IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MUSCOGEE CREEK NATION, a federally recognized Indian tribe, HICKORY GROUND TRIBAL TOWN, and MEKKO GEORGE THOMPSON, Plaintiffs, vs. POARCH BAND OF CREEK INDIANS, a federally recognized Indian tribe, BUFORD ROLIN, STEPHANIE BRYAN, ROBERT McGHEE, DAVID GEHMAN, ARTHUR MOTHERSHED, KEITH MARTIN, SANDY HOLLINGER, GARVIN SELLS, EDDIE TULLIS, ROBERT THROWER, PCI GAMING AUTHORITY, BRIDGET WASDIN, MATTHEW MARTIN, BILLY SMITH, TIM MANNING, FLINTCO, LLC, MARTIN CONSTRUCTION, INC., D.H. GRIFFIN WRECKING COMPANY, INC., KEN SALAZAR, in his official capacity as Secretary of the U.S. Department of Interior, JONATHAN JARVIS, in his official capacity as Director of the National Park Service, KEVIN WASHBURN, in his official capacity as Assistant Secretary, Bureau of Indian Affairs, U.S. DEPARTMENT OF INTERIOR, and AUBURN UNIVERSITY, Defendants.	)	Civil Action Number: 2:12-cv-01079-MHT-CSC

BRIEF IN SUPPORT OF
TRIBAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Plaintiffs ask this Court, *inter alia*, to permanently enjoin the Poarch Band of Creek Indians (PBCI) from engaging in any construction, improvement, or other "ground disturbing activity" on a tract of land that has been held in trust by the United States for the benefit of PBCI for nearly thirty years and to order PBCI to restore the entire property to its natural state. In an effort to effectuate this result, the Plaintiffs have filed a wide-ranging complaint naming PBCI, the PCI Gaming Authority (PCI Gaming), the leaders and tribal officials in charge of those tribal entities, and PBCI's Tribal Historic Preservation Officer (collectively, the Tribal Defendants)[1] and accusing them and various federal officials and private entities of violating numerous federal laws pertaining to Indian tribes and the preservation of historic, cultural, and archeological resources on federal and Indian lands. As set forth in detail below, however, the Plaintiffs have failed to establish this Court's subject matter jurisdiction over the Tribal Defendants and certain claims, and they have failed to allege facts sufficient to support a claim for relief against the Tribal Defendants under a single one of the theories set forth in the complaint. Accordingly, the Tribal Defendants have moved for the dismissal of all claims and now file this brief in support of that motion.

BACKGROUND

Although the Tribal Defendants take significant issue with many of the complaint's factual allegations and characterizations and will forcefully rebut them should this case proceed further, they recognize that those allegations must be taken as true at this stage in the

[1] The leaders and officials named include Defendants Buford Rolin, Stephanie Bryan, Robert McGhee, David Gehman, Arthur Mothershed, Keith Martin, Sandy Hollinger, Garvin Sells, and Eddie Tullis, who are members of the PBCI Tribal Council sued in their official capacities, Keith Martin (again), Bridget Wasdin, Matthew Martin, Billy Smith, and Tim Manning, members of the tribally-owned PCI Gaming sued in their official capacities, and Robert Thrower, the PBCI Historic Preservation Officer, sued in his official capacity. *See* Am. Compl. ¶¶ 12-13.

proceedings. The background information set forth in this section thus is comprised entirely of key factual material drawn from the complaint and published federal legal sources.

The PBCI is a federally recognized Indian tribe eligible for special services and programs provided by the United States by virtue of their status as Indians. Am. Compl. ¶ 12. *See also* 77 Fed. Reg. 47868, 47871 (August 10, 2012) (listing federally recognized tribes). It is a successor-in-status to the Creek Nation and has been a party to federal treaties dating as far back as the 18th century. *See*, *e.g.*, 49 Fed. Reg. 24083 (June 11, 1984); Treaty of Fort Jackson, Aug. 9, 1814, 7 Stat. 120 (reserving land for "friendly" Creek Indians). PCI Gaming is a tribal enterprise wholly owned by PBCI that is charged with the conduct of gaming activity on PBCI lands. Am. Compl. ¶ 12.

Both the Plaintiffs and PBCI claim cultural affiliation with and descent from Creek Indians that historically inhabited land that is now within the exterior boundaries of the State of Alabama. *Id.* ¶¶ 9-10 & 12. In 1980, PBCI acquired property in the vicinity of Wetumpka, Alabama (the Wetumpka property) that is sometimes referred to as Hickory Ground. *Id.* ¶ 23. The Wetumpka property contains a ceremonial ground used by the PBCI's ancestors, and human remains have been discovered on the property. *Id.* ¶ 22.

In 1984, the United States confirmed the tribal governmental status of the PBCI and acknowledged that PBCI, like other federally recognized tribes, is eligible for special services and programs provided by the United States to Indians by virtue of their status as Indians. *Id.* ¶ 24. That same year, the United States accepted title to the Wetumpka property into trust for PBCI. *Id.* PBCI, through PCI Gaming, for some time has operated a gaming facility at the Wetumpka property pursuant to its inherent sovereign authority as recognized in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq*. Am. Compl. ¶ 25. PBCI is currently

engaged in additional construction activity on the Wetumpka property, including the construction of a casino expansion, a hotel, and resort facilities. *See id.* ¶¶ 2 & 30.

During it's nearly three decades of ownership of the Wetumpka property, PBCI has excavated human remains and funerary objects from the property. *Id.* ¶¶ 29 & 32. The Plaintiffs do not allege that any of the remains recovered from the Wetumpka property (or any remains as-yet unrecovered) belong to any identifiable individual.

The Plaintiffs contend that any "ground disturbing activity" undertaken on the Wetumpka property is offensive to them. *Id.* ¶ 30. They further believe that activities already undertaken on the Wetumpka property have "irrevocably disturbed" the peace of those individuals whose remains were disinterred. *Id.* ¶ 31.

STANDARD FOR MOTION TO DISMISS

When deciding a motion to dismiss, the court considers only the facts set forth in the complaint, all of which are assumed to be true for purposes of the motion and all of which are construed in the plaintiff's favor. *See Johnson v. Andalusia Police Dep't*, 633 F. Supp. 2d 1289, 1292 (M.D. Ala. 2009) (citations omitted). Importantly, in order to survive a motion to dismiss, the complaint must set forth allegations establishing a claim to relief that is "plausible on its face." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). More critically still, the complaint's allegations "must be enough to raise a right of relief above the speculative level;" the use of "mere labels and conclusions … will not do." *Twombly*, 550 U.S. at 555. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557)). Finally, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

ARGUMENT AND ANALYSIS

In an effort to justify their requested injunctive and declaratory relief, the Plaintiffs cite a litany of federal statutes that they contend have been violated. For the reasons explained below, however, the Plaintiffs' claims should be dismissed in their entirety due to this Court's lack of subject matter jurisdiction and the Plaintiffs' failure to state a single cause of action upon which relief can be granted against the Tribal Defendants. *See* Fed. R. Civ. P. 12(b)(1) & (6).

As an initial matter, the Court lacks subject matter jurisdiction over the Plaintiffs' claims against the Tribal Defendants due to tribal sovereign immunity. Settled principles of federal Indian law, discussed in detail *infra*, provide that one of the many aspects of inherent tribal sovereignty is a broad immunity to suit without tribal consent or an unmistakable congressional waiver of immunity. Neither condition being present here, the Tribal Defendants are immune from suit and the Court is deprived of subject matter jurisdiction. Additionally, the Plaintiffs lack standing to bring a claim under the Indian Reorganization Act (IRA) for reasons wholly independent of sovereign immunity.

In addition to these jurisdictional defects, the Plaintiffs' case fails entirely on the merits. Even if they had standing for their IRA argument, their putative claim under that act constitutes an untimely, improper collateral attack on a decades old federal agency decision. The remaining statutory claims also are defective for various reasons, as the statutes upon which they are based (1) are inapplicable to the Tribal Defendants on their face or under the facts presented; (2) do not create private rights of action; (3) do not create any judicially enforceable rights against any entity; or (4) do not and cannot provide the relief that the Plaintiffs seek. For all of these reasons, the Plaintiffs' complaint should be dismissed in its entirety.

I. The Tribal Defendants Enjoy Sovereign Immunity and All Claims Against Those Defendants Should Be Dismissed for Lack of Subject Matter Jurisdiction.

A. Defendants PBCI and PCI Gaming enjoy sovereign immunity.

Defendants PBCI and PCI Gaming are immune from suit, and this court accordingly lacks subject matter jurisdiction over those defendants. As the Eleventh Circuit recently recognized, the "Supreme Court has made clear that a suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity." *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1226 (11th Cir. 2012). *See also Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009) (affirming district court's dismissal of claims against PBCI and PCI Gaming on the grounds that their sovereign immunity deprived the district court of subject matter jurisdiction). This immunity applies not only to the tribe itself, but also to tribal enterprises, such as PCI Gaming, that are owned by and act as an arm or instrumentality of the tribe. *See, e.g.*, *Miller v. Wright*, --- F.3d ---, 2013 WL 174493 at *3 (9th Cir. Jan. 14, 2013) ("The settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity accorded to the tribe itself." (internal quotation omitted)); *Freemanville*, 563 F.3d at 1207 n.1; *Sanderford v. Creek Casino Montgomery*, 2013 WL 131432 at *2 (M.D. Ala. Jan. 10, 2013) ("Defendant Creek Casino is indistinguishable from the Tribe for the purpose of sovereign immunity."); *Allman v. Creek Casino Wetumpka*, 2011 WL 2313706 at *2 (M.D. Ala. May 23, 2011) (holding that PBCI's sovereign immunity extended to one of the Tribe's gaming facilities). The Plaintiffs concede that PCI Gaming is a tribally-owned entity charged with carrying out PBCI's gaming activities. *See* Compl. ¶ 12. Accordingly, there can be no doubt that PCI Gaming shares in PBCI's immunity.

The Plaintiffs do not allege that Defendants PBCI and PCI Gaming have waived their immunity or that Congress has abrogated it. Indeed, a careful reading of the Plaintiffs' complaint shows that the Plaintiffs have not even alleged that this court has jurisdiction over these two defendants. *See* Am. Compl. ¶ 8 (alleging jurisdiction only over the individual Tribal Defendants). Because PBCI and PCI Gaming enjoy sovereign immunity, this court lacks subject matter jurisdiction to entertain claims against them. *Freemanville*, 563 F.3d at 1206-07. All claims against those defendants thus should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(1).

B. The individual Tribal Defendants also enjoy sovereign immunity.

The Court also lacks subject matter jurisdiction over the Plaintiffs' claims against the individual Tribal Defendants. It is settled law that tribal officials are protected by their tribe's sovereign immunity when acting in their official capacity and within the scope of their authority. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999). The only exception to this settled rule is a narrow one. Under the doctrine first elucidated in *Ex parte Young*, 209 U.S. 123 (1908), tribal officials can be susceptible to suit in certain circumstances where they have acted beyond their authority, which the Plaintiffs have not alleged here.[2] *Tamiami Partners*, 177 F.3d at 1226. Even then, however, tribal officials cannot be sued in cases that implicate "special sovereignty interests." *Hollywood Mobile Estates Ltd. v. Cypress*, 415 Fed. Appx. 207, 211 (11th Cir. 2011). This case implicates such interests.

[2] The Tribal Defendants acknowledge Eleventh Circuit authority indicating that alleged violations of federal laws may be considered *per se* in excess of a tribal official's authority. *Accord Tamiami*, 177 F.3d at 1225. To the extent that this is the law of this Circuit, the Tribal Defendants respectfully disagree, as such a position can enable parties such as the Plaintiffs to make an end run around sovereign immunity in a case – such as this one – that is clearly against the Tribe and not based on the actions of any individual defendant. *See, e.g., Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (affirming dismissal of suit against tribal officials on immunity grounds where "the only action taken by those officials was to vote as members of the Band's governing body" and it was "difficult to view the suit against the officials as anything other than a suit against the Band").

The Eleventh Circuit has provided explicit examples of what types of actions implicate "special sovereignty interests" such that they cannot be brought pursuant to the *Ex parte Young* exception to sovereign immunity. Importantly, these include actions that would "remove … land from the tribe's jurisdiction or permanently deprive the tribe of its property interests." *Hollywood Mobile*, 415 Fed. Appx. at 211. This is precisely what the Plaintiffs attempt to do here, as they seek a ruling that would remove the Wetumpka property from PBCI's jurisdiction, converting it to ordinary, private property, and that would effectively deprive PBCI of its property interests by preventing it from undertaking any development or "ground disturbing activity" on its own lands. Accordingly, this action falls outside of the scope of the *Ex parte Young* exception, the individual Tribal Defendants are protected by PBCI's sovereign immunity, and the Court lacks subject matter jurisdiction over the Plaintiffs' claims against them. The claims against the individual Tribal Defendants should be dismissed with prejudice pursuant to Rule 12(b)(1).

II. Any Claim Under the Indian Reorganization Act Should Be Dismissed for Lack of Subject Matter Jurisdiction and/or the Failure to State a Claim Upon Which Relief Can Be Granted.

The Plaintiffs first claim that the Defendants have violated the Indian Reorganization Act, 25 U.S.C. §§ 461, *et seq.* The IRA, *inter alia*, gives the Secretary of the Interior the discretionary authority to acquire lands in trust for the benefit of Indians. *See* 25 U.S.C. § 465. The Supreme Court recently held that the IRA only allows the Secretary to take land into trust for "tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). Contrary to the Plaintiffs' characterization of this ruling, the Court did not address or require that a tribe have been formally recognized by the United States in 1934. A tribe that did not enjoy formal recognition in 1934 could still establish that it – like PBCI – was "under federal jurisdiction" at that time and

thus within the scope of the IRA. *Id.* at 397-398 (Breyer, J., concurring). *See also Stand up for California! v. U.S. Dep't of the Interior*, --- F. Supp. 2d ----, 2013 WL 324035 (D.D.C. Jan. 29, 2013); *Cohen's Handbook of Federal Indian Law* (*Cohen*) § 3.02(6)(d) (2012 ed.). Nevertheless, the Plaintiffs attempt to use the *Carcieri* decision as grounds to attack the Secretary's 1984 decision to take land into trust for PBCI under the IRA.

This IRA claim suffers numerous deficiencies. As an initial matter, this Court lacks jurisdiction to adjudicate it because the Plaintiffs cannot establish Article III standing. Even if the Plaintiffs could establish standing, however, their IRA claim still fails because it constitutes an improper and clearly time-barred collateral attack on a decades old agency decision. While the Plaintiffs attempt to freshen their claim by citing the Supreme Court's 2009 *Carcieri* decision and alleging an ongoing violation of IGRA, this is just a thinly veiled effort to recast their IRA claim.[3] The Plaintiffs' entire argument hinges on this Court's willingness to revisit, outside of the context of the Administrative Procedure Act (APA) and without the benefit of prior agency review, and retroactively vacate the Secretary of the Interior's 1984 decision to accept land into trust for the benefit of the PBCI. The Court should decline this invitation.

[3] The *Carcieri* decision explicitly did not address – and therefore certainly did not revoke – the trust status of lands that had already been accepted into trust for the Narragansett Tribe. 555 U.S. at 385 n.3. Accordingly, *Carcieri* – and indeed the IRA itself – does not address the legality of gaming activity on lands held in trust for Indian tribes. That issue is governed by the Indian Gaming Regulatory Act , 25 U.S.C. §§ 2701, *et seq.* IGRA regulates the conduct of gaming activity on "Indian lands," which are defined as "all lands within the limits of any Indian reservation; and … any lands title to which is held in trust by the United States for the benefit of any Indian tribe …." § 2703(4). "Indian tribe," in turn, is defined as "any Indian tribe … recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians." §2703(5). The operative definitions in the IGRA differ substantially from the definition of "Indian" in the IRA, with the *sine qua non* for the applicability of IGRA being (1) whether a tribe is a federally recognized Indian tribe and (2) whether the land in question is held in trust by the United States for the benefit of a Tribe. It is undisputed that the PBCI is an Indian Tribe within the meaning of the IGRA. *See* Am. Compl. ¶¶ 12 & 24; 77 Fed. Reg. at 47871; *Freemanville*, 563 F.3d at 1206-07. It likewise is undisputed that the United States currently holds title to the property at issue in trust for the benefit of PBCI and has done so since 1984, and that the property accordingly falls within the definition of "Indian lands" set forth in the IGRA. *See* Am. Compl. ¶¶ 24, 43; 25 U.S.C. § 2703. It necessarily follows that PBCI may lawfully engage in gaming activity on the Wetumpka property unless the United States is divested of title to the property, an event that has not occurred (and will not). To the extent that the Plaintiffs contend otherwise, their argument can and should be rejected out of hand.

A. The Plaintiffs lack standing to challenge the Secretary's 1984 decision or otherwise state a claim under the IRA.

The threshold issue of standing presents a fatal flaw for the Plaintiffs' IRA-based claims because the Plaintiffs' alleged injuries from the Tribal Defendants' activities do not arise out of the Secretary's 1984 decision to take land into trust for PBCI and could not be redressed by a favorable ruling on this claim. Standing is a jurisdictional issue that must be assessed at the time when the complaint is filed. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264-65 (11th Cir. 2011). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted." *Id.* at 1265 (internal quotation omitted & emphasis added). Where a plaintiff lacks standing to pursue a particular claim, the court lacks jurisdiction over that claim and is "powerless to continue," and the claim must be dismissed. *Id.* (internal quotation omitted).

To establish standing, a plaintiff must show (1) an injury in fact that is (2) fairly traceable to the defendants' conduct and is (3) likely, not merely possible, to be redressed by a favorable decision from the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Hollywood Mobile*, 641 F.3d at 1265-66. An alleged injury is only redressable "when a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that *directly redresses* the injury suffered." *Hollywood Mobile*, 641 F.3d at 1266 (internal quotation omitted & emphasis added). Here, the Plaintiffs' alleged injury in fact is that excavation and other ground disturbing activities on the Wetumpka property have disturbed burial sites there, causing the Plaintiffs "severe emotional distress." Am. Compl. ¶¶ 38-39. The Plaintiffs lack standing to bring an IRA claim because their own factual allegations and internal tensions in their legal theories demonstrate that they cannot (1) fairly trace their alleged injury to

the Secretary's decision to take land into trust for PBCI or (2) obtain redress of their alleged injuries through any relief available under the act.

First, the Plaintiffs' alleged injury is not fairly traceable to the Secretary's decision to accept land into trust for PBCI. PBCI owned the Wetumpka property for four years prior to the Secretary's decision to take it into trust. Even in the absence of that secretarial decision, PBCI would have been free to engage in the construction and other ground-disturbing activities that serve as the basis for the complaint.[4] Accordingly, any excavation or related activity at the Wetumpka property simply is not fairly traceable to the Secretary's 1984 decision to take land into trust for PBCI. *Accord Yankton Sioux Tribe v. U.S. Army Corps of Engr's*, 396 F. Supp. 2d 1087, 1094 (D.S.D. 2005) (dismissing similar claims on standing grounds where the tribal plaintiff could not tie potential non-compliance with federal statutes to a federal land-transfer decision). The Plaintiffs therefore lack standing to challenge that decision, and their IRA claim should be dismissed pursuant to Rule 12(b)(1).[5]

Second, the Plaintiffs' alleged injury is not redressable through their IRA claim. The Plaintiffs have not alleged that gaming activity *qua* gaming activity – as opposed to construction, archeological excavations, and other development activity – carried out at the Wetumpka site causes them an injury in fact. On the contrary, it is evident from the face of the complaint that any development or excavation at the site would be offensive to the Plaintiffs and would result in

[4] Indeed, by alleging that PBCI "fraudulently misrepresented" an intent to preserve the Wetumpka property "without excavation" in 1980, the Plaintiffs concede their belief that excavation activities were planned for the property years before the Secretary agreed to take the land into trust. Am. Compl. ¶ 23.

[5] The Supreme Court's recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), is not to the contrary. There, the plaintiff was an adjacent landowner whose alleged injuries were attributable to the use of the land in question specifically for casino gaming, so the Court held that they fell within the zone of interests protected by the IRA. *Id.* at 2211-12. The Plaintiffs in this case, to the contrary, are not neighboring landowners and have alleged that *any* ground disturbing activity at the Wetumpka property is offensive and will cause them injury. Because activities cited by the Plaintiffs – including archeological excavation and non-casino construction – could and would have taken place regardless of the Secretary's trust decision, the Plaintiffs' alleged injuries are distinguishable from those at issue in *Patchak* and do not suffice to establish standing.

the injuries of which they complain. *See, e.g.*, Am. Compl. ¶¶ 31, 47, 99 & 103. It also is evident that the Plaintiffs' alleged injuries could only possibly be redressed by applying various federal preservation and protective statutes to require that human remains and other archeological resources on the property be treated in a very specific manner. Ergo, any relief provided to the Plaintiffs would only redress their injuries if it would result in (1) the cessation of all development, excavation, construction, and similar activities at the Wetumpka site and (2) a requirement that human remains and other artifacts discovered on the property – and even the property itself – be treated in accordance with the Plaintiffs' wishes and dictates.

In light of the foregoing, there is no possibility, much less a significant likelihood, that a favorable decision on the Plaintiffs' IRA theory will directly redress the alleged injuries and grievances set forth in their complaint. The only relief potentially available to the Plaintiffs under their IRA theory would be to divest the United States of title to the Wetumpka property. This might render continued gaming activity at the site unlawful. But it certainly would render the numerous other statutes relied upon in the Plaintiffs' complaint inapplicable to the site, which would once again be privately owned in fee by PBCI. *See* 16 U.S.C. §§ 470aa – 470bb (providing that the Archaeological Resources Protection Act applies only to public lands and Indian lands held in trust by or subject to alienation restrictions imposed by the United States); 25 U.S.C. §§ 3001-3002 (providing that the Native American Graves Protection and Repatriation Act applies only to federal lands and Indian reservation lands); *Sugarloaf Citizens Ass'n v. F.E.R.C.*, 959 F.2d 508, 515 (4th Cir. 1992) (citing several cases for the proposition that the National Historic Preservation Act is a narrow statute triggered only when the federal government has control over a project). Accordingly, were the Plaintiffs to succeed on their IRA theory, there would be no basis for the Court to order the Tribal Defendants to engage in or

refrain from any construction, excavation, or other activities on the property, nor would there be any statutory basis for the Plaintiffs to demand that human remains and other archeological resources located on the property be treated in any specific manner. Rather than likely redressing their alleged injuries, a favorable ruling on the Plaintiffs' IRA theory effectively would foreclose the relief that they seek. The Plaintiffs therefore lack standing to assert their IRA claim, and it should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(1).

B. The Plaintiffs' challenge to the trust status of the Wetumpka property constitutes an impermissible collateral attack on an agency decision.

While the Plaintiffs' IRA claim must fail due to lack of standing, there are other, independently sufficient grounds for its dismissal. Even assuming, for instance, that the Plaintiffs had a valid IRA claim and the standing to pursue it in some context, they could not do so in this action.[6] The Plaintiffs' requested remedy for their IRA claim is for the Court to divest the United States of title to the Wetumpka property and to declare PBCI's gaming activity there unlawful. *See* Am. Compl. ¶¶ 46-47 & 109. Their claim therefore necessarily involves a collateral attack on the Secretary's 1984 decision to accept the Wetumpka property into trust for the benefit of PBCI. Such a collateral attack is impermissible as a matter of law under the facts of this case.

"A party may not collaterally attack the validity of a prior agency order in a subsequent proceeding." *United States v. Howard Elec. Co.*, 798 F.2d 392, 394 (10th Cir. 1986) (internal quotation omitted). *See also United States v. Backlund*, 677 F.3d 930, 943 (9th Cir. 2012) (espousing the "eminently reasonable principle that parties may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions"); *United*

[6] The Tribal Defendants recognize that the merits of the Secretary's 1984 decision are likely beyond the proper scope of this motion (and indeed this litigation). Nevertheless, it is important to understand that the decision was based in part on the Secretary's findings that the PBCI (1) is a successor-in-status to the Creek Nation and (2) was a party to multiple treaties with the United States prior to 1934. *See, e.g.*, 49 Fed. Reg. 24083 (June 11, 1984); Treaty of Fort Jackson, Aug. 9, 1814, 7 Stat. 120. These findings show that the PBCI was indeed "under federal jurisdiction" for purposes of the IRA, rendering the Secretary's decision a lawful exercise of his statutorily-conferred discretion.

States v. Lowry, 512 F.3d 1194, 1203 (9th Cir. 2008) (affirming district court's conclusion that it lacked jurisdiction to consider a litigant's collateral attack on prior agency proceedings); *United States v. Metro. Petroleum Co.*, 743 F. Supp. 820 825-826 (S.D. Fla. 1990) (declining to entertain an untimely collateral challenge to an agency order). In *Howard*, the plaintiff sought to challenge a fine from the federal Occupational Safety and Health Review Commission on the grounds that the Commission lacked subject matter jurisdiction to assess such a penalty. *Howard*, 798 F.2d at 393. Although it had failed to pursue an available administrative remedy, Howard nonetheless argued that the jurisdictional nature of his claim allowed him to collaterally attack the Commission's order. *Id.* at 394. The Tenth Circuit resoundingly rejected this argument, noting that Congress did not intend to allow plaintiffs to "circumvent … exclusive, statutorily-created procedures" in favor of direct judicial review. *Id.* at 395.

This case presents an identical situation in all material respects. Had the Plaintiffs so chosen, they, like the *Carcieri* plaintiffs, could have brought a direct APA challenge to the Secretary's decision to accept the Wetumpka property into trust for the benefit of PBCI. Instead, like Howard, they chose to forego the available statutory avenue for challenging the Secretary's decision in favor of a delayed, collateral attack on the decision in a subsequent proceeding. Allowing the Plaintiffs to pursue such an attack in this case would throw open the door to any number of collateral challenges to agency decision making regardless of their timing or the availability of direct review. The Court should not countenance such an outcome, and should dismiss the Plaintiffs' IRA-based claims with prejudice for failure to state a claim upon which relief can be granted.

C. Any attack on the Secretary's 1984 decision is time-barred.

Even if the Plaintiffs' challenge to the Secretary's 1984 decision was not an improper collateral attack, it still would fail on limitations grounds. As noted above, the proper avenue for challenging a decision by the Secretary of the Interior is through a direct APA challenge. *See*, *e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012); *Carcieri*, 555 U.S. at 385. The statute of limitations for bringing a claim pursuant to the APA is six years. *See* 28 U.S.C. 2401(a); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007). By the Plaintiffs' own admission, the relevant agency decision in this case occurred in 1984 – nearly thirty years ago. Am. Compl. ¶¶ 24 & 43. The untimeliness of any challenge to the Secretary's decision to accept the Wetumpka property into trust for PBCI is thus plain on the face of the complaint.

Any argument that the Plaintiffs could not have brought their suit at an earlier time because *Carcieri* had not yet clarified the applicability of the IRA is entirely without merit. The Plaintiffs were in no way foreclosed from raising the same arguments that carried the day for their counterparts in *Carcieri*, had they done so in a timely manner. That they chose not to do so cannot inure to their benefit. Accordingly, the Plaintiffs' IRA-based claims should be dismissed with prejudice on the grounds that they are untimely.

D. For all of the foregoing reasons, the Plaintiffs' IRA-based claims and related requests for relief should be dismissed with prejudice.

As the foregoing discussion makes clear, the Plaintiffs' IRA claim suffers from numerous, fatal flaws. The Plaintiffs lack standing to assert it and it is wrong on the merits. It also constitutes an untimely, collateral attack on a decades-old agency decision by parties who eschewed the opportunity to launch a timely, direct challenge to that decision. Therefore, the claim – and all associated requests for relief, necessarily including any declaration regarding the

trust status of the Wetumpka property or the legality of gaming activity thereon – should be dismissed with prejudice as to all defendants pursuant to Fed. R. Civ. P. 12(b)(1) & (6).

III. The Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted against the Tribal Defendants under the Archaeological Resources Protection Act.

The Plaintiffs also have failed to state a claim on which relief can be granted against any of the Tribal Defendants under the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470, *et seq.*[7] As an initial matter, ARPA does not provide for a private right of action. *See Cohen* § 20.02(2)(d). The act is generally directed to federal officials, and while it certainly proscribes certain activities by non-federal entities and individuals, the enforcement mechanisms for these prohibitions consist of statutorily defined civil and criminal penalties. *See* 16 U.S.C. §§ 470ee & 470ff; 43 C.F.R. §§ 7.15-7.17. Importantly, enforcement of the civil penalties provided for in the act is left to the relevant federal land manager, and there is a specific provision providing that private parties who provide information that results in assessment of civil penalties against a violator are entitled to share in the proceeds of the penalty. *See id.* Such an enforcement regime clearly does not contemplate – indeed it leaves no room for – the bringing of private civil actions seeking to enforce ARPA, particularly against non-federal actors. *See, e.g.*, *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596-597 (2d Cir. 2011) (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)) (explaining that federal statutes only give rise to a private right of action where the "text and structure of the statute yield a clear manifestation of congressional intent to create" one); *Love v. Delta Air Lines*, 310 F.3d 1347, 1351-54 (11th Cir. 2002) (discussing and applying *Sandoval*). Accordingly, the Plaintiffs' ARPA-based claims should be dismissed for failure to state a claim upon which relief can be granted.

[7] As the Plaintiffs concede, ARPA applies only to "federal and tribal lands." Am. Compl. ¶ 48. It therefore has no applicability to this case to the extent that the Plaintiffs are successful under their IRA theory. Importantly, however, ARPA cannot support a claim against the Tribal Defendants even after the Plaintiffs' IRA theory is rejected.

Furthermore, although the complaint is recurrently unclear regarding exactly which defendants are the targets of its various allegations, it is impossible to conclude that many of the allegations of putative ARPA violations can apply to any of the Tribal Defendants. For instance, all of the allegations in paragraphs 58 through 65 of the amended complaint hinge on claimed violations of 43 C.F.R. Part 7. Am. Compl. ¶¶ 58-65. By its express terms, Part 7 applies only to "Federal land managers," which "[i]n the case of Indian lands … means the Secretary of the Interior. 43 C.F.R. §§ 7.1(a) & 7.3(c)(2). Accordingly, 43 C.F.R. Part 7 is not applicable to the Tribal defendants, and any claims against the Tribal Defendants based on alleged violations of those regulations should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

Other allegations of ARPA violations consist of claims that activities were undertaken at the Wetumpka site without a valid ARPA permit, pursuant to invalid ARPA permits, or in violation of ARPA permits. *See* Am. Compl. ¶¶ 48-54 & 66. These allegations likewise fail to state a claim against which relief can be granted against any of the Tribal Defendants, as ARPA explicitly provides that "[n]o permit shall be required … for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands or such Indian tribe …." 16 U.S.C. §470cc(g)(1). *See also Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990).

Attakai is instructive on this point. There, the district court dismissed ARPA claims for failure to state a claim upon which relief could be granted when the alleged ARPA violations arose out of the Hopi Tribe's activities on Hopi lands. 746 F. Supp. at 1411. As the court explicitly recognized, "no permit is required, even for excavations of qualifying archaeological resources, by an Indian Tribe on its land." *Id.*

The Plaintiffs concede that it was PBCI that allegedly performed the supposedly unlawful, unpermitted excavations at the Wetumpka site. Am. Compl. ¶¶ 29 & 31. But because PBCI is an Indian tribe and the Wetumpka site consists of lands owned by PBCI, ARPA imposes no permit requirement on any activities undertaken by PBCI or its members. Therefore, any claims against the Tribal Defendants based upon the alleged lack of ARPA permitting, improper ARPA permitting, or violations of unnecessary ARPA permits – indeed, all ARPA-based claims – should be dismissed with prejudice.

Allegations that ongoing activities at the Wetumpka site constitute ARPA violations must also be dismissed with prejudice. ARPA applies only to "purposeful excavation and removal of archaeological resources," not "construction activities [or] … excavations which may, or in fact inadvertently do, uncover such resources." *Attakai*, 746 F. Supp. at 1410. *See also San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860 (D. Ariz. 2003) ("No ARPA permit is required to conduct activities … entirely for purposes other than the excavation or removal of archaeological resources.") The Plaintiffs do not allege that any "intentional excavation" of archeological resources is ongoing at the Wetumpka site. Instead, their allegations involve ongoing construction activities and related "ground disturbing activity." *See* Am. Compl. ¶¶ 30 & 67. Because any such activities fall outside the purview of ARPA, any claims relying on that act as a basis for enjoining or otherwise limiting future construction and development activity at the Wetumpka site should be dismissed with prejudice.

The remaining allegations supposedly supporting the Plaintiffs' ARPA claims, all of which involve putative violations of 16 U.S.C. § 470cc(b), can be summarily addressed. *See* Am. Compl. ¶¶ 55-57. First, § 470cc(b) pertains entirely to determinations that a federal land manager must make prior to issuing an ARPA permit. Because the Tribal Defendants are neither federal

land managers nor required to obtain a permit for activities on their own lands, § 470cc(b) cannot support a claim against them. Even if that provision could support a claim against the Tribal Defendants, however, the allegations in paragraphs 55 and 56 of the complaint are exactly the sort of conclusory, unsupported legal statements devoid of factual support that are insufficient to withstand a motion to dismiss under *Iqbal*. *See Iqbal*, 556 U.S. at 678. The allegations in paragraph 57 suffer the same deficiency, and furthermore allege violation of a notification requirement that is not set forth in the statutory provision allegedly violated. *Compare* Am. Compl. ¶ 57 *with* 16 U.S.C. § 470cc(b)(3). This cannot support an ARPA-based claim against the Tribal Defendants.

For all of the foregoing reasons, it is clear that ARPA does not and was not intended to apply to parties such as the Tribal Defendants or under facts such as those alleged by the Plaintiffs. The Plaintiffs' ARPA-based claims should be dismissed with prejudice.

IV. The Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted under the National Historic Preservation Act.

The Plaintiffs cannot state a claim against the Tribal Defendants under the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470, *et seq.*, because the NHPA does not create a private right of action generally and, in particular, does not give rise to a right of action against non-federal defendants. Authority holds that the NHPA does not give rise to any private right of action and can be enforced only against federal officials through an action brought under the APA. *See, e.g., Karst Envtl. Ed. & Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2009) ("NHPA, like NEPA, contains no private right of action …."); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir. 2005) (affirming dismissal of NHPA claim on the grounds that the act creates no private right of action); *Sisseton-Wahpeton Oyate v. United States Dep't of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009) (holding that "no private right of

action was created by the NHPA" and rejecting older, contrary authority).[8] Because a cause of action under the NHPA may be brought, if at all, only under the APA, which the Plaintiffs do not invoke in their complaint, the Plaintiffs have failed to state a cause of action under the NHPA, and their claims pursuant to that statute should be dismissed with prejudice.

V. The Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted under the Native American Graves Protection and Repatriation Act.

A. The Plaintiffs have failed to allege a valid NAGPRA claim against the Tribal Defendants.

The Plaintiffs likewise have failed to state a claim for which relief can be granted against the Tribal Defendants pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001, *et seq.*[9] The Plaintiffs' claims hinge upon their unsupported assertion that they are the "lineal descendants" of individuals buried at the Wetumpka site. *See* Am. Compl. ¶¶ 10, 82. In the NAGPRA context, "lineal descendant" is a legally significant term with a specific, narrowly defined meaning: "an individual tracing his or her ancestry directly and without interruption … to a ***known Native American individual*** whose remains" are at issue. 43 C.F.R. § 10.14(b) (emphasis added). "This standard requires that the earlier person be identified as an individual whose descendants can be traced." *Id.* There can, by definition, be no lineal descendants entitled to claim remains and associated funerary objects that have not been identified as those of a specific, known, historical individual.

[8] This position is not unanimous, but contrary case law predates and is called into serious question by the Supreme Court's opinion in *Sandoval*, 532 U.S. 275. *Compare, e.g., Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (holding that a private right of action against a federal agency existed under the NHPA) *with Friends of St. Francis Xavier Cabrini Catholic Church v. F.E.M.A.*, 658 F.3d 460, 466 n.2 (5th Cir. 2011) (expressing "serious doubt on the continued validity of the private right of action under the NHPA" that the *Vieux Carre* panel recognized). Furthermore, even courts recognizing a private right of action under the NHPA agree that the act provides no basis for a private litigant to sue a non-federal defendant. *See Vieux Carre*, 875 F.2d at 458 (holding that "only a federal agency" can violate the NHPA and affirming the dismissal of claims against non-agency defendants). Accordingly, even if a private right of action existed under the NHPA, claims under that act against the Tribal Defendants and other non-federal entities should still be dismissed with prejudice.

[9] As noted *supra*, the Plaintiffs' NAGPRA claims necessarily fail if the Plaintiffs' IRA claim succeeds, as NAGPRA applies only to federal and Indian trust lands. *See, e.g.*, 25 U.S.C. §§ 3001-3004.

The complaint sets forth unsupported allegations that the tribal Plaintiffs' membership includes lineal descendants of individuals buried at the Wetumpka site, but it makes no pretense of identifying any such deceased individual or even identifying any specific, living individuals who claim to trace their ancestry directly to someone who conceivably could be interred there. In this context, the claim that members of the Muscogee Creek Nation or the Hickory Ground Tribal Town are "lineal descendants" of unidentified individuals whose mortal remains may be found on the Wetumpka property is a "mere label" that "will not do."[10] *Twombly*, 550 U.S. at 555. Indeed, it is exactly the sort of "naked assertion … devoid of further factual enhancement" that the Supreme Court has held inadequate to sustain a complaint. *Iqbal*, 556 U.S. at 678 (internal quotation omitted). Accordingly, the Plaintiffs' unsupported, conclusory claim that they represent "lineal descendants" of individuals buried at the Wetumpka site is entitled to no weight.

Because the Plaintiffs are not the established lineal descendants of identified individuals whose remains have been recovered from the Wetumpka site, they have no ownership interest in such remains under NAGPRA. The act specifically provides that where lineal descendants, as defined in the act's regulations, cannot be ascertained, remains and associated funerary objects unearthed on Indian lands belong to "the Indian tribe … on whose tribal land such objects or remains were discovered." 25 U.S.C. § 3002(a)(2)(A). It is undisputed that, in this case, that tribe is PBCI. *See* Am. Compl. ¶¶ 23-24. Therefore, absent a showing of lineal descent from an identified individual – facts supporting which are completely absent from the complaint – any human remains or associated funerary objects discovered on the Wetumpka property belong to PBCI. Any allegations or claims for relief against the Tribal Defendants in the complaint that

[10] There is no allegation that Mekko Thompson, the only individual plaintiff, can trace his ancestry to a specific, identifiable individual interred at the Wetumpka property.

hinge upon the Plaintiffs' alleged ownership (or PBCI's lack of ownership) of such objects should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See* Am. Compl. ¶¶ 82-84, 85(b), 86-88 & 90.

Additional allegations by the Plaintiffs fail to state a claim against the Tribal Defendants because they rely on statutory provisions that expressly do not apply to Indian tribes and tribal officials. For example, paragraphs 89-92 of the amended complaint allege violations of 25 U.S.C. §§ 3003 and 3005, both of which apply only to "Federal agenc[ies] and museums." § 3003(a); § 3005(a). Similarly, paragraph 83 alleges violations of 43 C.F.R. § 10.3, which only imposes mandatory duties on "Federal agency official[s]." *See* § 10.3(c). NAGRPA defines Indian tribes separately from both "federal agency," which means "any department, agency, or instrumentality of the United States," and "museum," which means "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C. § 3001(5) & (8). None of the Tribal Defendants fall within the act's definition of "federal agency" or "museum." *See Hawk v. Danforth*, 2006 WL 6928114 at *1 (E.D. Wis. Aug. 17, 2006) ("NAGPRA applies mainly to federal agencies and museums, and the Tribe is neither."). Because §§ 3003 and 3005 and 43 C.F.R. § 10.3 do not apply to the Tribal Defendants, Plaintiffs cannot rely upon them to state a cause of action pursuant to which relief can be granted against those defendants. All attempts to do so should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

The Plaintiffs' attempts to state a NAGPRA claim against the Tribal Defendants based on non-compliance with ARPA are also deficient. *See* Am. Compl. ¶ 93. As explained *supra*, the Tribal Defendants' activities at the Wetumpka property are specifically exempted from ARPA's permitting requirements, and those defendants have not violated ARPA. *See supra*, Part III. Any

attempt to bootstrap a NAGPRA violation onto a non-extant ARPA violation thus fails and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

The Plaintiffs have also failed to state a claim against the Tribal Defendants for violation of 25 U.S.C. § 3002(d), which delineates notification requirements and other actions to be undertaken in the event of an inadvertent discovery of human remains or other protected objects on federal or Indian lands. *See* Am. Compl. ¶ 85. Nowhere in the complaint do the Plaintiffs allege that such inadvertent discoveries have occurred; rather, they repeatedly allege that remains have been excavated intentionally and in violation of ARPA. *See id.* ¶¶ 31, 78 & 84. Such intentional excavations are governed by ARPA and by another provision of NAGPRA, 25 U.S.C. §3002(c). Because the human remains and associated objects at issue were unearthed at the Wetumpka site as a result of intentional excavation activity, § 3002(d) is inapplicable and the Plaintiffs cannot state a claim for relief based on that provision. Any claim based on the allegations in paragraphs 85 and 86 of the complaint should be dismissed pursuant to Rule 12(b)(6).

Even if § 3002(d)(1) were applicable, the Plaintiffs mischaracterize that statute by arguing that it required notification of the Muscogee Creek Nation or any particular federal agency official in this case. *See* Am. Compl. ¶ 85. When an inadvertent discovery takes place on tribal lands, as would be the case here had the Plaintiffs alleged any such discoveries, the only mandatory notification is to "the appropriate Indian tribe." 25 U.S.C. § 3002(d). *See also Rosales v. United States*, 2007 WL 4233060 at *8 (S.D. Cal. Nov. 28, 2007) (explaining that federal officials must be notified when discovery occurs on *federal* lands, and tribal officials must be notified when discoveries occur on *tribal* lands). As the owner of the tribal lands in question, PBCI is the "appropriate Indian tribe" and the proper recipient of any notification required under

§ 3002(d)(1). The Plaintiffs were not entitled to receive notification, and, to the extent that their complaint alleges that the Tribal Defendants violated the law by failing to notify themselves of any discoveries on PBCI land, it is nonsensical. Any claims against the Tribal Defendants based on alleged non-compliance with notification requirements imposed by 25 U.S.C. § 3002(d)(1) must be dismissed with prejudice pursuant to Rule 12(b)(6).

Having failed to establish that the Tribal Defendants' conduct has violated or violates NAGPRA, the Plaintiffs certainly fail to state a claim upon which relief can be granted based upon their conclusory assertion that those defendants "are continuing to violate NAGPRA with the current excavation and construction" at the Wetumpka property. Am. Compl. ¶ 94. It is self-evident that continuing to engage in conduct that has not violated NAGPRA will not result in future NAGPRA violations. Furthermore, this is yet another example of the sort of "naked assertion … devoid of further factual enhancement" that cannot suffice as the basis for a cause of action. *Iqbal*, 556 U.S. at 678 (internal quotation omitted). Any claim against the Tribal Defendants based upon unspecified ongoing or speculative future violations of NAGPRA should be dismissed pursuant to Rule 12(b)(6).

B. Construction or other activities that disturb human remains or funerary objects do not constitute *per se* violations of NAGPRA, which does not require that burial sites be maintained in a pristine, undisturbed condition.

Although it is never entirely clear which alleged statutory violations the Plaintiffs contend support their various requests for relief, it appears that they believe that NAGPRA provides them – as generally alleged but wholly unsubstantiated lineal descendants of those interred at the Wetumpka property – the right to demand that the property remain entirely undisturbed and that any remains found there be left in place or, if already removed, returned to their initial resting place. *See, e.g.*, Am. Compl. ¶¶ 32, 94. NAGPRA does not contemplate or

confer any such right on the Plaintiffs. Rather, it explicitly contemplates the removal of human remains and associated objects and provides steps to be taken for the preservation and transfer or repatriation of such remains to their rightful Indian owners. *See, e.g.*, 25 U.S.C. § 3002(c) (providing for the "intentional removal and excavation" of protected Indian cultural items, which is defined to include human remains); 43 C.F.R. § 10.3 (permitting the excavation and removal of human remains and protect objects and providing appropriate procedures to follow). The only provision of NAGPRA that provides for a cessation of construction or other activity on property containing protected resources is § 3002(d), which provides that construction or other activity shall be suspended for thirty days to allow the relevant federal official or tribe to take steps to protect and preserve such objects pending their repatriation to their rightful owners.

There is nothing in NAGPRA that grants the Plaintiffs the power to insist that the PBCI forever cease construction activities on its own lands. Accordingly, to the extent that the Plaintiffs' request for a permanent injunction on construction or other activity at the Wetumpka site or their demand that the site be restored to some pre-existing condition with remains replaced in their original locations are based on NAGPRA, they far exceed the scope of relief available under that act (or any other law) and should be dismissed for failure to state a claim upon which relief can be granted.

VI. The Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted under the American Indian Religious Freedom Act.

The Plaintiffs have failed to state a claim against the Tribal Defendants based upon the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996. It is settled law that the AIRFA cannot serve as the basis for any legal claims. As the Supreme Court succinctly explained, "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." *Lyng v. N.W. Indian Cemetery Prot.*

Ass'n, 485 U.S. 439, 455 (1988). *See also Winnemem Wintu Tribe v. U.S. Dep't of the Interior*, 725 F. Supp. 2d 1119 (E.D. Cal. 2010) (dismissing claim based on alleged AIRFA violations "[b]ecause AIRFA is simply a policy statement"). Accordingly, the Plaintiffs' claims based upon alleged violations of the AIRFA should be dismissed with prejudice pursuant to Rule 12(b)(6).

VII. The Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted under the Religious Freedom Restoration Act.

Like many of the statutes upon which the Plaintiffs attempt to rely, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*, does not apply to the Tribal Defendants and, even if it did, it would not support a cause of action under the facts alleged in the complaint. The RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion …." 42 U.S.C. § 2000bb-1(a). It goes on to define "government" as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." § 2000bb-2(1). The term "covered entity" is then defined as "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." § 2000bb-2(2). Because the RFRA applies only to certain "government[s]" and does not include Indian tribes or tribal governments within its definition of that term, the statute is by its own terms inapplicable to the Tribal Defendants. The Plaintiffs thus have failed to state a claim against the Tribal Defendants under the RFRA, and any claims based upon alleged violations of that act should be dismissed with prejudice.[11]

Even if the RFRA were applicable to the Tribal Defendants, the Plaintiffs' RFRA-based claims would still be subject to dismissal. The RFRA is implicated only by governmental actions

[11] Indeed, it is far from clear that the Plaintiffs even allege that the Tribal Defendants have violated or could violate the RFRA. *See* Am. Compl. ¶ 96 ("The Plaintiffs' rights have been substantially burdened by the *federal governmental action* in this case …." (emphasis added)). This is one of many instances in which the Plaintiffs have failed to clearly articulate which defendants are alleged to have committed the various alleged statutory and regulatory violations set forth in the complaint.

that "substantially burden" a person's exercise of religion without compelling justification. § 2000bb-1. In order to constitute a "substantial burden" under the RFRA, governmental activity must "completely prevent[] the individual from engaging in religiously mandated activity." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (citations omitted). While the Plaintiffs have made conclusory allegations that the exercise of their religious beliefs has been substantially burdened,[12] they have not alleged any actions by the Tribal Defendants (or any other defendants) that prevent them from engaging in activities mandated by their religious beliefs. Instead, the Plaintiffs have made a number of allegations essentially indicating that the subjective quality of their religious experience is detrimentally affected by the activities alleged in the complaint.

It is settled law that subjective diminishment of religious experiences does not constitute a substantial burden under the RFRA. *See, e.g., Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (*en banc*); *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. United States Dep't of the Interior*, 2012 WL 2884992 at *8 (C.D. Cal. July 13, 2012) (holding that "denial of access [to a sacred site] is irrelevant to establishing a substantial burden pursuant to RFRA"). The Ninth Circuit's opinion in *Navajo Nation* is particularly instructive here. There, the plaintiff tribes sought to prevent the Forest Service from permitting the use of recycled water containing miniscule amounts of human waste to make artificial snow that would be spread on a mountain that the tribal plaintiffs considered sacred. *Navajo Nation*, 535 F.3d at 1062-63. The Court of Appeals concluded that while the proposed activity might "spiritually desecrate a sacred mountain and … decrease the spiritual fulfillment that [the plaintiffs] get from practicing their religion … under Supreme Court precedent, the diminishment of spiritual

[12] Such statements are both conclusory and legal in nature, and thus are not entitled to any deference or presumption of validity from the court. *See, e.g., Iqbal*, 556 U.S. at 678.

fulfillment … is not a 'substantial burden' on the free exercise of religion." *Id.* at 1070. The same is true here. Even accepting as true the Plaintiffs' allegations that the development in the area of Hickory Ground would subjectively decrease the quality of their religious experience, that simply does not rise to the level of a "substantial burden" on the practice of religion necessary to sustain a claim under the RFRA.

The RFRA is not applicable to the Tribal Defendants. And even if it were, the fact that the Tribal Defendants' activities may reduce the sense of spiritual fulfillment that the Plaintiffs derive from the Hickory Ground does not make the Tribal Defendants' actions actionable under the RFRA. Accordingly, all of the Plaintiffs' RFRA-based claims against the Tribal Defendants should be dismissed with prejudice.

VIII. The Plaintiffs Have Failed to Identify Any Legal Basis for the Sweeping Relief Sought in Their Complaint.

For all of the reasons discussed above, none of the Plaintiffs' allegations of statutory violations suffice to state a claim upon which relief can be granted against the Tribal Defendants. Even if the court were to conclude to the contrary, however, it is readily apparent that none of the alleged statutory violations support some of the sweeping relief requested in the complaint. In particular, the Plaintiffs have identified no legal basis – and none exists – for any permanent injunction preventing the Tribal Defendants from "excavating, constructing or in any way disturbing" the grounds of the Wetumpka property or requiring the Tribal Defendants to "restore Hickory Ground to its pre-excavation condition and to reinter the remains and [funerary] objects at the sacred places where they were excavated." Am. Compl., unnumbered paragraph immediately following ¶ 106. Nor have the Plaintiffs cited any law that they even credibly allege would justify a declaration that the Tribal Defendants cannot "continue with the construction and excavation currently taking place" at the Wetumpka property. Am. Compl. ¶ 109.C.

It is hornbook law that "plaintiffs bear the burden of showing their entitlement to relief." *Pittman v. Cole*, 267 F.3d 1269, 1288 (11th Cir. 2001). With respect to the requested items of relief highlighted in the preceding paragraph, the Plaintiffs have failed to even make allegations that, if ultimately proven true, would enable them to carry that burden. Accordingly, the Plaintiffs' claims should be dismissed with prejudice to the extent that they seek (1) a permanent injunction or declaration of illegality of construction and other "ground disturbing activity" on the Wetumpka property or (2) an order requiring the Tribal Defendants to restore the Wetumpka property to any previous state or reinter any remains in situ.

IX. Because the Plaintiffs Have No Valid Claims Against the Tribal Defendants and This Case Cannot Appropriately be Resolved in Their Absence, the Entire Complaint Should be Dismissed Pursuant to Rule 19.

As explained throughout this brief, the Plaintiffs cannot state a valid claim against the Tribal Defendants under any of the myriad theories set forth in the complaint. The complaint therefore should be dismissed as to all Defendants, as the single objective of the case is to compel the discontinuation of certain development and other activities undertaken by PBCI on its own land. Under these circumstances, it is clear PBCI is a required party under Fed. R. Civ. P. 19(a) and that any adjudication of the case in PBCI's absence could not provide an adequate remedy without prejudicing PBCI's interests in the extreme. Rule 19(b) therefore requires dismissal of the entire case. *See, e.g., N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012) (affirming dismissal of a case brought by one Indian tribe that, if adjudicated, would have prejudiced the interests of another tribe that could not be joined); *Pit River Home & Agric. Co-op Ass'n v. United States*, 30 F.3d 1088, 1101-03 (recognizing propriety of dismissal under Rule 19 when necessary tribal defendant could not be joined and holding that the United States cannot adequately represent the interests of an absent tribe in an inter-tribal dispute).

Simply stated, there is no way that any aspect of this case fairly could or should move forward to adjudication without PBCI's participation.

CONCLUSION

This case presents emotionally charged issues that are doubtlessly important to the Plaintiffs. There is similar emotion on the Tribal Defendants' side, as PBCI has struggled to benefit its people by creating viable economic development on its own land through the exercise of its inherent rights as a self-governing sovereign. However, whatever the emotions on either side, the key consideration here is that the complaint has no *legal* merit. The Plaintiffs' beliefs and positions cannot overcome sovereign immunity, nor can they give rise to valid claims in the absence of supporting law. The statutes upon which the Plaintiffs attempt to rely represent a finely wrought and carefully tailored and balanced federal scheme for dealing with Indian tribes, issues pertaining to their sovereignty, and the protection and preservation of historical, cultural, and archeological resources on federal and Indian lands. In considering the appropriate balancing of those interests, Congress has legislated in a way that, for all of the reasons discussed above, leaves the Plaintiffs without a viable cause of action against any of the Tribal Defendants. Accordingly, the Plaintiffs' complaint, and all claims stated therein, should be dismissed with prejudice.

Respectfully submitted this 6th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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