

Plaintiff cannot establish that she has standing to bring this action or that the United States has waived sovereign immunity with respect to this action. Moreover, Plaintiff cannot establish that NAGPRA imposes any duties upon NPS with respect to her allegations, because the applicable section of the Act applies only to federal activities on federal or tribal lands, 25 U.S.C. § 3001(5), and applies only to the human remains of a “Native American tribe,” 25 U.S.C. § 3001(9); *see generally*, *Bonnischsen v. United States*, 367 F.3d 864 (9th Cir. 2004); *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010). Plaintiff failed to allege these necessary elements of a viable NAGPRA claim.

THE APPLICABLE LAW

I. Jurisdictional Requirements of Rule 12(b), Federal Rules of Civil Procedure

Rule 12(b)(1), Federal Rules of Civil Procedure, provides for dismissal of an action where plaintiff fails to allege facts sufficient to establish subject matter jurisdiction. Plaintiff bears the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co., of Am.*, 511 U.S. 375, 377 (1994); *Fafel v. Dipaola*, 399 F.3d 403, 410 (1st Cir. 2005). To establish subject matter jurisdiction, plaintiff is required to establish standing to sue. That is, plaintiff must allege facts sufficient to establish constitutional standing: that she has “suffered an ‘injury in fact’ . . . ; (2) that there be a causal connection between the injury and the conduct complained of . . .’ and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 162, 167 (1997); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-104 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (The party invoking federal jurisdiction bears the burden of establishing the Constitutional elements of standing.). Plaintiff must also establish prudential standing, including that her allegations fall within the zone of interest sought to be protected by the statute invoked.

Lexmark Internat'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014); *Bonnischen v. United States*, 367 F. 3d 864, 873 (9th Cir. 2004). “There is a “general prohibition on a litigant’s raising another person’s legal rights, the ruling barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint falls within the zone of interest protected by the law invoked.” *Id.*; *see also Bennett*, 520 U.S. at 175 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886 (1990) and holding that where a claim is brought under the Administrative Procedure Act, the interests claimed by plaintiff must be determined to be within the zone of interests protected under the substantive statute.)).

Plaintiff must also establish that the federal government has unequivocally waived its sovereign immunity. *United States v. Navajo Nation*, 129 S. Ct. 1547, 1551 (2009) (citing *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994)). It is well settled that the United States and any of its agencies are immune from suit unless there is an express waiver of sovereign immunity by federal statute. *Id.*; *United States v. Commonwealth of Puerto Rico*, 287 F.3d 212, 216 (1st Cir. 2002); *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). “The ‘terms of the [United States]’ consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. at 475 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). NAGPRA creates a private right of action, but contains no waiver of sovereign immunity. *See Geronimo v. Obama*, 725 F. Supp. 2d 182, 185 (D.D.C. 2010); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003). Instead, the Administrative Procedure Act (“APA”) waives the United States’ sovereign immunity for challenges to agency action or to compel action “unlawfully withheld.” *See id.*; 5 U.S.C. § 702; *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). The APA

provides a waiver of sovereign immunity for an action, which is limited to non-monetary relief where plaintiff is able to show violation of a statute or regulation. *Califano v. Sanders*, 530 U.S. 99, 197 (1977); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). For the APA's limited waiver of sovereign immunity to apply, plaintiff must show that she has been affected by "some agency action" that is "final," in violation of the provisions of NAGPRA. *See San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 882-83 (D. Ariz. 2003) (collecting cases); 5 U.S.C. § 701(b)(2).

Rule 12(b)(6) provides for dismissal of an action where a complaint "fail[s] to state a claim upon which relief can be granted" Fed. R. Civ. P. 12(b)(6). To avoid dismissal, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Garcia-Catalan v. U.S.*, 734 F.3d 100, 102 (1st Cir. 2013). When ruling on a motion to dismiss under 12(b)(6), the Court must ask whether a complaint contains sufficient factual matter to "state a claim to relief that is plausible on its face," accepting the plaintiff's factual allegations and drawing all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cooper v. Charter Communications Entertainments I, LLC*, 760 F.3d 103, 106 (1st Cir. 2014). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 578; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, (2007) ("In order to withstand a motion to dismiss, a complaint's factual allegations must be enough to raise a right to relief above the speculative level."). Finally, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 664.

The court is obliged to construe a pro se plaintiff's pleadings liberally, but "pro se status does not insulate a party from complying with procedural and substantive law." *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997). A pro se litigant must still allege facts that establish all the elements of the cause of action, *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987), and must "comply with the applicable procedural and substantive rules of law." *Lefebvre v. Commissioner of Internal Revenue*, 830 F.2d 417, 419 (1st Cir. 1987).

II. The Native American Graves Protection and Repatriation Act

Congress enacted NAGPRA "as a way to correct past abuses to, and guarantee protection for, the "cultural items" of Native American tribal culture" found "on Federal or tribal lands." 25 U.S.C. §§ 3001-3013; *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 260 (3d Cir. 2014). "Cultural items" includes "Native American human remains." 25 U.S.C. §§ 3001(3)(A), 3002; *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999). NAGPRA vests "ownership or control" of newly discovered Native American human remains in the decedent's lineal descendants, or, if lineal descendants cannot be ascertained, in a tribe "affiliated" with the remains. 25 U.S.C. § 3002(a). *Bonnichsen v. United States*, 367 F. 3d 864, 875 (9th Cir. 2004). NAGPRA seeks to protect Native American burial sites on Federal or tribal lands and to require excavation of those sites by permit only and in consultation with the appropriate Indian tribe. See H.R. Report No. 101-877, 101 Cong., 2d Sess. 1990, reprinted in 1990 U.S.C.C.A.N. 4367-68; *Kickapoo*, 46 F.Supp. 2d at 649. Section 3 of the Act provides:

(c) Intentional excavation and removal of Native American human remains and objects

The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if –

- (1) Such items are excavated or removed pursuant to a permit issued under section 470cc of Title 16 which shall be consistent with this Chapter;

- (2) Such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe . . . ;
- (3) The ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and
- (4) Proof of consultation or consent under paragraph (2) is shown.

25 U.S.C. § 3002(c). NAGPRA requires that whenever Native American cultural items are inadvertently discovered, the on-going activities on Federal or tribal land are to cease, effort made to protect the items, and the relevant Native American tribe consulted. *Id.* 43 C.F.R. § 10.4. The Federal agency responsible for the lands on which the remains were discovered is required to take immediate steps to protect the remains and notify any known lineal descendants of a deceased Native American individual or Indian tribes likely to be affiliated, and initiate consultation. 43 C.F.R. § 10.4(d)(ii) and (iii). National Park Service regulations require that if remains are discovered in connection with an on-going activity on Federal or tribal lands, the activity must be stopped and reasonable efforts made to protect the remains and cultural objects; 43 C.F.R. §§ 10.3, 10.4(d)(ii); and consultation initiated with known lineal descendants and Indian tribe officials. 43 C.F.R. § 10.5 NAGPRA provides jurisdiction in Federal court for an action “brought by any person alleging a violation . . . “ and seeking an order to enforce its provisions. 25 U.S.C. § 3013; *see also San Carlos Apache Indian Tribe v. United States*, 272 F. Supp. 2d 860, 883 (D. Ariz. 2003) (citing *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir. 1996) and *Bonnischsen v. U. S. Dept. of Army*, 969 F. Supp. at 627 n. 17).

NAGPRA applies to “Federal lands”, defined as “any land other than tribal lands which are controlled or owned by the United States....” 25 U.S.C. § 3001(5). Lands “controlled ... by the United States” refers to “lands not owned by the United States, but in which the United States

has a legal interest sufficient to permit it to apply NAGPRA without abrogating the otherwise existing legal rights of a person.” 43 C.F.R. § 10.2(f)(1). NAGPRA also applies to “tribal lands”, defined as: “(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities” 25 U.S.C. § 3001(15). NAGPRA does not apply to agency conduct unless a discovery of Native American human remains is “actual,” and a discovery does not occur simply because an agency is warned of a likely or certain discovery. *Rosales v. United States*, 2007 WL 4233060, at * 5 (S.D. Cal. Nov. 28, 2007) (citing *Yankton Sioux v. U.S. Army Corps of Engineers*, 209 F. Supp. 2d 1008, 1018-19 (D.S.D. 2002)). NAGPRA mandates that “[a]ny person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands . . . shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands” 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4(b).¹

ARGUMENT

I. Plaintiff Has Not Alleged Facts Sufficient to Establish Subject Matter Jurisdiction.

A. Plaintiff Cannot Establish Standing.

Plaintiff has not alleged facts sufficient to establish that she has standing to sue. NAGPRA provides that “[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act.” 25 U.S.C. § 3013. The statute anticipates that a Native American tribe will have the requisite particularized injury to bring an action for

¹ If remains were discovered as a result of on-going activity on Federal or tribal lands, the activity must cease and reasonable efforts must be made to protect the remains and cultural objects. See 43 C.F.R. § 10.4(c).

protection of its human remains. *Idrogo v. U.S. Army*, 18 F. Supp. 2d 25, 27 (D.D.C. 1998). Jurisdiction is not, in terms, limited to suits brought by Native Americans. *Bonnichsen v. United States*, 357 F.3d at 874 (archaeological scientists studying ancient peoples established standing to prevent immediate transfer of human remains to Indian tribe). However, any individual bringing suit under NAGPRA who is not a Native American tribal member is required to establish constitutional standing and jurisprudential standing. *Id.*

Plaintiff in this action has not alleged sufficient facts that, if true, establish standing. She does not allege that she is a Native American and does not allege particularized injury. Indeed, the injury that she alleges is loss to historical research, not any injury particular to her or to any Native American tribe of which she is a member. Although she claims a “right to heritage retained by the people,” Complaint at 3, and “historic importance [of human remains] to American heritage,” *id.*, these are generalized injuries, and they cannot constitute an injury in fact. Moreover, they do not establish the elements of prudential standing, including establishing that these injuries are particular and fall within the zone of interests protected by NAGPRA.

B. Plaintiff Has Not Alleged that the Human Remains are Native American.

Plaintiff’s NAGPRA claim also fails because she does not allege facts that may establish the supposed remains as Native American remains, as is required by the statute. 25 U.S.C. § 3001(9); *Bonnichsen v. United States*, 367 F.3d at 877. This is a jurisdictional requirement of an action under NAGPRA, because the Act protects only Native American remains. *Id.* at 875; *Rosales v. United States*, 2007 WL 4233060, at * 9 (S.D. Cal. Nov. 28, 2007); *see also Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999) (Considering the language of the Act and its legislative history, “‘human remains’ . . . [is] intended to mean ancient human remains or those with some sort of archaeological interest.”); 36 C.F.R.

§ 10.2(d)(1) (defining “human remains” as those “of a person of Native American ancestry”). The Complaint alleges nothing regarding the origin or age of the remains, merely making the puzzling allegation that “fact of race favoring Native Americans for the disposition of all pre-Columbian heritages... .” Complaint at 2.² Plaintiff alleges in her “Cease & Desist” pleading that the remains are merely “human.” (Doc. 19). Nor does Plaintiff allege any facts from which the Court could determine that the “human remains” are remains of Native Americans. Accordingly, she cannot establish that NAGPRA provides jurisdiction here.

C. Plaintiff has not Alleged that the “Human Remains” are Found On Federal Land or Tribal Lands.

As noted, the Complaint does not specify the location of the “human remains” observed by Plaintiff. The Complaint does not allege that the “human remains” are located on federal land or tribal land. “Human remains” protected by NAGPRA, however, are required to be found on Federal lands or tribal lands, and these locations are jurisdictional requirements of NAGPRA. 25 U.S.C. § 3003; 36 C.F.R. § 10.4. Plaintiff may take the position that she has alleged that the “human remains” are located on Federal land because Nantucket Town, where, she alleges, the remains are found, has been designated as a National Historic District (“NHD”). However, a NHD is not owned or controlled by the federal government. It is a geographical area designated under the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, as having exceptional historic value that “should be considered for protection from destruction or impairment;” 36 C.F.R. § 60.2; and is listed on a National Register “designed to be and is administered as a planning tool.” *See generally, West Branch Valley Flood Protection Ass’n v. Stone*, 820 F. Supp.

² Moreover, the Native American remains governed by NAGPRA are remains of “presently existing Indian tribes. . . indigenous to the United States.” *Bonnischsen v. United States*, 367 F.3d at 875.

1, 10 (D.D.C. 1993); *Citizens for the Scenic Severn River v. Skinner*, 802 F. Supp. 1325, 1337 (D. Mass. 1991) and cases cited therein. Once a NHD is registered, any federal agency undertaking a project having an effect on the designated area is required to provide the Advisory Council on Historic Preservation an opportunity to comment on the project. 36 C.F.R. § 60.2(a). A NHD is a planning tool for consideration of the historic value of a geographical area or site and confers no ownership or control on the federal government. *See, e.g., Moody Hill Farms Ltd. Partnership v. United States Dep't of the Interior*, 205 F.3d 554, 562 (2d Cir. 1999) (rejecting plaintiffs' due process argument "because national listing on its own does not impose any burdens on plaintiff" use of their property. [It] constrains only the ability of departments of the federal government to take action affecting a listed property without first considering the effect of that action on the property."). Where Plaintiff has not alleged that Indian remains have been discovered on Federal land, jurisdiction is absent. *Rosales v. United States*, 2007 WL 4233060, at * 8.

D. There is No Waiver of Sovereign Immunity for the Award of Monetary Damages for Violations of NAGPRA.

Plaintiff alleges personal injury with respect to her personal efforts to spur protective action from some governmental body, namely, "financial, mental, emotional, and physical stresses," Complaint at 4, but the statute seeks to protect American Indian cultural items, not protect individuals from the tolls of their personal initiatives to apply the statute. If Plaintiff is alleging "financial, mental, emotional, and physical stresses" as her injury in fact, her only recourse against the United States, if any, is under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), which she does not here claim and which she could not, for, among other reasons, she has failed to file a tort claim with the agency, a prerequisite to suit. *See* 28 U.S.C. § 2675(a). *See United States v. Smith*, 499 U.S. 160, 163 (1991) (FTCA is the exclusive remedy for torts committed by

government employees within the scope of their employment.); *McNeil v. United States*, 508 U.S. 106 (1993). NAGPRA does not provide for the recovery of monetary damages. *Romero v. Becken*, 256 F.3d 349, 353 (5th Cir. 2001); *see also Bonnichsen v. United States*, 969 F. Supp. at 627 (“The Act does not provide grounds for recovery of monetary damages . . .”). NAGPRA provides only for injunctive relief requiring preservation of remains where the elements of NAGPRA have been established, 25 U.S.C. § 3013, elements not here alleged. Moreover, the Administrative Procedure Act provides no waiver of sovereign immunity for any claim of monetary damages. 5 U.S.C. § 702. *Califano v. Sanders*, 430 U.S. 90, 107 (1977). An individual alleging claim of ownership of Native American cultural items that are excavated on federal or tribal lands and claiming lineal descendency from the original owners is entitled to “seek such orders as may be necessary to enforce the provisions of the Act;” 25 U.S.C. § 3013, but neither NAGPRA nor the APA waive of sovereign immunity for monetary damages. *See Geronimo v. Obama*, 725 F. Supp. 2d 182, 186 (D.D.C. 2010).

II. Plaintiff has not Alleged a Claim for Which Relief May Be Granted.

As noted, NAGPRA provides for protections to Native American cultural items, including documentation and repatriation of these items to the lineal Native American descendants. However, NAGPRA does not apply to all lands, but is restricted to Federal lands and tribal lands. *See pp. 9-10*. In this action, not only is the specific location of the “human remains” not pleaded, but there is no National Park Service land in the area. *See Declaration of Rachel McManus, National Park Service*, ¶ 4. Indeed, there are no Federal lands within the area described in the complaint.” *Id.*³ Moreover, there are no tribal lands on Nantucket Island.

³ The United States owns the Nantucket National Wildlife Refuge, which is not located in or near the “site” described by Plaintiff. McManus Decl. at ¶ 5.

Declaration of Ramona Peters, Tribal Historic Preservation Officer, Mashpee Wampanoag Tribe,
¶ 5. Not all “human remains” – even if they are Native American remains, which Plaintiff does not allege – are protected by NAGPRA, which confines its protections to Federal lands and tribal lands. Accordingly, Plaintiff cannot establish that she has a claim for which relief can be granted under NAGPRA.

CONCLUSION

For the forgoing reasons, NPS requests that the Court dismiss the Complaint for lack of jurisdiction and failure to state a claim for which relief may be granted.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Anita Johnson
ANITA JOHNSON
Assistant United States Attorney
U.S. Attorney’s Office
One Courthouse Way, Suite 9200
Boston, MA 02210
BBO No. 565540
(617) 748-3100
Anita.johnson@usdoj.gov

Of counsel:

Brianna Kenny
Office of the Regional Solicitor
U.S. Department of the Interior

CERTIFICATE OF SERVICE

This is to certify that the foregoing documents will be served upon Plaintiff pro se by first class mail, postage prepaid, on this eighth day of May 2015.

/s/ Anita Johnson