamon (Departmental Consulting Archeologist, National Park Service), Dr. C. Timothy McKeown (NAGPRA Team Leader, National Park Service), and Lars Hanslin (Senior Attorney, Office of the Solicitor), in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8 (c)(7) of the Act.

Paperwork Reduction Act

This interim rule does not contain collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

Compliance With Other Laws

This rule was reviewed by the Office of Management and Budget under Executive Order 12866. The Department of the Interior determined that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 *et seq.*). The civil penalties are expected to be assessed on only a very small number of museums that have failed to comply with the Act. Civil penalty amounts will be calculated to ensure compliance and not as retribution.

The National Park Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rule will not impose a cost of \$100 million or more in any given year on local, State, or tribal governments or private entities.

The National Park Service has determined that this interim rule will not have a significant effect on the quality of the human environment,

health and safety because it is not expected to:

- (a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;
- (b) Introduce non-compatible uses which compromise the nature and characteristics of the area, or cause physical damage to it;
- (c) Conflict with adjacent ownerships or land uses; or
- (d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, this interim rule is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) has been prepared.

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.*

2. 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 section, "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 section "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 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; 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 six 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 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 organization pursuant to the requirements of the Act; or

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

(2) Each violation will constitute a separate offense.

(c) *How to notify the Secretary of a failure to comply.* (1) Any person may bring an allegation of failure to comply to the attention of the Secretary.

(2) The Secretary may take the following steps upon receiving such an allegation:

(i) Review the alleged failure to comply;

(ii) Identify the specific provisions of the Act which allegedly have not been complied with;

(iii) Determine if the institution of a civil penalty action is in the public interest in the circumstances; and

(iv) If appropriate, estimate the proposed penalty.

(d) *How the Secretary determines the penalty amount.* (1) The penalty amount will be .25% of your museum's annual budget, or \$5000, 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 including, but not limited to, consideration of their importance to performing traditional practices; and

(ii) The 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

(iii) The number of violations that have occurred.

(2) An additional penalty of \$100 per day after the date the final administrative decision takes effect if your museum continues to violate the Act.

(3) 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 demonstration of hardship or inability to pay, provided that this factor will only apply when you have not been previously found to have failed to comply with the regulations in this part; or

(iv) A determination that the proposed penalty would constitute excessive punishment under the circumstances.

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

(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 the regulations in this part that you have allegedly not complied with;

(iii) The amount of the proposed penalty, including any initial proposal to mitigate or remit where appropriate, or a statement that the Secretary will serve notice of a proposed penalty amount after ascertaining the damages associated with the alleged failure to comply; and

(iv) Notification of the right to file a petition for relief as provided in this section below, or to await the Secretary's notice of assessment and to request a hearing. The notice will also inform you of your right to seek judicial review of any final administrative decision assessing a civil penalty.

(2) The Secretary also sends a copy of the notice of failure to comply to:

(i) Any lineal descendant of a known Native American individual whose human remains or cultural items 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 or cultural items in question.

(f) *Actions you may take upon receipt of a notice.* If you are served with a notice of failure to comply, you may: (1)

Seek informal discussions with the Secretary;

(2) File a petition for relief. You may file a petition for relief with the Secretary within 45 calendar days of receiving the notice of failure to comply (or of a proposed penalty amount, if later). 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.

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

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

(g) *How the Secretary assesses the penalty.* (1) The Secretary assesses the civil penalty when the period for filing a petition for relief expires, or upon completing the review of any petition filed, or upon completing informal discussions, whichever is later.

(2) The Secretary considers all available information, including information provided during the process of assessing civil penalties or furnished upon further request by the Secretary.

(3) If the facts warrant a conclusion that you have not failed to comply, the Secretary notifies you that you will have no penalty assessed.

(4) If the facts warrant a conclusion that you have failed to comply, the Secretary may determine a penalty according to the standards in paragraph (d) of this section.

(5) The Secretary notifies you 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 facts and conclusions from which the Secretary determined that you have failed to comply;

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

(iii) Notification of the right to request a hearing, including the procedures to follow, and to seek judicial review of any final administrative decision assessing a civil penalty.

(h) *How you request a hearing.* (1) You may file a written, dated request for a hearing on a notice of assessment with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard,

Arlington, Virginia 22203-1923. You must enclose a copy of the notice of failure to comply and a copy of 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 and fixing the assessment, and your preference as to the place and date for a hearing. You must serve a copy of the request upon 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 assessment. Hearings will 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 assessment waives your right to a hearing.

(i) *Hearing appearance and practice.*

(1) 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.

(2) Subject to the provisions of 43 CFR 1.3, you may appear by representative, or by counsel, and may participate fully in those proceedings. If you fail to appear and the administrative law judge determines 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.

(3) Departmental counsel, designated by the Solicitor of the Department, 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 files all petitions and correspondence exchanges by the Secretary and the respondent which become part of the hearing record. Thereafter, you must serve all documents for the Secretary to his/her counsel.

(4) 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, and an assessment of a penalty, if any.

(iii) Unless you file a notice of appeal described in the regulations in this part, 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.

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

(j) *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 Director, Office of Hearings and Appeals, U.S. Department of Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923, 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) Upon receiving this notice, the Director, Office of Hearings and Appeals, appoints an ad hoc appeals board to hear and decide an appeal. To the extent they are not inconsistent with the regulations in this part the provision of the Department of Hearings and Appeals Procedures in 43 CFR part 4, subparts A, B, and G 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 it 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 Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. Fees for this service are established by the Director of that Office.

(k) *The final administrative decision.*

(1) When you have been served with a notice of a failure to comply and have accepted the penalty as provided in the regulations in this part, 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 the regulations in this part, 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 in this part, the decision resulting from the hearing or any applicable administrative appeal from it constitutes the final administrative decision.

(l) *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 to institute a civil action to collect the penalty in the U.S. District Court for the district in which your museum is located. Where the Secretary is not represented by the Attorney General, the Secretary may start civil action directly. In these actions, the validity and amount of the penalty will not be 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: November 5, 1996.

George T. Frampton, Jr.,
Assistant Secretary for Fish and Wildlife and Parks.

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