

days after agreeing to transfer or deciding to reinter the human remains or associated funerary objects, the museum or Federal agency must submit a notice of proposed transfer or reinterment.

(i) A notice of proposed transfer or reinterment must be sent to all consulting parties and to the Manager, National NAGPRA Program, for publication in the FEDERAL REGISTER.

(ii) A notice of proposed transfer or reinterment must conform to the mandatory format of the FEDERAL REGISTER and include:

(A) An abstract of the information compiled under paragraph (d)(1)(ii) of this section;

(B) The total number of individuals and associated funerary objects (counted separately or by lot);

(C) The determination under paragraph (d)(1)(iii)(D) of this section that no lineal descendant or any Indian Tribe or Native Hawaiian organization with cultural affiliation can be clearly or reasonably identified. The notice must briefly describe the information considered and explain how the determination was made.

(D) The names of all consulting parties identified under paragraph (b) of this section;

(E) The Indian Tribe or Native Hawaiian organization requesting the human remains or associated funerary objects or a statement that the museum or Federal agency agrees to reinter the human remains or associated funerary objects;

(F) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(G) The date (to be calculated by the FEDERAL REGISTER 30 days from the date of publication) after which the museum or Federal agency may proceed with the transfer or reinterment of the human remains or associated funerary objects.

(iii) No later than 21 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, must:

(A) Approve for publication in the FEDERAL REGISTER any submission

that conforms to the requirements under paragraph (k)(2)(ii) of this section; or

(B) Return to the museum or Federal agency any submission that does not conform to the requirements under paragraph (k)(2)(ii) of this section. No later than 14 days after the submission is returned, the museum or Federal agency must resubmit the notice of proposed transfer or reinterment.

(3) *Step 3—Transfer or reinter the human remains or associated funerary objects.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the museum or Federal agency must transfer or reinter the human remains or associated funerary objects and send a written statement to the Manager, National NAGPRA Program, that the transfer or reinterment is complete.

(i) After transferring or reinterring, the museum or Federal agency must:

(A) Document the transfer or reinterment of the human remains or associated funerary objects, and

(B) Protect sensitive information from disclosure to the general public to the extent consistent with applicable law.

(ii) After transfer or reinterment occurs, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the human remains or associated funerary objects.

§ 10.11 Civil penalties.

Any museum that fails to comply with the requirements of the Act or this subpart may be assessed a civil penalty by the Assistant Secretary. This section does not apply to Federal agencies, but a Federal agency's failure to comply with the requirements of the Act or this part may be subject to other remedies under Federal law. Each instance of failure to comply constitutes a separate violation. The Assistant Secretary must serve the museum with a written notice of failure to comply under paragraph (d) of this section or a notice of assessment under paragraph (g) of this section by personal delivery with proof of delivery

§ 10.11

date, certified mail with return receipt, or private delivery service with proof of delivery date.

(a) *File an allegation.* Any person may file an allegation of failure to comply by sending a written allegation to the Manager, National NAGPRA Program. Each allegation:

(1) Must include the name and contact information (either a mailing address, telephone number, or email address) of the person alleging the failure to comply;

(2) Must identify the specific provision or provisions of the Act or this subpart that the museum is alleged to have violated;

(3) May enumerate the separate violations alleged, including facts to support the number of separate violations. The number of separate violations is determined by establishing relevant factors such as:

(i) The number of lineal descendants, Indian Tribes, or Native Hawaiian organizations determined to be aggrieved by the failure to comply; or

(ii) The number of individuals or the number of funerary objects, sacred objects, or objects of cultural patrimony involved in the failure to comply;

(4) May include information showing that the museum has possession or control of human remains or cultural items involved in the alleged failure to comply; and

(5) May include information showing that the museum receives Federal funds.

(b) *Respond to an allegation.* No later than 90 days after receiving an allegation, the Assistant Secretary must determine if the allegation meets the requirements of paragraph (a) of this section and respond to the person alleging the failure to comply.

(1) The Assistant Secretary may request any additional relevant information from the person making the allegation, the museum, or other parties. The Assistant Secretary may conduct any investigation that is necessary to determine whether an alleged failure to comply is substantiated. The Assistant Secretary may also investigate appropriate factors for justifying an increase or reduction to any penalty amount that may be calculated.

43 CFR Subtitle A (10–1–24 Edition)

(2) If the allegation meets the requirements of paragraph (a) of this section, the Assistant Secretary, after reviewing all relevant information, must determine one of the following for each alleged failure to comply:

(i) The alleged failure to comply is substantiated, the number of separate violations is identified, and a civil penalty is an appropriate remedy. The Assistant Secretary must calculate the proposed penalty amount under paragraph (c) of this section and notify the museum under paragraph (d) of this section;

(ii) The alleged failure to comply is substantiated, the number of separate violations is identified, but a civil penalty is not an appropriate remedy. The Assistant Secretary must notify the museum under paragraph (d) of this section; or

(iii) The alleged failure to comply is unsubstantiated. The Assistant Secretary must send a written determination to the person making the allegation and to the museum.

(c) *Calculate the penalty amount.* If the Assistant Secretary determines under paragraph (b)(2)(i) of this section that a civil penalty is an appropriate remedy for a substantiated failure to comply, the Assistant Secretary must calculate the amount of the penalty in accordance with this paragraph. The penalty for each separate violation must be calculated as follows:

(1) The base penalty amount is \$8,315, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74).

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(ii) The archaeological, historical, or commercial value of the human remains or cultural items involved;

(iii) The economic and non-economic damages suffered by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization, including expenditures by the aggrieved party to

Office of the Secretary, Interior

§ 10.11

compel the museum to comply with the Act or this subpart;

(iv) The number of prior violations by the museum that have occurred; or

(v) Any other appropriate factor justifying an increase.

(3) The base penalty amount may be reduced if:

(i) The museum comes into compliance;

(ii) The museum agrees to mitigate the violation in the form of an actual or an in-kind payment to an aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(iii) The penalty constitutes excessive punishment under the circumstances;

(iv) The museum is unable to pay the full penalty and the museum has not previously been found to have failed to comply with the Act or this subpart. The museum has the burden of proving it is unable to pay by providing verifiable, complete, and accurate financial information to the Assistant Secretary. The Assistant Secretary may request that the museum provide such financial information that is adequate and relevant to evaluate the museum's financial condition, including the value of the museum's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the museum's ability to pay in installments over time. If the museum does not submit the requested financial information, the museum is presumed to have the ability to pay the civil penalty; or

(v) Any other appropriate factor justifies a reduction.

(d) *Notify a museum of a failure to comply.* If the Assistant Secretary determines under paragraph (b)(2)(i) or (b)(2)(ii) of this section that an alleged failure to comply is substantiated, the Assistant Secretary must serve the museum with a written notice of failure to comply and send a copy of the notice to each person alleging the failure to comply and any lineal descendant, Indian Tribe, or Native Hawaiian organization named in the notice of failure to comply. The notice of failure to comply must:

(1) Provide a concise statement of the facts believed to show a failure to comply;

(2) Specifically reference the provisions of the Act and this subpart with which the museum has failed to comply;

(3) Include the proposed penalty amount calculated under paragraph (c) of this section;

(4) Include, where appropriate, any initial proposal to reduce or increase the penalty amount or an explanation of the determination that a penalty is not an appropriate remedy;

(5) Identify the options for responding to the notice of failure to comply under paragraph (e) of this section; and

(6) Inform the museum that the Assistant Secretary may assess a daily penalty amount under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect.

(e) *Respond to a notice of failure to comply.* No later than 45 days after receiving a notice of failure to comply, a museum may file a written response to the notice of failure to comply or take no action and await service of a notice of assessment under paragraph (g) of this section. A response which is not timely filed must not be considered. Any written response must be signed by an authorized representative of the museum and must be sent to the Assistant Secretary. In the written response, a museum may:

(1) Seek an informal discussion of the failure to comply;

(2) Request either or both of the following forms of relief, with a full explanation of the legal or factual basis for the requested relief:

(i) That the Assistant Secretary reconsider the determination of a failure to comply, or

(ii) That the Assistant Secretary reduce the proposed penalty amount; or

(3) Accept the determination of a failure to comply and agree in writing, which constitutes an agreement between the Assistant Secretary and the museum, that the museum must:

(i) Pay the proposed penalty amount, if any;

§ 10.11

43 CFR Subtitle A (10–1–24 Edition)

(ii) Complete the mitigation required to reduce the penalty, if offered in the notice; and

(iii) Waive any right to receive notice of assessment under paragraph (g) of this section and to request a hearing under paragraph (i) of this section.

(f) *Assess the civil penalty.* After serving a notice of failure to comply, the Assistant Secretary may assess a civil penalty and must consider all available, relevant information related to the failure to comply, including information timely provided by the museum during any informal discussion or request for relief, furnished by another party, or produced upon the Assistant Secretary's request.

(1) The assessment of a civil penalty is made after the latter of:

(i) The 45-day period for a response has expired and the museum has taken no action;

(ii) Conclusion of informal discussion, if any;

(iii) Review and consideration of a petition for relief, if any; or

(iv) Failure to meet the terms of an agreement established under paragraph (e)(3) of this section.

(2) If a petition for relief or informal discussion warrants a conclusion that no failure to comply has occurred, the Assistant Secretary must send written notification to the museum revoking the notice of failure to comply. No penalty is assessed.

(g) *Notify the museum of an assessment.* If the Assistant Secretary determines to assess a civil penalty, the Assistant Secretary must serve the museum with a notice of assessment. Unless the museum seeks further administrative remedies under this section, the notice of assessment is the final administrative decision of the Assistant Secretary. The notice of assessment must:

(1) Specifically reference the provisions of the Act or this subpart with which the museum has not complied;

(2) Include the final amount of any penalty calculated under paragraph (c) of this section and the basis for determining the penalty amount;

(3) Include, where appropriate, any increase or reduction to the penalty amount or an explanation of the determination that a penalty is not an appropriate remedy;

(4) Include the daily penalty amount that the Assistant Secretary may assess under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect. The daily penalty amount for each continuing violation shall not exceed \$1,664 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74);

(5) Identify the options for responding to the notice of assessment under paragraph (h) of this section; and

(6) Notify the museum that it has the right to seek judicial review of the final administrative decision of the Assistant Secretary only if it has exhausted all administrative remedies under this section, as set forth in paragraph (l) of this section.

(h) *Respond to an assessment.* No later than 45 days after receiving a notice of assessment, a museum must do one of the following:

(1) Accept the assessment and pay the penalty amount by means of a certified check made payable to the U.S. Treasurer, Washington, DC, sent to the Assistant Secretary. By paying the penalty amount, the museum waives the right to request a hearing under paragraph (i) of this section.

(2) File a written request for a hearing under paragraph (i) of this section to contest the failure to comply, the penalty assessment, or both. If the museum does not file a written request for a hearing in 45 days, the museum waives the right to request a hearing under paragraph (i) of this section.

(i) *Request a hearing.* The museum may file a written request for a hearing with the Departmental Cases Hearings Division (DCHD), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmission. A copy of the request must be served on the Solicitor of the Department of the Interior at the address specified in the OHA Standing Orders on Contact Information. The Standing Orders are available on

the Department of the Interior OHA's website at <https://www.doi.gov/oha>. The request for hearing and any document filed thereafter with the DCHD under paragraphs (i) or (j) of this section are subject to the rules that govern the method and effective date of filing and service under the subparts applicable to DCHD in 43 CFR part 4. The request for a hearing must:

(1) Include a copy of the notice of failure to comply and the notice of assessment;

(2) State the relief sought by the museum; and

(3) Include the basis for challenging the facts used to determine the failure to comply or the penalty assessment.

(j) *Hearings.* Upon receiving a request for a hearing, DCHD must assign an administrative law judge to the case and promptly give notice of the assignment to the parties. Thereafter, each filing must be addressed to the administrative law judge and a copy served on each opposing party or its counsel.

(1) To the extent they are not inconsistent with this section, the rules in the subparts applicable to DCHD in 43 CFR part 4 apply to the hearing process.

(2) Subject to the provisions of 43 CFR 1.3, a museum may appear by authorized representative or by counsel and may participate fully in the proceedings. If the museum does not appear and the administrative law judge determines that this absence is without good cause, the administrative law judge may, at his or her discretion, determine that the museum has waived the right to a hearing and consents to the making of a decision on the record.

(3) The Department of the Interior counsel is designated by the Office of the Solicitor of the Department of the Interior. No later than 20 days after receipt of its copy of the written request for hearing, Departmental counsel must file with the DCHD an entry of appearance on behalf of the Assistant Secretary and the following:

(i) Any written communications between the Assistant Secretary and the museum during any informal discussions under paragraph (e)(1) of this section;

(ii) Any petition for relief submitted under paragraph (e)(2); and

(iii) Any other information considered by the Assistant Secretary in reaching the decision being challenged.

(4) After Departmental counsel files an entry of appearance with DCHD, the museum must serve each document filed with the administrative law judge on Departmental counsel.

(5) In a hearing on the penalty assessment, the amount of the penalty assessment must be determined in accordance with paragraph (c)(2) of this section and may not be limited to the amount originally assessed or by any previous reduction, increase, or offer of mitigation.

(6) The administrative law judge has all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, and to render a decision, under 5 U.S.C. 554–557 and 25 U.S.C. 3007.

(7) The administrative law judge must render a written decision. The decision must set forth the findings of fact and conclusions of law, and the reasons and basis for them.

(8) The administrative law judge's decision takes effect as the final administrative decision of the Assistant Secretary 31 days from the date of the decision unless the museum files a notice of appeal as described in paragraph (k) of this section.

(k) *Appealing the administrative law judge's decision.* Any party who is adversely affected by the decision of the administrative law judge may appeal the decision by filing a written notice of appeal no later than 30 days after the date of the decision. The notice of appeal must be filed with the Interior Board of Indian Appeals (IBIA), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmission. The Standing Orders are available on the Department of the Interior OHA's website at <https://www.doi.gov/oha>. The notice of appeal must be accompanied by proof of service on the administrative law judge and the opposing party. The notice of appeal and any document

§ 10.12

filed thereafter with the IBIA are subject to the rules that govern the method and effective date of filing under 43 CFR 4.310.

(1) To the extent they are not inconsistent with this section, the provisions of 43 CFR part 4, subpart D, apply to the appeal process. The appeal board's decision must be in writing and takes effect as the final penalty assessment and the final administrative decision of the Assistant Secretary on the date that the appeal board's decision is rendered, unless otherwise specified in the appeal board's decision.

(2) OHA decisions in proceedings instituted under this section are posted on OHA's website.

(1) *Exhaustion of administrative remedies.* A museum has the right to seek judicial review, under 5 U.S.C. 704, of the final administrative decision of the Assistant Secretary only if it has exhausted all administrative remedies under this section. No decision, which at the time of its rendition is subject to appeal under this section, shall be considered final so as to constitute agency action subject to judicial review. The decision being appealed shall not be effective during the pendency of the appeal.

(m) *Failure to pay penalty or continuing failure to comply.* (1) If the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect, as described in paragraphs (g), (j)(6), or (k)(1) of this section, or after a date identified in an agreement under paragraph (e)(3) of this section, the Assistant Secretary may assess an additional daily penalty amount for each continuing violation not to exceed \$1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74). In determining the daily penalty amount, the Assistant Secretary must consider the factors in paragraph (c)(2) of this section. This penalty starts to accrue on the day after the effective date of the final administrative decision of the Assistant Secretary or on the date identified in an agreement under paragraph (e)(3) of this section.

(2) If the museum fails to pay the penalty, the Attorney General of the

43 CFR Subtitle A (10-1-24 Edition)

United States may institute a civil action to collect the penalty in an appropriate U.S. District Court. In such action, the validity and amount of the penalty are not subject to review by the court.

(n) *Additional remedies.* The assessment of a penalty under this section is not deemed a waiver by the Department of the Interior of the right to pursue other available legal or administrative remedies.

[88 FR 86518 Dec. 13, 2023, as amended at 89 FR 11742, Feb. 15, 2024]

Subpart D—Review Committee

§ 10.12 Review Committee.

The Review Committee advises the Secretary of the Interior and Congress on matters relating to sections 3003, 3004, and 3005 of the Act and other matters as specified in section 3006 of the Act. The Review Committee is subject to the Federal Advisory Committee Act (FACA, 5 U.S.C. App.).

(a) *Recommendations.* Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act. Findings and recommendations made by the Review Committee must be published in the FEDERAL REGISTER no later than 90 days after making the finding or recommendation.

(b) *Nominations.* The Review Committee consists of seven members appointed by the Secretary of the Interior.

(1) Three members are appointed from nominations submitted by Indian Tribes, Native Hawaiian organizations, and traditional religious leaders. At least two of these members must be traditional Indian religious leaders. A traditional Indian religious leader is a person who an Indian Tribe identifies as serving it in the practice of traditional Native American religion.

(2) Three members are appointed from nominations submitted by national museum organizations or national scientific organizations. An organization that is created by, is a part