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

MUSCOGEE (CREEK) NATION, et al., Plaintiffs, vs. POARCH BAND OF CREEK INDIANS, et al., Defendants.	)	Civil Action Number: 2:12-cv-01079-MHT-CSC

PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

TABLE OF ABBREVIATIONS

APA:	Administrative Procedures Act
ARPA:	Archaeological Resources Protection Act
BIA:	Bureau of Indian Affairs
Federal Defendants:	United States Department of the Interior, National Park Service, Bureau of Indian Affairs, Tara Sweeney (the Assistant Secretary for Indian Affairs within the Department of the Interior), David Vela (Acting Director of the National Park Service within the Department of the Interior), and David Bernhardt (Secretary of the United States Department of the Interior).
IGRA:	Indian Gaming Regulatory Act
IRA:	Indian Reorganization Act
NAGPRA:	Native American Graves Protection and Repatriation Act
NHPA:	National Historic Preservation Act
NPS Agreement:	National Park Service Agreement, Dkt. 190-1, Ex. I
Poarch:	Poarch Band of Creek Indians
RFRA:	Religious Freedom Restoration Act
RLUIPA:	Religious Land Use and Institutionalized Persons Act
Tribal Defendants:	Poarch, the PCI Gaming Authority, the officials in charge of those entities,[1] and the Poarch Tribal Historic Preservation Officer

[1] For Poarch, these officials are Tribal Council members Stephanie Bryan, Robert McGhee, Amy Bryan, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Arthur Mothershed, and Garvis Sells. Dkt. 190 at 8. For PCI Gaming Authority, these officials are Board members Westly Woodruff, Billy Smith, Eddie Tullis, Teresa Poust, and Timothy Manning. *See* Dkt. 207 at 1; Dkt. 190 at 8-9.

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I. INTRODUCTION

Plaintiffs Muscogee (Creek) Nation, Hickory Ground Tribal Town, and Mekko George Thompson seek relief from this Court for the systematic, wrongful, and ongoing desecration of the sacred historic burial place of their ancestors at Hickory Ground caused by the excavation, construction and operation of an opulent and highly profitable casino by the Poarch Band of Creek Indians. Poarch dug up Plaintiffs' ancestors from their intended final resting places, with some remains and related artifacts removed from the site entirely, while others were scattered about the site and then paved over or buried beneath the buildings.

Poarch's conduct, and the conduct of the individually-named defendants, represents a shocking betrayal of unequivocal commitments made by Poarch when it acquired the Hickory Ground property. Poarch assured Plaintiffs and represented in its application for federal preservation grants that it would protect the property from excavation and development in perpetuity. As a result, Plaintiffs did not oppose that acquisition or Poarch's efforts to have the land taken into trust by the Federal government. The Tribal Defendants then reneged on their promises and desecrated Hickory Ground in pursuit of profit.

Poarch and the Federal Defendants later entered into an agreement that obligated Poarch to take on cultural and historic preservation obligations imposed by various federal statutes. Poarch and its officials violated that agreement and the applicable federal laws by failing to consult with, or obtain consent from, Plaintiffs before conducting excavation and construction at Hickory Ground. The Federal Defendants failed in their independent obligations to oversee and enforce those obligations, and by allowing the illegal conduct. Plaintiffs are now barred from exercising and fulfilling the tenets of their religion because they are prevented from returning their ancestors to their rightful resting places and conditions.

Defendants do not dispute that Hickory Ground was and is a sacred place, that Plaintiffs' ancestors were buried there, or that the ancestors have been ripped from the resting place that the Tribal Defendants promised Plaintiffs they would preserve in perpetuity. Instead, they raise a

plethora of technical legal reasons why they cannot be held responsible for the harm they have caused.

At this stage of the litigation, Plaintiffs' only obligation is to allege a "short, plain statement of the case" demonstrating that their claim for relief is plausible. For the reasons explained in detail below, Plaintiffs have more than met that burden. Plaintiffs request that the Court deny the motions to dismiss in their entirety and allow this litigation to proceed so that these claims can be presented for resolution on the merits based on a fully developed record.

II. BACKGROUND

This case arises from the Poarch Band of Creek Indians' desecration of the sacred grounds and burial places of Plaintiffs' ancestors in Wetumpka, Alabama. The Muscogee (Creek) Nation, Hickory Ground Tribal Town, and the Tribal Town chief, Mekko Thompson, know this sacred place as "Hickory Ground." Poarch acquired Hickory Ground by promising it would always preserve and protect the site. Instead, it removed over 57 bodies of Plaintiffs' ancestors, and thousands of Plaintiffs' cultural artifacts, from the sacred place to bulldoze it for construction of Poarch's third casino. Plaintiffs brought this lawsuit to seek redress for this greedy, tragic, outrageous, and illegal act.

The Hickory Ground Tribal Town was one of over forty Tribal Towns within the Muscogee (Creek) Nation before the Nation was forcibly removed from Alabama to Oklahoma Territory in the early 1800s on the Trail of Tears. Hickory Ground was the last tribal capital of the Muscogee (Creek) Nation before removal. The members of the Hickory Ground Tribal Town took the embers from the ceremonial grounds at Hickory Ground on their long journey to Oklahoma Territory to maintain their sacred ties to their homeland and the original birthplace of their Tribal Town. The members of the modern-day Hickory Ground Tribal Town are matrilineal descendants of those buried at Hickory Ground in Alabama, and continue their centuries-old religious ceremonies today. *See* Dkt. 190 at 7, 13, 72–73.

Although Poarch never historically resided at Hickory Ground, it acquired Hickory Ground in 1980 using federal preservation grant funds. In its application for the funds, Poarch

promised that it would "prevent development on the property" and preserve Hickory Ground "without excavation." *See id.* at 19. Poarch emphasized that this preservation would benefit Plaintiffs: because Hickory Ground "is of major importance in the history of the Muscogee (Creek) Nation," the Site would "be a place where Creeks from Oklahoma may return and visit their ancestral home; the "existing Hickory Ground tribal town in Oklahoma" in particular "will be pleased to know their home in Alabama is being preserved." *Id.* Vowing that its purchase of Hickory Ground would save the property from being demolished by development, Poarch cautioned that "[d]estruction of archaeological resources in Alabama . . . destroy[s] the cultural history of Creek people." *Id.* at 5.

The federal government awarded the requested preservation grant funds to Poarch. Pursuant to the standard terms of preservation grant awards, a protective covenant was placed on Hickory Ground for 20 years. Despite its repeated promises to protect the sacred site, Poarch began a years-long desecration of Hickory Ground after the covenant expired in 2000 to clear the land for construction of its third casino. Dkt. 190 at 24–44. At the time, Poarch already had casinos in Atmore and Montgomery. Poarch did not notify the Muscogee (Creek) Nation about the excavations until 2006. *Id.* at 33.[2]

To make way for the $246 million casino resort, Poarch exhumed over 57 human remains of Plaintiffs' ancestors and removed thousands of artifacts in a massive excavation that concluded in 2011. In 2012, Poarch unilaterally reburied many of these remains *away from* their original resting places, using invented ceremonies that disrespected the dead and left the spirits

[2] Plaintiffs dispute the Tribal and Federal Defendants' assertions that Plaintiffs knew in 1992 or 2002 that Poarch did not plan to abide by its promises to preserve Hickory Ground. For example, a Bureau of Indian Affairs Archeologist and Federal Preservation Officer issued a Briefing Statement to the Assistant Secretary of Indian Affairs recounting that Poarch conducted limited exploratory testing at the Site around 1992 "to determine if some portion of the site could be developed without damaging archeological resources," and such activity "ceased after 1993" after the testing found "no area where such resources were totally absent." Dkt. 200-2 at PDF p. 29. Indeed, as of April 1999, Poarch's Office of Cultural and Historic Field Methodology had a policy that "'[u]nder no circumstances are the burials on the Poarch Creek Indians Reservations, or lands under their control, to be excavated, nor are they to be subjected to any examination or testing. Burial sites take precedence over any project or program plan.'" Dkt. 190 at 25-26 (quoting Dkt. 190-1, Ex. J). Hickory Ground Tribal Town's October 19, 2002 letter ultimately states that Hickory Ground Tribal Town heard rumors through third parties that Poarch may be disturbing the site, and "hope[s] this is not the case." Dkt 200-1 at PDF page 26; *see also* Dkt. 190 at 26, ¶ 92.

of Plaintiffs' ancestors in perpetual unrest. Many remains and artifacts have never been reburied. *Id.* at 5–6, 30–37.

The Department of the Interior, National Park Service, and Bureau of Indian Affairs facilitated Poarch's desecration of Hickory Ground by illegally providing assistance to Poarch and failing to comply with applicable law.

Poarch's mistreatment of Plaintiffs' ancestors and cultural items, and the Federal Defendants' facilitation of this mistreatment, violated the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, Archaeological Resources Protection Act, Religious Freedom Restoration Act, Indian Reorganization Act, Poarch's preservation agreement with the National Park Service, and Poarch's promises to protect Hickory Ground "without excavation." In addition, Poarch has been unjustly enriched to the tune of hundreds of millions of dollars through its breach of its promises to protect Hickory Ground in perpetuity. Dkt. 190 at 46–48, 53–76. Now, having affirmatively chosen to move forward with construction without legal basis, even *after* Plaintiffs filed this lawsuit, Poarch calls the casino "improvements on the property" that it insists it should get to keep. Dkt. 202 at 72. The law does not allow this.

Plaintiffs brought this action to bring peace to their ancestors by returning them to their intended final resting places in accordance with their religious duties. Plaintiffs seek to hold Poarch to its promises to protect and preserve Hickory Ground, and to hold Federal Defendants to their obligations under the law. Hickory Ground should be restored, to the greatest extent possible, to its condition prior to construction of the casino. The remains and artifacts should be returned to their original resting places.

III. STANDARD FOR MOTION TO DISMISS

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) allows a party to assert by motion a defense of "failure to state a claim upon which relief can be granted." To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563.

"Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the...claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (alteration in original) (quoting *Twombly*, 550 U.S. at 555). "In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id*. at 93–94. The court must assume that the factual allegations set forth in the complaint are true and must construe them in the light most favorable to the plaintiff. *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1215 (11th Cir. 2012); *Arthur v. Thomas*, 974 F. Supp. 2d 1340, 1343 (M.D. Ala. 2013). All reasonable inferences must be drawn in the plaintiff's favor. *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1043 (11th Cir. 2019).

A motion under Rule 12(b)(6) does not pose the question of whether the plaintiff can ultimately prevail on the merits—"a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556; *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2020) ("Whether the plaintiff ultimately can prevail on the merits is a matter properly determined on the basis of proof, which means on a summary judgment motion or at trial by the judge or a jury, and not merely on the face of the pleadings."). The burden of persuasion is on the party moving under Rule 12(b)(6) to demonstrate that no legally cognizable claim for relief exists. *Cohen v. Bd. of Trs. of the Univ. of the D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) (quoting 5B Wright & Miller, *supra* § 1357) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists."). The complaint may be dismissed "only if it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

IV. ARGUMENT

A. Plaintiffs state a claim over which this Court has jurisdiction under the Indian Reorganization Act.

Federal Defendants and Tribal Defendants both argue that this Court should dismiss Plaintiffs' Indian Reorganization Act claim because it is untimely and because Plaintiffs do not have standing. Both groups of Defendants' arguments are addressed here.[3] Plaintiffs' Indian Reorganization Act claim is timely because their claim is an "as-applied" challenge under the Administrative Procedures Act that was filed within six years of the date Interior's decision was applied to Plaintiffs. Plaintiffs also have standing because their particularized, concrete, and ongoing injuries result from Interior's decision to take land into trust and thereby allow the excavation and construction that desecrated Hickory Ground, and Plaintiffs' requested relief would redress that injury by unwinding the trust decision that enabled the illegal excavation and construction.

1. The Indian Reorganization Act and its application here.

The Indian Reorganization Act of 1934, 25 U.S.C. § 5123 *et seq.*, was intended to reverse prior policy of weakening the status of tribes as self-governing entities and dispossessing them of their lands. *See* Op. Solic. Dept. Int. M-37045, *Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles*, 2017 WL 7805664, at *5 (Jan. 18, 2017). Indians had been "stripped of their property," and the Indian Reorganization's land provisions were intended to "put[ ] a halt to the loss of tribal lands." *See id.*

[3] Plaintiffs' Indian Reorganization Act claim is against Secretary Bernhardt, not Tribal Defendants, consistent with innumerable other cases challenging the Secretary's authority to take land into trust. Though Tribal Defendants appear to acknowledge this, *see* Dkt. 202 at 21 (addressing the claim "to the extent that it is asserted against the Tribal Defendants"), they dedicate ten pages to opposing the claim, *see id.* at 16-25. Tribal Defendants' Rule 19 argument with respect to this claim is addressed in Section IV.J of Plaintiffs' Response to Tribal Defendants' Motion to Dismiss.

As Poarch emphasized in its application for federal preservation funds, Hickory Ground is within the Muscogee (Creek) Nation's original homelands. Dkt. 190 at 18–19. Hickory Ground was the Nation's last tribal capital before the Nation was stripped of its land in the southeast and forcibly removed to what is now Oklahoma. *See* Dkt. 190 at 13. Poarch, on the other hand, stated in its petition for federal recognition that it historically resided within an 18-mile radius around Tensaw, Alabama, about 160 miles away from Wetumpka. *See* Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment, p. 1–2 of 121 (Dec. 29, 1983), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/013_prchcr_AL/013_pf.pdf.[4]

One way the Indian Reorganization Act provided means for tribes to regain lands was through authorizing the Secretary of the Interior to acquire land and hold it in trust for the purpose of providing land for tribes "now under Federal jurisdiction." *Carcieri v. Salazar*, 555 U.S. 379, 381–82 (2009) (citing 25 U.S.C. §§ 5108 & 5129 (previously §§465 & 479). In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that qualifying tribes are "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395; *see also* Dkt. 190 at 21.

The federal government has construed "under federal jurisdiction" to involve an inquiry into whether (1) the United States took actions reflecting federal obligations, duties, responsibility for, or authority over a tribe in or before 1934, and (2) that relationship continued through 1934. Dkt 190 at 21 (citing Sol. Op. M-37029, *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf). On March 9, 2020, the same day Plaintiffs filed their Second Amended Complaint, the Solicitor's Office withdrew Opinion M-37029[5] and issued Opinion M-37054, available at https://www.doi.gov/sites/doi.gov/files/uploads/m-37054.pdf, along with a March 5, 2020 memo

[4] Tensaw too was part of the Muscogee (Creek) Nation's territory, so the individuals living there "applied for and were given permission by the council of the Creek Nation to settle on the Alabama-Tensaw River lands." *Id.* at 3.
[5] *See* Withdrawal Memorandum at https://www.doi.gov/sites/doi.gov/files/uploads/m-37055.pdf (last visited July 2, 2020).

titled "Determining Eligibility under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act of 1934" (available at https://www.indianz.com/News/2020/03/11/doisol031020.pdf) and a March 10, 2020 memo titled "Procedure for Determining Eligibility for Land-into-Trust under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act" (available at https://www.indianz.com/News/2020/03/11/doisol030520.pdf) (all sites last visited July 2, 2020). While this new guidance has been criticized as "incomprehensible and so convoluted that it couldn't guide any lawyer in the field,"[6] it turns on the same inquiry as the government's prior interpretation: whether the tribe had a government-to-government relationship with the United States in 1934. *See* Sol. Mem., *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act* 6, 8. The guidance establishes specific presumptive indicia of having such a government-to-government relationship, *see id.* at 2–7, and if no such indicia exists for a tribe, then Interior is required to consider whether the "cumulative weight of an applicant's evidence" establishes that the tribe was "under federal jurisdiction." As demonstrated by the facts alleged in the Second Amended Complaint and discussed below, Poarch cannot demonstrate the existence of the required "government-to-government" relationship, so the new guidance does not alter Poarch's failure of that test.

Poarch was not federally recognized until 1984. It has admitted in its own submissions to the federal government and federal courts that it had no relationship with the federal government for at least 140 years before it was recognized, including in 1934. In 2005, Poarch emphasized that "the federal government clearly ended its relationship with Poarch Creek following removal [in 1832]" and "the historical record amply demonstrates that," as of the 1830s, the federal government had "terminated the government-to-government relationship with the Creek in

[6] Megan Mineiro, *Native Tribe Could Lose Its Land Under New Trump Administration Guidelines*, Courthouse News Service (May 20, 2020), https://www.courthousenews.com/native-tribe-could-lose-reservation-land-under-new-trump-administration-guideline/ (quoting District of Columbia district court judge in hearing regarding an Indian Reorganization Act challenge).

Alabama through a broad course of dealings that included express statements by top federal officials disclaiming any federal relationship with the Tribe" until Poarch was federally recognized in 1984. Dkt. 190 at 21 (citation omitted). In the 1950s, Poarch took a consistent position, stating that it was "but a newly formed band of descendants of the original Creek nation" that was "not under the guardianship of the Federal Government" and had "possessed no territory and were not dealt with by the United States as a group" since the 1830s. *Id.* at 22–23 (citations omitted).

The United States agreed that there was no government-to-government relationship with Poarch before 1984. The Department of the Interior Solicitor's Office stated in 2008 that it "does not believe that the Poarch Creek Band ever had a government-to-government relationship with the United States until it was [recognized in 1984]," and in the same year the National Indian Gaming Commission agreed that "the United States specifically and repeatedly disclaimed any relationship with the Poarch Band" from the 1830s until 1984. *Id.* at 22 (alteration in original; citations omitted). In 1952, the United States wrote in an appellate brief to the United States Court of Claims that "those [Creeks] who remained in the East [after removal] abandoned their tribal relationships; and they never continued a tribal government recognized by the United States and they entered into no treaties or other political arrangements with the United States . . . and only recently organized themselves, apparently for the purpose of this suit." *Id.* at 23 (citation omitted). The brief also stated that these eastern Creeks were "not recognized by the administrative or legislative arm of the Government." *Id.* (citation omitted). The Court of Claims found that the United States had "no occasion for further dealings with [those Creeks who remained east of the Mississippi] since 1832." *Id.* at 24 (quoting *McGhee v. Creek Nation*, 122 Ct. Cl. 380, 391 (1952), *cert. denied*, 344 U.S. 856 (1952)).

Plaintiffs allege that because Poarch was not "under federal jurisdiction" within the meaning of the Indian Reorganization Act, Interior never had authority to take the Hickory Ground Site into trust for Poarch. *Id.* at 24, 45. Plaintiffs also allege that the federal government performed new applications of its land-into-trust decision through (1) granting permits under the

Archaeological Resources Protection Act covering certain time frames and allowing excavation at Hickory Ground that occurred through the year 2011, *see* Dkt. 190 at 28, 30, and (2) denying Plaintiff Mekko Thompson's Native American Graves Protection and Repatriation Act claim in 2009 based on its determination that Poarch retained legal interest in the "NAGPRA items from the Hickory Ground site," *id.* at 34.

Because the Hickory Ground Site was not validly taken into trust, Interior did not have authority to grant permits allowing Poarch to undertake the archaeological excavations. Dkt. 190 at 45. Any such excavation would be subject to state law. *Id.* Likewise, in denying Mekko Thompson's resulting NAGPRA claim, the federal government erred in determining that the lands from which the items were taken were "tribal lands" belonging to Poarch within the meaning of NAGPRA. Dkt. 190 at 34.

Absent the land-into-trust decision and the Department of the Interior's re-applications of that decision with respect to the excavation and disposition of excavated remains and other objects, Poarch could not have conducted the excavation or built its casino. Indeed, as discussed in Section IV.A.2 of Plaintiffs' Response to Tribal Defendants' Motion to Dismiss, neither federal nor state law allows gaming at the Site, so there would have been no point to constructing the casino. Dkt. 190 at 45–46.

2. Plaintiffs' Indian Reorganization Act claim is timely because the Federal Defendants applied their decision to Plaintiffs less than six years before this lawsuit was filed.

Both the Federal Defendants and Tribal Defendants argue that Plaintiffs' claim that the Department of the Interior did not have authority to take the Hickory Ground Site into trust for Poarch is untimely because the land was taken into trust in 1984 and the statute of limitations under the Administrative Procedures Act ("APA") therefore expired in 1990. This argument incorrectly assumes that Plaintiffs' cause of action accrued on the date of agency action in 1984. Instead, because Plaintiffs' are challenging Interior's action as *ultra vires*, and because Interior

did not apply its decision to Plaintiffs until within six years of this lawsuit, Plaintiffs' claim is timely.

The APA allows a party who is "adversely affected or aggrieved" by a federal agency's decision to challenge the action as *ultra vires*, procedurally deficient, or as an arbitrary policy choice. 5 U.S.C. §§ 702, 706(2)(A)–(D). Such a challenge must be "filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

When an APA claim accrues depends on the nature of the claim. Claims under the APA that challenge the action "on the grounds that an agency exceeded its constitutional or statutory authority"—just as the Plaintiffs' Indian Reorganization Act claim does—accrue when the agency applies the action to the "specific challenger." *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1270 (M.D. Ala. 2000) (first citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); then citing *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990)). As stated above, Plaintiffs allege that the federal government applied its land-into-trust decision to Plaintiffs through (1) granting ARPA permits that allowed the excavation that occurred through 2011 and (2) denying Plaintiff Mekko Thompson's Native American Graves Protection and Repatriation Act claim in 2009 based on its determination that Poarch retained legal interest in the "NAGPRA items from the Hickory Ground site," Dkt. 190 at 34.

a) ***The Department of the Interior applied its decision to Plaintiffs by issuing ARPA permits dependent on both "Indian lands" status and prior notification to the Muscogee (Creek) Nation.***

As explained in Section IV.D below, the Archaeological Resources Protection Act requires that permits first be obtained from the federal government before excavations on "Indian lands" by third parties can occur. 16 U.S.C. § 470ee(a). Here, the Department of the Interior illegally granted permits to Auburn University to excavate on "Indian lands." *See* Dkt. 190 at 29–30, 62–63; Dkt. 200-1 at PDF p. 37. That excavation extended through 2011, and the permits covered only some of this time period; much of the excavation took place without a permit at all. Dkt. 190 at 28, 63.

Before issuing those permits, Interior was required to (1) determine that it had the authority to issue the permits; and (2) "notify any Indian tribe which may consider the site as having religious or cultural importance," 16 U.S.C. § 470cc(c). Dkt. 190 at 61. The notice requirement is intended to give tribes an opportunity to intervene in development activity in order to safeguard cultural items. *See* S. Rep. No. 101-473, at 10 (1990). Interior incorrectly determined the lands were "Indian lands," *see, e.g.*, Dkt. 200-1 at PDF p. 37, Section 8, and issued the permits without notifying or consulting with the Muscogee (Creek) Nation, who clearly attached religious and cultural importance to these "Indian Lands." Dkt. 190 at 54–55, 61–63. "With the grant of each ARPA permit, Interior performed a new application of its unauthorized decision to take lands into trust for Poarch, as the ARPA permits only allowed excavations to take place 'on lands under the jurisdiction of the Department of Interior.'" Dkt. 190 at 30.

With respect to the accrual of this claim, Poarch first notified Plaintiffs of the excavation in 2006, and only through subsequent related public records requests did Plaintiffs receive copies of the permits for the excavation that were illegally issued by Interior. Due to no fault of Plaintiffs, both the Tribal Defendants and the Federal Defendants failed to notify Plaintiffs of the excavation in violation of the law, and Plaintiffs first learned that Interior had issued the permits after being notified of the excavation in 2006 by Poarch. This claim is subject to equitable tolling and therefore accrued when Plaintiffs obtained records of the permits. *See Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 306-CV-00657-LRH-RAM, 2008 WL 5111036, at *5 (D. Nev. Dec. 3, 2008) ("Equitable tolling applies in situations where, 'despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim,'" and "[t]he party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstance beyond the party's control . . . and that these circumstances go beyond a 'garden variety claim of excusable neglect") (*quoting Socop–Gonzalez v. I.N.S.*, 272 F.3d 1176, 1193 (9th Cir. 2001)) (alteration in original). Plaintiffs' claim

arising from Interior's re-application of its land-into-trust decision in issuing ARPA permits is therefore timely under the APA.

b) *The Department of the Interior also applied its decision to Plaintiffs by disposing of Mekko Thompson's NAGPRA claim in 2009 on the basis that the Site qualified as "tribal lands."*

In 2008, Mekko George Thompson, on behalf of Plaintiffs, submitted a NAGPRA complaint to the federal government relating to the excavation at Hickory Ground. Dkt. 190 at 33–34. The Department of Interior rejected Mekko Thompson's claims in 2009, based largely on its incorrect determination that Poarch retained legal interest in the "NAGPRA items from the Hickory Ground site." *Id.* at 34. Under NAGPRA, the tribal landowner is second in line for repatriation after lineal descendants for items excavated from "tribal land," *see* 25 U.S.C. § 3002(a); Dkt. 190 at 60. "Tribal land" means, in relevant part, "all lands within the exterior boundaries of any Indian reservation." 25 U.S.C. § 3001(15).[7] In disposing of Mekko Thompson's claim, Interior determined that NAGPRA and its provisions governing "tribal land" applied to Hickory Ground, and disregarded Mekko Thompson's lineal descendancy claim in deciding that Poarch, as the owner of "tribal land," retained legal interest in the excavated items. The fatal flaw in this argument is that Interior did not have authority to take Hickory Ground into trust as a reservation for Poarch, so Hickory Ground was not then, and is not now, "tribal land."

Thus, Interior's 2009 denial of Mekko Thompson's NAGPRA claim was "a new application of its unauthorized decision to take lands into trust for Poarch, as the determination relied not only on an incorrect application of NAGPRA, but on the presumption that the lands were 'tribal lands' belonging to Poarch within the definitions in NAGPRA." Dkt. 190 at 34. Plaintiffs' claim arising from Interior's re-application of its land-into-trust decision in disposing of Mekko Thompson's NAGPRA claim is therefore timely under the APA.

[7] "Tribal land" also includes "dependent Indian communities" and lands administered for Native Hawaiians, but those categories are irrelevant here as no party has suggested the lands qualify under either definition.

c) *Plaintiffs' Indian Reorganization Act claim did not arise more than six years prior to December 12, 2012, when they filed this lawsuit.*

As alleged in the Second Amended Complaint, "[b]ecause the Hickory Ground Site was not validly taken into trust, Interior did not have authority to grant permits allowing the phase III archaeological excavations." Dkt. 190 at 45. Plaintiffs' Indian Reorganization Act claim arising from Interior's re-application of its land-into-trust decision accrued after 2006, as discussed above. Interior also re-applied its land-into-trust decision in 2009 when it rejected Mekko Thompson's NAGPRA claim.

Federal Defendants and Tribal Defendants incorrectly argue that *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) and *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 944 (11th Cir. 2016) are controlling, see Dkt. 200 at 19–20; Dkt. 202 at 23–24. Defendants are wrong, because unlike the plaintiffs in *PCI Gaming* and *Hildreth*, Plaintiffs here could not have challenged the land-into-trust decision within six years of that decision.

A basic requirement of an APA claim is that the plaintiff be "adversely affected or aggrieved" by a federal agency's decision. 5 U.S.C. § 702. In 1984 when the Secretary of the Interior took Hickory Ground into trust for Poarch, the Muscogee (Creek) Nation had no reason to know it would be adversely affected by the decision. *See generally* Plaintiffs' Response to Tribal Defendants' Motion to Dismiss, §§ IV.C & D. Poarch itself had represented just four years earlier that it would preserve Hickory Ground "without excavation," and the Muscogee (Creek) Nation reasonably relied on those assurances. *See id.* As discussed above, it was not until within six years of this lawsuit that Interior's decision was applied to adversely affect Plaintiffs.

In contrast, the plaintiffs in *PCI Gaming* and *Hildreth* were aggrieved immediately upon the agency taking action. In *PCI Gaming*, the Eleventh Circuit held that Alabama's request to amend its complaint to add an "as-applied" APA claim against the Secretary would be futile because Alabama was notified of the land-into-trust decision that removed state power from the lands in 1984. *See* 801 F.3d at 1292. The court did not go into great detail on its ruling, but

Interior is required to notify an affected state of a land-into-trust decision precisely because of the resulting jurisdictional shift and related immediate effects on the state. *See* 25 C.F.R. § 151.12(d)(2)(ii).

Hildreth also involved a state governmental entity that was immediately impacted by the land-into-trust decision. There, the plaintiff Tax Assessor of Escambia County sought a ruling that Poarch's Atmore lands were subject to county taxation despite being notified at least as early as 1986 that the land-into-trust transaction removed the land from the County's taxing jurisdiction. 656 F. App'x at 937, 943–44.

Plaintiffs' "as-applied" challenge to the Secretary's *ultra vires* action is thus distinguishable from the plaintiffs in *PCI Gaming* and *Hildreth*. Because the Federal Defendants did not apply the decision to Plaintiffs, and Plaintiffs were not "aggrieved," until within six years of the date of filing their lawsuit, their APA claim is timely. And, to the extent the parties disagree over when the Plaintiffs were aggrieved, Plaintiffs are entitled to resolve that factual dispute on the merits.

3. Plaintiffs have standing to bring their Indian Reorganization Act Claim because they have alleged particularized, concrete, and actual or imminent injury resulting from the Secretary's decision that will be redressed by a finding that Hickory Ground is not validly held in trust.

Both Tribal Defendants and Federal Defendants argue that Plaintiffs lack standing to bring an Indian Reorganization Act-based challenge to Hickory Ground's trust status because their injuries are not fairly traceable to the land-into-trust decision and could not be redressed by a favorable ruling. Dkt. 200 at 23, Dkt. 202 at 16-21. This is plainly wrong. But for Interior making the legally incorrect determination that the Hickory Ground Site was "Indian land," it would not and could not have granted the ARPA permits allowing excavation at the Site, and the excavation and subsequent construction of the casino would not have happened. Indeed, there would have been no reason to make way for a casino when gambling would have been illegal under both state and federal law. *See* Dkt. 190 at 46. Reversing Interior's decision will directly redress this error. Furthermore, Plaintiffs go into great detail in the Second Amended Complaint

about the significant and ongoing harm the excavation and construction is causing to them. Plaintiffs' requested injunction to unwind the illegal excavation and construction would redress their injury. *See* Dkt. 190 at 76–77. Plaintiffs therefore have standing.

Article III injury "may be minimal" and even "'an identifiable trifle' is sufficient to establish standing" if the alleged harm affects the plaintiff in a "personal and individualized way." *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (first quoting *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008); then quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). As the cases discussed below make clear, standing exists if the harms suffered by the party challenging the "fee-to-trust" decision would have been avoided if that decision had come out the other way.

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, another case challenging a fee-to-trust decision, the plaintiff "contended that he lived 'in close proximity to' the [property] and that a casino there would 'destroy the lifestyle he has enjoyed' by causing 'increased traffic,' . . . 'an irreversible change in the rural character of the area,' and 'other aesthetic, socioeconomic, and environmental problems.'" 567 U.S. 209, 213 (2012). The Court held that the "economic, environmental, and aesthetic harm [suffered] as a nearby property owner" established standing. *Id.* at 224–228. And the Court of Appeals decision that the Supreme Court affirmed found "no doubt" that Article III standing was satisfied: "[T]he impact of the Band's facility on [the plaintiff's] way of life *constituted an injury-in-fact fairly traceable to the Secretary's fee-to-trust decision, an injury the court could redress with an injunction that would in effect prevent the Band from conducting gaming* on the property." *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) (emphasis added), *aff'd and remanded sub nom. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

Similarly, where plaintiffs lived near a planned casino and would suffer increased traffic as a result of construction of the casino, they satisfied standing requirements. *See Geyser v. United States*, No. CV 17-7315-DMG (ASX), 2018 WL 6990808, at *7 (C.D. Cal. Aug. 30, 2018). In *Upstate Citizens for Equal., Inc. v. United States*, two towns, a civic organization, and

several residents of the area near the questioned trust land who alleged "loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site," "loss of tax revenue currently generated by the agricultural land that comprises the casino site," and "the loss of business and recreational opportunities, such as retail stores and restaurants, that will be forced out by the casino" was enough to establish standing. 841 F.3d 556, 565–66 (2d Cir. 2016).

Likewise, the Picayune Tribe had standing to contest a land-into-trust decision for another tribe because the planned gaming on that land would "have a devastating economic impact" on the Picayune Tribe. *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 56 n.7 (D.D.C. 2013). The injury to the Picayune Tribe "will be fairly traceable to the defendants' conduct since it will result, if at all, because of the defendants' decision to transfer-in-trust the . . . Site and permit gaming thereon." *Id.* And, "the Picayune Tribe's injury in fact is likely to be redressed by a favorable decision because, if the plaintiffs are successful on the merits, the Secretary's determinations will likely be vacated, and the economic injury to the Picayune Tribe will not occur." *Id.; see also TOMAC v. Norton*, 193 F. Supp. 2d 182, 188 (D.D.C. 2002), *aff'd sub nom. TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (the link between Interior's actions and a group of residents' injuries to their enjoyment of their neighborhoods and viewing local wildlife is "easy to identify" "because the taking of the site in trust is a necessary prerequisite to both Class II and III gaming," and the residents' claims against the land-into-trust decision were redressable "since a decision *not* to take the land in trust would prevent the [tribe] from building a casino on that site and from satisfying the requirements of IGRA for casino gambling") (emphasis in original); *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *20 (W.D.N.Y. July 8, 2008) (Plaintiffs' challenge to land-into-trust decision to prevent casino construction was redressable because "were the Court to agree that the Buffalo Parcel is not 'Indian lands' within the meaning of the IGRA, no [tribal] gaming can lawfully occur on that restricted fee land").

Plaintiffs' alleged harms are several orders of magnitude worse than the harms alleged in *Patchak* and the other cases discussed above. As discussed in greater detail in Sections IV.C and D of Plaintiffs' Response to Tribal Defendants' Motion to Dismiss, Plaintiffs have rights to the preservation of the land arising not only from Poarch's promises but also from common law rights to gravesites and their contents. As Plaintiffs allege in the Second Amended Complaint, Hickory Ground is sacred to them; it has "profound cultural and religious importance." Dkt. 190 at 14. Hickory Ground's desecration is violating their deeply held religious beliefs and destroying their cultural history—just as Poarch warned it would in its application for federal preservation funds. *See* Second Amended Complaint, Dkt. 190 at 13–14, 17, 19, 28, 31–32, 37, 44, 72–76. Plaintiffs' cultural identity and religion is inextricably tied to their homelands and ancestors; they owe constant and continuing duties to care for their ancestors and their ceremonial grounds. *See id.* at 72–76. Thus, Hickory Ground is part of Plaintiffs' culture and way of life. The unique importance of Hickory Ground to Plaintiffs is similar to the significance of Bethlehem in Christianity, and to Philadelphia in the history of the United States. This place dates back to the time of the beginnings for Hickory Ground Tribal Town and was the last tribal capital of the Muscogee (Creek) Nation prior to its forcible removal from the southeast. *See* Dkt. 190 at 13. Thus, Plaintiffs will suffer ongoing injury to their cultural identity, heritage, and way of life if Poarch's continuing desecration of Hickory Ground is allowed.

Like the injury to the Picayune Tribe in *Stand Up for California!*, the injuries to Plaintiffs here are traceable to the Secretary's decision and are likely to be redressed by a favorable decision from this Court. The ongoing harm to Plaintiffs has resulted because of the Secretary's decision to take the land into trust and permit excavation thereon, just as the Picayune Tribe's injury would result from the "defendants' decision to transfer-in-trust the . . . Site and permit gaming thereon." *Stand Up for California!*, 919 F. Supp. 2d at 56 n.7.

Finally, Plaintiffs' injury in fact is likely to be redressed by a favorable decision, because as with the Picayune Tribe's claim, "if the plaintiffs are successful on the merits, the Secretary's determinations will likely be vacated, and the economic injury to the [plaintiff] will not [continue

to] occur." *Id.* Federal Defendants' and Tribal Defendants' arguments that Poarch would still be able to develop its property in fee are simply red herrings. The tribes in all of the above cases already held their lands in fee prior to the land-into-trust decision. *See Patchak*, 632 F.3d at 703 (noting "[t]he Band owned the land and wanted to construct and operate a gambling facility there"); *Geyser*, 2018 WL 6990808, at *2 (noting the property was "fee land owned by the Tribe"); *Upstate Citizens*, 841 F.3d at 563 ("All of the land was already owned by the Tribe."); *Stand Up for California!*, 919 F. Supp. 2d at 55 (noting the transaction was "fee-to-trust"). Absent the disputed fee-to-trust decisions, each tribe could still develop its fee land in accordance with applicable law—development that might cause similar injuries to the plaintiffs. However, the issue is not what speculative use might have been made of the *fee* land—which use the parties are free to dispute once the use is made—but rather what use and resulting harm arose from the *trust* decision. *See Stand Up for California!*, 919 F. Supp. 2d at 56 n.7; *TOMAC*, 193 F. Supp. 2d at 188; *Citizens Against Casino Gambling in Erie Cty.*, 2008 WL 2746566, at *20.

Plaintiffs have shown they will suffer a particularized, concrete, and actual or imminent injury resulting from the Secretary's decision that will be redressed by a finding that Hickory Ground is not validly held in trust. Plaintiffs therefore have standing. Their Indian Reorganization Act claim is also timely because it was raised within six years of Interior applying its decision to Plaintiffs. This Court should deny Federal Defendants' and Tribal Defendants' motions to dismiss this claim.

B. The Plaintiffs properly allege subject matter jurisdiction for their NAGPRA claim.

The Federal Defendants have moved to dismiss the Plaintiffs' NAGPRA claim for lack of subject matter jurisdiction. They argue that the Plaintiffs have not alleged an appropriate agency action under the APA, and that the Court accordingly lacks jurisdiction. But jurisdiction and the right of action in this case is provided by NAGPRA. And while the APA provides a waiver of sovereign immunity in this case, the APA's procedural requirements, including its various requirements regarding agency actions, are not jurisdictional. So dismissal on that basis for lack

of jurisdiction cannot be granted, and the Federal Defendants' motion to dismiss the NAGPRA claim for lack of subject matter jurisdiction must be denied. Even if that were not the case, the Plaintiffs' NAGPRA claim is sufficient to withstand the motion to dismiss.

1. Dismissal cannot be granted on the basis of a procedural requirement in the APA that is not jurisdictional in nature.

NAGPRA provides both subject matter jurisdiction and a private right of action in this case. And the APA provides a waiver of sovereign immunity for NAGPRA claims against the federal government. Accordingly, this Court has subject matter jurisdiction over the Plaintiffs' NAGPRA claim against the Federal Defendants. Importantly, the procedural requirements of the APA are ***not*** jurisdictional and do not limit the APA's waiver of sovereign immunity in this case. Thus, they cannot serve as a basis for dismissal for lack of subject matter jurisdiction, as the Federal Defendants argue.

a) NAGPRA grants a private right of action.

NAGPRA's enforcement provision, 25 U.S.C. § 3013, provides: "The United States district courts *shall have jurisdiction* over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." (Emphasis added.) NAGPRA's implementing regulations also recognize that "the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act." 43 C.F.R. § 10.17(a).

Not surprisingly, given that plain language, courts are in agreement that NAGPRA's enforcement provision vests the federal courts with jurisdiction over claims alleging violation of NAGPRA. *E.g.*, *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 259 (3d Cir. 2014), *cert. denied*, 136 S.Ct. 84 (2015) ("NAGPRA's jurisdictional provision vests federal courts with jurisdiction over 'any action brought by any person alleging a violation of' NAGPRA."); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir. 1996) (stating that Section 3013 "explicitly vests jurisdiction in federal courts,"); *Yankton Sioux Tribe v. U.S. Army Corps of Eng's*, 209 F.

Supp. 2d 1008, 1016 (D. S.D. 2002) ("The Court has jurisdiction in this case pursuant to 25 U.S.C. § 3013….").

Courts are also in agreement (and the Federal Defendants concede) that NAGPRA's enforcement provision creates a private right of action.[8] Indeed, as the *Bonnichsen* court stated, "[i]t is difficult to see how Congress could be more express than that." 969 F. Supp. at 627. Accordingly, NAGPRA provides both jurisdiction and a private right of action in this case.

b) Plaintiffs' NAGPRA claim for non-monetary relief can proceed under APA Section 702's broad waiver of sovereign immunity.

The APA provides a waiver of sovereign immunity for NAGPRA claims against the federal government.[9] The APA states, in pertinent part:

> [1] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. [2] An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The distinction (in brackets, above) between the first and second sentences is important for purposes of this discussion. As discussed below, it is the second sentence of Section 702 that provides the waiver of sovereign immunity, and that is relevant here.

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[8] *E.g.*, *Geronimo v. Obama*, 725 F. Supp. 2d 182, 185 (D.D.C. 2010) (stating that Section 3013 "expressly provides for a private right of action."); *White v. Univ. of Cal.*, No. 12-01978, 2012 WL 12335354, at *2 (N.D. Cal. Oct. 9, 2012) (unpublished)\ ("Significantly, NAGPRA includes an enforcement provision that creates a private right of action."), *aff'd*, 765 F.3d 1010 (9th Cir. 2014); *Rosales v. United States*, No. 07-0624, 2007 WL 4233060, at *3 (S.D. Cal. Nov. 28, 2007) (unpublished) ("NAGPRA creates a private right of action…"); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003) ("There is a private right of action under NAGPRA…."), *aff'd* 417 F.3d 1091 (9th Cir. 2005); *Bonnichsen v. U.S. Dep't of Army*, 969 F. Supp. 614, 627 (D. Or. 1997) (stating that NAGPRA appears to establish a private right of action); Dkt. 200 at 25 ("NAGPRA contains a private right of action....").

[9] At least one court, in one of the most prominent NAGPRA cases to date, has suggested that an argument can be made that NAGPRA itself provides a waiver of sovereign immunity. *Bonnichsen*, 969 F.Supp. at 627 n.17 ("An argument can be made in favor of an implied waiver of sovereign immunity in § 3013, since a primary purpose of NAGPRA is the repatriation of remains and other items that are in the possession of federal agencies or that may be discovered on federal lands."). Although the Plaintiffs do not waive this argument, they do not assert it for purposes of the Federal Defendants' motion to dismiss.

The waiver of sovereign immunity in the second sentence of Section 702 is not just for APA claims, but is for all claims seeking non-monetary relief. *E.g.*, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("We have previously, and repeatedly, rejected [the argument that the waiver applies only to actions arising under the APA], expressly holding that the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'"). This specifically includes NAGPRA claims. *White*, 765 F.3d at 1024 (stating that suits concerning the United States under NAGPRA are authorized under the APA, "which contains an express limited sovereign immunity waiver for suits seeking non-monetary relief against the United States"); *Geronimo*, 725 F. Supp. 2d at 185 ("The waiver of sovereign immunity applicable to a claim under NAGPRA is the waiver found within the [APA]."); *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886 ("The APA waives the sovereign immunity of the Government for NAGPRA claims.").

The combination of a grant of jurisdiction with a private right of action in NAGPRA, and the a waiver of sovereign immunity in the APA, provides this Court with subject matter jurisdiction over the Plaintiffs' claim of NAGPRA violations, and the Federal Defendants' motion to dismiss for lack of jurisdiction should be denied.

c) Section 702's waiver of sovereign immunity is not dependent upon an "agency action" being reviewed.

Despite the statutory guidance and precedent, the Federal Defendants nevertheless argue that this Court lacks subject matter jurisdiction over the Plaintiffs' NAGPRA claim. They say that a discrete agency inaction in violation of a nondiscretionary duty is required for a waiver of sovereign immunity, and hence for jurisdiction, under the APA. Not true. The "agency action" of Section 702's first sentence does not apply here, and the APA's other procedural requirements are not jurisdictional in nature.

The "agency action" provision in the first sentence of Section 702 is not relevant here, because "[c]laims not grounded in the APA," like the NAGPRA claim here, "'do[] not depend on the cause of action found in the first sentence of [Section] 702.'" *Navajo Nation v. Dep't of*

the Interior, 876 F.3d 1144, 1170 (9th Cir. 2017) (second alteration in original) (citation omitted). As discussed above, NAGPRA provides its own cause of action, so only the waiver of sovereign immunity in the second sentence of Section 702 is relevant. In 1976, Congress amended Section 702 to add the second sentence, which provides "a broad waiver of sovereign immunity for actions seeking relief other than money damages against federal agencies, officers, or employees." *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011). The two sentences of Section 702 are quite distinct from one another. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 774 (7th Cir. 2011) ("The first and second sentences of § 702 play quite different roles." (internal quotation marks omitted)). The first sentence provides an "omnibus judicial-review provision, which permits suit for violations of numerous statutes…*that do not themselves include causes of action for judicial review*," while the second sentence provides the "broad waiver of sovereign immunity" discussed above. *Navajo Nation*, 876 F.3d at 1168 (emphasis added) (internal quotation marks omitted).

Importantly, the second sentence is not limited by the first sentence. By placing the waiver of sovereign immunity in Section 702, Congress did not mean to limit that waiver to actions arising under the APA. *E.g.*, *Delano*, 655 F.3d at 1345 (rejecting an argument that "the placement of the waiver of sovereign immunity in section 702 of the APA suggests that the waiver was meant to be limited to actions arising under the APA itself or under a statute directed at the review of 'agency action' as that term is defined in the APA."); *see also Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (rejecting an argument that the waiver of sovereign immunity in the second sentence applies only if there is an agency action under the first sentence, finding that the second sentence contains no limitation regarding "agency action," and concluding that the waiver "was clearly intended to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of 'agency action'"); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 399–400 (3d Cir. 2012) (agreeing with *Delano*, *Presbyterian Church*, and others on this point). This differs from the situation where a litigant is claiming a right of review under the first sentence of Section 702.

Compare Lujan v. Nat'l Wildlife Fed'n., 497 U.S. 871, 882 (1990) (review under the *first sentence* of Section 702 (and not under a separate federal statute, as is the case here) must identify some "agency action"). Thus, the waiver of sovereign immunity in the second sentence of Section 702 applies in this case without regard to the "agency action" provision of the first sentence of Section 702.

The waiver of sovereign immunity also applies regardless of the APA's other procedural requirements, because the APA's other procedural requirements are not jurisdictional in nature. The U.S. Supreme Court recognized decades ago that the APA is not a jurisdiction-granting statute. *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (holding that the APA does not grant subject-matter jurisdiction). As discussed above, it merely provides a cause of action for some cases (for which there must still be an independent basis of jurisdiction), and a waiver of sovereign immunity. And while a handful of federal courts over the subsequent years occasionally and incorrectly "loosely referred" to certain requirements of the APA as being "jurisdictional," *Trudeau*, 456 F.3d at 184, that has changed drastically in more recent years.

In the 2006 case of *Arbaugh v. Y & H Corp.*, the U.S. Supreme Court established a "readily administrable bright line" regarding whether statutory requirements are jurisdictional:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

546 U.S. 500, 515-16 (2006) (internal footnote and citation omitted).

The *Trudeau* court was one of the first federal appellate courts to consider the effect of the APA's requirements after *Arbaugh*. The *Trudeau* court noted that the courts that had previously "loosely referred" to certain requirements of the APA as being "jurisdictional," 456 F.3d at 184, did not have "the benefit of the 'bright line' that the Court recently drew between jurisdictional and nonjurisdictional requirements in *Arbaugh*." *Id*. at 184 n.6. The *Trudeau* court proceeded to consider the effect of Section 704 of the APA, which requires "agency action" for

claims made reviewable by statute (such as NAGPRA) and "final agency action" for claims for which there is no other remedy. *Id.* at 184-85; 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). The "final agency action" requirement of Section 704 was the one relevant in *Trudeau*. The *Trudeau* court reaffirmed prior cases holding "that the APA's final agency action requirement is not jurisdictional," 456 F.3d at 184, held that Section 702's waiver of sovereign immunity applied regardless of whether there was a "final agency action," and stated that the "district court therefore had subject-matter jurisdiction ... and its dismissal of the complaint for lack of jurisdiction pursuant to Rule 12(b)(1) was erroneous." *Id*. at 187.

Nearly every federal appellate court since has followed suit in holding that the APA's procedural requirements are not jurisdictional in nature. While these cases have most often pertained to the requirements of Section 704, courts have reached the same conclusion with respect to other provisions of the APA as well, and the conclusion should be the same for any requirements of the APA. *Cf.* 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Jurisdiction* § 3659 (4th ed.) ("[N]umerous circuits have held that the APA's waiver of sovereign immunity under § 702 extends to all challenges to Government actions, ***regardless of whether other requirements of the APA cause of action***—particularly that agency action be final—***are met***." (emphasis added)).

Thus, the federal appellate courts are now in "near-unanimity" that the second sentence of Section 702 waives sovereign immunity broadly for all causes of action that meet its terms, and does not incorporate the requirements of Section 704. *Navajo Nation*, 876 F.3d at 1172.[10]

[10] The D.C. Circuit, Federal Circuit, and 1st, 3rd, 6th, 7th, 8th, and 9th Circuits are all in accord. *E.g.*, *Navaho Nation*, 876 F.3d at 1172; *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017); (stating that the finality requirement and adequate remedy bar of Section 704 does not determine whether there is subject matter jurisdiction); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) ("We now join all of our sister circuits who have done so in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of 'agency action' or 'final agency action' as set forth in § 704."); *Treasurer of N.J.*, 684 F.3d at 400 ("Accordingly, section 704 in limiting review to 'final agency action' concerns whether a plaintiff has a cause of action under the APA that can survive a motion to dismiss under Rule 12(b)(6) but does not provide a basis for dismissal on grounds of sovereign immunity."); *Delano*, 655 F.3d at 1344 ("We hold that section 702 of the APA waives sovereign immunity for non-monetary claims against federal agencies….[i]t is not limited to 'agency action' or 'final agency

The Eleventh Circuit has not addressed this issue since the Supreme Court decided *Arbaugh*. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240 (11th Cir. 2003) (referring loosely, in a pre-*Arbaugh* decision, with little analysis, to Section 704's "final agency action" requirement as "implicat[ing] federal subject matter jurisdiction"). As noted by the *Trudeau* court, the *National Parks* court did not, at that time, have the benefit of *Arbaugh*'s bright-line rule regarding jurisdictional and nonjurisdictional requirements. *See* 546 U.S. at 515-16. And *Arbaugh* itself suggests that this type of decision, which is not "meticulous" on the "subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy," "should be accorded 'no precedential effect'" on the question of a federal court's authority to adjudicate a claim. *Id.* at 511. Moreover, the *National Parks* court relied on D.C. Circuit case law for the proposition that finality is jurisdictional under the APA, 324 F.3d at 1236 (citing *Indep. Petrol. Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001)), but the D.C. Circuit no longer follows the case law on which *National Parks* relied. *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 & n.8 (D.C. Cir. 2010) (commenting that cases such as *Independent Petroleum Association* ignored a U.S. Supreme Court footnote "that the judicial review provisions of the APA are not jurisdictional"); *Friends of Animals v. Bernhardt*, __ F.3d __, 2020 WL 3244011, at *6 (D.C. Cir. 2020) ("[F]inality under the APA is no longer considered jurisdictional"); *Flytenow, Inc. v. F.A.A.*, 808 F.3d 882, 888 (D.C. Cir. 2015) ("After a period of uncertainty in our circuit, it is 'now firmly established' that finality under the APA is non-jurisdictional."); *National Parks* can also be distinguished because it involved claims brought directly under the APA, rather than

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action,' as those terms are defined in the APA."); *Michigan*, 667 F.3d at 775 (explaining that "the conditions of § 704 affect the right of action contained in the first sentence of § 702, but they do not limit the waiver of immunity in § 702's second sentence"); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007) ("We have previously held that the APA's finality requirement is not jurisdictional in nature."); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ("[T]he waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief."). The Fifth Circuit appears to be alone in holding otherwise. *Navajo Nation*, 876 F.3d at 1172 n.36. *See Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (treating "agency action" as a requirement for establishing a waiver of sovereign immunity under Section 702).

under another federal statute providing jurisdiction and a private cause of action, as here. 324 F.3d at 1231.

Since *Arbaugh*, several circuits have similarly found that a provision of the APA that excepts "agency action [that] is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is not jurisdictional, *e.g.*, *Chehazeh v. Attorney General of the U.S.*, 666 F.3d 118, 125 n.11 (3d Cir. 2012) (agreeing with *Ochoa* and *Vahora* that even if Congress has committed an action to agency discretion, it does not deprive the courts of jurisdiction under the APA); *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010) (agreeing with *Ochoa* that the issue of whether an action is committed to agency discretion "is not termed properly one of jurisdiction"); *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010) (explaining that if a plaintiff complains about an action that is committed to agency discretion by law, it does not mean that a court lacks subject matter jurisdiction over the claim; instead the court will properly grant a motion to dismiss the complaint for failure to state a claim). Notably, the *Ochoa* court, which the other circuits followed, was clearly applying *Arbaugh* in its decision, noting with an omitted citation to *Arbaugh* that "[t]he Supreme Court's recent proscription against 'drive-by jurisdictional rulings' compels us to make this distinction in the interest of facilitating the clarity sought by the Court." *Id*.

d) APA Section 706 is procedural and neither confers nor restricts the Court's jurisdiction.

While there appears to be a dearth of similar case law regarding 5 U.S.C. § 706 specifically, which is the provision the Federal Defendants rely upon for their jurisdictional argument, all of the same considerations apply to the requirements of that section, which are procedural, not jurisdictional, in nature.[11] First, as discussed above, the APA is not a jurisdiction-granting statute. Nor does it restrict jurisdiction. *Trudeau*, 456 F.3d at 185 (stating that "the APA neither confers ***nor restricts*** jurisdiction") (emphasis added). If the provisions of Section 706 do

[11] Section 706 sets forth procedures regarding how the reviewing court should conduct its review. It is discussed in more detail in Section IV.B.2.c.(2)below.

not grant jurisdiction, then, by the same token, they cannot deprive a federal court of any jurisdiction it otherwise has. *Cf. id*. at 184–85 (making the same point about Section 704). Accordingly, the only issue relating to jurisdiction is whether Section 706 limits Section 702's waiver of sovereign immunity. It does not.

As the courts in the decisions discussed above have reasoned in reaching their conclusions that other provisions of the APA are not jurisdictional, neither the text, nor the legislative history, of Section 702 supports any limitation of its waiver. As the *Presbyterian Church* court stated first:

> On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable. Nothing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of "agency action."

870 F.2d at 525 (internal footnote omitted). Attempting to restrict the waiver of sovereign immunity, such as to only actions challenging agency action, "offends the plain meaning of the amendment." *Id*. This reasoning applies with equal force here. Subsequent courts have similarly noted the absence of various terms from the text of Section 702 in concluding that the absent terms did not limit Section 702's waiver. *E.g.*, *Delano*, 655 F.3d at 1344 (noting that nothing in the text of Section 702's waiver limits its scope to "agency action" or "final agency action"); *Trudeau*, 456 F.3d at 187 (noting that Section 702's waiver sentence "does not use either the term 'final agency action' or the term 'agency action.'"). It is axiomatic that courts must not read into statutes language that is not there. On its face, Section 702's waiver does not reference Section 704's requirements of "agency action" or "final agency action," much less the "discrete agency inaction in violation of a nondiscretionary duty" requirement under Section 706(1) advanced by Federal Defendants as the basis for dismissal (language which is *not even in Section 706(1)*, but rather is a *paraphrase of case law interpreting 706(1)*). Accordingly, the express language of Section 706 does not limit Section 702's waiver of sovereign immunity.

Moreover, nothing in the legislative history of the 1976 amendment suggests that Congress intended to limit the waiver. *Presbyterian Church*, 870 F.2d at 525. "On the contrary, Congress stated that 'the time [has] now come to eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Id*. (emphasis and alteration in original); *see also*, *e.g.*, *Trudeau*, 456 F.3d at 187 ("Nor does the legislative history refer to either limitation. To the contrary, the House and Senate Reports' repeated declarations that Congress intended to waive immunity for 'any' and 'all' actions for equitable relief against an agency make clear that no such limitations were intended." (internal citations omitted)).

"The APA is a procedural statute that provides no substantive requirements but merely provides the framework for judicial review of agency action." *Ochoa*, 604 F.3d at 549. Nothing about Section 706 suggests that it is any different than the rest of the APA in that regard. It simply sets forth procedures regarding how a reviewing court should conduct its review. *See Delano*, 655 F.3d at 1344 (characterizing Sections 704 and 706 as providing merely "rules governing" judicial review under the APA). Other courts are in agreement that Section 702's waiver of sovereign immunity is not limited by the APA's procedures and review provisions, which would logically include those in Section 706. *E.g.*, *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ("[T]he waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief."). *Michigan*, 667 F.3d at 775 ("Moreover, the waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself."). Like the rest of the APA, Section 706 is procedural, not jurisdictional, in nature, and it does not limit the waiver of sovereign immunity provided in Section 702.

The primary case upon which the Federal Defendants rely, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), or *SUWA*, as they refer to it, is not to the contrary. Nowhere in *SUWA* does the Court discuss, much less decide, the issues of whether Section 706 is

jurisdictional in nature, or whether it limits Section 702's waiver of sovereign immunity.[12] And even if the Court's silence on those issues could somehow be construed to mean something, only Section 706(1) was at issue in that case, *id*. at 57, and the Plaintiffs here have primarily, although not exclusively, invoked Section 706(2), which *SUWA* does not address. *See generally Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1031 n.6 (9th Cir. 2020) (characterizing *SUWA* as "inapposite" in a case involving Section 706(2), because SUWA pertains to Section 706(1)); *All. to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d. 1, 10 (D.D.C. 2007) (noting that *SUWA* "does not reach claims encompassed within § 706(2)," which are "unaffected by *SUWA*").

This Court should decline the Federal Defendants' invitation to issue a proscribed "drive-by jurisdictional ruling[]" that conflates the APA's nonjurisdictional procedural requirements with subject matter jurisdiction. *Cf. Arbaugh*, 546 U.S. at 511. Dismissal of Plaintiffs' NAGPRA claim for lack of subject matter jurisdiction would be erroneous. *Trudeau*, 456 F.3d at 187 (holding that the APA's waiver of sovereign immunity applied regardless of whether there was a final agency action, so the district court had subject matter jurisdiction and "its dismissal of the complaint for lack of jurisdiction pursuant to Rule 12(b)(1) was erroneous."). Because the Federal Defendants ***only*** argue that the NAGPRA claim should be dismissed for lack of jurisdiction, their motion to dismiss should be denied with respect to the NAGPRA claim without further consideration.

2. Even if the APA's procedural requirements were jurisdictional (they are not), Plaintiffs have plausibly alleged a claim based on agency actions.

Only if this Court were to hold, contrary to the great weight of authority discussed above, that the APA's procedural requirements are jurisdictional, must it consider the Federal

[12] *SUWA*, which is discussed in more detail in Section IV.B.2.c.(2), below, does state that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64 (emphasis in original). However, in light of *Arbaugh*'s more recent admonitions, and the subsequent case law discussed above concluding that the APA's procedural provisions are nonjurisdictional and do not limit Section 702's waiver of sovereign immunity, this is more appropriately understood as speaking to the issue of whether a plaintiff has stated a claim.

Defendants' subject matter jurisdiction arguments under Rule 12(b)(1). "[A] federal court may dismiss a federal question claim for lack of subject matter jurisdiction only if: (1) 'the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction'; *or* (2) 'such a claim is wholly insubstantial and frivolous'" (meaning that the claim has no plausible foundation or is clearly foreclosed by a prior Supreme Court decision). *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (citing *Bell v. Hood*, 327 U.S. 678 (1946)). Notably, the test is *not* whether a claimant can prevail on the cause of action. *Id*.

If the Federal Defendants are correct that Section 706(1) is jurisdictional, then the question of whether the Plaintiffs have satisfied that section intertwines jurisdiction and the merits, and consequently is not appropriate for dismissal under 12(b)(1). *See Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) ("[T]he district court should only rely on Rule 12(b)(1) '[i]f the facts necessary to sustain jurisdiction *do not implicate the merits of plaintiff's cause of action.*'") (citing *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir.1997)); *S.E.C. v. Mut. Benefits Corp.*, 408 F.3d 737, 741–42 (11th Cir. 2005) (if the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court is to "find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case"); *see also* Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1350 (3rd ed.).

In any event, the Court should ***not*** proceed to consider dismissal of the Plaintiffs' NAGPRA claim any further, because the Federal Defendants have not argued that the NAGPRA claim should be dismissed on any basis ***other than*** lack of subject matter jurisdiction. Specifically, they ***have not*** argued that the NAGPRA claim should be dismissed for failure to state a claim. While the Federal Defendants move to dismiss the case as a whole for both lack of subject matter jurisdiction and failure to state a claim, they specifically argue one basis or the other (or sometimes both bases) for dismissal with respect to each claim. And nowhere do they argue that the NAGPRA claims should be dismissed for failure to state a claim.

If the Court nevertheless proceeds to further consider dismissal of the NAGPRA claim, it must do so under the standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Treasurer of N.J. v. United States*, 684 F.3d 382, 400 (3d Cir. 2012) ("Accordingly, section 704 in limiting review to 'final agency action' concerns whether a plaintiff has a cause of action under the APA that can survive a motion to dismiss under Rule 12(b)(6) but does not provide a basis for dismissal on grounds of sovereign immunity."); *Chehazeh v. Attorney General*, 666 F.3d 118, 125 n.11 (3d Cir. 2012) (agreeing with *Ochoa* that even if Congress has committed an action to agency discretion, it does not deprive the courts of jurisdiction; rather, the "question is whether a plaintiff can state a claim for relief from such action under the APA"); *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010) (explaining that if a the action at issue is committed to agency discretion, the court should grant a motion to dismiss the complaint for failure to state a claim); *Geronimo v. Obama*, 725 F.Supp.2d 182, 186 (D. D.C. 2010) (dismissing a NAGPRA claim for under Rule 12(b)(6) where the plaintiff alleged no federal agency involvement whatsoever); *cf. Arbaugh*, 546 U.S. at 511 (criticizing "unrefined dispositions" that do not meticulously distinguish between dismissal for lack of subject matter jurisdiction or failure to state a claim).

Plaintiffs have met the *Twombly* standard for pleading a plausible claim. Much of the Federal Defendants' argument is premised on the assertion that the land in question is "tribal land," not "Federal lands," for purposes of NAGPRA. However, as discussed in Section IV.B.2, *infra*, at least some of the land in question is "Federal lands" for purposes of NAGPRA. And, as discussed in Section IV.B.2.c, *infra*, the Plaintiffs have alleged violations of NAGPRA that also constitute sufficient agency actions under the APA. No "final agency action" is required under the APA in this case. Accordingly, even though the Court should ***not*** undertake further consideration of the Plaintiffs' NAGPRA claim at this point, if it does, it should still deny the Federal Defendants' motion to dismiss the NAGPRA claim.

a) *"Federal lands" are at issue in this case for purposes of NAGPRA.*

The Plaintiffs have alleged that the Hickory Ground Site includes both reservation land and trust land. Dkt. 190 at 64. Importantly, the Federal Defendants do not contest that allegation. Land status matters here because NAGPRA distinguishes between "tribal land" and "Federal lands" in some ways, as discussed in Section IV.B.2.c, below. While reservation land constitutes "tribal land" for purposes of NAGPRA, any off-reservation trust land in this case constitutes "Federal lands" for purposes of NAGPRA.

NAGPRA defines "Federal lands," in relevant part, as "any land other than tribal lands which are controlled or owned by the United States." 25 U.S.C. § 3001(5). Land held in trust by the United States is plainly "owned or controlled by the United States," so as long as the trust land in question here does not fall within the definition of "tribal land" (which it does not, for the reasons explained below), then it constitutes "Federal lands" for NAGPRA purposes.

NAGPRA defines "tribal land," in relevant part, as "(A) all lands within the exterior boundaries of any Indian reservation; [and] (B) all dependent Indian communities." 25 U.S.C. § 3001(15). NAGPRA's implementing regulations indicate that the phrase "dependent Indian communities" should be interpreted pursuant to 18 U.S.C. § 1151. 43 C.F.R. § 10.2(f)(2)(ii). Section 1151 defines the term "Indian country" for purposes of criminal jurisdiction, but its definition of "Indian country" is sometimes used for other purposes as well. In paraphrase, Section 1151 defines "Indian country" as (a) reservation land, (b) dependent Indian communities, and (c) certain allotments not relevant here. Significantly, however, ***only*** the "dependent Indian communities" category of Section 1151 is relevant for NAGPRA purposes, because it is the only category referenced in NAGPRA's implementing regulations with respect to the definition of "tribal lands." *See also* 60 Fed. Reg. 62134, 62140 (Dec. 4, 1995) (referencing the "dependent Indian communities" subsection of 18 U.S.C. 1151(b) specifically).

The Federal Defendants argue that all of the land in question, apparently including any off-reservation trust land, is "Indian country," and therefore constitutes "tribal land" under NAGPRA. But they are painting with far too broad a brush. Under NAGPRA, the question is not

whether land is "Indian country," but rather, whether it meets ***NAGPRA's definition of "tribal land"*** because it is either (1) within the exterior boundaries of an Indian reservation, or (2) a dependent Indian community. If Congress had intended the definition of "tribal land" in NAGPRA to merely mirror the definition of "Indian country" in 18 U.S.C. § 1151, it could have simply said so, as it has done in numerous other federal statutes. *E.g.*, 15 U.S.C. § 657a(b)(5)(C)(i) (defining the term "Indian reservation" as having "the same meaning as the term 'Indian country' in section 1151 of Title 18," with certain exceptions); 25 U.S.C. § 1304(a)(3) ("The term 'Indian country' has the meaning given the term in section 1151 of Title 18"); 28 U.S.C. § 1738B(b)(9) (defining the term "State" to include "Indian country (as defined in section 1151 of title 18)").

Congress did not make NAGPRA's definition of "tribal land" coextensive with "Indian country." Rather, it included within NAGPRA's definition of "tribal land" only the narrower categories of (1) reservation land and (2) dependent Indian communities. Had Congress wished to include off-reservation trust land within the coverage of NAGPRA, it certainly knew how to do so. *See, e.g.*, 25 U.S.C. § 1903(10) (defining "reservation" as including both "Indian country" as defined in 18 U.S.C. § 1151 ***and*** any trust lands not covered by that section); 25 U.S.C. § 2703 (4) (defining "Indian lands" as including both reservation lands and trust lands). The fact that it did not do so here indicates that Congress did not intend to include off-reservation trust land in the definition of "tribal land" (unless it constitutes a dependent Indian community; this is not the case here). *See also* 60 Fed. Reg. 62134, 62140 (rejecting a suggestion to include off-reservation trust lands in the definition of tribal lands found in NAGPRA's implementing regulations because it would be "inconsistent with the Act's definition of tribal lands"); *id*. at 62142 ("Lands outside the exterior boundary of an Indian reservation that are held in trust by the United States for an Indian tribe do not meet the statutory definition of tribal lands. These lands are under federal control. . . .").

Accordingly, to the extent the Hickory Ground Site is within the boundaries of Poarch's reservation, it constitutes "tribal land" under NAGPRA. The parts of the Hickory Ground Site

that include trust land lying outside the boundaries of Poarch's reservation constitute "Federal lands" under NAGPRA because they do not qualify as a "reservation" under NAGPRA.

b) *The off-reservation trust land is not "reservation" land for purposes of NAGPRA.*

As noted above, the Federal Defendants have not challenged the Plaintiffs' allegation that the Hickory Ground Site includes both reservation land and trust land. The Federal Defendants contend that the term "reservation" as used in NAGPRA should be interpreted coextensively with the term "reservation" under the Indian Country Statute, 18 U.S.C § 1151, which recognizes informal reservations. *See* Dkt. 200 at 25. This argument fails for three reasons. First, what matters here is whether the land constitutes reservation land for purposes of NAGPRA, ***not*** for purposes of Section 1151(a). Second, NAGPRA's definition of "tribal land" should be interpreted narrowly, according to what it actually says (which the cases cited by the Federal Defendants do not contradict). Third, reading NAGPRA's "reservation" provision to include informal or *de facto* reservations would render its "dependent Indian communities" provision largely superfluous, in contravention of the canon of statutory construction against surplusage.

The issue here is whether the off-reservation trust land at Hickory Ground constitutes land "within the exterior boundaries of any Indian reservation" for purposes of NAGPRA pursuant to 25 U.S.C. § 3001(15)(A). Notably, neither that section, nor the relevant provision of NAGPRA's implementing regulations, 43 C.F.R. § 10.2(f)(2)(i), refers to 18 U.S.C. § 1151(a). Accordingly, this Court need not, and should not, turn to case law interpreting 18 U.S.C. § 1151(a) to determine whether the off-reservation trust land in this case constitutes reservation land for purposes of NAGPRA. According to a plain meaning interpretation, it does not—it is off the reservation, and therefore not "within the exterior boundaries of any Indian reservation."

Congress could easily have incorporated 18 U.S.C. § 1151's definition of Indian country into NAGPRA definition of "tribal land" by reference, but it did not. And it could have made NAGPRA's definition of "tribal land" more inclusive, but it did not. This indicates that NAGPRA's definition of "tribal land" is specific and limited, and should not be given the

flexible interpretation, based on a different statute, that the Federal Defendants urge. Indeed, the legislative history of NAGPRA supports this proposition. H.R. Rep. No. 101-877, at 15 (1990) ("The term 'tribal land' . . . is for purposes of this Act only and may be inapplicable in other circumstances.").

The cases the Federal Defendants cite do not involve NAGPRA's definition of "tribal land." Rather, they involve the question of whether certain land constitutes "Indian country" more broadly. *See* Dkt. 190 at 25. Those cases also involve completely different legal issues. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 507 (1991) (addressing state regulatory authority in Indian country); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 116 (1993) (addressing federal criminal jurisdiction in Indian country). Accordingly, they do not support the proposition that the reservation land provision of NAGPRA's definition of "tribal land" should be read to include informal reservations as in case law interpreting a definition of an entirely different term ("Indian country") in an entirely different federal statute (18 U.S.C. § 1151(a)).

The issue in *Citizen Band Potawatomi Indian Tribe* was whether a state had the authority to tax a tribe's cigarette sales on trust land. 498 U.S. at 507. The state argued that the tribe's sovereign immunity should not apply because the land was not a "reservation." *Id*. at 511. The Court did not specifically cite 18 U.S.C. § 1151, and (unlike the instant case) no specific definition in another federal statute was at issue. The Court's holding was narrow: it held that the trust land "qualifies as a reservation ***for tribal immunity purposes***." *Id*. at 510 (emphasis added).

The issue in *Sac & Fox Nation* was whether a state had the authority to impose its income and motor vehicle taxes on tribal members in a tribe's territory. 508 U.S. at 116. The state argued that the tribe's reservation had been disestablished. *Id*. at 121. The Court cited 18 U.S.C. § 1151's definition of "Indian country," *id*. at 115, 123, but no specific definition in another federal statute was involved. While the Court alluded to the possibility that an "informal reservation" might constitute "Indian country," *id*. at 123, 125, the Court did not so hold.

Instead, the Court remanded the case for a determination of whether the land in question was "Indian country." *Id*. at 126, 128.

The circuit court cases to which the Federal Defendants cite are likewise inapposite. *See* Dkt. 200 at 25 n.3 (citing *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), and *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986)). *Roberts* and *Azure* are both criminal cases involving questions of federal criminal jurisdiction under 18 U.S.C. § 1151 directly. The *Roberts* court, admitting that "the relationship between informal reservations and dependent Indian communities is not entirely clear under the current case law," did not actually determine whether the tribal government complex in question was a reservation under 18 U.S.C. § 1151(a) or a dependent Indian community under 18 U.S.C. § 1151(b), although it did determine that the land was Indian country regardless. 185 F.3d at 1133. And while the *Azure* court was more decisive, its holding was narrow, like that of the *Potawatomi* Court—it held that the tribal housing area in question "can be classified as a *de facto* reservation, ***at least for purposes of federal criminal jurisdiction***." 801 F.2d at 339 (emphasis added).

Accordingly, the cases upon which the Federal Defendants rely illustrate, at best, that ***in some areas of federal Indian law***, and under appropriate factual circumstances, it may be appropriate to apply a more flexible interpretation of the term "reservation" as used in 18 U.S.C. 1151(a). But that statute is not at issue here, and the statute that is at issue—NAGPRA's definition of "tribal land"—should be read to mean what it says: that "tribal land" includes only reservation land (according to a plain meaning of the term "reservation," which would not include informal reservations) and dependent Indian communities (which could, under appropriate circumstances not met here, include informal reservations). If Congress had wanted to include more, it would have said so.

Finally, the canon against surplusage cautions strongly against the interpretation of NAGPRA's "tribal land" definition advanced by the Federal Defendants. Under the canon of surplusage, "[i]f possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another

provision or to have no consequence." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 174 (2012). Explained further:

> Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant. If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.

Id. at 176 (internal citation omitted); *see also Yates v. United States*, 574 U.S. 528, 543 (2015) ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."). If any informal or *de facto* reservation could constitute a "reservation" for purposes of NAGPRA, then the "dependent Indian community" portion of NAGPRA's definition of "tribal land" would be rendered largely superfluous because, in many cases, a *de facto* reservation ***is*** a dependent Indian community. *See, e.g.*, *Azure*, 801 F.2d at 339 (stating that a tribal housing area on trust land near a tribe's reservation could be classified as a *de facto* reservation ***and*** a dependent Indian community); *United States v. Papakee*, 485 F. Supp. 2d 1032, 1041, 1044–45 (N.D. Iowa 2007) (holding that the Meskwaki Settlement is an informal reservation, but that even if it were not, a tribal housing area on trust land within the Settlement "can be considered a 'dependent Indian community'"). Interpreting NAGPRA's definition of "tribal land" in accordance with its plain meaning—as including only formal reservations under the "reservation" provision of the definition—would avoid that surplusage while still allowing informal or *de facto* reservations to fall under the "dependent Indian communities" provision in situations not presented here.

The Federal Defendants have not denied that there is some reservation land in question and some off-reservation trust land at Hickory Ground. Under NAGPRA's definition of "tribal land," the reservation land constitutes land "within the exterior boundaries of any Indian reservation," 25 U.S.C. § 3001(15)(A), but the off-reservation trust land does not.[13]

[13] "Tribal land" also includes a "dependent Indian community" and lands administered for Native Hawaiians, 25 U.S.C. § 3001(15), but no party has suggested that either of those two categories applies here.

c) *The Federal Defendants had duties to act under NAGPRA and the Plaintiffs have alleged a viable claim under both NAGPRA and the APA that the Federal Defendants violated those duties.*

The Plaintiffs' NAGPRA claim alleges multiple violations of NAGPRA by the Federal Defendants. These violations constitute agency actions reviewable under the APA. The NAGPRA claim should survive the Federal Defendants' motion to dismiss.

(1) NAGPRA Requirements.

NAGPRA is a remedial human rights statute passed after "decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property back to Native owners." Jack R. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992). It specifically affords protection to Native American "cultural items," which include human remains, associated funerary objects, unassociated funerary objects, sacred objects, and other objects of cultural patrimony.[14] 25 U.S.C. § 3001(3).

Among other things, Section 3002 of NAGPRA provides prohibits such items from being disturbed unless several carefully-prescribed requirements are met:

> "The intentional removal from or excavation of Native American cultural items from Federal or tribal lands . . . is permitted only if—
> (1) such items are excavated or removed *pursuant to a permit* issued under [16 U.S.C. 470cc] which shall be consistent with this chapter;
> (2) such items are *excavated or removed after consultation with or, in the case of tribal lands, consent* of the appropriate [Indian tribe];
> (3) the *ownership and right of control of the disposition* of such items shall be as provided in subsections (a) and (b); and
> (4) *proof of consultation or consent* under paragraph (2) is shown."

25 U.S.C. § 3002(c) (emphasis added).

The permit required by Section 3002(c)(1) is a federal permit issued under the ARPA to excavate or remove any archaeological resource located on public lands or Indian lands. 16 U.S.C. § 470cc(a). If harm to, or destruction of, any religious or cultural site may result, notice to

[14] Each of these terms is further defined in the statute, but the definitions are not of central relevance here.

"any Indian tribe which may consider the site as having religious or cultural significance" is required before the permit may be issued. 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). While there is an exception under the ARPA for tribes performing archaeological excavations on their own lands, 16 U.S.C. § 470cc(g)(1), that does not apply to non-tribal individuals or entities, even if they are acting on behalf of a tribe. *Id.*; *see also* 25 C.F.R. § 262.4(c) (clarifying that consultants, advisors, and others serving by contractual agreement as agents for Indian tribes are not exempt from permit requirements under the ARPA, although they may be able to expedite the permit). Nor does it apply to individual tribal members in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands. 16 U.S.C. § 470cc(g)(1). Indeed, in some limited circumstances, the exception may not even apply to tribal employees, particularly if the tribe does not ensure that permit requirements have been met by other documented means. 25 C.F.R. § 262.4(c)(2).

The consultation requirements of Section 3002(c)(2) are further detailed in 43 C.F.R. §§ 10.3 and 10.5. Notably, these requirements do not depend solely on the Federal Defendants receiving notice of an excavation or inadvertent discovery—the requirements are also triggered if they otherwise become aware of it. 43 C.F.R. § 10.5(b). Under Section 10.5, consultation must be conducted with lineal descendants, tribes on whose aboriginal lands the excavation will occur, tribes that are culturally affiliated with the cultural items, and tribes that have a demonstrated cultural relationship with the cultural items. 43 C.F.R. § 10.5(a). The consultation requirements are extensive, and include development of a plan of action that will cover topics such as how the cultural items will be treated, the planned disposition of the cultural items and more. 43 C.F.R. § 10.5(b)-(e). Moreover, Federal Agencies are instructed to enter into comprehensive agreements with tribes that are affiliated with the cultural items "whenever possible." 43 C.F.R. § 10.5(f). If a planned activity is also subject to review under Section 106 of the NHPA, then the federal agency should coordinate its NAGPRA and NHPA consultation and agreement processes. 43 C.F.R. § 10.3(c)(3).

Of the ownership and control requirements in Section 3002(c)(3), those under Section 3002(a) are primarily relevant here. They control to whom ownership or control of cultural items must be given. Ownership or control of human remains and associated funerary objects is in the lineal descendants of the deceased. 25 U.S.C. § 3002(a)(1). If the lineal descendants cannot be ascertained, then ownership or control will be as provided for unassociated funerary objects and other cultural items. 25 U.S.C. § 3002(a)(2). Ownership or control of those items is in *inter alia*, first the tribe on whose tribal land the objects or remains were discovered, and second the tribe which has the closest cultural affiliation with such remains or objects. *Id*.

NAGPRA does not relieve the federal government of responsibility for actions occurring on tribal land. Also notably, NAGPRA does not *limit* the federal government's responsibility to its obligations under NAGPRA. 25 U.S.C. § 3009. And NAGPRA expressly recognizes the "unique relationship between the Federal Government and Indian tribes," 25 U.S.C. § 3010, which includes its trust responsibility to tribes. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating that the federal government, in its dealings with Indians, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards"); *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The federal government has substantial trust responsibilities toward Native Americans. This is undeniable.").

(2) APA Requirements.

The APA establishes a presumption in favor of judicial review for one suffering legal wrong because of agency action. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, __ U.S. __, 2020 WL 3271746, at *7 (2020). As discussed in Section IV.B.1, above, in a case like this, where another federal statute provides a jurisdiction and a cause of action, the second sentence of Section 702 of the APA provides a waiver of sovereign immunity. 5 U.S.C. § 702. The other provisions of the APA set forth the procedures for a reviewing court to follow.

For example, under Section 704, "***[a]gency action made reviewable by statute*** and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added). That means that where, as here, another federal statute authorizes judicial review, ***no "final agency action" is required—only an "agency action."*** *Cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004) ("Where no other statute provides a private right of action, the 'agency action' complained of must be '*final* agency action.'"); *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990) ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *Wilderness Soc. v. Alcock*, 83 F.3d 386, 388 n.5 (11th Cir. 1996) ("Agency action is subject to judicial review only if it is 'final agency action' or '[a]gency action made reviewable by statute.' Since the NFMA does not provide for judicial review of agency actions taken pursuant to the Act, we have jurisdiction over a challenge under the NFMA only if the agency action is final.") (internal citation omitted); *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) ("[W]e decline to conjure up a finality requirement for '[a]gency actions made reviewable by statute' where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements."). The Federal Defendants appear to recognize that no "final agency action" is required for purposes of the NAGPRA claim. But because their argument regarding NAGPRA does contain one errant reference to a lack of "final agency action," Dkt. 200 at 24, it is important to highlight that point here—only "agency action" is required.

The APA defines "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 701(b)(2) (incorporating by reference certain definitions from 5 U.S.C. § 551, including the definition of "agency action"); 5 U.S.C. § 551(13) (defining "agency action").

Section 706 outlines procedures for the scope of review, including what actions the "reviewing court shall" take. 5 U.S.C. § 706. First, the reviewing court must "compel agency

action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Second, the reviewing court must "*hold unlawful and set aside* [certain] agency action, findings, and conclusions," including those "found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [and] (D) without observance of procedure required by law." 5 U.S.C. § 706(2) (emphasis added).

In *Southern Utah Wilderness Alliance* ("*SUWA*"), the U.S. Supreme Court proclaimed that a claim for agency inaction under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64 (emphasis in original). *SUWA* pertained to Section 706(1), and several courts since *SUWA* have concluded that it did not impact Section 706(2) (which, as discussed in Section IV.B.2.c), below, is the primary focus of the Plaintiffs' NAGPRA claim). *E.g.*, *Oregon Natural Desert Assoc. v. United States Forest Serv.*, 957 F.3d 1024, 1031 n.6 (9th Cir. 2020) (characterizing *SUWA* as "inapposite" in a case involving Section 706(2), because SUWA pertains to Section 706(1)); *Alliance to Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d. 1, 10 (D. D.C. 2007) (noting that *SUWA* "does not reach claims encompassed within § 706(2)," which are "unaffected by *SUWA*"). *Alliance* further explains:

> "This reading is bolstered by the fact that according to the plain terms of APA, 'failures to act' fall under the scope of *both* § 706(1) and § 706(2): the Act defines an 'agency action' as 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.' 5 U.S.C. § 551(13) (emphasis added). Thus, plaintiffs' claim here—that EPA wrongly failed to exercise discretion in their favor—is directed not at an 'agency action unlawfully withheld,' but rather at a consummated 'agency action' that APA views as final, notwithstanding the fact that the agency 'did' nothing. The court, therefore, has subject matter jurisdiction over these claims pursuant to § 706(2)."

Id. Accordingly, *SUWA* should not apply to any claims for action or inaction that the Plaintiffs bring under 5 U.S.C. § 706(2).

SUWA itself also illustrates the type of case to which it should apply. In *SUWA*, the federal agency had a relatively vague statutory mandate to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Id*. at 59.

Environmental groups wanted the federal agency to protect the public lands from off-road vehicles. *Id*. at 60–61. Accordingly, they brought suit under Section 706(1), seeking declaratory and injunctive relief for the federal agency's alleged failure to do so. *Id*. The Court concluded, *inter alia*, that while the statute was mandatory as to the object to be achieved, it left the agency a great deal of discretion in deciding how to achieve it and did not mandate, with the clarity necessary to support judicial action under 706(1), the total exclusion of off-road vehicles. *Id*. at 66. As discussed in Section IV.B.2.c(3), below, the instant case is easily distinguishable from *SUWA*.

Moreover, *SUWA* should be inapplicable where, as here, a separate federal statute provides a cause of action that, by its own terms is not limited to compelling non-discretionary action unlawfully withheld. *See Center for Biological Diversity v. United States Forest Service*, 640 F. App'x 617, 619 (9th Cir. 2016) (unpublished). The statute at issue in that case "grants courts the ***power*** to 'restrain any person who has contributed to' disposal of a solid or hazardous waste that presents an imminent and substantial danger, and to '***order*** such person to take ***such other action as may be necessary.***" *Id.* (quoting 42 U.S.C. § 6972(a)) (emphasis added). Similarly, NAGPRA provides: "The United States district courts shall have ***jurisdiction*** over any action brought by any person alleging a violation of this chapter and shall have the ***authority to issue such orders as may be necessary to enforce the provisions of this chapter***." 25 U.S.C. § 3013 (emphasis added).

(3) Plaintiffs' Claims.

In considering whether Plaintiffs have alleged plausible claims under NAGPRA, the court should focus on the purposes for which it was passed—as remedial human rights legislation intended to protect Indians and Indian tribes, such as the Plaintiffs, from the desecration of their ancestors' graves and to require the return of their wrongfully taken ancestors and cultural items to them. Jack R. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24

ARIZ. ST. L.J. 35, 59–60 (1992). "In interpreting NAGPRA, it is critical to remember that it must be liberally interpreted as remedial legislation to benefit the class for whom it was enacted. *Id*. at 76. And the federal government is primarily responsible for administering and enforcing NAGPRA. It is unusual and shocking for another federally recognized Indian tribe, acting on its own reservation and trust lands, to be the party accused of wrongdoing, as here. But that scenario does not excuse the Federal Defendants' abdication of their responsibility to enforce NAGPRA and uphold their trust responsibilities to the Plaintiffs. The Plaintiffs are entitled to the protections of NAGPRA for their ancestors and cultural items, regardless of who desecrated their graves and sacred site and wrongfully took the remains and cultural items therein.

Plaintiffs have alleged, among other things,[15] that the Federal Defendants, in violation of NAGPRA, knowingly allowed the excavation of the Plaintiffs' ancestors, their funerary objects, and other cultural items from the Hickory Ground Site without appropriate notice, consultation, permits, or proper disposition of the items excavated. The Federal Defendants also failed to perform independent obligations they had along the way, such as giving notice to the Plaintiffs at various points, and engaging in consultation with the Plaintiffs. They also had obligations to ensure that NAGPRA's consultations requirements were fulfilled by others, and to ensure that the Plaintiffs were given ownership and control of the excavated remains and cultural items.

More specifically, the Plaintiffs have alleged that at least 57 sets of human remains and associated funerary objects were excavated from the Hickory Ground Site. Dkt. 190 at ¶ 117. And numerous other cultural items were removed from the site. *Id*. at ¶119. They have further alleged that the Federal Defendants knew about this excavation, and the Plaintiffs' concerns about it. They state that concerns about violations of NAGPRA at the Hickory Ground Site were brought to the Federal Defendants' attention on several occasions, by several individuals. *Id*. at ¶¶ 90, 93–94, 142. They also point out that the Federal Defendants did issue one or more permits, and knew or should have known of the removals based on conditions of the permits,

[15] The Plaintiffs streamline their arguments for purposes of the instant motion only; they do not waive any other allegations set forth in the Second Amended Complaint, or any arguments pertaining thereto.

such as submitting reports of work performed under the permit(s). *Id*. at ¶¶ 108–111. Accordingly, this is not a case in which the Federal Defendants were legitimately unaware of what was happening.

Anyone other than Poarch itself who engaged in intentional excavation, ***whether on "tribal land" or "Federal lands"*** for purposes of NAGPRA, was required to obtain a permit under the ARPA (and Poarch itself was required to obtain a permit for any intentional excavations on Federal lands), as discussed above. 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470cc(g)(1). That includes archaeologists affiliated with Auburn University and its associated archaeologists, who the Plaintiffs allege conducted excavations, Dkt. 190 at ¶ 101, and any other non-tribal individuals or entities who discovery may reveal conducted excavations, even if they were contracted by Poarch or otherwise acting on Poarch's behalf. 16 U.S.C. § 470cc(g)(1); *see also* 25 C.F.R. § 262.4(c) (clarifying that consultants, advisors, and others serving by contractual agreement as agents for Indian tribes are not exempt from permit requirements under the ARPA). Individual Poarch tribal members would also have been required to obtain permits if, as it appears may be the case, there was an absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands (or the excavation may have been in violation of that law if it did exist). *See* 16 U.S.C. § 470cc(g)(1); Dkt. 190 at ¶¶ 87–89 (Poarch had a policy in place at one time prohibiting excavation, but upon information and belief, later reversed it). Indeed, in limited cases, it could even include Poarch tribal *employees*, particularly if permit requirements were not met by other means, which there is no indication that they were. Any excavation that took place without a permit was in violation of NAGPRA and the Federal Defendants could and should have stopped it.

Moreover, the Federal Defendants were required to provide notice to the Muscogee (Creek) Nation ***before*** granting any permit(s) they did issue. 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). The Plaintiffs allege that the Federal Defendants issued one or more permit(s), Dkt. 190 at ¶ 108, and the Federal Defendants concede that they issued at least one permit, but

they do not cite to any materials properly before this Court showing they provided the required notice to the Plaintiffs before doing so.

When the Federal Defendants received notice ***or otherwise became aware of*** an excavation or inadvertent discovery on any "Federal lands" for purposes of NAGPRA, as discussed in Section IV.B.2.c(1), above, they were required to initiate consultation with the Plaintiffs. 43 C.F.R. § 10.5(b). Plaintiffs fall within ***all*** of the categories for which consultation is required under 43 C.F.R. § 10.5(a). Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are lineal descendants of the excavated ancestors. Dkt. 190 at ¶¶ 2, 13–14, 45–46, 118, 147. And the Hickory Ground Site is within the aboriginal lands of the Muscogee (Creek) Nation, which is also culturally affiliated with the cultural items, and which also has a demonstrated cultural relationship with the cultural items. *Id*. at ¶¶ 2, 43–46. None of this was unknown to the Federal Defendants. Yet the Plaintiffs have alleged that the Federal Defendants did not consult with them before granting the permit(s). *Id*. at ¶ 112. And the Federal Defendants do not contest that allegation, or suggest that they fulfilled it at any time. Had the Federal Defendants fulfilled NAGPRA's consultation requirements, perhaps, at the very least, the Plaintiffs' ancestors could have been treated in a culturally appropriate way, which the Plaintiffs would have had the opportunity to provide direction for. 43 C.F.R. § 10.5(b)–(e).

As noted above, as part of the consultation process, the Federal Defendants also should have entered into a comprehensive agreement with the Muscogee (Creek) Nation if possible. 43 C.F.R. § 10.5(f). Because the Hickory Ground Site is listed on the National Register of Historic Places, Dkt. 190 at ¶ 50, the Federal Defendants also should have coordinated their NAGPRA and NHPA consultation and agreement processes. 43 C.F.R. § 10.3(c)(3).

The Federal Defendants also had a duty to ensure that ownership and control of the excavated cultural items was given to the appropriate parties. This required ownership and control of the human remains and associated funerary objects to go to Plaintiffs Mekko Thompson and Hickory Ground Tribal Town, as lineal descendants. 25 U.S.C. § 3002(a)(1). The Federal Defendants appear to argue that they have no duty with respect to the disposition of the

cultural items under 25 U.S.C. § 3002(c)(3) because they do not possess or control the cultural items. While they may not have physical possession of the cultural items, they do have a legal interest in the cultural items as the owner of all land in question, which falls within the definition of control. 43 C.F.R. § 10.2(a)(3)(ii) (defining "control" to include a legal interest in cultural items, with or without physical custody). *See also Native American Graves Protection and Repatriation Act Regulations*, 60 Fed. Reg. 62,134, 62,134–35 (Dec. 4, 1995) (explaining that the term "control" extends not just to cultural items in federal agency collections or museums, but also to cultural items intentionally excavated or inadvertently discovered on Federal or tribal lands, and the Federal agencies are responsible for their appropriate treatment and care, even when held by non-governmental repositories). Allowing other parties to exert ownership or control over the cultural items without an appropriate determination of who was entitled to ownership and control under NAGPRA constitutes a NAGPRA violation and is reviewable under the APA. *Cf. Navajo Nation v. United States Dept. of Interior*, 819 F.3d 1084, 1086 (9th Cir. 2016) ("By deciding to undertake NAGPRA's inventory process, the Park Service conclusively decided that it, and not the Navajo Nation, has the present right to 'possession and control' of the remains and objects").

Indeed, even the Federal Defendants' decision(s) that they had no obligations under NAGPRA with respect to the Hickory Ground Site, *e.g.*, Dkt. 190 Compl. ¶ 145, is subject to review under NAGPRA and constitutes a sufficient agency action under the APA. *See* 43 C.F.R. § 10.1(b)(3) ("Any final determination making the Act or this part inapplicable is subject to review under [25 U.S.C. § 3013]."); *Navajo Nation*, 819 F.3d at 1086 (Park Service's decision to inventory remains and objects was a determination of "possession and control" and constituted a final agency action).

Both the NAGPRA violations committed by the Federal Defendants and those they permitted to occur in violation of NAGPRA are continuing. The Plaintiffs have yet to receive the required notices for the ARPA permits issued by the Federal Defendants. They have yet to be invited to consult with the Federal Defendants. Some of the cultural items, including human

remains, to which the Plaintiffs are entitled to ownership and control are still in storage, outside of their ownership and control. Dkt. 190 at ¶¶ 120–124. The rest also remain outside of their ownership and control, having been reburied by Poarch *away from* their final resting places in 2012, knowingly contrary to the Plaintiffs' wishes. *Id*. at ¶¶ 150, 160–62. The Plaintiffs also fear that the NAGPRA violations are capable of repetition and evading review. *Id*. at ¶¶ 184–188.

The foregoing NAGPRA violations are reviewable under the APA. As discussed above, only an "agency action" is required in this case, because NAGPRA makes claims of NAGPRA violations reviewable. Various "agency actions" occurred here. A permit issued under NAGPRA and the ARPA, such as the one(s) in question here, constitutes a "license" under the APA. 5 U.S.C. § 551(8) (defining "license" to include "an agency permit"). The requirement of a license also constitutes a "sanction" under the APA, with the failure to require the license accordingly constituting a "failure to act" thereunder. *Id*. at §§ 551(10)(F) (defining "sanction" to include a "requirement, revocation, or suspension of a license") and (13) (including "failure to act" in the definition of "agency action"). Likewise, giving a required notice, or conducting a required consultation, constitutes a "sanction" under the APA, with the failure to take the required action constituting a "failure to act." *Id*. at §§ 551(10)(G) and (13). Various decisions under NAGPRA constitute "order[s]" under the APA, such as a decision that NAGPRA does not apply, or a decision that directly or indirectly recognizes a right to ownership or control in a party. *Id*. at § 551-(6) (defining "order"); *see also* 43 C.F.R. § 10.1(b)(3) ("Any final determination making the Act or this part inapplicable is subject to review under [25 U.S.C. § 3013]."); *Navajo Nation*, 819 F.3d at 1086 (Park Service's decision to inventory remains and objects was a determination of "possession and control" and constituted a final agency action). All of these constitute "agency action" reviewable under the APA. 5 U.S.C. § 701(a)(2) (incorporating by reference certain definitions from 5 U.S.C. § 551, including the definition of "agency action"); 5 U.S.C. § 551(13) (defining "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

This Court must "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As discussed above, *SUWA* arguably should not apply here, because NAGPRA, which provides jurisdiction and a right of action here, broadly authorizes this Court to issue "such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013. But even if *SUWA* does apply with respect to Section 706(1), the Plaintiffs here have asserted that the Federal Defendants failed to take discrete agency actions that they were required to take, such as issuing notices and engaging in consultation. These types of actions are distinguishable from those in *SUWA*, where the statutory mandate was vague, and the claimants sought to require the agency to do something it was not clearly required to do. Moreover, the Plaintiffs do not argue that a particular result is mandated (which could be problematic under *SUWA*), just that the requirements of NAGPRA must be followed going forward, and past failures must be corrected.

This Court must also "hold unlawful and set aside [certain] agency action, findings, and conclusions," including those "found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [and] (D) without observance of procedure required by law." 5 U.S.C. § 706(2). As discussed above, *SUWA* does not affect Section 706(2). And the Plaintiffs primarily rely on Section 706(2) for their NAGPRA claim. Dkt. 190 at 55 ¶ 247 (using language from Section 706(2) specifically). Accordingly, this Court may hold unlawful and set aside any of the foregoing agency actions that it finds to be arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law. This would logically include failure to require a required permit, failure to provide a required notice before issuing a required permit, failure to engage in a required consultation, making a *de facto* determination of ownership and control without appropriate consideration and procedures, determining that NAGPRA or certain NAGPRA requirements do not apply without appropriate consideration, and more.

Finally, even if the land in question were all "tribal land" for purposes of NAGPRA (which it is not), it cannot be the case that the Federal Defendants, who hold the land in trust and

have asserted control (at least by statute and regulation, if not in practice, as they should) over the excavation and disposition of cultural items on the land, can simply turn a blind eye and allow the desecration of the Hickory Ground Site. The federal government's failure to uphold its responsibilities under NAGPRA (whether by promulgating regulations that allow it to turn a blind eye in situations like this one, or by affirmatively turning that blind eye) violates its trust responsibility to the Plaintiffs under the "unique relationship" recognized in NAGPRA. This failure is arbitrary and capricious for purposes of the APA. *See generally Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257–58 (D. D.C. 1972) (finding an agency action that failed to demonstrate an adequate recognition of the government's fiduciary duty to a tribe to be "arbitrary, capricious, an abuse of discretion, and not in accordance with law").

At this stage in the proceedings, the Plaintiffs do not have to show that they will ultimately prevail on the merits. The Federal Defendants have argued that this Court lacks jurisdiction because of a procedural requirement in the APA. The Plaintiffs have shown that this argument is incorrect as a legal matter, and the Federal Defendants motion to dismiss the NAGPRA claim should therefore be denied. Even if this Court proceeds to further consider the Federal Defendants' arguments (which it should not), it should do so under a Rule 12(b)(6) standard, which the Plaintiffs have met. The Plaintiffs have stated a facially plausible claim that gives the defendant fair notice of what the NAGPRA claim is and the grounds upon which it rests. Even if the Court were to apply a Rule 12(b)(1) standard, the Plaintiffs' NAGPRA claim is not clearly immaterial, made solely for the purpose of obtaining jurisdiction, or wholly insubstantial and frivolous. The Plaintiffs have alleged viable claims that the Federal Defendants, *inter alia*, failed to provide them with notice before issuing one or more permits, failed to consult with them upon becoming aware of excavations on federal land, and failed to ensure that ownership and control of human remains and funerary objects went to lineal descendants, all agency actions that violate NAGPRA and are reviewable under the APA. The Federal Defendants' motion to dismiss should be denied with respect to the Plaintiffs' NAGPRA claim.

C. Plaintiffs' NHPA claim against the Federal Defendants does not fail for lack of subject matter jurisdiction.

The purpose of NHPA is the preservation of historic resources. *See Nat'l Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981). The Hickory Ground Site has been listed on the National Register of Historic Places since 1980. *See* Dkt. 190 at 5, 14. Accordingly, it is a "historic property" subject to NHPA. 54 U.S.C. § 300308 (defining "historic property" as including sites included on the National Register).

Section 106 of NHPA (codified at 54 U.S.C. § 306108) requires Federal agencies to take into account the effects of their undertakings on historic properties. 36 C.F.R. § 800.1. This is commonly referred to as the "Section 106 process."

> The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

Id. Federal agencies must complete the Section 106 process ***before*** approving the expenditure of any Federal funds or issuing any license. 54 U.S.C. § 306108; 36 C.F.R. § 800.1.

In considering the Federal Defendants' NHPA obligations in this case, it is important to keep in mind the Federal Defendants' trust responsibility to the Plaintiffs. Like NAGPRA, NHPA expressly recognizes the "unique legal relationship" the Federal Government has with tribes. 36 C.F.R. § 800.2(c)(2)(ii). The Federal Defendants should be held to a heightened standard of accountability in light of this trust responsibility.

1. The Tribal Defendants' assumption of NHPA obligations did not absolve the Federal Defendants of their own NHPA obligations.

The Tribal Defendants' assumption of NHPA obligations did not absolve the Federal Defendants of their own continuing NHPA obligations. NHPA provides for a tribe to assume all or part of the functions of a State Historic Preservation Officer with respect to tribal land. 54 U.S.C. § 302702. Section 302702 incorporates by reference 54 U.S.C. § 302302, which makes

evaluation of such a program mandatory ***not less than every 4 years***, and generally ***requires*** disapproval of the program if, at any time, the Secretary determines that a major aspect of the program is not consistent with the historic preservation program regulations.

Poarch entered into such an agreement with Federal Defendants the National Park Service and Department of the Interior for the assumption of NHPA responsibilities (the "NPS Agreement"). Dkt. 190-1 at 115-19. Under the NPS Agreement, Poarch expressly assumed responsibility for certain NHPA functions on tribal lands. *Id*. These include, *inter alia*, to cooperate with various other entities to "ensure that historic properties are taken into consideration at all levels of planning and development;" to consult with appropriate Federal agencies regarding any "Federal undertakings that may affect historic and culturally significant properties on tribal lands;" and to consult with appropriate Federal agencies regarding "the content and sufficiency of any plans to protect, manager, or mitigate harm to such properties." *Id*. Poarch also agreed to "carry out its responsibilities for review of Federal undertakings pursuant to Section 106 of the Act in accordance with [its implementing regulations]." *Id*. at 117.

Of paramount importance, Poarch also expressly agreed to provide for "consultations with representatives of any other tribes whose traditional lands may have been within [Poarch's reservation]." *Id*. Even more specifically, in any case where an action covered by NHPA might affect the traditional lands of another tribe, Poarch agreed to "seek and take into account the views of that Tribe." *Id*. These provisions are an integral and mandatory part of any such agreement. *See* 54 U.S.C. § 302704 (Secretary may ***only*** enter into such an agreement if it provides for appropriate participation by "representatives of other Indian tribes whose traditional land is under the jurisdiction of the Indian tribe assuming responsibilities," among other things).

Poarch's assumption of these responsibilities did not absolve the Federal Defendants of their responsibilities. *See* 54 U.S.C. § 306102 (providing that each Federal agency must establish a program that *inter alia*, appropriately considers the preservation of historic property under its jurisdiction or control, and that it carries out its preservation-related activities in consultation with tribes and others who are carrying out historic preservation activities); 36

C.F.R. 800.2(a) (stating that Federal agencies have a statutory obligation to fulfill the requirements of section 106 and to ensure that an agency official, which may be a SHPO or THPO, takes responsibility for Section 106 compliance). The NPS agreed to carry out a periodic review to ensure that Poarch was carrying out its program consistent with the NPS Agreement. Dkt. 190-1 at 118. And it reserved the right to terminate the NPS Agreement if Poarch was not carrying out its assumed responsibilities in accordance with the NPS Agreement, NHPA, or "any other applicable Federal statute or regulation." *Id*. at 119. 54 U.S.C. § 302302 makes both of these things mandatory. So even though Poarch may have assumed certain historic preservation obligations under the NHPA, the Federal Defendants remained responsible for compliance with the NHPA, including the Section 106 process.

2. The Plaintiffs have alleged various "undertakings" under the NHPA.

"Undertaking" means a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 54 U.S.C. § 300320. It includes projects, activities, or programs carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, and those requiring a Federal permit, license, or approval. *Id*. Courts have construed the statute to mean that only a Federal permit, license, or approval is required for an action to be a federal undertaking—federal funding is not necessarily required. *See United Keetoowah Band of Cherokee Indians v. Fed. Comm. Comm'n*, 933 F.3d 728, 734 (D.C. Cir. 2019); *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (finding that the definition of "undertaking" included projects requiring a federal permit or merely federal approval, because a narrower reading would "deprive the references to licensing in § 106 of any practical effect); *Standing Rock Sioux Tribe v. U. S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) ("An undertaking is defined broadly to include any 'project, activity, or program' that requires a federal permit."); *Fein v. Peltier*, 949 F.Supp. 374, 379 (D.V.I. 1996) (reading the phrase "funded in whole or in part" as modifying only the word "program," and finding that "an undertaking for purposes of section 106 includes a project or

activity under the direct or indirect jurisdiction of the NPS which requires its prior approval, regardless of whether the project or activity is funded in whole or in part by the federal government.").

The federal decision need not be particularly formal, and it need not result in affirmative action in order to constitute an undertaking. For example, the construction of wireless communication towers has been held to constitute an undertaking subject to NHPA review based on an online registration process for the towers that takes mere minutes to complete. *CTIA-Wireless Ass'n v. Fed. Comm. Comm'n*, 466 F.3d 105, 114 (D.C. Cir. 2006). A decision to take *no action* has also been held to constitute an undertaking. *Nat'l Trust for Hist. Pres. v. Blanck*, 938 F. Supp. 908, 920 (D. D.C. 1996). In that case, Walter Reed Army Medical Center made a decision not to excess (*i.e.*, sell) historic buildings, even though it was not using the buildings, did not have the resources to maintain the buildings, and had allowed the condition of the historic buildings to significantly deteriorate. *Id*. at 910, 919–20. As the court explained, "[t]hat decision had the sort of serious and long-term consequences" for the historic buildings that the NHPA requires be undertaken in accordance with the Section 106 process. *Id*. at 920.

As in *Blanck*, the decision to allow the excavation (whether with or without required ARPA permits) "had the sort of serious and long-term consequences" for the National Register-listed Hickory Ground Site that should have triggered the Section 106 process. It would be nonsensical if a short, online registration process for something that *might* have an impact on a historic site was an undertaking, as in *CTIA-Wireless*, but a decision to allow excavation of a known Muscogee (Creek) Nation historic burial and ceremonial site was not.

By these standards, several "undertakings" occurred in connection with the desecration of the Hickory Ground site. Both the issuance of ARPA permits and the decision to allow excavation of the Hickory Ground Site to occur without required ARPA permits constitute undertakings. Although issuance of an ARPA permit alone is generally not an undertaking requiring compliance with Section 106 of NHPA, 43 C.F.R. § 7.12, the excavation of the Hickory Ground Site was an undertaking, and thus NHPA required the Section 106 process to be

completed before any federal funds could be approved in connection with the project and before any permits allowing activity at the site were issued. *See Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995) (it is the project that constitutes the undertaking, not the decision to fund or license). The excavation took place on land owned by the federal government in trust for Poarch, for which the federal government had delegated Poarch historic preservation responsibilities subject to NPS oversight. *See Fein*, 949 F. Supp. at 379 (concluding that the NHPA applied, citing federal ownership of the land and a contractual obligation not to disturb historic ruins on the land and to allow NPS representatives to enter upon the property at reasonable times). Moreover, the Plaintiffs have alleged facts sufficient to support a reasonable belief that the excavation was federally funded, in whole or in part. *See* Dkt. 190 at 65, 71 (indicating that Poarch appears to generally receive federal historic preservation funds on an annual basis); 54 U.S.C. §§ 302906, 302907 (authorizing grants to tribes for the preservation of their cultural heritage, as well as for the purposes of carrying out a historic preservation program). Such funding would make the project an undertaking.

Construction and operation of the casino and hotel on the Hickory Ground Site also constituted an undertaking, because an Indian gaming facility is by its very nature a project conducted with the approval and extensive involvement of the federal government. From the very earliest days of the Indian gaming industry, the federal government has been extensively involved in all aspects of Indian gaming. The federal government actively promoted gaming as a way of meeting federal goals for tribes, such as economic development and self-determination. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 & n.21 (1987). Multiple departments of the federal government, including Federal Defendant the Department of the Interior, provided financial assistance to tribes to develop the nascent industry. *Id.* at 218. Federal Defendant the Secretary of the Interior originally approved tribal gaming ordinances, regulated the gaming activities, and reviewed management contracts for tribal gaming facilities. *Id*. Indeed, the very reason the Indian gaming industry exists as it does is because of the important tribal ***and federal*** interests involved, which preempt state regulation. *See id.* at 216–

22 (balancing the interests of the federal government first, tribal governments second, and state government third, in order to determine whether state regulation was preempted, and determining that it was).

After *Cabazon*, the federal government further formalized its regulation of the Indian gaming industry by enacting the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. §§ 2701–2721. IGRA established the National Indian Gaming Commission ("NIGC") within the Department of the Interior, 25 U.S.C. § 2704(a), and granted the NIGC extensive authority over Indian gaming operations. For example, gaming can only be conducted with an ordinance approved by the NIGC Chairman. 25 U.S.C. § 2710(b)(1)(B). The NIGC is required to monitor gaming conducted on Indian lands on a continuing basis, and to inspect and examine all premises located on Indian lands on which gaming is conducted. 25 U.S.C. § 2706(b). IGRA imposes requirements regarding the uses of gaming revenues and, notably for purposes of this case, the construction of gaming facilities. 25 U.S.C. § 2710(b). The NIGC even plays a role in the hiring and retention of employees. *Id.*; 25 U.S.C. § 2710(c) (primary management officials and key employees must be licensed, and background checks must be conducted and sent to the NIGC before licenses are issued; NIGC may require the suspension of a license if it does not approve of the employee). NIGC approval is required, and the NIGC mandates terms, for certain contracts. 25 U.S.C. § 2711 (requiring the Chairman's approval of management contracts and collateral agreements, setting limits on the term of management contracts and fees under such contracts, and prescribing certain other terms in the contracts). The NIGC has the authority to close a gaming operation. 25 U.S.C. § 2713(b). And, notably for purposes of this case, the NIGC is funded by tribal gaming operations—the casino built on the Hickory Ground Site is required to pay a percentage of its revenues to the NIGC. 25 U.S.C. § 2717(a).

Pursuant to NIGC regulations, a tribe must notify the NIGC at least 120 days before opening any new gaming facility. 25 C.F.R. § 559.2(a). Assuming Poarch complied with this requirement, as it should have, the federal government accordingly had at least four months' notice that the casino was under construction. Finally, the NIGC prescribes extremely detailed

standards for all aspects of tribal gaming operations. *See, e.g.*, 25 C.F.R. Part 543 (Minimum Internal Control Standards for Class II Gaming).

The federal government's ownership of the Hickory Ground Site; its extensive involvement in the gaming operation, from construction on; and its receipt of revenues from the gaming operation make the planning, construction, and operation of the gaming facility an undertaking for NHPA purposes. *Cf. Fein*, 949 F. Supp. at 379; *CTIA-Wireless*, 466 F.3d at 114–15 (retention of approval authority constituted an undertaking). This is not a situation in which non-federal land and resources were used for a construction project. *See, e.g., Ringsred v. City of Duluth*, 828 F.2d 1305, 1306, 1308-09 (8th Cir. 1987) (parking ramp to be built adjacent to a pre-IGRA Indian gaming facility was not an undertaking for purposes of NHPA because it would be built on City land, using City funds, the federal government would provide no financial aid and receive no revenue from it, there were no federal licensing requirements, and the federal government would have no input regarding design or construction).

Finally, each extension of the NPS Agreement without appropriate review and without terminating the NPS Agreement for noncompliance constituted an undertaking. The National Park Service was statutorily mandated to evaluate Poarch's historic preservation program at least every four years, and was required to disapprove the program if, at any time, the Secretary determined that a major aspect of the program was not consistent with historic preservation program regulations. 54 U.S.C. § 302302. The National Park Service was also contractually obligated by the NPS Agreement to carry out this review. Dkt. 190-1 at 118. And it reserved the right to terminate the NPS Agreement if Poarch was not carrying out its assumed responsibilities in accordance with the NPS Agreement, NHPA, or "any other applicable Federal statute or regulation." *Id.* at 119. Yet the National Park Service did not conduct these required reviews. Dkt. 190 at 27. Its failure to do so, particularly when doing so would have revealed the Federal Defendants' egregious violations of the NPS Agreement, NHPA, and other applicable federal statutes and regulations and could have prevented some or much of the desecration of the Hickory Ground Site, should be treated as an extension of the NPS Agreement constituting an

undertaking requiring NHPA review. *Cf. Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006) (holding that extension of leases was a federal undertaking requiring NHPA review).

3. The Federal Defendants violated the NHPA.

In carrying out its obligations under the Section 106 process, a Federal agency must consult with Indian tribes, among others. 54 U.S.C. § 302706(b); *Id.* § 306102(b). If a historic property may be affected by an undertaking, the agency official must consult with any Indian tribe that "attaches religious and cultural significance" to the historic property. 36 C.F.R. § 800.2(c)(2)(ii); 36 C.F.R. § 800.3(f)(2). The Federal Defendants had the duty to consult with the Muscogee (Creek) Nation, as a tribe—indeed the primary tribe—that attaches religious and cultural significance to the National Register listed Hickory Ground Site, with respect to any undertakings that might affect the Hickory Ground Site.

Consultation obligations arise throughout the Section 106 process. For example, consideration of adverse effects to a historic property must be done in consultation with any tribe that attaches religious and cultural significance to the property. 36 C.F.R. § 800.5. If a party disagrees with a finding of no adverse effect, then the agency official must either consult with the party to resolve the disagreement or request the Advisory Council on Historic Preservation to review the finding. *Id*. § 800.5(c)(2). If an adverse effect is found, the agency official must consult further to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects. *Id*. § 800.5(d)(2); 36 C.F.R. § 800.6. The consultation process is intended to give a tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A).

Plaintiffs have alleged that the Federal Defendants did not engage in consultation with the Muscogee (Creek) Nation at ***any*** of these required points in the consultation process, with respect to any of the undertakings discussed above. Dkt. 190 at 66. The Federal Defendants do not dispute this allegation. These failures to consult caused real-world harm to Plaintiffs. The Federal Defendants' wholesale disregard of these consultation obligations deprived the Plaintiffs of the opportunity to identify their concerns about undertakings at the Hickory Ground Site and to participate in the resolution of adverse effects. If Plaintiffs had been consulted as they should have been, perhaps the parties would have been able to avoid the egregious harms that occurred. At a minimum, the Plaintiffs could have advised as to how to treat their ancestors' remains and cultural items in a culturally appropriate fashion.

The repeated extension of the NPS Agreement also violated NHPA's review and disapproval requirements. As discussed above, each extension should be treated as an undertaking requiring NHPA review. *See Pit River Tribe*, 469 F.3d at 787. This is particularly true if the NPS Agreement was initially approved without consultation with the Muscogee (Creek) Nation. *See id.* at 786–87 (stating that a federal agency does not satisfy the National Environmental Policy Act ("NEPA") by ignoring the statute at the critical stage, then hiding behind the assertion that the decision has already been made).

Finally, the Federal Defendants' continued granting of historic preservation program funds to Poarch, even as Poarch was destroying the National Register-listed Hickory Ground Site and thereafter, violates NHPA. 54 U.S.C. § 306113 provides:

> Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to void the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

Plaintiffs have alleged facts sufficient to support a reasonable belief that the excavation was federally funded, in whole or in part. *See* Dkt. 190 at 65, 71 (indicating that Poarch appears to generally receive federal historic preservation funds on an annual basis); 54 U.S.C. §§ 302906, 302907 (authorizing grants to tribes for the preservation of their cultural heritage, as well as for the purposes of carrying out a historic preservation program). Having pleaded a plausible claim on this issue, the Plaintiffs should be allowed to conduct discovery in order to obtain information in the exclusive possession and control of the Defendants to determine whether any portion of that funding related to the Hickory Ground Site.

4. The Federal Defendants' NHPA violations are reviewable under the NHPA and the APA and are subject to redress under the Court's broad equitable powers.

The Federal Defendants' NHPA violations are reviewable under the NHPA. Most or all of the NHPA violations discussed above took place within the six years before the Plaintiffs filed their original Complaint. Thus, they are within the APA's six-year statute of limitations.

The NHPA expressly contemplates enforcement actions by "any interested person."

> In any civil action brought in any United States district court ***by any interested person*** to enforce this division, if the person substantially prevails in the action, the court may award attorney's fees, expert witness fees, and other costs of participating in the civil action, as the court considers reasonable.

54 U.S.C. § 307105 (emphasis added).

Courts across the country have found that section provides a private right of action. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir.1991); *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir.1989); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F.Supp.2d 977, 990 (D. S.D. 2002). *See also Narragansett Indian Tribe v. Rhode Island Dept. of Transp*., 903 F.3d 26, 29-30 (1st Cir. 2018) ("We have previously assumed, without deciding, that the NHPA creates some type of private right of action….we can continue to indulge in this assumption, again…because the Tribe in its complaint does not purport to bring any claim to enforce the NHPA."). *But see Karst Envtl.*

Educ. & Prot., Inc. v. Envtl. Prot. Agency, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (stating in passing, and without analysis, that NHPA contains no private right of action); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (agreeing with its "sister circuits" that the attorney fees provision "demonstrates Congressional intent that individuals may sue to enforce the NHPA," but concluding that it does not give rise to a private action against the government).

As discussed in Section IV.B.1, above, the APA provides a broad waiver of sovereign immunity where, as here, another federal statute provides the cause of action. 5 U.S.C. § 702. This waiver of sovereign immunity is not limited by the "agency action" requirement found in the first sentence of Section 702. Nor is it limited by the other procedural requirements of the APA, such as those of 5 U.S.C. § 706. And because the NHPA makes the Federal Defendants' actions reviewable, only an "agency action" is required under 5 U.S.C. § 704, not a "final agency action."

The Federal Defendants' actions with respect to the following undertakings are all agency actions for which relief is available under Section 706 of the APA: issuance of ARPA permits and the decision to allow excavation of the Hickory Ground Site to occur without required ARPA permits; approval of the construction and operation of the casino and hotel on the Hickory Ground Site; and extension of the NPS Agreement without appropriate review and without terminating the NPS Agreement for noncompliance. The Federal Defendants' continued granting of historic preservation program funds to Poarch even as it destroyed the Hickory Ground Site and thereafter, in violation of the NHPA, is also an agency action for which relief is available under Section 706 of the APA.

Even if the Court were to find, contrary to the weight of the authority, that NHPA does not provide a private right of action, in which case a "final agency action" would be required, Plaintiffs have alleged final agency actions reviewable under Section 706 of the APA as well. In order to be a "final agency action," the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. *Bennett v.*

Spear, 520 U.S. 154, 177–78 (1997). Second, the action must be one by which rights or obligations have been determined, or from which legal consequence will flow. *Id.* at 178. "'[C]ourts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled.'" *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018) (quoting *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094–95 (9th Cir. 2014)). Courts therefore "'focus on both the practical and legal effects of the agency action,' and define the finality requirement 'in a pragmatic and flexible manner.'" *Id.* (quoting *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)).

The agency actions alleged here meet these standards. A decision to issue an ARPA permit (or not to require one when one should be required) is a final decision, not interlocutory in nature, from which legal consequences will flow (and tragically did in this case). Further discovery would be required to determine exactly when the Federal Defendants' approval of the casino on the Hickory Ground Site became final, but it necessarily must have occurred at some point between the preparation for construction and the present day, otherwise the casino would not be in operation, given the federal government's ability to shut it down. Likewise, each decision to extend the NPS Agreement and each award of historic preservation program funds to Poarch constitute final agency actions—there were to be no further decisions or actions, and consequences flowed from each of the foregoing decisions. The Court should conclude that the NHPA provides a private right of action, so only an "agency action" is required. But even if it concludes that a "final agency action" is required, Plaintiffs have alleged sufficient facts to find one or more final agency actions as well.

Finally, the Court has broad equitable powers to order appropriate relief in an NHPA case. *See, e.g., Vieux Carre Property Owners, Residents & Assoc., Inc. v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991) ("There is, in other words a broad range of remedies that could conceivably emerge from NHPA review. We find it inappropriate to pre-judge those results as being limited to the extremes of either maintaining the status quo or totally demolishing the park."); *see also Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1034–35, 1039 (D.

Mont. 2006) (noting in a NEPA/NHPA/ESA case that the court's equitable powers were broad, and listing its options for injunctive relief, which included requiring that a pipeline be removed, although it ultimately chose to order the pipeline shut down instead). The Court should exercise those equitable powers on the basis of a fully-developed record and after fact finding. *Slockish v. United States Federal Highway Admin.*, 682 F. Supp. 2d 1178, 1185 (D. Or. 2010). Resolution at an earlier stage would be premature. "Such a determination will best be made in any remedial phase of this litigation after the facts have been established and the legal issues have been decided." *Id.*

At this stage of the case, all the Court needs to decide is whether Plaintiffs have alleged a plausible claim for relief under the NHPA. Once the facts are determined, the Court can decide whether the Federal Defendants violated the NHPA and the NPS Agreement; whether an order in the nature of mandamus requiring them to abide by the NHPA going forward is needed to prevent further tragedies of this nature; and whether to issue an injunction requiring them to consult with the Plaintiffs during such restoration of the Hickory Ground Site as the Court may order. Those are important decisions that should be made on a full record.

D. Plaintiffs allege jurisdiction under the Archaeological Resources Protection Act.

As alleged in the Second Amended Complaint, Dkt. 190 at 11, this Court has jurisdiction to hear the Plaintiffs' Archeological Resources Protection Act ("ARPA") claim under 28 U.S.C. § 1331 (federal question jurisdiction). The claim is reviewable under the APA, which also provides a waiver of sovereign immunity. 5 U.S.C. § 702.

The purpose of ARPA is to secure "the protection of archaeological resources and sites . . . on public lands and Indian lands." 16 U.S.C. § 470aa(b). Under ARPA, "[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands *unless such activity is pursuant to a permit issued* under [16 U.S.C. § 470cc]." 16 U.S.C. § 470ee(a) (emphasis added); *see also* 25 C.F.R. § 262.3(a). For purposes of ARPA, "Indian

lands" means, in relevant part, land held in trust by the United States for Indian tribes. 16 U.S.C. § 470bb(4). "Public lands" means certain lands owned and administered by the United States, such as national parks, national forests, etc. 16 U.S.C. § 470bb(3). The Hickory Ground Site constitutes "Indian lands" for purposes of ARPA, because it is held in trust by the United States for Poarch.

The permit requirement is a very important part of the process under ARPA (and NAGPRA, which incorporates it) for preserving ancestral and cultural relics, because it requires the Federal land manager to "notify any Indian tribe which may consider the site as having religious or cultural importance" before issuing a permit that may result in harm to a religious or cultural site. 16 U.S.C. § 470cc(c). This notice requirement is intended to give tribes an opportunity to intervene in development activity in order to safeguard cultural items. *See* S. Rep. No. 101-473, at 10 (1990). Failing to give notice to the appropriate tribes before issuing a permit and allowing excavation to be conducted on Indian lands without a required permit are both very serious lapses of oversight.

Plaintiffs allege that the Federal Defendants issued one or more ARPA permit(s), Dkt. 190 at 29, and the Federal Defendants concede that they issued at least one such permit, Dkt. 200 at 34, but the Federal Defendants do not claim to have provided the required notice to the Plaintiffs before doing so. This permit, and any other permit that the Federal Defendants issued without notice to the Plaintiffs, violated the mandatory notice requirements under ARPA.

The Federal Defendants argue that they were not required to issue other permits because of two exceptions to ARPA's permit requirement—an exception for tribes excavating on their own lands, and an exception for general earth moving excavations. Dkt. 200 at 33. But the Second Amended Complaint pleads a plausible claim that neither of these exceptions applies in this case.

While there is an exception to the permit requirement for tribes (and sometimes tribal members, depending on the circumstances) performing the excavation or removal of archaeological resources on their own Indian lands, 16 U.S.C. § 470cc(g)(1), as discussed in

Section IV.B.2.c above, that exception does ***not*** apply to others performing excavation on a tribe's behalf. 25 C.F.R. § 262.4(c). Indeed, in some circumstances, it may not even apply to tribal employees. *Id.* So while Poarch itself may not have needed a permit, those performing excavation and removal of archaeological resources on its behalf did, and the Federal Defendants had a duty to ensure that they obtained the appropriate permits. To the extent the Federal Defendants allowed any excavation to occur without a permit, as the Plaintiffs have alleged, Dkt. 190 at 63, they violated ARPA. At minimum, Plaintiffs have pleaded sufficient facts to be entitled to conduct discovery and have this claim resolved on a fully-developed record.

The plain language of the other exception in ARPA's implementing regulations relied upon by the Federal Defendants demonstrates that it is not applicable in this case. That exception excludes from the permit requirements activities that are "***exclusively*** for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources," 43 C.F.R. § 7.5(b)(1) (emphasis added). But that exception applies only to "activities on the ***public lands***." *Id*. (emphasis added). Under the facts alleged here, the lands at issue here are "Indian lands," not "public lands," for purposes of ARPA, so this exception does not apply and cannot excuse excavation done without satisfying the notice requirements that are a prerequisite to validly issuing a permit under ARPA.

Even assuming (incorrectly) that this exception applied to Indian lands (it does not), the exception does not apply in a situation such as this one, where the actor *knew* that archaeological resources were present and that excavation would cause their excavation and removal.

> [T]he actions of the plaintiff in this case are easily characterized as 'purposeful excavation and removal of archaeological resources' inasmuch as Fein was made aware through the language of the Deed that historical ruins were present in the area he proposed to build a house. ***He and his agents*** were thus charged with the knowledge that any digging on the site would certainly cause the excavation and removal of archaeological resources, which would be 'purposeful' and not inadvertent.

Fein v. Peltier, 949 F.Supp. 374, 380 (D. V.I. 1996) (emphasis added). Thus, the court concluded that an ARPA permit was required. *Id*. Plaintiffs have well-pleaded allegations that the Hickory Ground site was so extensively populated with human remains and cultural artifacts that any amount of excavation would disturb them. Dkt. 190 at 30–31, 41. Put differently, excavation at Hickory Ground would not have involved "incidental" disruption of Plaintiffs' ancestors—it was a site devoted to their eternal resting places. Accordingly, to the extent the Federal Defendants allowed excavations to occur at the Hickory Ground Site without the appropriate permits, they violated ARPA.

Plaintiffs have alleged plausible claims that the Federal Defendants violated ARPA requirements beyond those involving notice and permits. Primary among these is the requirement that archaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources. 43 C.F.R. § 7.13. As discussed in Section IV.B.2.c, above, that tribe was the Muscogee (Creek) Nation, according to the order of priority set forth in 25 C.F.R. § 262.8. The Federal Defendants' violation of this requirement is ongoing.

The Federal Defendants also had duties regarding the curation of excavated cultural items. To issue any permit in the first place, the Federal land manager had to determine, among other things, that the applicant "possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records." 43 C.F.R. § 7.8(a)(6). Plaintiffs' allegations regarding the deplorable and disrespectful manner of storage of the human remains and cultural items found at Hickory Ground state a plausible claim that this requirement was either ignored entirely or was not satisfied. Dkt. 190 at 50 (describing human remains placed in newspaper and plastic bins and left in a non-air-conditioned shed through numerous hot Alabama summers). Federal agencies are also required to ensure that archaeological resources excavated pursuant to ARPA are curated pursuant to 36 C.F.R. Part 79. 36 C.F.R. § 79.3(a). Those regulations set specific standards for the curation and use of such archaeological resources, which include inventory and recordkeeping, proper storage and conservation, safety

and security, availability for tribal religious uses, and more. *See, e.g.*, 36 C.F.R. § 79.9; 36 C.F.R. § 79.10. The conditions in which these sacred items were stored here as described in the Second Amended Complaint do not come anywhere near those standards.

The Federal Defendants' action of allowing excavation of the Hickory Ground Site to take place without required permits, inaction of failing to provide notice to the Muscogee (Creek) Nation before issuing any permit(s) they did issue, and failure to ensure appropriate curation of the items, are unquestionably agency actions that are reviewable under Section 706 of the APA.

Nor is there any doubt that the Plaintiffs' ARPA claim is timely. Plaintiffs allege that the Phase III excavation ended in 2011, Dkt. 190 at 28, the year before the original Complaint in this matter was filed in 2012, making it well within the statute of limitations. Second, any excavation, removal, damage, alteration, or defacement to archaeological resources by or at the direction of the Tribal Defendants without a required permit violated ARPA, regardless of whether it occurred during the Phase III excavation or during the subsequent construction of the casino (which the Plaintiffs allege concluded in 2014, Dkt. 190 at 32). For all of the foregoing reasons, the Plaintiffs have stated a timely and plausible claim under ARPA, and the Federal Defendants' motion to dismiss the ARPA claim should be denied.

E. The Plaintiffs have stated a claim against the Federal Defendants and Tribal Defendants under RFRA.

Federal Defendants and Tribal Defendants contend that Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, does not apply here because there is not a sufficient nexus between federal actions and the Tribal Defendants' actions and because the federal actions are not substantially burdening Plaintiffs' religion. Dkt. 200 at 35; Dkt. 202 at 62–69.[16] These arguments cannot require dismissal because the well-pleaded allegations state a plausible claim that the Tribal Defendants are federal actors, and therefore their actions are federal actions under

[16] Because Tribal Defendants and Federal Defendants advance very similar arguments in their motions to dismiss Plaintiffs' RFRA claim, Plaintiffs address both Tribal Defendants' and Federal Defendants' arguments in this brief for the sake of convenience and efficiency.

RFRA. Further, Plaintiffs have alleged that these federal actions are preventing them from practicing their religion and forcing them to choose between violating their religious mandates and facing civil or criminal penalties. Therefore, the federal actions are substantially burdening Plaintiffs' exercise of their religion. No compelling government interest justifies this substantial burden, and even if there were such an interest, there are means that are less restrictive on Plaintiffs' religion to fulfill that interest.

1. RFRA provides broader protections for religious liberty than were provided prior to the Supreme Court's 1990 decision in *Employment Division v. Smith*.

RFRA prohibits the federal government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014). Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (hereinafter *Smith*), holding that neutral state laws not targeting specific religious practices do not violate the free exercise clause of the First Amendment. *Id.* at 877-83. The effect of the ruling was to deny unemployment benefits to two Native Americans who were fired for ingesting peyote as part of religious ceremony. *Id.* at 874–75.

The dissent in *Smith* cautioned that the Court's deviation from its prior decisions seemed to stem from the fact that *Smith* involved Native American religion, as opposed to a religion with which the Court might be more familiar. *Id.* at 920–21 (Blackmun, J., dissenting). The dissent cautioned that the Court should not "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion," and must instead "scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be." *Id*. The dissent emphasized that this is especially important "in light of the federal policy-reached in reaction to many years of religious persecution and intolerance-of protecting the religious freedom of Native Americans" as embodied in the American Indian Religious Freedom Act, 42 U.S.C. § 1996, providing that:

> it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Id. at 920 (quoting 42 U.S.C. § 1996). Failing to live up to these standards means that "both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise." *Id.* at 921.

The purpose of RFRA was to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1). RFRA "provide[s] even broader protection for religious liberty than was available under" *Sherbert* or *Yoder* because the government must also show that it used the least restrictive means to achieve its compelling interest. *Burwell*, 573 U.S. at 695.

2. RFRA applies to the Tribal and Federal Defendants because Tribal Defendants were federal actors who had been delegated federal authority and obligations in the NPS Agreement.

Federal Defendants and Tribal Defendants contend that there is not a sufficient nexus between any federal actions and the Tribal Defendants' actions for RFRA to apply. Dkt. 200 at 35; Dkt. 202 at 62. Not so. The federal government's delegation of enumerated federal preservation functions and powers to the Tribal Defendants, which is subject to compliance with federal regulations, federal oversight, and entwinement with both state and federal governments, makes the Tribal Defendants federal actors subject to RFRA.

First, the National Park Service delegated federal functions and obligations under the National Historic Preservation Act to Tribal Defendants, making the Tribal Defendants actions those of government officials. *See* Dkt. 190 at 55, 72. Second, even if Tribal Defendants were acting as a private entity, as they contend, they are acting under color of law within the meaning of 42 U.S.C. § 2000bb-2(1) and therefore subject to RFRA because they are acting (1) as a delegee of federal functions, (2) as a joint actor with the federal government, and (3) as a party entwined with governmental policies and (4) whose management or control is entwined with the

government. Each of these independently establishes Tribal Defendants as federal actors. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (a challenged activity may be state action when "a private actor operates as a 'willful participant in joint activity with the State or its agents,'" when the private actor "has been delegated a public function by the State," when it is "entwined with governmental policies," or when government is "entwined in [its] management or control" (citations omitted)).

In the Eleventh Circuit, the listed factors from *Brentwood* have been incorporated into three tests: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003) (quoting *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993)); *see also Ala. Mun. Ins. Corp. v. Ala. Ins. Underwriting Ass'n*, No. 2:06CV291-CSC, 2008 WL 4493433 (M.D. Ala. Sept. 30, 2008) (applying the *Brentwood* factors). Under the public function test, a private entity acts under color of state law when it exercises powers that are "traditionally and exclusively governmental." *Nat'l Broad. Co. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988) (quoting *Jackson v. Met. Edison Co.*, 419 U.S. 345, 353 (1974)). Under the joint action/nexus test, courts consider whether "the State had so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Id.* (quoting *Jackson*, 419 U.S. at 357–58). "To charge a private party with state action under this standard, the governmental body and private party must be intertwined in a 'symbiotic relationship.'" *Id.* (quoting *Jackson*, 419 U.S. at 357).

The factors enumerated above from *Brentwood* and incorporated in the public function and joint action/nexus tests are plainly embodied in the delegation of the vital federal preservation functions to Tribal Defendants, and show that Tribal Defendants satisfy the public function and nexus/joint action tests. Under the NPS Agreement between Poarch and the federal government, Poarch assumed "the *functions* of a State Historic Preservation Officer . . . . with respect to tribal lands." Dkt. 190-1 at PDF p. 115 (emphasis added) (quoting 16 U.S.C. § 470a). In addition, before allowing a delegation of responsibility to Tribal Defendants, the Secretary

was required to determine "that the tribal preservation program is fully capable of carrying out the [delegated] *functions*" and that the preservation plan "defines the *remaining responsibilities* of the Secretary and the State Historic Preservation Officer." 16 U.S.C. § 470a(d)(C)(2)(D)(i)–(ii) (emphasis added). The delegated functions under the NPS Agreement are comprehensive, leaving no "remaining responsibilities" for the State Historic Preservation Officer. *See* Dkt. 190-1 at PDF p. 115–16. Several of the delegated functions require ongoing joint action with the federal and state government. For example, Poarch agreed to "[a]dvise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities"; to "[c]ooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal agencies, State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development"; to "[c]onsult with the appropriate Federal agencies in accordance with Section 106 of the Act" on certain matters. *Id.* at PDF p. 116. Upon execution of the Agreement, the National Park Service sent notification to several federal and state entities that Poarch had "assumed formal responsibility on tribal lands for all of the [listed] functions." *Id.* at PDF p. 118.

In turn, the federal government assumed oversight of the delegation. For example, the Agreement requires Advisory Council on Historic Preservation involvement if Tribal Defendants want to deviate from the Council's procedures for reviewing federal undertakings. *Id.* at PDF p. 116. It also requires Tribal Defendants to provide an annual report on their activities pursuant to the delegated functions; to notify the National Park Service of vacancies and successors to the Tribal Historic Preservation Officer position; and to undergo regular reviews of the Tribe's program "to ensure that the Tribe is carrying out the program consistent with this agreement." *Id.* If the Tribe fails to "carr[y] out its assumed responsibilities in accordance with th[e] agreement, the [NHPA], or any other applicable Federal statute or regulation," the National Park Service can terminate the agreement. *Id.* at PDF p. 119. In addition, federal regulations require that the "agency official"—defined as "a State, local, or tribal government official" who has been

delegated federal responsibilities—take "legal and financial responsibility for section 106 compliance in accordance with [the Section 106 process]." 36 C.F.R. § 800.2.

Importantly, the delegation itself, as well as the delegated functions, obligated the Federal Defendants and Tribal Defendants to notify and consult with the Muscogee (Creek) Nation with respect to activity subject to the delegation that could affect the Nation's aboriginal tribal lands. Even before the delegation occurred, the Secretary was required to consult with "other tribes . . . whose tribal or aboriginal lands may be affected by the conduct of the tribal preservation program." 16 U.S.C. § 470a(d)(C)(2)(D); *see also* Dkt. 190 at 64, 66. Tribal Defendants and Federal Defendants were required to seek ways to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate the adverse effects" of the casino project on the Site through consulting with the Muscogee (Creek) Nation. 36 C.F.R. § 800.6; Dkt. 190 at 68. The NPS Agreement also obligated Tribal Defendants to consult with "representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," in "any case where action arising pursuant to the [NHPA] may affect the traditional lands of another Tribe," and where individuals or groups "may be affected by the program's activities." Dkt. 190 at 24–25, 69. Given the broad scope of this delegated authority, Tribal Defendants—as federal actors—are carrying out delegated federal functions and they are doing so in a manner that substantially burdens Plaintiffs' exercise of their religion.

Federal Defendants rely on the D.C. Circuit's decision in *Village of Bensenville*, 457 F.3d 52 (D.C. Cir. 2006) to argue that there is an insufficient basis for a federal nexus in this case. However, in *Bensenville*, the court found the federal government played merely a "peripheral role" in issuing a single approval for the City of Bensenville's airport reconfiguration plan. *Id.* at 65. The airport reconfiguration was carried out *subject to* federal regulations, but not pursuant to a broad delegation of federal functions—as Tribal Defendants' excavation and construction was here. *Id.* The federal government's role in *Bensenville* was solely as a regulator, whereas here the Tribal Defendants themselves carried out their activities *as federal actors* pursuant to the

delegation of federal functions. Thus, Tribal Defendants' actions are federal actions subject to RFRA. *See Brentwood Acad.*, 531 U.S. at 289 (private association was a state actor because its "nominally private character is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings"); *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966) (private trustees to whom a city had transferred a park were nonetheless state actors barred from enforcing racial segregation, since the park served the public purpose of providing community recreation, and "the municipality remain[ed] entwined in [its] management [and] control"); *Dotson v. Shelby Cty.*, No. 13-2766-JDT-TMP, 2014 WL 3530820, at *13 (W.D. Tenn. July 15, 2014) (finding private entity that provided food service at a prison to be a state actor for purposes of Plaintiffs' Religious Land Use and Institutionalized Persons Act and Free Exercise claims).

For the same reasons, Tribal Defendants' reliance on *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011), is misplaced and not persuasive. The plaintiff in *Florer* failed to present any evidence that the government delegated its obligations to the private entity at issue. *Id.* at 925 (private entity's professional standards were not governed by the state). In contrast, here there are clear delegations of federal functions governed by federal law and federal oversight. *See, e.g.*, 36 C.F.R. § 800.2 (defining a "tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law" as an "agency official" obligated to comply with federal law); Dkt. 190-1 at PDF p. 115 (noting that the Secretary reviewed and approved Poarch's preservation plan for conformance with federal regulations).

Tribal Defendants' affirmative and ongoing choice to carry out their delegated federal functions made them federal actors. As discussed below, their actions have and continue to substantially burden Plaintiffs' exercise of their religion, which violates RFRA.

3. Tribal Defendants, as federal actors, are substantially burdening Plaintiffs' religious exercise by forcing them to choose between fulfilling their religious duties or facing criminal and civil penalties.

Federal Defendants and Tribal Defendants assert that the facts alleged in the Second Amended Complaint do not give rise to a RFRA violation because the governmental activity does not "substantially burden" Plaintiffs' exercise of religion. However, as Plaintiffs have alleged, the manner in which Tribal Defendants—as federal actors—are carrying out their delegated federal functions is causing a substantial burden to Plaintiffs' continuing and affirmative religious duties to care for the Hickory Ground ceremonial site and for the graves and bodies of the deceased by preventing them from carrying out those duties. Dkt. 190 at 72–76. This forces Plaintiffs to choose between either abandoning their religious beliefs or facing civil or criminal sanctions for fulfilling their religious duty to their ancestors. *See id.* at 73, 75. No compelling government interest justifies the continued desecration of the Hickory Ground Site, as its acquisition was made for the precise purpose of preserving the Site for the benefit of Plaintiffs. *Id.* at 75. Nor is a complete prohibition of Plaintiffs fulfilling their religious obligations the least restrictive means to serve any compelling government interest that may exist, given Tribal Defendants' broad landholdings and well-demonstrated ability to serve their self-governance and economic interests at those locations. Plaintiffs have therefore stated a claim against Tribal Defendants under RFRA.

Hickory Ground is a place of profound religious importance to Plaintiffs; for Hickory Ground Tribal Town and Mekko Thompson in particular, this place represents their origin in this world. Dkt. 190 at 13. Without bothering to consult with or seek consent from Plaintiffs, Tribal Defendants exhumed Plaintiffs' ancestors, placed them in a perpetual state of unrest, and continue to desecrate the burial and ceremonial site by mistreating the remains and funerary objects and allowing prohibited persons and substances in and around the ceremonial grounds. *Id.* at 73–76. Tribal Defendants' actions were fully subject to their delegated federal functions, and Tribal Defendants affirmatively contend their actions comported with those functions. *See* Dkt. 202, Sections V-VII.

Tribal Defendant's actions have caused, and are causing, Plaintiffs to fail in their religious duties because Plaintiffs are not being permitted to complete required religious protocol and return the bodies of their ancestors, along with their funerary objects, to their original and intended final resting places. *Id.* at 73–76. Tribal Defendants' actions are preventing Plaintiffs from fulfilling this duty, forcing Plaintiffs to choose between either abandoning their religious beliefs or facing civil or criminal sanctions for fulfilling their religious duty to their ancestors. *See id.* at 73, 75. Tribal members have already been arrested and charged with crimes for attempting to comply with their religious duties. *Id*. at 73; Dkt. 100 at 23.

These are precisely the kinds of situations that constitute a substantial burden on Plaintiffs' religious exercise.

The Supreme Court in *Wisconsin v. Yoder* held that a government act substantially burdens free exercise if it "affirmatively compel[s a person], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. A substantial burden is also exerted when the government act causes "pressure that tends to force adherents to forego religious precepts," *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), or when the government makes the practice of religion more expensive in the context of business activities, *see Burwell*, 573 U.S. at 710. Thus, the Supreme Court had "little trouble" concluding that a law that required business owners to choose between following their religion and dropping their business health insurance, for which they would face penalties, substantially burdened the owners' religion. *Id.* at 719–20.

Similarly, in *Comanche Nation v. United States*, 2008 WL 4426621 (W.D. Okla. 2008), the court found that construction of a federal building near a site the Comanche held sacred would impose a substantial burden on their religious practices because the proposed location was the central sight-line to the site and an unobstructed view was required to practice the Comanche religion. *Id.* at * 2, 17 (noting that the building "would further encroach on the last remaining open viewscape on the southern approach to the [sacred site]"). Because other land was available to the government, the planned location was not the least restrictive alternative. *Id.* at *18. The

Comanche thus established a likelihood of prevailing on their RFRA claim, and the court granted a preliminary injunction. *Id.* at *7.

The burden on Plaintiffs' religion in this case is greater than the burden held to be substantial in *Comanche*. Tribal Defendants' actions have put Plaintiffs' ancestors and the sacred site of Hickory Ground Tribal Town's origin in a state of perpetual unrest that Plaintiffs are compelled by their religion to remedy. *See id.*; Dkt. 190 at 73–76. When Hickory Ground Tribal Town members attempted to comply with their religious duties at Hickory Ground in 2013, they were arrested and charged with crimes. *See id.*; Dkt. 100 at 23. Like the plaintiffs in *Burwell*, Plaintiffs are forced to either follow their religion and face these consequences or violate their religion with the heart-wrenching knowledge that they are leaving their mutilated ancestors in a state of perpetual unrest and their sacred place of origin desecrated. And, like the plaintiff in *Comanche*, Tribal Defendants' religious exercise is prevented by the development at Hickory Ground.

This case is distinguishable from the magistrate's recommendation in *Slockish v. United States Federal Highway Administration* (and cases cited therein), cited by Tribal Defendants. No. 3:08-CV-01169-YY, 2018 WL 4523135, at *6 (D. Or. Mar. 2, 2018). In that case, the plaintiffs failed to show that they were forced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Id.* Notably, at the pleading phase, the magistrate observed that "[w]ithout the artifacts and free access to the site, plaintiffs may be forced to act contrary to their religious beliefs," and furthermore that it could not ascertain whether the defendants "took the least restrictive means for implementing the Project and whether they followed all appropriate procedures." *Id.* at *10 n.9. As a result, the district court denied the defendants' earlier motion to dismiss for failure to state a claim. *See Slockish v. U.S. Fed. Highway Admin.*, No. CV-08-1169-ST, 2011 WL 7167042, at *9 (D. Or. Sept. 21, 2011), *report and recommendation adopted in part*, No. 3:08-CV-1169-ST, 2012 WL 398989 (D. Or. Feb. 7, 2012) (noting that fact issues needed to be resolved in order to determine the existence of a substantial burden and whether defendants took the least restrictive means in implementing the project).

Whatever the decision might be in this case on a fully-developed record, the allegations in the Second Amended Complaint undoubtedly state a plausible claim under RFRA.

Tribal Defendants also rely on *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. U.S. Department of the Interior*, but that case is also distinguishable because the plaintiffs there did not "demonstrate that they have in fact been barred from the Project site or received actual threats of arrest," and alleged a burden on their religion that was in the nature of decreased "spiritual fulfillment" and visits to a religious site, as opposed to affirmative religious duties to take action at the Site. No. 2:11-CV-00395-ODW, 2012 WL 2884992, at *7–8 (C.D. Cal. July 13, 2012). Here, Plaintiffs have been barred from Hickory Ground, because virtually all of it is covered over in concrete and asphalt, and they would face civil and criminal penalties if they took action to return their ancestors to their intended resting sites and protected the ceremonial grounds as their religion requires. Thus, *La Cuna De Aztlan* is inapposite.

That is precisely the "substantial burden" that the Tribal Defendants have imposed on Plaintiffs here. They have paved over the vast majority of the ceremonial and burial grounds at the Hickory Ground Site, and are desecrating the entirety of the Site by mistreating the remains and funerary objects and allowing prohibited persons and substances in and around the ceremonial grounds. Worse, neither the Tribal Defendants nor the Federal Defendants ever consulted with the Plaintiffs prior to the delegation of federal duties or prior to the excavation. Nor are the Defendants covering a small part of a sacred ground with tainted snow; they disrupted the burial grounds with heavy machinery and wrenched Plaintiffs' ancestors from their graves and mutilated them, leaving them strewn among construction debris, plastic bins, Auburn University, and the makeshift reburial site that was hurriedly filled in 2012. *See* Dkt. 190 at 50–52; Dkt. 179-1 a6–7. This case is also distinguishable from *Navajo Nation v. U.S. Forest Service*, because the Navajo there were not forced "to act contrary to their religion under the threat of civil or criminal sanctions," 535 F.3d 1058, 1070 (9th Cir. 2008), unlike the prohibitions applicable to Plaintiffs here, *see* Dkt. 190 at 73; Dkt. 100 at 23.

In contrast, here the Tribal Defendants have paved over the vast majority of the ceremonial and burial grounds at the Hickory Ground Site, and are desecrating the entirety of the Site by mistreating the remains and funerary objects and allowing prohibited persons and substances in and around the ceremonial grounds. Furthermore, the Defendants in this case never consulted with the Plaintiffs prior to the delegation of federal duties or prior to the excavation. Nor are the Defendants just creating snow; they wrenched the Plaintiffs' ancestors from their graves and mutilated them, leaving them strewn among construction debris, plastic bins, Auburn University, and the makeshift reburial site that was hurriedly filled in 2012. *See* Dkt. 190 at 50–52; Dkt. 179-1 at PDF pp. 6–7.

The Federal Defendants also improperly rely on *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008). In that case, Snoqualmie argued that a planned federal action would "interfere with" (as opposed to completely prevent) tribal members' practice of religion, and did not establish that they would face criminal or civil sanctions for complying with their religion. *Id.* at 1214. Here, Plaintiffs have asserted that Defendants' actions are completely preventing them from fulfilling their religious duties, and that if they did obey their religious tenets, they would face civil and criminal sanctions just as they did when they attempted to fulfill their duties in 2013.

Nor are Defendants helped by *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In that case, the challenged project ensured that "[n]o sites where specific rituals take place were to be disturbed," and the route of the project was planned to as far removed as possible from spiritual sites. *Id.* at 454. This case is the opposite of *Lyng*; Plaintiffs' spiritual sites were disrupted, unearthed, paved over and now lie beneath a mammoth structure where activities abhorrent to their traditions take place, with human remains displaced and subjected to varying forms of continuing mistreatment.

Because Plaintiffs establish a substantial burden on the exercise of their religion, the burden of persuasion shifts to the Defendants to prove that the challenged conduct is "in furtherance of a compelling government interest" and is implemented by "the least restrictive

means" of furthering that interest. 42 U.S.C. § 2000bb-1(b). When "'a plausible, less restrictive alternative is offered . . . it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.'" *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 77 (D.C. Cir. 2006) (quoting *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000)). Here, there is no compelling government interest that justifies the continued desecration of the Hickory Ground Site, and there are less restrictive means to accomplish any compelling interest that may exist. *Id.* at 75–76. The acquisition of Hickory Ground, made with federal preservation funds, was made for the purpose of preserving the Site for the benefit of Plaintiffs—a fact known at the time of acquisition by both Interior (who provided the funds) and Tribal Defendants (who asked for the funds). As discussed in Sections IV.C and D. of Plaintiffs' Response to Tribal Defendants' Motion to Dismiss, Tribal Defendants voluntarily undertook obligations to perpetually preserve the Site, and had protected it for over two thirds of the time it owned the Site by the time this suit was filed. By 2005, Poarch was operating IGRA gaming at its casinos in Montgomery[17] and Atmore (opened in 1985)[18]. Like the defendant in *Comanche*, Tribal Defendants have alternatives available to them. For example, Poarch has numerous trust and fee properties and therefore has ample opportunity to pursue its interests on its own lands. *See* Wind Creek Hospitality Property Overview, *available at* https://windcreekhospitality.com/properties-2/overview (last visited July 6, 2020) (listing ten casino and resort locations). Furthermore, the public interest, as expressed in NAGPRA, ARPA, the NHPA, the ARPA permit conditions, and the NPS Agreement, is to preserve sites of historic, cultural, and religious importance, with paramount importance placed on consultation with affected tribes. Requiring Poarch not to substantially burden Plaintiffs' religion at just one of its parcels of land does not impose any obligations beyond those Tribal Defendants already undertook when acquiring Hickory Ground.

[17] *See* U.S. Department of the Interior Office of Inspector General Semiannual Report to Congress 9 (Oct. 2006), *available at* https://www.doioig.gov/sites/doioig.gov/files/Semiannual-OCT2006SAR.pdf (last visited July 3, 2020).
[18] *See* Dkt. 190 at 28.

Because Tribal Defendants' actions are federal actions, and because those federal actions are substantially burdening Plaintiffs' exercise of religion by forcing Plaintiffs to choose between religious compliance and sanctions without a compelling government interest, this Court should deny Federal Defendants' motion to dismiss Plaintiffs' RFRA claim.

F. This Court should not dismiss Count VIII of the Second Amended Complaint.

Because Tribal Defendants and Federal Defendants advance very similar arguments in their motions to dismiss Count VIII, Plaintiffs address both Tribal Defendants' and Federal Defendants' arguments in Section IV.I of their Response to Tribal Defendants' Motion to Dismiss for the sake of convenience and efficiency.

V. CONCLUSION

For the reasons explained in detail above, the Court should reject the Federal Defendants' improper efforts to obtain a dismissal of this case before discovery and before the claims can be presented to the Court on the basis of a fully-developed record. Plaintiffs' have satisfied the requirements of Rule 8 and Rule 12(b)(6) with thorough factual allegations stating facially plausible claims for relief. The Court should deny the Federal Defendants' motion in its entirety and allow this case to proceed forward on the merits. If the motion is granted to any extent, Plaintiffs request that the Court condition such dismissal on the ability of Plaintiffs to submit a revised complaint. This is consistent with the liberal policy in favor of allowing amendments under Fed. R. Civ. P. 15(a)(2) (the "court should freely give leave when justice so requires."). *See also Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984).

Respectfully submitted this 6th day of July, 2020.

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Certificate of Service

I hereby certify that on the 6th day of July, 2020, I caused to be electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties entitled to receive notice.

s/ *Lauren J. King*
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