UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARLYN GERONIMO, ET AL. Plaintiffs, and ROBERT GERONIMO, JR., ET AL. Intervenors-Plaintiffs, v. BARACK HUSSEIN OBAMA, ET AL. Defendants.	)	Case: 1:09-cv-00303- RWR

FEDERAL DEFENDANTS' MOTION TO DISMISS

Federal Defendants, through undersigned counsel, hereby move to dismiss the Plaintiffs' Complaint in the above-captioned case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. This motion is supported by the attached Memorandum. A proposed Order consistent with this motion is also attached hereto.

Dated this 10th day of June, 2009.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS'
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INTRODUCTION

Barack Hussein Obama, in his official capacity as President of the United States of America, Robert M. Gates, in his official capacity as Secretary of Defense, and Pete Geren, in his official capacity as Secretary of the Army (collectively, the"Federal Defendants"), through undersigned counsel, hereby move to dismiss Plaintiffs' Complaint in the above-captioned case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, and move alternatively pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiffs, who assert that they are the lineal descendants of Geronimo, have sued the Federal Defendants, as well as Yale University and the Order of Skull and Bones, for alleged violations of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 USC §§ 3001-3013. In their first claim for relief, Plaintiffs request this Court find that they are the lineal descendants of Geronimo. Plaintiffs also request that all defendants be required to provide an accounting of all human remains and associated funerary objects of Geronimo in their present or past possession, and that all defendants be required to surrender to Plaintiffs all human remains and associated funerary objects in their possession or control. In their second claim for relief, Plaintiffs request compensatory and punitive damages in an unspecified amount.

This Court should dismiss Plaintiffs' Complaint for several reasons. First and foremost, Plaintiffs fail to identify in their Complaint *any* waiver of sovereign immunity to sue the United States under NAGPRA. Second, even if Plaintiffs had identified the appropriate waiver of sovereign immunity for their claims under NAGPRA, namely the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the requirements of NAGPRA have not been triggered in this

case, as Plaintiffs do not allege that there has been any inadvertent discovery or intentional excavation of Geronimo's human remains or associated funerary objects since the enactment of NAGPRA in 1990. Finally, Plaintiffs fail to identify any waivers of sovereign immunity under which they could sue the United States for money damages, and again even if Plaintiffs had identified any such waiver, they fail to satisfy the requirements of those waivers.

Therefore, Plaintiffs' Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

Plaintiffs assert that they are lineal descendants of the Apache warrior known as Geronimo, who surrendered to the United States Army in 1886. Complaint ¶¶ 1, 29. (Doc. 1). Following that surrender, the United States Army held Geronimo and his fellow Chiricahua Apache prisoners in Florida and Alabama before transferring them to Fort Sill, Oklahoma, in 1894. Compl. ¶ 21. Geronimo remained a prisoner of war until his death in 1909, when he was buried at Fort Sill. Compl. ¶ 40. Plaintiffs state that following Geronimo's death, "[i]t has been claimed and widely repeated that in 1918, or 1919 a group of Yale University Students" may have disturbed Geronimo's grave. Compl. ¶ 43. Plaintiffs have averred no excavation, discovery, or other disturbance of Geronimo's grave after 1919.

Plaintiffs have named the President of the United States, the Secretary of Defense and the Secretary of the Army in their official capacities as defendants in this action. Compl. ¶ 3. In addition to the Federal Defendants, Plaintiffs have also named Yale University and the Order of Skull and Bones as defendants in this action. Compl. ¶¶ 4, 5.

Plaintiffs have requested that this Court require all defendants to provide an accounting

of Geronimo's remains or associated funerary objects in their possession and further provide Plaintiffs those human remains and objects. Compl. ¶ 45. Plaintiffs also seek an order from this Court declaring that they are Geronimo's lineal descendants. *Id.* In addition, Plaintiffs seek monetary damages in an unspecified amount. Compl. ¶ 47.

Geronimo's remains have been the cause of prior litigation by other plaintiffs on at least one other occasion. In 1997, a group of plaintiffs filed suit against the U.S. Army and President Clinton in this Court. *See Idrogo v. U.S. Army*, 18 F. Supp. 2d 25 (D.D.C. 1998). That action requested, *inter alia*, the repatriation of Geronimo's remains pursuant to 25 U.S.C. § 3005 (Section 7) of NAGPRA. *Id.* at 26. The court dismissed the suit, holding that the plaintiffs lacked standing to assert their claims because they were not lineal descendants or an affiliated tribal organization. *Id.* at 27-28.

STATUTORY AND REGULATORY BACKGROUND

Section 3 of NAGPRA, 25 U.S.C. § 3002, sets out a detailed hierarchy that addresses the "ownership or control of Native American cultural items *which are excavated or discovered on Federal or tribal lands after November 16, 1990*." 25 U.S.C. § 3002(a) (emphasis added).[1/] With respect to excavated or discovered human remains and associated funerary objects, Section 3 provides lineal descendants with priority over the ownership or control of those items. *Id.* A lineal descendant is "an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian

[1/] In addition to Section 3, NAGPRA contains two other main provisions. Section 4 concerns illegal trafficking in Native American human remains and cultural items. 18 U.S.C. § 1170. Section 7 concerns repatriation of Native American cultural items in collections held by museums or federal agencies prior to November 16, 1990. 25 U.S.C. § 3005.

organization or by the common law system of descendance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations." 43 C.F.R. § 10.2(b)(1); *see also* 43 C.F.R. § 10.14(b).[2/] Unlike known human remains and associated funerary objects, the ownership or control of unassociated funerary objects, sacred objects, and objects of cultural patrimony rests, in the first instance, with "the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered." 25 U.S.C. § 3002(a)(2)(a).

In addition to establishing the ownership or control of cultural items excavated or discovered on federal or tribal lands after November 16, 1990, NAGPRA also sets forth the conditions and duties triggered in the event of an intentional excavation or inadvertent discovery of such items. *See* 25 U.S.C. §§ 3002(c), (d). Intentional excavation is defined as "the planned archaeological removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to [25 U.S.C. § 3002(c).]" 43 C.F.R. § 10.2(g)(3). Intentional excavations are permitted only if a number of requirements have been satisfied. For example, a permit must be obtained under Section 4 of the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. § 470cc. *See* 25 U.S.C. § 3002(c)(1). In addition, items may only be excavated or removed after consultation with the appropriate Indian tribes, and proof of that consultation must be provided. *See* 25 U.S.C. §§ 3002(c)(2), (4). The "ownership and right of control of the disposition" of cultural items intentionally excavated is determined by 25 U.S.C. §§ 3002(a) and (b). *See* 25 U.S.C. § 3002(c)(3).

[2/] The regulations implementing NAGPRA are found at 43 C.F.R. Part 10.

Inadvertent discovery is defined as "the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to [25 U.S.C. § 3002(d).]" 43 C.F.R. § 10.2(g)(4). Persons making inadvertent discoveries on federal land must notify the federal land manager. *See* 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4(b). The "disposition of and control over any cultural items excavated or removed" as the result of an inadvertent discovery is determined by 25 U.S.C. § 3002(a) and (b). *See* 25 U.S.C. § 3002(d)(2).

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

A. Standard Under Fed. R. Civ. P. 12(b)(1)

Under the Federal Rules of Civil Procedure, a defendant may move to dismiss a claim for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). The "plaintiff [must] bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 51 (D.D.C. 2004); *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, a Rule 12(b)(1) "motion imposes on the court an affirmative duty to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge*, 185 F. Supp. 2d at 13. Thus, "[w]hile the Court must accept as true all the factual allegations contained in the complaint, . . . the plaintiff's factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Bennett*, 321 F. Supp. 2d at 51-52 (internal quotations and citations omitted). In reviewing a Rule 12(b)(1) motion, a court may consider materials outside of the pleadings to determine whether the court has jurisdiction to hear the case. *Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Bennett*, 321 F.

Supp. 2d at 52; *see also Haase v. Sessions*, 835 F.2d 902, 905-06 (D.C. Cir. 1987) (holding that a court's consideration of materials outside the pleadings in deciding a 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

B. Standard Under Fed. R. Civ. P. 12(b)(6)

Under the Federal Rules of Civil Procedure, a defendant may move to dismiss a claim for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To survive such a motion, a plaintiff must "include in his complaint a short and plain statement of the claim showing that the pleader is entitled to relief." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008) (internal quotations and citation omitted). "In deciding a 12(b)(6) motion, a court construes the complaint liberally in the plaintiff's favor, accepting as true all of the factual allegations contained in the complaint, with the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (internal quotations, notations, and citations omitted). However, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (internal citations and emphasis omitted); *see also Fame Jeans Inc.*, 525 F.3d at 15-17 (discussing *Twombly*).

In deciding a motion to dismiss under Rule 12(b)(6), a court should consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Fraternal Order of*

Police v. Gates, 562 F. Supp. 2d 7, 11 (D.D.C. 2008) (internal citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief," and therefore should be dismissed. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

ARGUMENT

I. PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS FAIL TO ALLEGE ANY WAIVER OF SOVEREIGN IMMUNITY

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (internal quotations, notations and citations omitted); *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989); *United States v. Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the [reviewing] court's jurisdiction"). Waivers of sovereign immunity "must be *unequivocally expressed in [the] statutory text*, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (emphasis added) (internal citations omitted). "[I]t is incumbent upon the Plaintiff to state in his complaint the grounds upon which the sovereign consented to this suit." *Swift v. U.S. Border Patrol*, 578 F. Supp. 35, 37 (S.D. Tex. 1983), *aff'd*, 731 F.2d 886 (5th Cir. 1984).

A claim asserted against the Government that does not fall within the scope of a waiver of sovereign immunity must be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1). *See, e.g., P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). A plaintiff bears the burden of demonstrating that this Court has jurisdiction to hear its

claims. *Bennett*, 321 F. Supp. 2d at 51; *Grand Lodge*, 185 F. Supp. 2d at 13. In this case, Plaintiffs utterly fail to identify or rely upon any waiver of sovereign immunity, and therefore their Complaint should be dismissed as against all of the Federal Defendants.

A. Plaintiffs' First Claim for Relief Under NAGPRA Must be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiffs Identify No Waiver of Sovereign Immunity

In their First Claim for Relief, Plaintiffs request equitable relief pursuant to Section 3 of NAGPRA, including an order finding that Plaintiffs are lineal descendants of Geronimo, an accounting of any of Geronimo's remains in the defendants' possession, and transfer of those remains to Plaintiffs. *See* Compl. ¶ 45. Plaintiffs do not, however, specify a statute which provides for a waiver of the United States' sovereign immunity. Instead, Plaintiffs merely rely on NAGPRA and 28 U.S.C. § 1331 to provide this Court with subject matter jurisdiction. *See id.*, ¶ 6. NAGPRA, however, does not contain an independent waiver of sovereign immunity. *See Rosales v. United States*, 2007 WL 4233060 at *3 (S.D. Cal. 2007) ("NAGPRA creates a private right of action but no waiver of sovereign immunity"), citing 25 U.S.C. § 3013 and *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003), *aff'd* 417 F.3d 1091 (9th Cir. 2005). Likewise, 28 U.S.C. § 1331 is only a statute of general jurisdiction that does not serve as a waiver of the United States' sovereign immunity. *See Clopton v. Dep't of Navy*, 1996 WL 680189 at *1 (D.C. Cir. Oct. 30, 1996); *Walton v. Fed. Bureau of Prisons*, 533 F. Supp. 2d 107, 114 (D.D.C. 2008), citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996). Plaintiffs have failed to identify any waiver of the United States' sovereign immunity that would allow this Court to entertain a suit for equitable relief. Therefore, Plaintiffs' First Claim for

Relief should be dismissed as against the Federal Defendants.[3/]

B. Plaintiffs' Second Claim for Relief for Damages Must Be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiffs Identify No Waiver of Sovereign Immunity

In their Second Claim for Relief, Plaintiffs request compensatory and punitive damages, as well as attorneys fees and costs. *See* Compl. ¶47. However, sovereign immunity "bar[s] suits for money damages against the government itself, and against public officials sued in their official capacities" in the absence of the identification of a statute providing a waiver. *See Walton*, 533 F. Supp. 2d at 115. Plaintiffs again fail to identify any such waiver. Further, as the Fifth Circuit has held, NAGPRA "does not provide grounds for recovery of monetary damages for individuals who allege Native American ancestry." *See Castro Romero v. Becken*, 256 F.3d 349, 354-55 (5th Cir. 2001) (upholding the conclusion that the request for damages under NAGPRA is inappropriate).

The common waivers of sovereign immunity for actions taken by government officials in their official capacity are contained in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), for actions sounding in tort, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), for non-tort actions seeking damages. Neither has been invoked in this action and no factual allegations made in the Complaint could support jurisdiction under those waivers. For example, the United States is the only proper defendant under FTCA, as the FTCA provides no jurisdiction over suits against federal agencies or federal officials. *See Watkins v. Bixler*, 2007 WL 2903361 at *4 (M.D. Pa. Sept. 28, 2007); *Continental Ins. Co. of N.J. v. U.S.*, 335 F. Supp.

[3/] Further, as discussed below in Part II, even if Plaintiffs had identified the appropriate waiver, their claims under NAGPRA must be dismissed.

2d 532, 535 (D.N.J. 2004).

Moreover, a claim under the FTCA "cannot be brought 'unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing'. . . ." *Zhengxing v. U.S. Patent & Trademark Office*, 579 F. Supp. 2d 160, 163-164 (D.D.C. 2008), citing 28 U.S.C. § 2675. The claim to the federal agency must be "a written statement 'sufficiently describing the injury to enable the agency to begin its own investigation' and containing a 'sum-certain damages claim.'" *Id.* at 164 (internal citation omitted). "Because the FTCA is a limited waiver of the United States' sovereign immunity, exhaustion of administrative remedies is required for the court to have subject matter jurisdiction." *Id.*, citing *McNeil v. United States*, 508 U.S. 106, 111-13 (1993). Plaintiffs do not allege here that they presented such a claim to any federal agency.

Similarly, Plaintiffs' allegations would not satisfy the requirements for bringing a suit under the Tucker Act or the Little Tucker Act. First, the proper party to an action under the express terms of the Acts is the United States. *See* 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 1491(a)(1); *see also Amber Resources Co. v. Unites States*, 73 Fed. Cl. 738, 751 (2006) ("It is basic to litigation under the Tucker Act that actions are brought against the United States, not Congress, not particular Executive agencies, and not the courts.").

Moreover, for Little Tucker Act claims to be within the jurisdiction of this Court, they must be limited to less than $10,000. 28 U.S.C. § 1346(a)(2); *see Powell v. Castaneda*, 390 F. Supp. 2d 1, 7 (D.D.C. 2005). Plaintiffs fail to specify an amount of damages sought in this suit. *See* Compl. 47. However, "[t]o the extent the defendant seeks damages against the United States in excess of $10,000, only the Court of Federal Claims has jurisdiction." *Chandler v.*

Roche, 215 F. Supp. 2d 166, 169 (D.D.C. 2002) (citations omitted). Further, it is Plaintiffs' burden to establish subject matter jurisdiction, and in the absence of any allegation that their claim is for $10,000 or less, they fail to establish jurisdiction under the Little Tucker Act. *See McNeil v. Adams County, Miss.*, 2006 WL 2372253 at *1 (S.D. Miss. Aug. 15, 2009) (finding because plaintiff did not specify the amount of damages sought, she failed to meet her burden of establishing her claim did not exceed $10,000 and court did not have jurisdiction); *Leveris v. England*, 249 F. Supp. 2d 1, 4 (D. Me. 2003) (dismissing claim under Little Tucker Act where plaintiff declined to specify the amount of back pay he anticipated recovering).

Plaintiffs have failed to identify a waiver of sovereign immunity for their claim for damages, and therefore Plaintiffs' Second Claim for Relief must be dismissed as against the Federal Defendants as outside the jurisdiction of this Court.[4/]

II. PLAINTIFFS' CLAIMS UNDER NAGPRA MUST BE DISMISSED

A. Assuming, Arguendo, That Plaintiffs Had Asserted a Waiver of Sovereign Immunity, Plaintiffs' Claims under NAGPRA Must Be Dismissed Because the Allegations Do Not Present a Viable or Ripe Claim under the APA and Fail to State Any Claim for Relief Under NAGPRA Against the Federal Defendants

1. The Only Conceivable Claim Would Be Under the APA and Plaintiffs Allege No Request to an Agency or Agency Official to Take an Action Under NAGPRA

Although as discussed above, Plaintiffs' Complaint identifies no waiver of the United States' sovereign immunity, the only potentially applicable waiver for claims alleging violations

[4/] Further, the President is entitled to "absolute immunity from damages liability predicated on his official acts in the absence of explicit affirmative action by Congress." *Nixon v. Fitzgerald*, 457 U.S. 731, 748 and n.27.

of NAGPRA by the federal government would be provided by the APA.[5/] *See Rosales*, 2007 WL 4233060 at *3 (S.D. Cal. 2007); *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886; *see also Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1216-17 (D. Nev. 2006) (reviewing allegations of NAGPRA violations by the agency under the APA). The APA, however, waives sovereign immunity and grants a private right of action only to plaintiffs "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. §702. Thus, under the APA, "the person claiming a right to sue must identify some 'agency action' that affects him . . . ." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

Plaintiffs fail to identify an "agency action," final or otherwise, that the United States has taken or failed to take under NAGPRA in this case. Plaintiffs allege no affirmative actions taken by any federal agency or official after the burial of Geronimo. Plaintiffs allege no specific actions that allegedly contravene NAGPRA following its enactment in 1990. Plaintiffs allege no request by any of the plaintiffs for any agency or agency official to take action with respect to Geronimo's remains. As Plaintiffs fail to identify any such agency action, their claims under the APA are not ripe for judicial review and thus should be dismissed for lack of subject matter jurisdiction, and for failure to state a claim for relief. *See Smith v. Harvey*, 541 F. Supp. 2d 8, 12-13 and n. 4 (D.D.C. 2008).

2. Plaintiffs' NAGPRA Claims for Geronimo's Remains Are Meritless

Plaintiffs claim, with absolutely no support in the statute or regulations, that the Federal

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[5/] As discussed below in Section II(B), the APA does not provide a basis for Plaintiffs' claims against the President of the United States.

Defendants are required under NAGPRA to "provide a full and detailed accounting of all human remains and associated funerary objects of Geronimo in their present possession, or that have at any time been in their possession," and to "surrender to plaintiffs all human remains and related funereal objects in their control or possession." *See* Compl. ¶ 45. However, the requirements related to priority of ownership or control of human remains contained in Section 3 of NAGPRA are triggered *only* if there has been an inadvertent discovery or an intentional excavation.

Plaintiffs do not allege any inadvertent discovery or intentional excavation after NAGPRA's enactment in 1990. Thus, Plaintiffs' attempt to rely on 25 U.S.C. § 3002(a)(1) (Section 3 of NAGPRA), *see* Compl. ¶ 45, which sets forth the priority of ownership or control of items excavated or discovered on federal or tribal lands after November 16, 1990, should be disregarded. *See* 25 U.S.C. § 3002(a). 25 U.S.C. § 3002(c)(3), pertaining to intentional excavations, which Plaintiffs are clearly requesting here, refers to the ownership and control provisions in 25 U.S.C. § 3002(a) only as a condition that must be met in the event of an intentional excavation. NAGPRA does not provide for ownership and control over items that have not been already removed or excavated, nor does it require an agency to undertake or approve an intentional excavation, which is what Plaintiffs are requesting here.

The plain reading of NAGPRA shows that it is not a prospective statute, but rather is a statute that is triggered only upon an inadvertent discovery or intentional excavation, a conclusion that finds support in multiple court opinions regarding claims of inadvertent discovery under Section 3 of NAGPRA. For example, as part of an alternative holding, the court in *Rosales* rejected a claim by the plaintiffs that because they had provided notice to the United States government that they believed remains and associated objects would be found on tribal

land, an inadvertent discovery had occurred pursuant to NAGPRA. *See Rosales*, 2007 WL 4233060 at *9. As the court stated, "[a]ll courts to consider this issue have held an inadvertent discovery does not occur when an agency is placed on notice of likely or certain discovery, *but that discovery must be 'actual*.'" *Id.* (emphasis added).

Likewise, in *Hawk v. Danforth*, the court held that NAGPRA "applies only to remains or artifacts that are 'excavated or discovered' — *not to remains that may still be buried*." 2006 U.S. Dist. LEXIS 58104 at *4 (E.D. Wis. 2006) (emphasis added). The court went on to state that NAGPRA "protects human remains and cultural items *found* in federal public lands and tribal lands." *Id*. (emphasis in original), citing *Castro Romero*, 256 F.3d at 354. Similarly, in *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992), the court found that NAGPRA was not applicable in the absence of an actual discovery of human remains and cultural items, even though "the possibility of their existence is extremely high." 805 F. Supp. at 252 (because NAGPRA applies to cultural or funerary items "*already discovered or excavated*," any claims that NAGPRA's provisions had been triggered prior to this occurring were premature). In *San Carlos Apache Tribe*, the court also rejected the notion that the requirements of NAGPRA could be triggered in the absence of an inadvertent discovery. 272 F. Supp. 2d at 893-94 ("only when and if" human remains are uncovered as a result of action taken by a federal agency "will NAGPRA duties and obligations be triggered.").[6/]

In the absence of an intentional excavation, the requirements of NAGPRA have not been triggered. Consequently, Plaintiffs have failed to identify any agency action or inaction affecting

[6/] The court also noted that 25 U.S.C. § 3002(a) "governs the ownership and control of Native American cultural items which are intentionally excavated or removed." *Id.* at 887.

their legal rights. As Plaintiffs have alleged, Geronimo was buried at Ft. Sill in 1909. Compl. ¶ 40. Plaintiffs make no allegation that any human remains or associated funerary items of Geronimo were excavated or discovered on federal or tribal lands after November 16, 1990. Because they do not allege any inadvertent discovery or intentional excavation after that date, nothing in NAGPRA gives Plaintiffs, who claim to be lineal descendants, ownership rights or priorities for control of the remains. A claim based on Section 3 of NAGPRA simply has not been stated, and therefore their requests pursuant NAGPRA must be dismissed, including their request that the Court issue an order finding that the Plaintiffs are the lineal descendants of Geronimo. *See* Compl. ¶ 45.

3. Had NAGPRA Been Triggered, Plaintiffs Failed to Exhaust Their Administrative Remedies

Further, assuming arguendo, that the requirements of NAGPRA were triggered in the absence of an intentional excavation, Plaintiffs have failed to exhaust available administrative remedies before bringing their claims to this Court, and therefore their claims should be dismissed for failure to state a claim. A plaintiff generally must exhaust available administrative remedies before seeking a judicial remedy. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993). NAGPRA's regulations provide that no person is considered to have exhausted his or her administrative remedies with respect to the repatriation or disposition of human remains until (1) the person has filed a written claim for repatriation or disposition of the objects with the responsible Federal agency and (2) the agency denies that claim. *See* 43 C.F.R. § 10.15.

The Complaint does not allege that Plaintiffs filed any written claim pursuant to NAGPRA regarding the repatriation of Geronimo's remains. Further, the Army has not received such a request. *See* Declaration of Thomas Ray Kelly, ¶¶ 4-5. Therefore, the Army has not

been given the opportunity to take any action with regard to such a claim.[7] As the Ninth Circuit has held, where a plaintiff has not exhausted his administrative remedies as required under 43 C.F.R. § 10.15(c), claims under NAGPRA for repatriation must be dismissed, as they are not ripe for judicial decision. *See Monet v. Hawai'i*, 113 F.3d 1241 (9th Cir. 1997) (unpublished opinion); *see also Na Iwi O Na Kupauna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1405-06 (D. Hawai'i 1995) (exhaustion of administrative remedies was required under NAGPRA in order to assert a repatriation claim).[8]

Therefore, even if this Court were somehow to find that the requirements of NAGPRA

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[7] NAGPRA's regulations provide that in the case of an intentional excavation, the basis for determining likely custody of human remains shall be made by the federal agency official pursuant to 43 C.F.R § 10.6. *See* 43 C.F.R. § 10.3(c)(1). 43 C.F.R.. § 10.6(a)(1) provides that in the case of human remains and associated objects, lineal descendancy is determined pursuant to 43 C.F.R. § 10.14. Thus, in making a determination related to a request for repatriation, the Army would necessarily have to take into consideration that there is more than one individual claiming to be a lineal descendant of Geronimo, as evidenced by the Intervenors-Plaintiffs' motion to intervene (Doc. 5), and that the various individuals claiming to be lineal descendants disagree about what should be done with Geronimo's remains. *Compare* Plaintiffs' Complaint (Doc. 1), *with* Intervenors-Plaintiffs' Complaint (Doc. 11).

In addition, Geronimo's grave is part of a site listed on the National Register of Historic Places. *See* http://www.ocgi.okstate.edu/shpo/allsites.htm (last visited on June 9, 2009). Any proposed action to disturb the grave would likely trigger reviews pursuant the National Historic Preservation Act and the National Environmental Policy Act. Further, excavation without an ARPA permit is subject to civil and criminal penalties. *See* 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470ee(d).

[8] Both of these cases were brought pursuant to requests for repatriation under Section 7, which concerns collections held by federal agencies and museums, and which contains provisions governing requests for repatriation of human remains. *See* 25 U.S.C. § 3005; 43 C.F.R. § 10.10. As discussed above, Plaintiffs have brought this case pursuant to Section 3 of NAGPRA, which concerns inadvertent discoveries and intentional excavations on federal or tribal land, and which, similarly to Section 7, provides a basis for determining likely custody and requires transfer of custody pursuant to that determination. *See* 25 U.S.C. § 3002*;* 43 C.F.R § 10.3(c)(1); 43 C.F.R § 10.6(c). However, as 43 C.F.R. § 10.15 applies in general to requests for repatriation under NAGPRA, and as both sections of NAGPRA provide for repatriation of human remains to lineal descendants, the holdings in both of these cases are applicable.

have been triggered in this case, Plaintiffs' Complaint must be dismissed for failure to state a claim because they have failed to exhaust their administrative remedies under NAGPRA regarding repatriation.

B. Plaintiffs' Complaint Against President Obama Must be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiffs Identify No Waiver of Sovereign Immunity as Against the President

Finally, Plaintiffs' claims against the President of the United States should be dismissed for lack of subject matter jurisdiction. The APA, which provides the only waiver of sovereign immunity for claims brought pursuant to NAGPRA, does not apply to claims brought against the President of the United States. This is because "the President is not an 'agency' under the APA and the waiver of sovereign immunity [found in the APA] thus does not apply to him." *See Bismullah v. Gates* 514 F.3d 1291, 1305 -1306 (D.C. Cir. 2008), citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); *see also Dalton v. Specter*, 511 U.S. 462, 476 (1994); *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551-53 (D.C. Cir. 1993); *El-Shifa Pharm. Indus. v. United States*, 402 F. Supp. 2d 267, 272-73 (D.D.C. 2005). As the courts have explained, judicial review of presidential actions would impinge upon the President's power in violation of the separation of powers doctrine. *Franklin*, 505 U.S. at 800-01 ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."); *see also Armstrong*, 924 F.2d at 289 (emphasizing review might "significantly alter the balance between Congress and the President"). Because the APA, the only potential waiver of sovereign immunity for cases brought pursuant to NAGPRA, does not allow for a suit against the President, Plaintiffs' claims against President Barack Obama must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the Federal Defendants' motion to dismiss Plaintiffs' Complaint.

Dated this 10th day of June, 2009.

Respectfully submitted,

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