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

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

PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE TO TRIBAL 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
SHPO:	State Historic Preservation Officer
THPO:	Tribal Historic Preservation Officer
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. Tribal Defendants' authority does not include unchecked power to violate applicable law; they do not have sovereign immunity under *Ex Parte Young*.

1. Defendants Poarch Band of Creek Indians and PCI Gaming do not have sovereign immunity from Plaintiffs' claims against them as delegees of federal authority.

Plaintiffs have sued the Poarch Band ("Poarch") and PCI Gaming in their capacities as delegees of federal preservation responsibilities under the National Historic Preservation Act ("NHPA"). These responsibilities also include obligations to comply with related laws, including the Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act. Specifically, the Second Amended Complaint alleges that "[a]s a delegee of federal functions, Poarch and its officials performing the delegated functions are federal actors, liable as federal officials" and that "[w]hen the National Park Service delegates its authority, the delegee carries out the delegated responsibilities on behalf of the National Park Service. Poarch's assumption of responsibility under the NHPA pursuant to federal law means that Poarch acts as a de facto government agency with respect to the delegated responsibilities." Second Amended Complaint, Dkt. 190 at 55, 64. The Second Amended Complaint also alleges that, among other things, Poarch and its agents failed to comply with the NHPA responsibilities delegated by the National Park Service. *See id.* at 55, 64–69. These responsibilities incorporate obligations under the Native American Graves Protection and Repatriation Act, *see* 54 U.S.C. § 306102(b)(5)(C), and the Archaeological Resources Protection Act, *see* 36 C.F.R. § 800.2(a)(1).

Poarch and PCI Gaming cannot have it both ways: they cannot accept federal "legal responsibility" under the NHPA and their agreement with the National Park Service and at the same time retain sovereign immunity. Such a result would impermissibly allow the federal government and its delegees to frustrate the purpose of the Administrative Procedure Act's waiver of sovereign immunity.

The Administrative Procedure Act ("APA") generally waives the federal government's immunity from a suit "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" and further provides that anyone "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." 5 U.S.C. § 702.

"[T]he APA is a waiver of sovereign immunity in cases to which it applies. . . ." *Wonders v. Crutchfield*, No. 1:12-CV-514-WKW, 2013 WL 2453535, at *4 (M.D. Ala. June 4, 2013) (quoting 5 U.S.C. § 702). The APA applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The Supreme Court has held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702), *abrogated on other grounds by statute as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977).

This protection for aggrieved persons—the right for judicial review—does not simply disappear when the agency delegates its authority to another entity, as the National Park Service did here in its agreement delegating National Historic Preservation Act responsibilities to Poarch. Instead, the delegation comes with a mandate 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 subpart B of this part ["the Section 106 process"]." 36 C.F.R. § 800.2 (emphasis added). Put differently, the delegee steps into the shoes of the agency that made the delegation in the first place.

Thus, when NPS delegated preservation responsibilities to Poarch, Poarch was required, among other things, to:

a. Follow Section 106 of the NHPA in accordance with the regulations codified at 36 C.F.R. § 800 *et seq.*, which mandates consultation with any tribe that attaches

religious and cultural significance to a historic site, *see* 16 U.S.C. §§ 470a(d)(6), 470f; 36 C.F.R. § 800.1 e*t seq*.;

b. ”[P]articipat[e] in the historic preservation program and “consult[] with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation”; and

c. “In any case where an action arising pursuant to the [NHPA]may affect the traditional lands of another Tribe . . . seek and take into account the views of that Tribe.”

NPS Agreement, Dkt. 190-1 at 117 §§ 5, 7; *see also* Second Amended Complaint, Dkt. 190 at 24–25.

Under Tribal Defendants’ theory of the case, aggrieved persons could seek redress where federal authority is exercised by *federal agencies* in violation of applicable law, but not if the ***exact same authority*** is exercised by a *federal delegee* in violation of applicable law. Although the delegee would not have the authority to act *but for* the federal delegation, the Tribal Defendants contend that the accompanying accountability falls into the ether after delegation occurs. Such a result would be absurd and “would make a sham of the reconsideration required by federal law.” *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972) (jurisdiction over the delegee’s action prevents “emasculation of remedy clearly available against the federal respondents”).

The Tenth Circuit addressed a similar delegation issue in *Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes*, 786 F. App’x 837, 840–42 (10th Cir. 2019). In that case, the Caddo Nation sued the Wichita Tribe for violations of the National Historic Preservation Act in developing an area that may have been located on grave sites. The Wichita Tribe’s development project was funded using a Department of Housing and Urban Development (“HUD”) grant, which empowered HUD to delegate its responsibilities and “require that a grantee like Wichita Tribe comply with both NEPA and NHPA.” *Id.* at 840 (citing 42 U.S.C. § 3535(d); 24 C.F.R. §§ 58.1, 58.4, 58.5, 1003.605). The Wichita Tribe moved to dismiss Caddo Nation’s

complaint on the basis of tribal sovereign immunity. The district court rejected this defense but dismissed the complaint on other grounds. On cross-appeal, the Wichita Tribe challenged the district court's conclusion that the claims were not barred by sovereign immunity.

The Tenth Circuit Court of Appeals affirmed the district court's conclusion that the Caddo Nation's claims were not barred by sovereign immunity because HUD had delegated its National Historic Preservation Act responsibility to the Wichita Tribe. The court explained that "[b]y specifically accepting and assuming HUD's rights, duties, and obligations to act in conformity with NEPA and NHPA, Wichita Tribe waived its sovereign immunity for just the type of APA-based suit at issue in this case." *Id.* at 841. In reaching this conclusion, the court observed that the statutory and regulatory scheme "could not be more clear: HUD can condition the provision of a grant to an Indian tribe on the tribe's acceptance of HUD's obligation to comply with NEPA and NHPA, an obligation enforceable via the APA." *Id.* at 840 (citing 5 U.S.C. § 702; 42 U.S.C. §§ 5304(g), 5306(a)). That is precisely why the Poarch delegees have no sovereign immunity to Muscogee (Creek) Nation's APA-based claims.

Similarly, in *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, the court held that because the Richmond Metropolitan Authority "purposefully availed itself of the benefits of federal laws," it "constitute[d] a waiver of sovereign immunity as to the requirements of the federal statutes involved." 359 F. Supp. 611, 624 (E.D. Va. 1973), *aff'd*, 481 F.2d 1280 (4th Cir. 1973). In that case, the plaintiff challenged the proposed construction of an expressway that would require destruction or relocation of the historically significant James River and Kanawha Canal. Among other things, the plaintiff sought compliance with the NHPA. The court held that jurisdiction over this claim extended to the United States defendants and "to the nonfederal defendants as well, since it is alleged that they have taken advantage of the benefits conferred by federal law and because their activities could otherwise make a 'sham' of federal statutory requirements if these requirements must be met in this case." *Id.* at 622 (citing *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972)). *See also S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 330 (4th Cir.

2008) ("Where 'the challenged activities' of state actors 'would make a sham of the reconsideration required by federal law,' federal courts may entertain suits against state actors 'to preserve federal question jurisdiction in the application of federal statutes.'") (quoting *Arlington Coalition*, 458 F.2d at 1329); *Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dep't*, 446 F.2d 1013, 1028 (5th Cir. 1971) (by accepting federal funding and participation, the state "voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law.").

Here, as in *Caddo Nation* and *James River*, Poarch has accepted federal benefits in the form of a delegation of National Historic Preservation Act authority and acceptance of preservation grant funds. The NPS Agreement and the applicable regulations obligate Poarch to comply with federal law, and Poarch *certified it would comply* in the NPS Agreement. *See* NPS Agreement, Dkt. 190-1 at PDF p. 117 §§ 5, 7. A ruling that Poarch and its agents were not subject to the very laws with which they certified they would comply would render the certification meaningless and would allow circumvention of laws that carry out vital policies of national importance—like protecting historically significant places.

2. Tribal official Defendants are not immune from *Ex Parte Young* claims for ongoing violations of applicable law.

Under the doctrine of *Ex Parte Young*, tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of applicable law. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 796 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) ("As an officer of the [tribe], [the tribe's governor] is not protected by the tribe's immunity from suit"). The Eleventh Circuit expressly held in *Alabama v. PCI Gaming Authority* that Poarch tribal officials were not immune from a claim alleging that they were "engaged in ongoing conduct that violates federal law," noting that "[s]everal other circuits similarly have held that the *Ex parte Young* doctrine applies to make tribal officials

subject to suit to enjoin ongoing violations of the Constitution or federal law." 801 F.3d 1278, 1288 & n.19 (11th Cir. 2015).[3]

The "applicable law" implicating the *Ex Parte Young* doctrine as it pertains to tribal officials includes federal law, *PCI Gaming*, 801 F.3d at 1288, including federal common law, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011), and state law, *see Bay Mills*, 572 U.S. at 796; *PCI Gaming*, 801 F.3d at 1290. "Given that tribal immunity arises from tribes' statuses as sovereigns, it is unremarkable that they too can be sued for prospective, injunctive relief based on violations of [applicable] law," including applicable state law. *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121-24 (2d Cir. 2019), *cert. denied sub nom. Sequoia Capital Operations, LLC v. Gingras*, 140 S. Ct. 856 (2020).

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of [applicable] law and seeks relief properly characterized as prospective.'" *Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (alterations in original) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

The Tribal Defendants' principal argument is that the *Young* doctrine does not apply because the Tribal Officials' violations of law are not ongoing. Dkt 202 at 11–14. They also argue that if the Tribal Officials *are* engaged in ongoing violations of law (they are), the *Young* doctrine still wouldn't apply because Plaintiffs' claims implicate "special sovereignty interests." *Id.* at 11. Not so. The Second Amended Complaint plainly alleges the ongoing violations for which Plaintiffs seek prospective injunctive relief. The "special sovereignty interests" exception to the doctrine has been cabined to the facts from *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and the claims here do not approach those facts in any way.

[3] These other circuits include the D.C. Circuit, the Eighth Circuit, the Ninth Circuit and the Tenth Circuit. *See Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir.1993); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011).

a) *The Complaint alleges ongoing violations of law.*

Tribal Defendants advocate a standard for "ongoing violations" that would insulate a sovereign actor's ongoing harm from judicial review whenever it is caused by an action taken in the past. That result would turn *Ex Parte Young* on its head.

Three cases from the Eleventh Circuit demonstrate that actions in the past can result in ongoing harm for which injunctive relief is available under *Ex Parte Young*. In *Curling v. Secretary of State of Georgia*, the Eleventh Circuit rejected the defendants' contention that the Plaintiffs had not alleged an ongoing violation of law because their claims centered on the unreliability of voting machines in past elections. 761 F. App'x 927, 932 (11th Cir. 2019). The Court held that the showing of the past unreliability of the machines was to show "that past is prologue to their future injuries caused by the same election system." *Id.* (citing *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984) ("Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction.").

Similarly, a state inmate's claim for injunctive relief was allowed to proceed under *Ex Parte Young* because the failure to remedy the loss of his court files constituted an ongoing violation of his right of access to the court. *Schwindler v. Comm'r, Ga. Dep't of Corr.*, 605 F. App'x 971 (11th Cir. 2015). The Eleventh Circuit emphasized that "most importantly," the inmate was seeking "the *replacement* of his lost or destroyed files, to the extent possible," and that the district court had improperly "ignored the possibility that the Commissioner's continued refusal to attempt to replace the files that were lost . . . is itself an ongoing violation" of the inmate's right to have access to the courts. *Id.* at 972; *see also Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (reaffirming that requests for reinstatement after loss of employment "constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception").

Finally, *Hollywood Mobile Estates Ltd. v. Cypress*, 415 F. App'x 207 (11th Cir. 2011), illustrates the difference between what does and does not fall within the ambit of *Ex Parte*

Young. A landlord sued to recover possession of certain leased premises and for rents collected from subtenants. The defendant was the Seminole Tribe of Florida. The Eleventh Circuit held that *Ex Parte Young*'s sovereign immunity exception did *not* apply to the business's request for return of rent, because it was a request for monetary damages from a past legal breach "rather than a prospective request for relief." *Id.* at 209. However, the exception *did* apply to the business's request for an injunction compelling them to return possession of the leased premises. *Id.* The Eleventh Circuit rejected the Seminole Tribe's argument that the injunction request was not prospective because "it would remedy past, rather than future, harms" and "really requests an undoing of what was done in the past." *Id.* The court reasoned that the alleged past wrong (eviction) gave rise to the ongoing harm of depriving the business of its right to occupy the property. *Id.* The court concluded that the business's request for an injunction "directing the tribal defendants to restore it to the property" constituted prospective relief that would "cure [the] ongoing violation," and the tribal officials therefore did not have immunity to the claim. *Id.*

As *Curling*, *Schwindler*, and *Hollywood Mobile Estates* indicate, the appropriate inquiry to determine whether a claim alleges an ongoing violation is whether the plaintiff seeks *injunctive relief*, as opposed to *damages*. "If the violation has ceased, the only remedy available would be retrospective compensatory damages, which are barred by the Eleventh Amendment;" thus, *Ex Parte Young* cannot be employed where "a pattern of illegal conduct by [government] officers ceases" such that injunctive relief would not provide a remedy. 13 Wright & Miller, Fed. Prac. & Proc. § 3524.3 (3d ed.). Importantly, "[t]he line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief." *Hutto v. Finney*, 437 U.S. 678, 690 (1978). Thus, a plaintiff who "seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the [defendant]'s action" does not run afoul of *Ex Parte Young* so long as the plaintiff does not seek monetary damages from a past breach of legal duty from the sovereign via its officials (named in their official capacities). *Verizon Md., Inc.*, 535 U.S. at 646.

Plaintiffs seek declarations of the illegality of certain of the Tribal Officials' past conduct, but seek only prospective, non-monetary relief against them designed to address the

ongoing harm from that conduct. Plaintiffs' claims therefore satisfy the "straightforward inquiry" into whether the complaint alleges an ongoing violation of law and seeks prospective relief. Each claim is addressed in turn.

(1) Count I: Ongoing violation of the Indian Reorganization Act.

Count I alleges that, because Poarch was not "under federal jurisdiction" within the meaning of the Indian Reorganization Act, 25 U.S.C. § 5123 *et seq.*, the Secretary did not have authority to take land into trust for Poarch and the land is "properly considered fee land subject to state, not federal, law." Dkt. 190 at 45. If so, "[g]aming on the Hickory Ground Site is thus not legal under applicable Alabama law and the Indian Gaming Regulatory Act." *Id.* at 46.

Count I is is a claim against the Secretary, not Poarch, and does not require Poarch's involvement, as discussed in Section IV.J below. However, Plaintiffs address Poarch's arguments here.

Tribal Defendants attempt to dismiss Count I by advancing a "heads I win, tails you lose" proposition. *See* Dkt. 202 at 12–13. They argue that if the land is *not* validly in trust, then it is not subject to the Indian Gaming Regulatory Act and there is no violation under that statute. If the land *is* validly held in trust, then the gaming there is lawful under the Indian Gaming Regulatory Act. But Plaintiffs specifically allege that gaming is not legal under "applicable Alabama law" *as well as* the Indian Gaming Regulatory Act. Dkt. 190 at 46.

If the legal basis for gaming at the Hickory Ground site is the Indian Gaming Regulatory Act, that statute requires that the gaming occur on "Indian lands," which are limited to trust and reservation lands. This requirement is not met if the land is not validly in trust. *See* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2703(4), 2710 (defining "Indian lands"; stating that tribes may engage in gaming on "Indian lands" subject to certain restrictions). Nor would the gaming be legal under state law. For example, Alabama Code Section 13A enumerates numerous criminal gambling offenses that would apply to the gambling activity at Hickory Ground.

In *Bay Mills*—which also involved a question of whether a tract of land qualified as

"Indian lands"—the Supreme Court specifically stated that the State of Michigan could pursue state law claims against Bay Mills officials under *Ex Parte Young*:

> Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. *See* [Mich. Comp. Laws Ann.] § 432.220; see also § [Mich. Comp. Laws Ann.] 600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct. *See Santa Clara Pueblo*, 436 U.S., at 59, 98 S.Ct. 1670.

Bay Mills, 572 U.S. at 795–96 (emphasis in original). Accordingly, "tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands." *PCI Gaming*, 801 F.3d at 1290. "The Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law," and "[t]here is a minimal intrusion on sovereignty if federal courts are available as forums for enforcing violations of a state's law against tribal officials because tribes cannot empower their officials to violate [applicable] state law." *Gingras*, 922 F.3d at 121–22.

The Tribal Defendants' motion to dismiss conveniently ignores Plaintiffs' allegations that gaming at Hickory Ground is illegal under state law. *See* Dkt. 190 at 46. Just as tribes are not empowered to authorize their officials to violate applicable federal law, they also lack the power to authorize their officials to violate applicable state law. Thus, Count I alleges a violation of applicable law, regardless of whether Hickory Ground is considered fee or trust land.

Count I also alleges an ongoing violation of law. The Eleventh Circuit already held that a plaintiff adequately alleged ongoing violations of law by alleging that gaming at a site was illegal because the site was not validly held in trust. "Because [the plaintiff] alleges that the Individual [Poarch] Defendants are engaged in ongoing conduct"—namely, gambling on lands not validly taken into trust—"that violates federal law, the Individual Defendants are not entitled to immunity." *PCI Gaming*, 801 F.3d at 1288, 1290.

Similarly, here Plaintiffs allege that Tribal Officials are engaged in ongoing conduct—violation of applicable state and federal law—and resolution of certain of Plaintiffs' causes of action depends on whether Hickory Ground was validly taken into trust.

(2) Counts II and V: Ongoing Unjust Enrichment.

Counts II and V allege (under state and federal law, respectively) that Poarch unjustly enriched itself by acquiring the Hickory Ground Site without objection from Plaintiffs based on promises that it would perpetually protect the Site, and enjoying ongoing profits based on contraventions of those promises. Dkt. 190 at 46-48. Poarch promised, among other things, that it would provide "permanent protection of the site"; and that "Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home." *Id.* at 46-47.

These counts allege an ongoing violation of state and federal law: they allege that Poarch is continuing to be unjustly enriched because, instead of providing "permanent protection of the Site" as it promised, Poarch is operating a casino resort "that is generating hundreds of millions of dollars in gambling and resort revenues" while sacred remains and burial objects remain displaced from their intended resting places. *Id.* at 46-48.

Counts II and V also seek prospective relief to remedy the ongoing violation: Plaintiffs ask the Court to "impose equitable remedies, among other things, requiring the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and Poarch THPO to abide by Poarch's promises and restore the property, to the greatest extent possible, to its preexcavation and pre-construction condition." *Id.* at 48. Similar to the prospective claim in *Schwindler* seeking "replacement of [] lost or destroyed files, to the extent possible," Counts II and V seek to remedy the continuing unjust enrichment by means of an injunction requiring the return of displaced sacred items and restoration of the Site to the extent possible. This prospective relief would remedy the ongoing failure of the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and Poarch THPO to fulfill the promise of "permanent protection of the Site."

(3) Counts III and VI: Promissory Estoppel.

Counts III and VI allege (under state and federal law, respectively) that Poarch promised the Muscogee (Creek) Nation and Hickory Ground that it would preserve the Hickory Ground Site in perpetuity; that the Muscogee (Creek) Nation relied on that promise in not objecting to (and instead supporting) Poarch's acquisition of the site, and that Poarch was aware that if Poarch had instead disclosed that it would desecrate the site, the Muscogee (Creek) Nation would have sought to prevent the acquisition. Second Amended Complaint, Dkt. 190 at 48-49.

These counts allege an ongoing violation of state and federal law: they allege that Poarch is continuing to violate state and federal law regarding promissory estoppel by continuing to desecrate the Site in violation of its promise to protect the site, to the detriment of Plaintiffs. *Id.* at 46-48.

Counts III and IV also seek prospective relief to remedy the ongoing violation: Plaintiffs ask the Court to "impose equitable remedies, among other things, requiring the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and Poarch THPO to abide by Poarch's promises and restore the property, to the greatest extent possible, to its preexcavation and pre-construction condition." *Id.* at 49. As with the unjust enrichment claim, these counts seek to remedy Poarch's continuing failure to fulfill its promise to permanently protect the Site by means of an injunction requiring the return of displaced sacred items to their intended final resting places and restoration of the Site to the extent possible.

(4) Count VII: Ongoing violations of the Native American Graves Protection and Repatriation Act.

Count VII alleges that Tribal Defendants violated the Native American Graves Protection and Repatriation Act ("NAGPRA") by failing to (1) consult with, and obtain consent of, the Muscogee (Creek) Nation, before intentionally removing or excavating Native American cultural items; and (2) dispose of any removed items in accordance with NAGPRA, under which Mekko Thompson has the right to custody of human remains and funerary objects and the Muscogee

(Creek) Nation has the right to custody of all other cultural items at the Site. *See* Second Amended Complaint, Dkt. 190 at 53-58.

Count VII alleges an ongoing violation of federal law: it alleges that the Tribal Officials are violating NAGPRA by failing to give custody of the human remains and funerary objects from the Hickory Ground Site to Mekko Thompson (*id.* at 55-56), failing to give custody of other cultural items found at the Site to the Muscogee (Creek) Nation (*id.*), and failing to comply with the inadvertent discovery, consent, and consultation requirements of NAGPRA, resulting in ongoing improper treatment, storage, and displacement of the excavated items (*id.* at 56-57). Tribal Defendants admit that Plaintiffs "may allege an ongoing violation of federal law" in their claims that they are entitled to repatriation of remains and artifacts. *See* Dkt. 202 at 13 n.8.

Count VII also seeks prospective relief: an injunction requiring the Tribal Officials to come into compliance with NAGPRA by seeking the consent of the Muscogee (Creek) Nation to the excavation and construction, and reversing any unconsented-to actions, including restoration of the site to the extent possible if the Nation does not consent to any excavation or construction that was subject to NAGPRA. *Id.* at 58. In addition, even if the Court determines consent is not required, NAGPRA requires that excavated items subject to NAGPRA be given to Mekko Thompson and the Nation, as described above. *Id.* at 55-56.

(5) Count IX: Ongoing violations of the Archeological Resources Protection Act.

Count IX alleges that Tribal Officials violated the Archeological Resources Protection Act ("ARPA") by failing to meet the prerequisites for excavation at the Hickory Ground Site. *See* Second Amended Complaint, Dkt. 190 at 61-63. In other words, the items at the Site never should have been excavated because the legal prerequisites were not met, and the excavated items were wrongfully displaced, and continue to be wrongfully displaced, from the Site. This is the very thing the Archeological Resources Protection Act seeks to avoid.

Thus, Count IX alleges an ongoing violation: the continuing wrongful displacement of the excavated remains and other items from the archaeological site. *Id.*

Count IX also seeks prospective relief: an injunction requiring the Tribal Officials to come into compliance with the Archeological Resources Protection Act by seeking the consent of the Muscogee (Creek) Nation to the excavation and other activities subject to the Archeological Resources Protection Act, and reversing any unconsented-to actions, including restoration of the site to the extent possible if the Nation does not consent to any such activity. *Id.* at 64. In addition, even if the Court determines consent is not required, the Archeological Resources requires that excavated items subject to the Act be curated in accordance with particular requirements under the law. *Id.* at 63.

(6) Count X: Ongoing violations of the National Historic Preservation Act.

Count X alleges that Tribal Officials violated the National Historic Preservation Act by failing to carry out its obligations as a delegee of federal preservation responsibilities under the Act. *See* Second Amended Complaint, Dkt. 190 at 64-69. (specifying multiple failures and violations of delegated duties). As a result, damage is occurring at the Site that could have been avoided had Tribal Officials fulfilled their legal responsibilities, including ongoing mistreatment of the excavated remains and items. *Id.* at 5, 6, 31, 70. This ongoing mistreatment includes improper storage and handling of remains and items that have yet to be reburied and continued displacement of all remains and items from their intended resting places, *id.*—displacement that never would have occurred if Defendants had complied with the law.

Count X alleges ongoing violations: the continuing wrongful displacement and improper treatment of the excavated remains and other items from the Site. *Id.* at 5, 6, 31, 64-71.

Count X also seeks prospective relief: an injunction requiring Tribal Officials to comply with the National Historic Preservation Act and consult with the Muscogee (Creek) Nation during restoration of the Site to avoid or mitigate further adverse effects to the Site. *Id.* at 72.

(7) Counts XI and VIII: Ongoing violations of the Free Exercise Clause, Religious Freedom Restoration Act, and Religious Land Use and Institutionalized Persons Act.

Counts XI and VIII allege an ongoing violation of federal law: it alleges that the Tribal Officials are substantially burdening Plaintiffs' religious obligations to (1) remove their ancestors from what is in Plaintiffs' religion akin to purgatory by returning them to their intended resting places and (2) adhere to religious protocol in the reburial and maintenance of the Site thereafter. Second Amended Complaint, Dkt. 190 at 72-76, 59-61.

Plaintiffs also seek prospective relief: an order requiring Tribal Officials to "cease preventing Plaintiffs from fulfilling their religious obligations" by restoring the Site to its pre-excavation condition. *Id.* at 76, 78-79.

One key, common thread runs through all counts against Tribal Officials in the Second Amended complaint: Plaintiffs seek prospective relief for ongoing violations of law. Nowhere is there a claim for damages against Tribal Officials for past acts. All counts therefore satisfy the "straightforward inquiry" required under *Ex Parte Young*.

b) *None of Plaintiffs' claims implicate "special sovereignty interests."*

The Tribal Officials claim that even if they are committing ongoing violations of applicable law, their "special sovereignty interests" prevent the application of the *Young* doctrine. "Special sovereignty interests" are a "unique" and "narrow" exception to *Young* established by the Supreme Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997). Nearly all appellate circuit courts that have addressed this exception after the *Verizon* Court clarified the "straightforward inquiry" under *Ex Parte Young* have either (1) held that *Couer d'Alene* applies only where "an action implicates the exact issues of *Coeur d'Alene* itself, namely navigability of waters or the state's control over submerged lands,"[4] or (2) held that the exception no longer exists after *Verizon*.[5]

[4] *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1074 (9th Cir. 2014) (internal citations and quotations omitted); *see also*:

- Eleventh Circuit: *Hollywood Mobile Estates*, 415 Fed. Appx. at 211 (explaining that the interests must be of the type in *Coeur d'Alene*, i.e., "the functional equivalent of a quiet title action against the state"); *Lane v. Cent. Alabama Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (observing that the exception in *Coeur*

Last year in *Curling*, the Eleventh Circuit limited *Coeur d'Alene* to its facts. 761 F. App'x 927, 933–34 (11th Cir. 2019) (*Couer d'Alene* was an "unusual case" with facts that gave rise to a narrow exception to *Ex parte Young*). The Eleventh Circuit in *Curling* held that there was nothing so unusual about the claim that state election officials weren't comporting with the Constitution that "warrants applying *Coeur d'Alene Tribe*'s narrow exception." 761 F. App'x at 934. In making this observation, the court relied on the Tenth Circuit's opinion in *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008). That case held that *Verizon* limited the "reach" of *Coeur d'Alene Tribe*, and the Tenth Circuit later clarified that *Verizon* eliminated the special sovereignty interests inquiry from the *Ex Parte Young* analysis altogether. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012) (citing *Verizon*, 535 U.S. at 645; *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir.2007); *see also Columbian Fin. Corp. v. Stork*, 702 F. App'x 717, 722 (10th Cir. 2017) ("we have recognized that, after *Verizon Maryland*, this inquiry [regarding special sovereignty interests] is no longer required").

This case does not implicate the issues involved in *Coeur d'Alene*. The facts are instead similar to those in *Hollywood Mobile Estates*, 415 Fed. Appx. 207, where a business sued tribal officials to regain possession of leased premises from the tribe from which the business was

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d'Alene was driven by the "particular and special circumstances" of that case, and holding that the exception did not apply because "[t]his case is not like *Coeur d'Alene*").

- D.C. Circuit: *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) ("we cannot extend *Coeur d'Alene* beyond its 'particular and special circumstances,' 521 U.S. at 287, 117 S.Ct. 2028, which involved the protection of a State's land");

[5] *See*:

- Fifth Circuit: *Williams On Behalf of J.E. v. Reeves*, 954 F.3d 729, 739 (5th Cir. 2020) ("We have never before applied the holding of *Coeur d'Alene* in a context outside of the unique land rights challenge in that case. . . . To the contrary, this circuit has rejected the idea that *Coeur d'Alene* affects the traditional application of *Ex parte Young*.") (internal quotations and citations omitted).
- Seventh Circuit: *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) ("Although *Coeur d'Alene Tribe* seemed to introduce a new balancing approach (and new uncertainty) to the application of *Ex parte Young*, . . . the Supreme Court then turned away from that balancing approach [involving special sovereignty interests] in *Verizon Maryland* and returned to the "straightforward" inquiry into "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 535 U.S. at 645); *Ameritech Corp. v. McCann*, 297 F.3d 582, 588 (7th Cir.2002) ("While the Supreme Court [in *Coeur d'Alene Tribe*] seemed to advocate this balancing approach, a majority of the Court in *Verizon* rejected it.").
- Tenth Circuit: *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012) (noting that the special sovereignty interests exception was abrogated by *Verizon*).

allegedly wrongfully ejected. The tribal officials argued that the business's claims should be barred under *Coeur d'Alene* because it implicated special sovereignty interests, given that the relief the business sought required "(1) ordering the tribal council members into session; (2) compelling them to place matters on the agenda contrary to established procedures; and (3) forcing members to abandon their obligations of office and vote as the court has directed, contrary to the interests of the Tribe." *Id.* at 210. The Eleventh Circuit rejected the argument that *Coeur d'Alene* applied on those facts:

> Here, the requested injunction would merely affect the tribe's possessory rights to the property for the remainder of the lease term. It would not remove the land from the tribe's jurisdiction or permanently deprive the tribe of its property interests. The fact the tribal officials may have to take a vote to effect compliance with such an injunction does not create a "special sovereignty interest." We therefore hold that the district court erred in concluding the relief sought implicates special sovereignty interests. Instead, we hold, based on this record and these parties, that HME's request for an injunction restoring it to the premises is not barred by tribal sovereign immunity.

Id. at 211.

Here, the Tribal Officials make the same "special sovereignty interests" arguments as the tribal officials in *Hollywood Mobile Estates*. And, as in *Hollywood Mobile Estates*, Tribal Officials alleged sovereignty interests do not merit application of *Coeur d'Alene*.

First, this court's clarification that the Wetumpka property was not validly taken into trust in 1984 under the Indian Reorganization Act would not "extinguish" Poarch's "control over a vast reach of lands and waters long deemed . . . to be an integral part of its territory." *Coeur d'Alene*, 521 U.S. at 282. The Wetumpka property would *still be* under Poarch's control, just in fee status—as it always should have been since Poarch's acquisition of the property in 1980.

Nor is the Wetumpka property "long deemed" to be Poarch's territory. Poarch acquired it in 1980, and in its application for federal recognition, Poarch acknowledged that it did not historically occupy or control the land. Poarch's professed origin was in the "small geographic area" of "an eighteen-mile radius" around Tensaw, Alabama. *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. Individuals who resided in part of the Muscogee (Creek) Nation's territory—which spanned most of what later became Alabama, including what is now Wetumpka—did so pursuant to permission from the Nation. *Id.* at 3 (these individuals "applied for and were given permission by the council of the Creek Nation to settle on the Alabama-Tensaw River lands").

Second, the promissory estoppel claims in the Second Amended Complaint do not seek to give Plaintiffs' "de facto control of the property," as Tribal Defendants allege (dkt. 202 at 15). Instead, the claims seek injunctive relief to compel Poarch officials to comply with *Poarch's own promises*. Poarch's promises that Hickory Ground would be permanently protected so that "Creeks from Oklahoma may return and visit their ancestral home" where their ancestors were buried are sufficient to establish a constructive trust to fulfill those promises. Dkt. 190-1, Ex. A at PDF pp. 4-5, 7; *see infra* at 40 to 50. That Poarch is now unhappy with its own promises does not give it special sovereign interests to break them.

Third, issuance of an affirmative injunction directing Poarch officials to restore Hickory Ground to its pre-excavation state does not implicate special sovereignty interests. That relief is in keeping with Poarch's own promises that it acquired Hickory Ground to *prevent* development of the property and preserve it for the Muscogee (Creek) Nation in recognition that it was the Nation. It is also in keeping with various other laws that prohibited excavation and development on the property, including but not limited to the Native American Graves Protection and Repatriation Act, the Archeological Resources Protection Act, the National Historic Preservation Act, and the Religious Freedom Restoration Act. When Plaintiffs filed this suit, Poarch was just beginning construction. Poarch and its officials *chose* to continue construction knowing that it was illegal, and now argue that because construction is completed, this Court cannot require it to comply with applicable law by undoing what the law prohibited it from doing in the first place. Because governmental authorities have an obligation to cure violations of law, "judicial authority may be invoked" if those authorities "fail in their affirmative obligations," and "the scope of a

district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Hutto*, 437 U.S. at 687 n.9 (internal quotation and citation omitted). These powers include "bring[ing] an ongoing violation to an immediate halt." *Id.*

As in *Curling*, Plaintiffs' claims seek injunctive relief to bring Tribal Defendants into compliance with applicable law. Quite simply and logically, a tribe "has no interest in protecting a sovereignty concern that has been taken away" in the form of applicable law prohibiting certain conduct. *Vann v. Kempthorne*, 534 F.3d 741, 755-56 (D.C. Cir. 2008). "The tribe does not just lack a 'special sovereignty interest' in [conduct that would violate applicable law]—it lacks *any* sovereign interest in such behavior." *Id.* at 756.

The Tribal Defendants have no special interest in conducting their affairs in a manner that violates the law. The Tribal Defendants are not immune from Plaintiffs' claims.

B. The Plaintiffs' Indian Reorganization Act claim should not be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Because Plaintiffs' Indian Reorganization Act claim is against Secretary Bernhardt, not Tribal Defendants, and because Tribal Defendants and Federal Defendants raise the same arguments in support of their motion to dismiss Plaintiffs' Indian Reorganization Act claim, Plaintiffs address both groups of Defendants' arguments in Section IV.A of their Response to the Federal Defendants' Motion to Dismiss.

C. The Plaintiffs' promissory estoppel claim should not be dismissed.

Plaintiffs' promissory estoppel claim asserts that, in acquiring Hickory Ground, Poarch promised to protect the Site from development and preserve the culturally significant historical and burial grounds for Plaintiffs' benefit. Dkt. 190 at 48. Plaintiffs relied on this promise by cooperating with Poarch's application to purchase the Site and foregoing other potential avenues to block development on these sacred cultural grounds. *Id.* Plaintiffs therefore ask this Court to impose the equitable remedies of an injunction and a constructive trust to halt Poarch's misuse of Hickory Ground and restore the Site to its original state. *Id.*

Tribal Defendants contend that Plaintiffs' promissory estoppel claim is barred by the statute of limitations and the statute of frauds. *See* Dkt. 202 at 26–32. These defenses fail, however, because both erroneously presuppose that Plaintiffs' claim sounds in contract. As discussed below, Alabama case law makes clear that that promissory estoppel is an equitable remedy, and the nature of the claim must be analyzed on a case by case basis. Because Plaintiffs seek the imposition of a constructive trust, rather than monetary damages or the enforcement of a specific contractual term, their claim is properly characterized as one in the nature of recovery of land. Accordingly, the applicable 10-year statute of limitations has not yet run, and the statute of frauds is inapplicable.

Tribal Defendants also contend that Plaintiffs have failed to state a claim for promissory estoppel. Dkt. 202 at 32–37. But Plaintiffs have plausibly alleged that they detrimentally relied on Poarch's representation that it would preserve Hickory Ground for the cultural benefit of the Muscogee (Creek) Nation. While Tribal Defendants may dispute the veracity of these allegations, Plaintiffs have met their burden at this early stage to plausibly allege the elements of promissory estoppel.

1. The promissory estoppel claim is timely.

a) *A ten-year statute of limitations governs the promissory estoppel claim.*

Tribal Defendants argue that the promissory estoppel claims[6] are time-barred by the two-year statute of limitations in Alabama Code § 6-2-38(l). This statute does not apply to Plaintiffs' promissory estoppel or unjust enrichment claims because they do not assert a claim in the nature of damages for personal injury as contemplated by Alabama Code § 6-2-38(l).

[6] The Second Amended Complaint includes a count of promissory estoppel under state law in the event the Court rules in Plaintiffs' favor on Count I (under the Indian Reorganization Act) and a count of promissory estoppel under federal law in the event the Court does not rule in Plaintiffs' favor on Count I. *See* Second Amended Complaint, Dkt. 190, Counts III and VI at 48-49, 53. As the controlling law and relevant facts are substantially the same regardless of which claim is operative, as the Tribal Defendants have treated them as a single claim for purposes of their brief, Plaintiffs treat them as a single claim in this brief as well. The Plaintiffs will do the same for the alternatively pled unjust enrichment claims, as the Tribal Defendants did in their brief. Second Amended Complaint, Dkt. 190, Counts III and VI at 46-48, 53.

Rather, these claims are rooted in equity and seek the equitable remedy of an injunction and constructive trust to enforce Poarch's promise of protection of the Hickory Ground site. *See* Second Amended Complaint, Dkt. 190 at 46-49, 76-77. They are therefore claims in the nature of recovery of real property under Alabama Code § 6-2-33(2), which provide a ten-year statute of limitations.

This Court's decision in *Auburn University v. IBM*, 716 F. Supp. 2d 1114, 1118 (M.D. Ala. 2010) teaches that the determination of which statute of limitations should apply to a particular claim depends on the nature of the claim itself. It recognizes that claims will not always fall into the same category for limitations purposes and certainly does not hold or otherwise dictate that promissory estoppel claims must be classified as either tort claims or implied-contract claims. Indeed, the Alabama Code Article governing statutes of limitations is structured this way: each section sets out a time limit, *see* Alabama Code §§ 6-2-31 to -40, and then various categories of claims are provided under each one. The court must decide the category in which a particular claim fits to determine the applicable statute of limitations.

Thus, in *Auburn University*, this Court noted that the threshold issue was whether the claim at issue—unjust enrichment—fit into the category described by Alabama Code § 6-2-38(l); i.e., "whether the claim at issue seeks recovery for an *injury* that *arises* from contract." *Auburn Univ.*, 716 F. Supp. 2d at 1118 (emphasis in original). Because unjust enrichment claims vary, including claims "for enrichment flowing from a breach of the corporate fiduciary duties of loyalty and due care" that "clearly arise from tort injuries" and claims "for enrichment flowing from the rendering of substantial performance on a merely technically invalid contract" that "clearly arise from contract injuries," "it would be improper to classify all unjust-enrichment claims as either tort claims subject to the two-year statute of limitations or implied-contract claims subject to the six-year statute of limitation." *Id.*

Another court in the Northern District recently determined that the approach of the court in *Auburn University* in "determining the appropriate statute of limitations according to the circumstances from which the unjust enrichment claim arises" is a "well-reasoned approach,"

especially "[g]iven the lack of binding authority on th[e] issue" of the appropriate statute(s) of limitation for unjust enrichment claims. *Branch Banking & Tr. Co. v. McDonald*, No. 2:13-CV-000831-KOB, 2013 WL 5719084, at *7 (N.D. Ala. Oct. 18, 2013). Noting that the options were between a six- and ten- year statute of limitations for the plaintiff's particular unjust enrichment claim, the court decided that because the claim arose from a negotiable instrument, the six-year statute of limitations applied. *Id.*

Like unjust enrichment claims, the nature of promissory estoppel claims vary such that they may fit in different categories, it would not be appropriate to treat all promissory estoppel claims as fitting in only one or two categories for statute of limitation purposes. Rather, the focus is on the nature of the claim. *Id.* Where the claim is for enforcement of a right in land, Alabama case law indicates that the ten-year statute of limitations governing actions for the recovery of lands should apply.

It is "well settled" under Alabama Supreme Court law "that an action for establishment of a resulting trust is subject to the statute of limitations of ten years," as such action is "in the nature of a suit for the recovery of land since land is the subject matter of the suit." *Sykes v. Sykes*, 78 So. 2d 273, 276 (Ala. 1954) (internal quotation and citations omitted; emphasis added); *see also Henslee v. Merritt*, 82 So. 2d 212, 214 (Ala. 1955) (same). The court in *Robinson v. Sanders*, 530 So. 2d 821, 821 (Ala. 1988) (per curiam) affirmed the lower court's judgment based on the 10-year statute of limitations applicable to the remedy of constructive trust, as such remedy was one "for recovery of land" under Alabama Code § 6-2-33.

Tribal Defendants misconstrue the facts in order to circumvent application of the ten-year statute of limitations. They incorrectly state that Plaintiffs' allegations are merely that Poarch obtained property subject to a 20-year preservation covenant and then "began to develop the property after that [covenant] expired in a manner that is offensive to the Plaintiffs. Dkt. 202 at 28. What Plaintiffs actually allege in Counts III and VI is that "Poarch promised the Muscogee (Creek) Nation and Hickory Ground that it would preserve the Hickory Ground Site in *perpetuity*"; that the Muscogee (Creek) Nation "relied on that promise to its detriment in not

objecting to Poarch's acquisition of the property"; and that Poarch was aware that if Poarch had instead disclosed that it would desecrate the site, the Muscogee (Creek) Nation would have sought to prevent the acquisition. Second Amended Complaint, Dkt. 190 at 48-49, 53 (emphasis added).

Poarch was quite clear that (1) its promises were perpetual, and not limited to just 20 years, and (2) were expressly intended to benefit the Muscogee (Creek) Nation and Hickory Ground Tribal Town:

- "Acquisition of the property is principally a protection measure. Acquisition will prevent development on the property." Dkt. 190-1, Ex. A at PDF p. 4.
- "The Hickory Ground site will continue to enhance [Creek youth's] understanding of their history, *without excavation*." *Id.* (emphasis added).
- "There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved." *Id.*
- "In order to halt the destruction [i.e., clearing and leveling the land] planned for the site and to *insure [sic] against future destruction*, funds for acquisition of fee simple title are requested." *Id.* at PDF pp. 4-5 (emphasis added).
- "Specific end products of the project is to provide protection for a particularly important site in Creek History. . . . Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home." *Id.* at PDF p. 5.

See also Second Amended Complaint. Dkt. 190 at 18-20, 44, 46-49.

The Alabama Supreme Court recently detailed the nature of the constructive trust remedy in *Mitchell v. K & B Fabricators, Inc.*, 274 So. 3d 251 (Ala. 2018). "Equity may impress a constructive trust on property in favor of one beneficially entitled thereto when another holds title to the property by fraud, commission of wrong, abuse of a confidential relationship, or any other form of unconscionable conduct"; or "who, against the rules of equity and against good conscience, in any way either has obtained or holds and enjoys legal title to property that in justice that person ought not to hold and enjoy." *Id.* at 266 (internal quotations and citations

omitted). The obligation is "imposed not because of the intention of the parties but to prevent unjust enrichment"; thus, "[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Id.* (internal quotations and citations omitted). "[A]ctual or intentional fraud is not an essential element of a constructive trust . . . a constructive trust may be imposed to prevent unjust enrichment, without regard to actual fraud." *Hughes v. Branton*, 141 So. 3d 1021, 1026 (Ala. 2013) (quotation and citation omitted). A constructive trust may be also impressed upon property when the owner of the property has abused a confidential or fiduciary relationship. *Radenhausen v. Doss*, 819 So. 2d 616, 620 (Ala. 2001).[7]

Plaintiffs have pleaded the traditional bases for establishment of a constructive trust as the remedy for their promissory estoppel claims. Poarch's promises were unequivocal, and expressly involved, and were made for the benefit of, Plaintiffs, in connection with the wrongful acquisition of real property.

Poarch clearly does not intend to keep those promises—and, as Plaintiffs allege, Poarch knew that if it disclosed this to the Muscogee (Creek) Nation, "the Muscogee (Creek) Nation would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent the acquisition." Second Amended Complaint, Dkt. 190 at 48-89. This is exactly the kind of unconscionable conduct that merits a constructive trust remedy. Furthermore, a claim of promissory estoppel premised on unconscionable conduct in the acquisition and possession of real property falls within the category of "[a]ctions for the recovery of lands, tenements or hereditaments, or the possession thereof," under Alabama Code § 6-2-33

[7] The responsibilities of a fiduciary flow to "all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise. It is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." *Line v. Ventura*, 38 So. 3d 1, 12-13 (Ala. 2009). This includes relationships in which "one person has gained the confidence of another and purports to act or advise with the other's interest in mind," and "arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another." *Id.* at 13 (quoting *Bank of Red Bay v. King*, 482 So. 2d 274, 284 (Ala. 1985)).

governing actions for which there is a ten-year statute of limitations.[8]

Plaintiffs' allegations, which the Court is required to accept as true for purposes of this motion, dispute the Tribal 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. 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. Because these are issues of disputed fact, they should be resolved on a properly-developed record and are not an appropriate basis to dismiss the claim. *See Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 976 (11th Cir. 2015).

Plaintiffs' meritorious claim for promissory estoppel and a remedy of a constructive trust is timely because it is a claim in the nature of recovery of lands (as discussed in the next section) and is therefore accorded a ten-year statute of limitations.

[8] Tribal Defendants misapprehend Plaintiffs' request to impose a constructive trust in the event that the Court enters a judgment in their favor on Count I (under the Indian Reorganization Act). Dkt. 202 at 29 (citing Second Amended Complaint, Prayer for Relief at 76 (paragraphs (a), (b)(i))). Plaintiffs' request for a remedy under the federal common law of promissory estoppel to "h[o]ld [Poarch] to its promises to perpetually preserve Hickory Ground," Second Amended Complaint, Prayer for Relief at 77 (paragraph (c)(i)), is premised on the same unconscionable conduct in the acquisition and possession of real property as the state law promissory estoppel claim, and seeks equivalent protections over the real property under federal common law, and therefore falls within the category of "[a]ctions for the recovery of lands, tenements or hereditaments, or the possession thereof," for which federal common law would provide a ten-year statute of limitations through Alabama Code § 6-2-33.

b) *Alabama Code § 6-2-33(2) provides a ten-year statute of limitations for all claims "in the nature of" recovery of land.*

As the above cases hold, the categories of actions falling within Alabama Code § 6-2-33(2) include those "in the nature of" a suit for recovery of land. In other words, the plaintiff need not literally seek recovery of land, as the Tribal Defendants contend.

For example, in *Glass v. Cook*, the court held that a complaint seeking rescission of a lease on the grounds of fraud was governed by the ten-year statute, as "[t]his suit is *in essence* one to recover land and is controlled by the ten-year statute." 57 So. 2d 505, 507-08 (1952) (emphasis added). Similarly, *Branch Banking & Tr. Co. v. McDonald*, No. 2:13-CV-000831-KOB, 2013 WL 5719084 (N.D. Ala. Oct. 18, 2013) involved a claim for an "equitable mortgage" after the mortgage on a property was erroneously recorded as satisfied and discharged and the discharged debtor then failed to pay on the erroneously discharged mortgage despite promises that he would continue to make payments. The court held that the "equitable mortgage" claim was an action for the recovery of lands subject to the ten-year statute of limitations in § 6-2-33(2). *Id.* at *6 (citing *Barnett v. Waddell*, 27 So. 2d 1 (Ala. 1946)) (action for equitable mortgage subject to 10-year statute of limitations as an action for the recovery of lands).

The language in Section 6-2-33(2) referring to "[a]ctions for the recovery of lands, tenements or hereditaments, or the possession thereof," and its inclusion of claims "in the nature of recovery of lands" seeking a constructive trust remedy reflect long-established common law. Specifically, state and federal common law hold that where a landowner promises specific use (or non-use) of land, the landowner can be held to its promises in the form of a constructive trust. As discussed above, claims to enforce promises regarding the use of land are "in essence" or "in the nature of" claims seeking recovery of lands.

"A dedication of land" by a landowner "may be defined to be an act by which the owner of the fee appropriates to some public use an easement in the land." *Forney v. Calhoun Cnty.*, 84 Ala. 215, 220 (1887). The landowner's promise that land will be used for a particular purpose "may be done by writing, or it may be done verbally—without any writing. It may be express, or

it may be implied. It may be by a single act, or by a series of acts properly indicative of the owner's intention." *Id.* The uses to which the land may be dedicated include any "use of a public nature," including a graveyard. *Id.* at 220-21. Once accepted, the dedication "is irrevocable," even where the original dedication "was voluntary in the sense of being made without any valuable consideration." *Id.*

Especially "[w]here the owner of land intentionally, or by culpable negligence, leads the public to believe that he has dedicated it to a public use, he will, upon every principle of fair and conscientious dealing, be *estopped* from denying the fact of such dedication to the prejudice of those whom he has thus misled." *Id.* at 221 (emphasis in original). Thus, "[a] court of chancery will intervene to protect the public in the enjoyment of this easement against any interference of the owner of the legal title, bringing to their assistance the prompt aid of its injunctive relief." *Id.* (citing *Beatty v. Kurtz*, 27 U.S. 566 (1829)) (other citations omitted).

Beatty v. Kurtz established the principle that equitable principles can be used to enforce promises regarding the protection of burial grounds. 27 U.S. 566 (1829). In that case, two individuals (Beatty and Hawkins) platted an addition to Georgetown, indicating on the plat that a particular parcel was for the use of the Lutheran Church. An informal group of Lutherans used the parcel for a church and burial grounds. The group sued after heirs of Beatty and Hawkins tore down fences and tombstones on the parcel to make way for redevelopment plans. A unanimous Supreme Court held that the Lutheran group's interest in the parcel had been "consecrated to their use by perpetual servitude or easement" through Beatty and Hawkins' indication that the parcel was intended for the Lutherans' use.

> [T]he sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.

Id. at 584-85. Thus finding that Beatty and Hawkins had promised that the land would be used for a particular purpose that included burials, the court imposed a constructive trust preventing development of the land.

Thus, the equitable remedy of a constructive trust has special application in the context of burial grounds. The common law provides that the dead have rights "which are committed to the living to protect," and most significantly, the right to an undisturbed repose in perpetuity. It is "an offense against good morals" to mortgage a plot of ground in a cemetery that is "dedicated exclusively, under the sanctions of the law, as a sanctuary for the dead of one's family, and already consecrated by the ashes of one's kindred"; to do so "is contrary to its equity, and is within the evils it was designed to cure, and our moral nature protests against it." *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 166 (N.Y. Sup. Ct. 1880). "[B]urial places dedicated to public use . . . are not to be degraded to the sordid enterprises of the money-maker." *Brown v. Maplewood Cemetery Ass'n*, 89 N.W. 872, 877 (1902). Even absent a dedication of land to a particular use involving burial grounds, Alabama Code § 35-1-4(a) imposes upon owners of private land "on which a cemetery, graves, or burial sites are located" a "duty to allow ingress and egress to the cemetery, graves, or burial sites" by "descendants of the deceased persons buried there." That such protection of access arises automatically even on private lands underscores Alabama's recognition of the principles established in common law.

Poarch's promises that Hickory Ground would be permanently protected amply support the establishment of a constructive trust to enforce those promises. Before acquiring Hickory Ground, Poarch knew of its cultural and religious importance to the Muscogee (Creek) Nation and the Hickory Ground Tribal Town, and was aware that there were burials at the site. In its application for federal preservation funds, Poarch noted the presence of burial remains at the site and cautioned that destruction of archeological resources "destroy[s] the cultural history of Creek people" and that past destruction had given anthropology and archaeology "a bad name" because the excavation ignored "the significance . . . to Native Americans." Dkt. 190-1, Ex. A at PDF p. 7. After emphasizing the importance of the Hickory Ground Site to the Muscogee (Creek)

Nation, Poarch promised that "[t]he Hickory Ground site will continue to enhance [Creek youth's] understanding of their history, without excavation," noting that the "existing Hickory Ground tribal town in Oklahoma" will be "pleased to know their home in Alabama is being preserved" and promising that, as a "[s]pecific end product[] of the project is to provide protection for a particularly important site in Creek History," "Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home." *Id.* at PDF pp. 3-5. These promises were shared with the Muscogee (Creek) Nation; the Poarch's letter states that the preservation project was to be undertaken by two "Native American Groups," including the Creek Nation Foundation in Oklahoma that represented the Muscogee (Creek) Nation. *See id.* at PDF p. 3, 5. The detailed nature of the allocation of responsibility between Poarch and the Muscogee (Creek) Nation demonstrates that the two groups had discussed the preservation project and the related commitments at length: one half of the Site's appraised value would be donated to the Creek Nation Foundation; the property would be jointly owned by the two groups (who would be "equally responsible for the protection and care of the site" as a cultural resource management endeavor to "guard[] and preserv[e] a site directly connected with their entire history"); and an Attorney for the Creek Nation Office of Justice would handle legal matters for the Creek Nation Foundation. *Id.* at 5–6. *See also generally* Dkt. 190 at 18–20, 44, 46–49.

Three years later, the Poarch Chairman publicly testified in a Congressional hearing that Poarch was "in ownership of one of the last historical sites of the Creek nation before the removal to Oklahoma," and "propose[d] to use part of this money" that was the subject of the hearing "to make that site, not only available to all of our people, but to the general public as well." *Id.* at 20 (citing S. Hrg. 98-200 at 21-22 (May 26, 1983)). The Poarch Chairman's written testimony that was also submitted to Congress reiterated in a section titled "preservation of a historical site" that "there is a strong desire among our people to preserve and share our unique history. To this end our tribe has acquired titled [sic] to 'Hickory Ground', one of the most important Creek historical sites. We propose to use fifty percent of the proceeds of S. 1224 to preserve and to present to both Indian and non- Indian this unique and historical site." *Id.* (citing

S. Hrg. 98-200 at 24 (5/26/1983)).[9] A representative of the Muscogee (Creek) Nation Chief testified at the same hearing and was present when the Poarch Chairman made these promises.[10]

Poarch's promises are of the kind described in *Forney*, *Beatty*, and *Thompson* and are in the nature of recovery of land—imparting easement-like rights in the beneficiaries—warranting the equitable remedy of a constructive trust. The Plaintiffs' promissory estoppel claim requesting that this Court hold Poarch to its promises of protecting Hickory Ground in perpetuity, including for the purpose of the Muscogee (Creek) Nation and the Hickory Ground Tribal Town visiting their "ancestral home," thus falls within the category of claims under Alabama Code § 6-2-33 that have a ten-year statute of limitations.

2. Plaintiffs have alleged the elements of promissory estoppel.

"Although the full contours of the doctrine of promissory estoppel are ill-defined and still developing as part of Alabama's common law," *Sykes v. Payton*, 441 F. Supp. 2d 1220, 1223 (M.D. Ala. 2006) (citing Corbin on Contracts § 8.12), and should be informed by the above-cited cases governing promises relating to lands that house burial grounds, Alabama follows the definition of the doctrine set forth in the Restatement of Contracts. Specifically, to state a claim for promissory estoppel, a plaintiff must allege "(1) that the defendant made a promise (2) that the defendant should have reasonably expected to induce action or forbearance of definite and substantial character; (3) the promise did, in fact, induce action or forbearance; (4) and injustice can be avoided only by enforcing the promise." *Id.* at 1224 (citing *Bush v. Bush*, 278 Ala. 244, 177 So.2d 568, 570 (1964)). Plaintiffs have properly alleged these elements and facts establishing a plausible claim for purposes of Rule 12(b)(6).

[9] Poarch received the funds. *See* Pub. L. 98–390, 98 Stat. 1356 (1984) (providing for funds to go to "Eastern Creek entities" who obtain federal recognition by December 30, 1984); 49 Fed. Reg. 24,083-01 (June 11, 1984) (extending federal recognition to Poarch).

[10] Poarch is correct that the testimony was given after Poarch acquired Hickory Ground in *fee*. Dkt. 202 at 35 n.16. However, it was given *before* the Site was taken into trust, and Plaintiffs allege that these assurances led the Muscogee (Creek) Nation not to object or seek to prevent Poarch's acquisition "either in fee or trust." *See* Second Amended Complaint. Dkt. 190 at 20, 46-49.

The Second Amended Complaint plainly alleges the elements of promissory estoppel: (1) "Poarch promised the Muscogee (Creek) Nation and Hickory Ground that it would preserve the Hickory Ground Site in perpetuity"; (2) "Poarch was aware that, had the Muscogee (Creek) Nation known that Poarch would not protect the Hickory Ground Site as it promised and instead would destroy Plaintiffs' sacred burial grounds and religious sites, the Muscogee (Creek) Nation would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent the acquisition"; *i.e.*, Poarch expected to induce forbearance of definite and substantial character; (3) "[t]he Muscogee (Creek) Nation relied on that promise to its detriment in not objecting to Poarch's acquisition of the property, either in fee or trust, and in supporting Poarch's federal recognition"; and (4) "[t]he injustice of Poarch enriching itself by breaking its promises and thereby causing irreparable harm to the Muscogee (Creek) Nation and Hickory Ground can only be avoided by enforcing those promises." Dkt. 190 at 48–49.

Tribal Defendants argue that Plaintiffs have not alleged (1) an enforceable promise, (2) that Poarch should have reasonably expected to induce action or forbearance, or (3) that Plaintiffs relied to their detriment on Poarch's promises. Dkt. 202 at 32–33. These claims are without merit and are belied by the facts.

a) *Plaintiffs allege an enforceable promise.*

Tribal Defendants inexplicably insist that Poarch's application for preservation funds to acquire Hickory Ground, which expressly states that the acquisition was to "prevent development on the property" and "insure against future destruction," Dkt. 190-1 at PDF p. 4–5, instead "makes clear that Poarch Band intended to develop the property in the future." Dkt. 202 at 34. Tribal Defendants then argue that Plaintiffs have not alleged an enforceable promise. This assertion defies logic, law, and fact.

First, Tribal Defendants claim that it is unclear what "preserve" means in Plaintiffs' allegation that Poarch "promised to preserve the Hickory Ground Site in perpetuity." Dkt. 202 at

33. Plaintiffs detail exactly what they mean: In Paragraph 202[11] Plaintiffs allege that Poarch "promise[d] that it would perpetually protect the Site," and Paragraph 212 reiterates that the promise was "permanent protection." In Paragraph 203, Plaintiffs directly quote Poarch's application for federal preservation funds, in which Poarch does not mince words about whether Hickory Ground would be "preserved":

> In its application for federal preservation grant funds, Poarch expressly assured that its acquisition of the Hickory Ground Site would result in the "existing Hickory Ground tribal town in Oklahoma…. know[ing] their home in Alabama is being preserved," "without excavation"; that Poarch would provide "permanent protection of the site"; and that "Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home." Poarch warned that "[d]estruction of archaeological resources in Alabama … destroy[s] the cultural history of Creek people."

Paragraphs 67 and 68 (also re-alleged in the Promissory Estoppel claim, ¶214), provide more detailed direct quotes from Poarch's application: "Poarch unequivocally represented and promised that "[a]cquisition of the property is principally a protection measure. Acquisition will prevent development on the property . . . . [P]lans will be developed to minimize continued destruction of the archaeological resources." Dkt. 190 at 18–19 (quoting Dkt. 190-1 at 4). Poarch also stated that a trained anthropologist would "act as an advisor to the tribal councils [of Poarch and the Muscogee (Creek) Nation] on plans for permanent protection of the site." *Id.* (quoting Dkt. 190-1 at 6). Numerous promises focused on the Muscogee (Creek) Nation's continued access to their "preserved" "original homeland":

> "The property will serve as a valuable resource for cultural enrichment of Creek people. . . . The Creek people in Oklahoma pride in heritage and ties to original homeland can only be enhanced. There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved. . . . The Hickory Ground site will continue to enhance [Creek youth's] understanding of their history, without excavation. . . . Specific end products of the project is to provide protection for a particularly important site in Creek History."

[11] The Promissory Estoppel claim begins by re-alleging all prior allegations, which include but are not limited to Paragraphs 202-213. *See* Dkt. 190 at 48, ¶ 214.

Id. at 19 (quoting Dkt. 190-1 at 5, 6). Poarch was very clear that it was requesting *preservation* funds "[i]n order to halt the destruction planned for the site and to insure [sic] against future destruction. . . . As the landowner is very much interested in developing the property for commercial purposes it is felt acquisition of fee simple title is necessary to prevent destruction of the site." Dkt. 190 at 19, ¶ 68 *Id.* (quoting Dkt. 190-1 at 5).

Tribal Defendants contend that Poarch's preservation fund application letter "leads one to the inescapable conclusion that [Poarch] made no promise at all to preserve the Wetumpka property in perpetuity, without development, excavation, or destruction." Dkt. 202 at 34. All of this is expressly contradicted in Poarch's own application letter, which states that Poarch is acquiring the Site "to insure against future destruction," including "destruction" from "developing the property," and that the Site "will continue" to enhance Creeks' understanding of their history "without excavation." To the extent further explanation of the meaning of "preserve" is needed, the above preservation promises made by Poarch comport with the dictionary definition of the term. Merriam-Webster defines "preserve" as "to keep safe from injury, harm, or destruction**:** PROTECT." *Preserve*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/preserve (last visited June 29, 2020).

Tribal Defendants accuse Plaintiffs of cherry-picking statements from the preservation fund application, but it is Tribal Defendants who contort specific parts of the letter into a warped meaning that no reasonable person would derive from such clear commitments to protect and preserve Hickory Ground. The letter must be read as a whole, and Poarch's statement that "[p]rior to any type of development of the property a scientifically sound archaeological program will be conducted to mitigate or minimize effects upon the historic resources" must be read in conjunction with Poarch's promises of preservation, including in the very next paragraph where Poarch states that:

> [t]he Creek people in Oklahoma pride in heritage and ties to original homeland can only be enhanced. There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved. The site may serve as an open air classroom where Creek youth can

> learn of their heritage. Interpretive programs can be developed around the vast array of history connected with Hickory Ground. The Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) has already conducted CETA sponsored training in archaeological methods for Creek youth. The Hickory Ground site will continue to enhance their understanding of their history, without excavation.

Dkt. 190-1 at PDF p. 4. The next paragraph unequivocally underscores that the acquisition of the Site is to (1) "halt the destruction planned for the site" that would involve "clear[ing] and level[ing] the land to "develop[] the property for commercial purposes," and to (2) "insure against future destruction." *Id.* at PDF pp. 4–5. These paragraphs, along with the other representations in the application, simply cannot be read to effectively say, as Tribal Defendants contend, that Poarch intends to ensure against future destruction and development of the Site by acquiring the Site and destroying it through development. Indeed, the application goes on to say that "[a] matter of great importance about this project is the involvement of Creek People through their government in the management and *protection* of their archaeological resources." *Id.* at PDF pp. 6–7 (emphasis added). At the most, these statements reflect an intention to perform non-invasive, non-destructive archaeological test digs to educate Creek citizens about their history and about archaeology; as "[d]estruction of archaeological resources in Alabama . . . destroy[s] the cultural history of Creek people," so such digs would "continue to enhance [Creek people's] understanding of their history, without excavation" while "bridging the communication gap between archaeology and Native Americans." *Id.* at PDF pp. 4, 7.

It would be nonsensical to read Poarch's promises to "prevent development on the property" and "insure against future destruction" of the site such that the Muscogee (Creek) Nation and Hickory Ground Tribal Town "will be pleased to know their home in Alabama is being preserved" with the understanding that those promises left room for Poarch develop and destroy the property in the future.

Even if Poarch's promises weren't so clear, this Court has recognized that "[a]n express promise is not necessary to establish a promissory estoppel. It is sufficient that there be promissory elements which would lull the promisee into a false sense of security." *Sykes v.*

Payton, 441 F. Supp. 2d at 1224 (citing *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770, 774 (Ala. 1976)). Here, the Muscogee (Creek) Nation had been in detailed communications with Poarch on plans to save Hickory Ground from development and preserve it for the benefit of Creeks in Oklahoma and future generations. Nothing in Poarch's application letter indicated that Poarch, in trying to save Hickory Ground from development and ensure against future destruction—for the benefit of the Muscogee (Creek) Nation and Hickory Ground Tribal Town—instead intended to accomplish that development and destruction itself. And nothing indicated that the Muscogee (Creek) Nation's subsequent inability to participate in the acquisition would cause Poarch to abandon its promises. Indeed, after the acquisition occurred, Poarch reaffirmed its commitment to preserve the Site in its Congressional testimony. Poarch's communications with the Muscogee (Creek) Nation quite reasonably gave the Nation a sense of peace and security that Poarch would take care of the sacred site just as it promised. Just as Poarch stated in its application letter, its promises made the Muscogee (Creek) Nation and Hickory Ground Tribal Town "pleased to know their home in Alabama is being preserved."

Poarch's promises to perpetually protect Hickory Ground were specific, unambiguous, and unequivocal. Plaintiffs have alleged an enforceable promise.

b) ***Poarch reasonably foresaw that the Muscogee (Creek) Nation would rely on the promises made in the grant application letter, the congressional testimony, and related communication between the parties.***

Tribal Defendants next complain that Poarch could not have reasonably foreseen that Plaintiffs would rely on its promises. As described in detail above and in the Second Amended Complaint, Poarch strongly emphasized the importance of the Hickory Ground Site to the Muscogee (Creek) Nation and Hickory Ground Tribal Town in its application for federal preservation funds. Dkt. 190 at 18-20, 46-49. Poarch knew there were burials on the Site. *See* Dkt. 190-1 at PDF p. 7. And, by virtue of Hickory Ground being a tribal town, Poarch knew or should have known that there were ceremonial grounds at the Site. John Reed Swanton, *Modern Square Grounds of the Creek Indians* 9 (Smithsonian Institution, 1931), *available at*

https://repository.si.edu/bitstream/handle/10088/23920/SMC_85_Swanton_1931_8_1-46.pdf ("every Creek town had [a ceremonial] ground"). Poarch shared the application letter for federal preservation funding and related correspondence with the Muscogee (Creek) Nation, as the acquisition was intended to be a joint project. Dkt. 190 at 19–20. And, after the acquisition occurred, Poarch confirmed its plan to continue preserving the Site before Congress and a representative for the Chief of the Muscogee (Creek) Nation.

Poarch knew that the Muscogee (Creek) Nation objected to development of Hickory Ground because the two groups were working together to save the Site from development. *See* Dkt. 190-1 at PDF pp. 5–6. And Poarch knew that, absent the assurances it made about the perpetual preservation of the Site, the Muscogee (Creek) Nation would continue to attempt to save the Site and prevent Poarch's purchase. The same is true for Poarch's 1983 testimony: had Poarch revealed then that it had abandoned plans to preserve Hickory Ground, the Muscogee (Creek) Nation would not have supported its bid for federal recognition and would have objected to, and attempted to prevent, Poarch's acquisition of the Site in trust the next year. Indeed, disbursement of Indian Claims Commission funds—the subject of the Congressional hearing—was contingent on achieving federal recognition by the end of 1984. *See* S. Hrg. 98-200; Pub. L. 98–390, 98 Stat. 1356 (1984) (providing for funds to go to "Eastern Creek entities" who obtain federal recognition by December 30, 1984). As Plaintiffs have alleged, given the importance of the Site to the Muscogee (Creek) Nation, "Poarch was aware that, had the Muscogee (Creek) Nation known that Poarch would not protect the Hickory Ground Site as it promised and instead would destroy Plaintiffs' sacred burial grounds and religious sites, the Muscogee (Creek) Nation would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent the acquisition." Dkt. 190 at 48–49. Thus, Poarch reasonably should have foreseen that the Muscogee (Creek) Nation would rely on its promises in the application for federal funds, its Congressional testimony, and related communications.

That the project went forward without the Muscogee (Creek) Nation does not mean, as Tribal Defendants appear to argue, that the promises Poarch made—based on the supposedly

mutual reverence both groups held for Hickory Ground—were rendered unreliable or nonexistent. Nothing about the circumstances suggests that the Muscogee (Creek) Nation was forcing an unenthusiastic but grudgingly-accepting Poarch Band to protect a sacred Site, or that without the Nation's participation, Poarch would indulge unstated desires to destroy the Site. When the Muscogee (Creek) Nation was ultimately unable to join in the project, the Muscogee (Creek) Nation trusted that Hickory Ground would be protected, in reasonable reliance on Poarch's statements about the importance of the Site and unequivocal promises to preserve it. Dkt. 190 at 47–49. *See also Sykes v. Payton*, 441 F. Supp. 2d at 1225 ("the plaintiffs have alleged that they took the actions outlined above in reliance on [defendant]'s unequivocal representations. Thus, they have sufficiently pled this element of promissory estoppel.").[12]

c) *Plaintiffs allege detrimental reliance.*

The Tribal Defendants incorrectly assert that Plaintiffs have not alleged a link between Plaintiffs' reliance and the harm they suffer. The gist of Tribal Defendants' argument is that Plaintiffs did not have "legal or practical authority" to prevent Poarch from acquiring the site in trust or fee, so there is no causal connection between Plaintiffs' harm and their forbearance from attempting to prevent Poarch's acquisition of Hickory Ground in fee or trust. Tribal Defendants simply misapprehend the concept of forbearance.

In defining the doctrine of promissory estoppel, "[Alabama] has adopted § 90 of the Restatement of Contracts First which states in pertinent part: 'A promise which the promisor should reasonably expect to induce action ***or forbearance*** of definite and substantial character and which does so is binding if injustice can be avoided only by enforcement thereof.'" *Wyatt v. Bellsouth, Inc.*, 18 F. Supp. 2d 1324, 1326 (M.D. Ala. 1998) (emphasis added) (quoting *Davis v. Univ. of Montevallo*, 638 So. 2d 754, 757 (Ala. 1994)). Likewise, in the context of constructive

[12] Notably, "reliance is evaluated objectively both for reasonableness and foreseeability. Customarily, that evaluation is done by the [factfinder] as fact issues based on all surrounding circumstances." *Sykes v. Payton*, 441 F. Supp. 2d at 1224 (quoting 3 Corbin on Contracts § 8.11).

trust, a beneficiary's acceptance "may be shown either by some positive conduct of the proper public officers evincing their consent in behalf of the public, or may be inferred from official acts of implied recognition on their part, or by long public use, or from the beneficial nature of the dedication." *Forney.*, 84 Ala. at 220.

The Tribal Defendants incorrectly assert that Plaintiffs lacked legal or practical authority to prevent Poarch from acquiring Hickory Ground in fee or in trust. As Plaintiffs allege in their Second Amended Complaint, "[h]ad the Muscogee (Creek) Nation known that Poarch would desecrate Hickory Ground, it would have taken steps to prevent Poarch from acquiring the land" either in fee or in trust, "and would have opposed Poarch's bid for federal recognition." Dkt. 190 at 47. Instead, in reliance on Poarch's promises, the Muscogee (Creek) Nation did not take such actions. *Id.* Had Poarch disclosed its true plans for the Site, the Muscogee (Creek) Nation would have certainly informed the Alabama Historical Commission and the Department of Interior, and presumably Poarch would not have received the preservation funding it purportedly needed to purchase Hickory Ground in the first instance. Furthermore, had it known that no party was intervening to save Hickory Ground from development, the Muscogee (Creek) Nation—or another party truly dedicated to preserving the Site—could have independently applied for the preservation funds or outright purchased the Site. It is not a foregone conclusion, as Tribal Defendants contend, that had Poarch not purchased the Site, no other party would have tried to save Hickory Ground and plans for development would have been executed. Indeed, Poarch's assurances were intended to, and would have, made any party who would have otherwise intervened feel secure that Hickory Ground would be preserved in perpetuity.

With respect to Poarch's *trust* acquisition of Hickory Ground, Plaintiffs allege that the Department of the Interior had no legal authority under the Indian Reorganization Act to take the site into trust for Poarch because Poarch was not "under federal jurisdiction" in 1934. *See* Dkt. 190 at 44–45. Had Poarch revealed in 1983 that it planned to develop the Site instead of reaffirming its commitment to preserve Hickory Ground, the Muscogee (Creek) Nation would have raised this argument to prevent the trust transaction. *See id.* at 48–49. If a court agreed

with the Muscogee (Creek) Nation that the acquisition was illegal, no casino would have been built at the site because gaming would not have been legal at the site. *See id.* at 46.

This case is similar to *Mazer v. Jackson Ins. Agency*, wherein developers were planning to develop an office park adjacent to residential houses in the city of Mountain Brook. 340 So. 2d 770 (Ala. 1976). The developers requested that the Mountain Brook Planning Commission pass a resolution containing assurances to the homeowners. In 1955, the developers recited the assurances in the Mountain Brook Planning Commission's resolution in a memorandum to the homeowners. Those assurances were that development would only occur if there were protections for the residential area, including a buffer between the development and homes that would be left as "natural woodland." *Id.* at 771. The memorandum stated that the developers had presented those conditions to the legislative delegation that was considering whether to annex the area to the city, and that the developers felt the homeowners "will be very happy indeed over the conclusion." *Id.* at 771–72. About 20 years later, the Mountain Brook Planning Commission rezoned the buffer zone, and the developers announced they would clear-cut and develop the zone. The court found that promissory estoppel barred the development, rejecting the developers' claim that the homeowners failed to prove an enforceable promise or detrimental reliance.

The court held that although the developers' memorandum in *Mazer* "did not state the assurances as promises from the Developers, but as provisions of the Planning Commission's resolution," it "contained sufficient promissory elements to support a promissory estoppel," including that "it was the desire and purpose of the Developers to develop their property 'in a manner which would be an asset to all of the surrounding property owners,'" and "'to assure the residents of the good faith of the developers that they would not develop the property in a manner inconsistent with [the] assurances.'" *Id.* at 773–74. The court held that "[t]he clear implication of the language of the memorandum was that the assurances represented the future intentions of the Developers with regard to their property." *Id.* at 774. The homeowners would have opposed the development without the assurances, and the resolution and memorandum were "to assure the residents of the Developers' good faith." *Id.* Thus, "[c]ommon sense and the

evidence compel the conclusion that the Developers intended that the [homeowners] cease their opposition to annexation in reliance on the assurances stated in the memorandum." *Id.* The court also found that the homeowners' cessation of opposition to the development "was forbearance of a definite and substantial character." *Id.* In addition, there was detriment to the homeowners because the annexation that facilitated the development (which they'd ceased to oppose in reliance on the assurances) reduced the homeowners' power to influence decisions of officials on zoning. *Id.* at 774–75. "Finally, if the Developers are permitted to ignore the assurances given in the memorandum, the Homeowners will lose the protection that was the sole reason for their ceasing to oppose annexation and will thereby suffer a serious injustice" in the form of making their property less desirable. *Id.*

Like the developers in *Mazer*, Poarch knew the Muscogee (Creek) Nation objected to development on the property, and would try to prevent Poarch's acquisition of Hickory Ground had it known that Poarch planned to impose the same destruction it was promising to prevent. Poarch's communications with the Muscogee (Creek) Nation were for the same purpose as the developers' memorandum to the homeowners in *Mazer*: "to assure the [recipients] of the good faith of the developers that they would not develop the property in a manner inconsistent with [the] assurances." As in *Mazer*, the clear implication of Poarch's communications to the Muscogee (Creek) Nation was that the assurances represented Poarch's future intentions with regard to the property.

As in *Mazer*, the Muscogee (Creek) Nation's forbearance—in the form of not objecting to or seeking to prevent Poarch's acquisition of Hickory Ground—was of a definite and substantial character. The Muscogee (Creek) Nation's reliance on Poarch's promises resulted to the Nation's detriment, because after the purchase—just like after annexation in *Mazer*—the Nation's power to influence what occurred at the property was significantly diminished. Had the Nation known that Poarch would clear-cut and develop Hickory Ground, it could and would have taken action to prevent Poarch's acquisition and ensure the property was acquired either by the Nation or another party dedicated to its preservation.

Finally, as in *Mazer*, if Poarch is permitted to ignore the promises given in its communications with the Muscogee (Creek) Nation, the Muscogee (Creek) Nation will lose the protection that was the very reason it did not seek to prevent Poarch's acquisition of Hickory Ground, and will thereby suffer a serious injustice. *See also Sykes v. Payton*, 441 F. Supp. 2d at 1225. Plaintiffs' ancestors have been wrenched from their graves and their sacred site and last tribal capital before removal is being desecrated. That injustice can only be avoided by enforcing Poarch's promises.

3. The Promissory Estoppel Claim is Not Barred by the Statute of Frauds.

Tribal Defendants seek dismissal of Plaintiffs' promissory estoppel claim, arguing that "Alabama law does not allow the use of promissory estoppel to enforce an agreement that is void under the statute of frauds." Dkt. 202 at 30. Tribal Defendants' request to dismiss this claim should be rejected for three reasons.

First, their argument is premised on the erroneous assumption that Plaintiffs' claim must sound in contract. Promissory estoppel does not require that the plaintiff seek to enforce the terms of an oral contract. *See, e.g.*, *Bush*, 177 So.2d at 578 (applying promissory estoppel to a will, which is neither a promise nor a contract). As discussed in Sections IV.C.1 and .2, *supra*, Plaintiffs' promissory estoppel claim is one the nature of recovery of land, not enforcement of a contract or oral agreement. Accordingly, the statute of frauds does not apply to this claim and the motion should be denied.

Second, the statute of frauds is no barrier to the imposition of a constructive trust, which is the remedy Plaintiffs' seek based on their claim for promissory estoppel. A constructive trust arises by operation of law and is not subject to the statute of frauds. Alabama Code § 19-3B-1301 states that "[n]o trust concerning lands, *except such as results by implication or construction of law*, . . . can be created, unless by instrument in writing." (emphasis added); *see also Newell v. Newell*, 254 So. 3d 878, 881 (Ala. 2017). A constructive trust is "a creature of equity," which "springs from a desire to prevent the statute of frauds from being used as a shield

which would otherwise allow a party to be unjustly enriched." *Ralston Oil & Gas Co. v. July Corp.*, 719 P.2d 334, 339 (Colo. Ct. App. 1985). Thus, if this Court concludes that a constructive trust is appropriate, "the statute of frauds is no obstacle to the establishment of such trust." *Perryman v. Pugh*, 114 So.2d 253, 259 (Ala. 1959); *see also Cole v. Adkins*, 358 So. 2d 447, 448–51 (Ala. 1978) ("A constructive trust is properly impressed upon property under certain limited circumstances even though the Statute of Frauds makes an oral agreement to convey land unenforceable.").

Third, even assuming for the sake of argument only that that the statute of frauds applies here, dismissal of the promissory estoppel claim would still not be appropriate because Plaintiffs have alleged sufficient facts to show that the Tribal Defendants partially performed on their promises. *See Houston v. McClure*, 456 So. 2d 788, 789 (Ala. 1984) (affirming a trial court's award of specific performance of a contract otherwise subject to the statute of frauds based on a showing part performance). Plaintiffs have alleged that Tribal Defendants initially performed in accordance with their promises, giving Plaintiffs reason to believe that Poarch intended to abide by those promises for decades. *See* Dkt. 190 at 45. As discussed above, it was not until the 2000s that Poarch violated its promises. At this early stage, these facts are sufficient to remove the promissory estoppel claim from the operation of the statute of frauds.

In sum, Plaintiffs have alleged the elements of promissory estoppel: the Muscogee (Creek) Nation reasonably relied on specific promises of protection for Hickory Ground that Poarch extended so that the Nation would acquiesce to Poarch's purchase of Hickory Ground, resulting in harm to the Muscogee (Creek) Nation when Poarch disregarded its promises and began desecrating the sacred site. Plaintiffs' promissory estoppel claim is in the nature of recovery of real property because it seeks imposition of a constructive trust. Therefore, the statute of frauds does not apply and the claim should not be dismissed.

D. The Plaintiffs' unjust enrichment claim should not be dismissed.

As with Plaintiffs' promissory estoppel claim, Tribal Defendants contend that Plaintiffs' unjust enrichment claim does not allege all of the elements of unjust enrichment, that it is time-barred because it is subject to no more than a six-year statute of limitations, and that it is barred by the statute of frauds. These arguments lack merit and this aspect of the motion should be denied.

First, Plaintiffs have alleged a claim of unjust enrichment by asserting that Poarch is unjustly retaining a benefit—unrestrained use of the Hickory Ground Site—that belongs to Plaintiffs, because Poarch promised Plaintiffs certain restraints on the use of the Site in exchange for Plaintiffs' non-objection to Poarch's acquisition of Hickory Ground. Second, as with promissory estoppel, a ten-year statute of limitations governs unjust enrichment claims in the nature of recovery of property, so the Plaintiff's unjust enrichment claim is timely. Third, the statute of frauds does not bar the unjust enrichment claim, because Plaintiffs' unjust enrichment claim is in the nature of recovery of land such that the statute of frauds is not implicated.

1. Unjust enrichment claims include the loss of rights in property.

Tribal Defendants incorrectly insist that, to prevail on a claim of unjust enrichment, it is necessary to show that the defendant holds *money* that rightfully belongs to the plaintiff. Dkt. 202 at 38–39. A claim for money is not the only form of unjust enrichment claim; such a claim can also encompass claims in the nature of recovery of real property, *see supra* at 40 to 45, or rights in or to property.

Thus, "unjust enrichment can include claims for money *and property*." *Micor Indus., Inc. v. C2JS Holdings, Inc.*, No. 12-02654, 2012 WL 5931707, at *4 (N.D. Ala. Nov. 26, 2012). A plaintiff with a claim relating to property can establish unjust enrichment by showing "unjust retention of a *benefit* to the loss of another or the retention of money *or property* of another against the fundamental principles of justice or equity and good conscience." *Id.* (internal quotation marks and citation omitted). "Whenever one person adds to the other's advantage *in any form,* whether by increasing his holdings or saving him from expense or loss, he has

conferred a benefit upon the other." *Id.* (emphasis added) (quoting *Am. Family Care v. Fox*, 642 So.2d 486, 488 (Ala. Civ. App. 1994)). As discussed above, an appropriate remedy for an unjust enrichment claim relating to property would be a constructive trust over the property. *Id.; see supra* at 40 to 45.

2. Plaintiffs allege that the Tribal Defendants have retained a benefit to the loss of the Muscogee (Creek) Nation.

The Second Amended Complaint alleges that the Muscogee (Creek) Nation benefited the Tribal Defendants by withholding objections to Poarch's acquisition of Hickory Ground that they otherwise would have raised had they known Poarch would break its promises to perpetually protect the site. Dkt. 190 at 46–48. As stated in *Mazer*, 340 So. 2d at 774, forbearance of the kind the Muscogee (Creek) Nation exercised here is "definite and substantial," and that forbearance was the precise benefit Poarch sought by making the assurances that eliminated any opposition to its acquisition of Hickory Ground. The Muscogee (Creek) Nation's lack of objection in reliance on Poarch's promises resulted in Poarch obtaining federal preservation funds and purchasing Hickory Ground—two things the Muscogee (Creek) Nation would have acted to prevent had Poarch revealed its plans to desecrate Hickory Ground. Dkt. 190 at 46–48.

The Restatement (First) of Restitution § 1 cmt. b (Am. Law Inst. 1937), which was cited as authoritative in *Jordan v. Mitchell*, 705 So.2d 453, 458 (Ala. Civ. App. 1997), defines an unjust enrichment as follows:

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss."

Thus, is it not limited to a pecuniary benefit, but can be an intangible benefit that adds to another's advantage.

Quite simply, like the developers in *Mazer*, 340 So. 2d at 773, Poarch made promises of protection to receive a benefit: no opposition to its plans. Like the homeowners in *Mazer*, 340 So. 2d at 774, the Muscogee (Creek) Nation did not oppose acquisition in exchange for the Tribal Defendants' promises that there would not be unchecked use of the property; that instead the property would be used in a manner beneficial to the Nation and consistent with its undisputed nature as a sacred burial site. Poarch, like the developers in *Mazer*, therefore owed the forbearer something: use of the property in conformance with its promises.

Poarch is not entitled to desecrate Hickory Ground; its undertaking of obligations to preserve the Site was the reason the Muscogee (Creek) Nation did not object to its acquisition, and the reason it was able to acquire the Site. *See* Dkt. 190 at 47–48. As the court explained in *Mazer*, "if the [acquirer of the property is] permitted to ignore the assurances given [to the forbearers], the [forbearers] will lose the protection that was the sole reason for their ceasing to oppose [the acquisition] and will thereby suffer a serious injustice." *Mazer*, 340 So. 2d at 775. As alleged throughout the Second Amended Complaint, by taking away the protection that belongs to the Muscogee (Creek) Nation, Poarch is causing extreme cultural, religious, and emotional harm to Plaintiffs. Poarch thus is retaining a benefit—unbridled use of the Hickory Ground Site—where the "bridle" rightfully belongs to the Muscogee (Creek) Nation. A constructive trust effectively returns that "bridle" to the Nation by converting Poarch to a trustee and enforcing Poarch's promises. *Mitchell*, 274 So. 3d at 266.

Thus, contrary to the Tribal Defendants' contentions, Poarch is indeed benefiting from usurping a right that belongs to Plaintiffs: the right to protection of their sacred ancestral home. Plaintiffs have alleged that Tribal Defendants have retained a benefit to the loss of the Muscogee (Creek) Nation.

3. Plaintiffs' unjust enrichment claim is timely.

The Tribal Defendants argue that the statute of limitations for unjust enrichment can be no more than six years. However, as the Tribal Defendants acknowledge, in Alabama there is a

lack of authority definitively stating the statute of limitations applicable to an unjust enrichment claim. Dkt. 202 at 41. As with promissory estoppel, because the nature of unjust enrichment claims vary such that they may fit in different categories provided under Title 6, Chapter 2 of the Alabama Code, the focus is on the nature of the claim. For the same reasons that a ten-year statute of limitation applies to Plaintiffs' promissory estoppel claim, *see supra* at 40 to 50, a ten-year statute of limitations governs their unjust enrichment claim.

Like their promissory estoppel claim, Plaintiffs' unjust enrichment claim is rooted in equity and seeks the equitable remedy of an injunction and constructive trust to enforce Poarch's promise of protection of the Hickory Ground site. *See* Dkt. 190 at 46–48, 76–77. The basis of Plaintiffs' unjust enrichment claim is based on Poarch's continuing usurpation and deprivation of Plaintiffs' right to the protections Poarch promised. To remedy the unjust enrichment—i.e., Poarch's retention of unchecked use of Hickory Ground where a specific "bundle of sticks" with respect to that use was effectively given to Plaintiffs—Plaintiffs seek return of that bundle of sticks in the form of a constructive trust enforcing those promises. *See id.* A claim of unjust enrichment premised on unconscionable conduct in the acquisition and possession of real property falls within the category of "[a]ctions for the recovery of lands, tenements or hereditaments, or the possession thereof," under Alabama Code § 6-2-33 governing actions for which there is a ten-year statute of limitations. In other words, Plaintiffs' unjust enrichment claim is a claim in the nature of recovery of real property under Alabama Code § 6-2-33(2), and is subject to a ten-year statute of limitations. *See supra* at 40 to 50.

As stated on page 45, Plaintiffs have made allegations disputing the Tribal Defendants' assertions that Plaintiffs knew in 1992 or 2002 that Poarch did not plan to abide by its promises. On this motion, the Court must consider Plaintiffs' allegations as true. Furthermore, the Tribal Defendants concede that "Alabama law does appear to allow for a form of continuing unjust enrichment under limited circumstances," such as "where a defendant was obligated to undertake serial performances." Dkt. 202 at 41 (citing *Snider v. Morgan*, 113 So. 3d 643, 655–56 (Ala. 2012)).

Though the Tribal Defendants assert that "no such serial performance obligation is present here," *id.*, that is precisely the obligation Poarch undertook when it promised to permanently preserve Hickory Ground. Indeed, in their statute of frauds argument, the Tribal Defendants assert that "a promise to protect land 'in perpetuity' by its very terms cannot be performed within one year," *id.* at 30, as the obligation to protect the land presumably requires serial acts of "performance" in the form of continual efforts to preserve the site. The Tribal Defendants cannot have it both ways.

The Alabama Supreme Court explained in *Snider* that the statute of limitations for an unjust enrichment claim runs from the last date the defendant was unjustly enriched. *See* 113 So. 3d at 655-56. In *Snider*, the court held that an estate was unjustly enriched each time a payment on a mortgage came due and estate failed to make that payment. *Id.* Here, Poarch is similarly unjustly enriched, because each day it owes an affirmative duty to protect Hickory Ground, and instead it reaps casino revenues while failing to fulfill its obligation to preserve the site (and while continually mistreating, and causing damage to, Plaintiffs' ancestors' remains and sacred artifacts).

Plaintiffs' meritorious claim for unjust enrichment and a remedy of a constructive trust is timely because it is a claim in the nature of recovery of lands and is therefore accorded a ten-year statute of limitations.

4. The statute of frauds does not bar Plaintiffs' unjust enrichment claims.

Tribal Defendants advance substantially the same statute of frauds argument raised in opposition to Plaintiffs' promissory estoppel claim. Dkt. 202 at 41–42. The statute of frauds is inapplicable to Plaintiffs' unjust enrichment claims for the same reason it does not apply to its claim for promissory estoppel—namely, Plaintiffs' unjust enrichment claim does not seek specific performance of a contractual term. Instead, Plaintiffs ask this Court to remedy Tribal Defendants' unjust enrichment flowing from their dishonest and inequitable conduct by imposing a constructive trust. As discussed in Section IV.C.3, *supra*, the statute of frauds does

not bar enforcement of a constructive trust. *See Perryman*, 114 So.2d at 259. Tribal Defendants' statute of frauds defense is therefore inapposite.

Like Plaintiffs' claim for promissory estoppel, Plaintiffs' claim for unjust enrichment does not depend on the enforcement of the terms of a contract. Courts widely recognize that a claim for unjust enrichment is an alternative basis, which is distinct from a breach of contract claim. *See, e.g.*, *Kennedy v. Polar-BEK & Baker Wildwood P'ship*, 682 So. 2d 443, 447 (Ala. 1996) (recognizing that express contracts and implied contracts are "incompatible"); *Berry v. Druid City Hosp. Bd.*, 333 So. 2d 796, 798–99 (Ala. 1976) (explaining that courts imply contracts to prevent unjust enrichment and that an implied contract "is not a contract at all"); Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (Am. Law Inst. 2011) (observing that unjust enrichment is "an independent basis of liability" and serves as a "cause of action as well as the remedy"). The Tribal Defendants have been unjustly enriched by Plaintiffs' acquiescence in Poarch's purchase of Hickory Ground. "The law may impose any obligations that justice requires," *Berry*, 333 So.2d at 798–99, including the imposition of a constructive trust.

In sum, Plaintiffs have alleged the elements of unjust enrichment: a benefit—their acquiescence in Poarch's purchase of Hickory Ground—exchanged for promises that Poarch would protect the sacred site, which protections Poarch has unjustly done away with for its own enrichment and to the Plaintiffs' detriment. As with promissory estoppel, Plaintiffs' unjust enrichment claim is in the nature of recovery of real property because it seeks imposition of a constructive trust. Therefore, the statute of frauds does not apply and the claim is timely.

E. The Plaintiffs have stated a claim under NAGPRA.

NAGPRA is human rights legislation 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 F. Trope and Walter R. Echo-Hawk, *The*

Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 ARIZ. ST. L.J. 35, 36 (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. NAGPRA was intended to prevent situations just like this one, where the Plaintiffs' ancestors, their funerary objects, and other religious and cultural items were wrongfully disinterred without appropriate notice to or consultation with the Plaintiffs and have been wrongfully kept from the Plaintiffs' custody. In a shocking and grimly ironic twist, the alleged wrongdoer in this case is another federally recognized Indian tribe. The Plaintiffs are entitled to the protections of NAGPRA for their ancestors and cultural items regardless of who commits the wrongful acts.

Plaintiffs have provided detailed allegations showing that the Tribal Defendants violated NAGPRA by, *inter alia*, failing to follow NAGPRA requirements with respect to intentional excavations at the Hickory Ground Site, inadvertent discoveries at the Hickory Ground Site, and the ownership and control of the ancestors buried at the Hickory Ground Site. This Court has broad equitable powers to order appropriate relief with respect to Plaintiffs' NAGPRA claim and the relief that Plaintiffs seek here is within the scope of that equitable authority. The Tribal Defendants' motion to dismiss the Plaintiffs' NAGPRA claim should be denied.

1. NAGPRA requirements.

NAGPRA 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.[13] 25 U.S.C. § 3001(3). NAGPRA applies to (1) the intentional excavation and removal of cultural items, and (2) the inadvertent discovery of cultural items. With respect to intentional excavations, Section 3002 of NAGPRA provides:

> "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;

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

> (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). The relevant provisions of this subsection are discussed in more detail below. With respect to inadvertent discoveries, Section 3002 of NAGPRA provides:

> ***Any person*** who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe…with respect to tribal lands, if known or readily ascertainable. . . . If the discovery occurred in connection with an activity, including (but not limited to) ***construction***, mining, logging, and agriculture, the person shall ***cease the activity*** in the area of the discovery, make a reasonable effort to ***protect the items*** discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after ***30 days*** of such certification.

25 U.S.C. § 3002(d)(1) (emphasis added). In the event of inadvertently-discovered cultural items excavated or removed, the disposition is the same as for intentionally-excavated cultural items, 25 U.S.C. § 3002(d)(2), which is discussed in more detail below.

As an initial matter, it is important to point out that, by their terms, these provisions apply to *everyone*, not just to federal agencies and museums. The requirements for intentional excavations are simply generally applicable. And the requirements for inadvertent discoveries apply to "any person," which includes an "individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian tribe . . . or of any State or political subdivision thereof." 43 C.F.R. § 10.2(a)(5). In addition, these provisions draw certain distinctions between "Federal lands" and "tribal land." "Tribal land" means, in relevant part, "(A) all lands within the exterior boundaries of any Indian reservation; [and] (B) all dependent

Indian communities." 25 U.S.C. § 3001(15). "Federal lands" means, in relevant part, "any land other than tribal lands which are controlled or owned by the United States." 25 U.S.C. § 3001(5).

The permit required for intentional excavations under Section 3002(c)(1) is a federal permit issued under 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 "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 exception 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, it 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 provisions of Section 3002(c)(2) are further detailed in 43 C.F.R. §§ 10.3 and 10.5. Consultation is required for intentional excavations on "Federal lands" and suggested for intentional excavations on "tribal land." 43 C.F.R. § 10.3(b)-(c). 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).

In addition, intentional excavations on "tribal land" require the prior "consent of the appropriate [Indian tribe]" under 25 U.S.C. § 3002(c)(2). Neither that section nor the relevant provisions of NAGPRA's implementing regulations, 43 C.F.R. §§ 10.3, 10.5, clarify the meaning of "appropriate" tribe. However, BIA regulations regarding the issuance of permits for such excavations suggest that "[d]etermination as to which tribe is the appropriate tribe shall be made in accordance with [25 C.F.R.] § 262.8(a)." 25 C.F.R. § 262.5(d). That section, in turn, gives first priority to lineal descendants for human remains and funerary objects. 25 C.F.R. § 262.8(a)(1). For other items, the tribal landowner generally has first priority, followed by the tribe who aboriginally occupied the land, but the tribe "having the strongest cultural relationship with such remains or objects" may take precedence over both in certain circumstances. 25 C.F.R. § 262.8(a)(2).

Of the ownership and control requirements referenced in Sections 3002(c)(3) and 3002(d)(2) for both intentional excavations and inadvertent discoveries, 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 vests first in 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*.

With respect to inadvertent discoveries, three requirements apply to everyone, on both federal land and tribal land: (1) they must provide immediate notice of the discovery; (2), they must stop any ongoing activity for at least 30 days; and (3) they must make a reasonable effort to protect the discovered cultural items. 25 U.S.C. § 3002(d)(1); 43 C.F.R. § 10.4(a)-(c). If the discovery is on federal lands, they must notify the appropriate federal official, and if the discovery is on tribal land, they must notify the appropriate tribal official. On federal lands, this triggers consultation requirements and, if the discovered cultural items must be excavated or

removed, the requirements for intentional excavations must be followed (ARPA permit, consultation, appropriate disposition, etc.). 43 C.F.R. § 10.4(d). On tribal land, the tribal official is suggested to take immediate steps to further secure and protect the cultural items, and, if the discovered cultural items must be excavated or removed, the requirements for intentional excavations must be followed (ARPA permit, consultation, appropriate disposition, etc.). 43 C.F.R. 10.4(e).

2. Plaintiffs' claims.

In considering the Plaintiffs' claims, it is important to keep in mind that NAGPRA is, as discussed above, remedial human rights legislation that must be liberally interpreted to benefit the class for whom it was enacted, which includes the Plaintiffs. The wrongs done to the Plaintiffs are exactly those that NAGPRA was intended to prevent and redress. Applying NAGPRA in such a way so as to compound another grievous historical wrong—the forced removal of the Plaintiffs from the Hickory Ground Site—by allowing a newly recognized tribe to desecrate the Hickory Ground Site with impunity and take ownership and control over the Plaintiffs' ancestors and their cultural items to which they are not entitled contravenes the intent of NAGPRA.

As an initial matter, the Tribal Defendants have duties under NAGPRA even if they are not a federal agency or museum. The Tribal Defendants seem to imply that NAGPRA does not apply because they are not a federal agency or museum. Dkt. 202 at 43. This is wrong. As discussed above, the duties with respect to intentional excavations and inadvertent discoveries apply to everyone, not just to federal agencies and museums.

To the extent those duties turn on land status, both "federal lands" and "tribal land," as defined in NAGPRA, are at issue here. The Plaintiffs have alleged that the Hickory Ground Site includes both reservation land and trust land. Dkt. 190 at 64 ¶ 286. And the Tribal Defendants do not directly contest that allegation, providing only the conclusory statement that "[t]he Wetumpka property is tribal land." Dkt. 202 at 43. However, only the portion of the Hickory

Ground Site that is within the boundaries of Poarch's reservation is "tribal land" within the definition of NAGPRA. 24 U.S.C. § 3001(15). Any off-reservation trust land constitutes "Federal lands" under NAGPRA. 24 U.S.C. § 3001(5). The Plaintiffs explain this distinction in more detail in Section IV.B of the Plaintiffs' Brief in Response to the Federal Defendants' Motion to Dismiss, filed contemporaneously herewith.

The Tribal Defendants violated NAGPRA when they directed or allowed any intentional excavations at the Hickory Ground Site to take place without the appropriate permits. This permit requirement is a very important part of NAGPRA, because, as discussed above, it should ensure that the Muscogee (Creek) Nation receives prior notice of any excavation on the Hickory Ground Site, as a tribe who considers the site to have religious or cultural significance, 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). Importantly, ***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, 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 at the Tribal Defendants' direction, Dkt. 190 at 28 ¶ 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, although they may be able to expedite the permit). It may also include individual Poarch tribal members, as it appears that there may have been 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* Dkt. 190 at 25–26 (describing how Poarch had at least 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 Poarch should not have caused it to occur.

To the extent they conducted or directed any intentional excavations on "Federal lands," the Tribal Defendants had a duty to consult with the Plaintiffs, and they should have done so for intentional excavations on "tribal land" as well. 43 C.F.R. § 10.3(b)–(c). This 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 Plaintiffs fall within ***all*** of these categories. Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are lineal descendants of the excavated ancestors.[14] Dkt. 190 at 1, 7, 14, 31, 34. 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 1, 14. The Tribal Defendants knew all of this. Yet the Plaintiffs have alleged that the Tribal Defendants did not consult with them before commencing the intentional excavations. *Id.* at 30. And the Tribal Defendants do not contest that allegation, or suggest that they fulfilled it at any time. Had the Tribal Defendants fulfilled NAGPRA's consultation requirements, perhaps, at the very least, the Plaintiffs' ancestors could have been treated in a culturally appropriate way, for which the Plaintiffs would have had the opportunity to provide direction. 43 C.F.R. § 10.5(b)–(e).

To the extent they conducted, directed, or allowed intentional excavations on "tribal land," the Tribal Defendants also had a duty to obtain the prior consent of the Muscogee (Creek) Nation as the "appropriate" tribe under 25 U.S.C. 3002(c)(2); 25 C.F.R. § 262.8(a); 25 C.F.R. § 262.5(d). Because Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are lineal descendants,[15] the Muscogee (Creek) Nation was in first priority as the appropriate tribe. 25

[14] The Tribal Defendants argue that Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are not lineal descendants. *E.g.*, Dkt. 202 at 44. This issue will be discussed in connection with the ownership and control violation, below, as it is more central to that violation.

[15] As noted in the previous footnote, the Tribal Defendants dispute this, and it will be discussed below.

C.F.R. § 262.8(a)(1). And even if that were not the case, the Muscogee (Creek) Nation, as the tribe "having the strongest cultural relationship with such remains or objects" could have taken precedence over Poarch (as the current tribal landowner) for this purpose had it been given the appropriate opportunity to do so. 25 C.F.R. § 262.8(a)(2).

With respect to any inadvertent discoveries on ***both*** "federal lands" and "tribal land," the Tribal Defendants had specific duties to: (1) provide immediate notice of the discovery, or ensure that others provided them with immediate notice, as applicable; (2) stop any ongoing activity for at least 30 days; and (3) make a reasonable effort to protect the discovered cultural items. 25 U.S.C. § 3002(d)(1); 43 C.F.R. 10.4(a)–(c). If the discovery was on federal lands, they had a duty to engage in consultation with the Plaintiffs and, if the discovered cultural items had to be excavated or removed, to follow the requirements for intentional excavations (ARPA permit, consultation, appropriate disposition, etc.). 43 C.F.R. 10.4(d). And if the inadvertent discovery was on tribal land, they still should have taken immediate steps to further secure and protect the cultural items, and, if the discovered cultural items had to be excavated or removed, to follow the requirements for intentional excavations (ARPA permit, consultation, appropriate disposition, etc.). 43 C.F.R. 10.4(e). There is no indication that they fulfilled any of these duties, and they do not argue that they did.

Instead, they argue that because Poarch itself was the tribe to which the immediate notice had to be provided, there was no NAGPRA violation. Dkt. 202 at 49. Tellingly, that does not address whether the notice requirement was actually complied with, much less whether the important requirements of work stoppage and protection of the cultural items were complied with. Moreover, notice to the appropriate federal official was still required with respect to any inadvertent discoveries on Federal lands. And even on tribal land, anyone making an inadvertent discovery still had to immediately notify the Tribal Defendants, and the Tribal Defendants had a duty to ensure that they did so, rather than turning a blind eye to the destruction and later arguing that because it occurred at their direction, no notice, work stoppage, or protection was required.

The Tribal Defendants also argue that the Plaintiffs "have failed to adequately allege that inadvertent discoveries occurred." Dkt. 202 at 47. This is incorrect. The Plaintiffs allege that cultural items were present in ***almost all areas*** of the Hickory Ground Site. Dkt. 190 at 30; *see also id*. at 41 (depicting extensive distribution of burials). They further allege that it would have been "***virtually impossible*** to undertake ***any construction activities*** without a ***high probability of damaging***" human remains and other cultural items. Dkt. 190 at 30 (emphasis added). The Tribal Defendants nevertheless imply that inadvertent discoveries are not likely to have occurred during construction because a Phase III excavation was previously conducted. Dkt. 202 at 47–48. But as the Plaintiffs have explained, the purpose of a Phase III excavation is to record data about a site, ***not*** to remove all remains and cultural items a site may contain. Dkt. 190 at 28. In a Phase III archaeological excavation ***some*** items are removed, but ***others*** are left at the site. *Id*.. At this point, the Plaintiffs are not required to identify specific inadvertent discoveries of cultural items. Discovery will reveal those details. The Plaintiffs have made allegations sufficient to support a very reasonable belief that inadvertent discoveries (and destruction) of cultural items occurred.

Finally, the Tribal Defendants had a duty to give ownership and control of the Plaintiffs' ancestors, their funerary objects, and their other cultural items to the Plaintiffs. 25 U.S.C. § 3002(c)(3). As discussed above, this duty does not apply only to federal agencies and museums, as the Tribal Defendants seem to imply, but rather, is a central and generally applicable provision of NAGPRA. *Id*. As lineal descendants of the deceased, Dkt. 190 1, 7, 14, 31, 34, Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are entitled to ownership and control of their ancestors' remains and associated funerary objects. 25 U.S.C. § 3002(a)(1). The Tribal Defendants argue that Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are not lineal descendants of the excavated ancestors. Dkt. 202 at 44. NAGPRA itself does not contain a definition of "lineal descendant," but NAGPRA's implementing regulations define "lineal descendant" as:

> an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe . . . or by the common law system of descendance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.

43 C.F.R. § 10.2(b)(1). By making traditional kinship system the primary standard for determining lineal descendants (the definition originally *only* referred to the traditional kinship system; the common law system was added as an alternative in response to a comment received), the Department of the Interior intended that *tribes* would be able to *determine for themselves*, as an intramural matter firmly within tribal authority, who qualifies as a lineal descendant. *See* 60 Fed. Reg. 62134, 62135 (Dec. 4, 1995) ("Reference to traditional kinship systems is designed to accommodate the different systems that individual Indian tribes use to reckon kinship."). According to the Plaintiffs' traditional kinship system, Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are the lineal descendants of the ancestors buried at the Hickory Ground Site. Dkt. 190 at 1, 7, 14, 31, 34.

While, as the Tribal Defendants point out, Dkt. 202 at 44, Hickory Ground Tribal Town may not be an "individual" according to the common sense of the word (although the term "individual" is not defined, so that cannot be ruled out), its *members* are individuals and lineal descendants. Allowing a determination of their status as lineal descendants to turn on such a technicality, particularly at this early stage of the case, would be contrary to NAGPRA's remedial purpose. The Tribal Defendants' other argument, that the ancestors are not "known Native American individual[s]," *see* Dkt. 202 at 44, is unavailing for the same reason. In addition, the Plaintiffs' ancestors are ***not*** unknown individuals. The definition of "lineal descendant" does not require that the deceased be identifiable by name, it only requires that they be known. Regardless of whether the Plaintiffs might or might not know all of the deceased's names currently, they know that the deceased are their ancestors, and that they are the lineal descendants of the deceased, according to their (and the ancestors') traditional kinship system. In some cases, the individuals may be even more closely identifiable as the Plaintiffs' direct ancestors based on the location of their burial. *E.g.*, Dkt. 190 (describing how Mekko

Thompson's ancestors have served as Mekko of Hickory Ground Tribal Town since time immemorial, and how *mekkos* are buried in a certain location). Thus, Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are lineal descendants of the ancestors buried at the Hickory Ground Site.

Even if Plaintiffs Mekko Thompson and Hickory Ground Tribal Town were not lineal descendants (which they are), the Muscogee (Creek) Nation would be entitled to ownership and control of the cultural items as the tribe which has the closest cultural affiliation with the cultural items. 25 U.S.C. § 3002(a)(2)(B). Although the Tribal Defendants might normally occupy a higher position of priority for ownership and control as the current tribal landowner with respect to cultural items discovered on its reservation *only*, 25 U.S.C. § 3002(a)(2)(A), the Muscogee (Creek) Nation should take precedence in this case, as the tribe "having the strongest cultural relationship with such remains or objects" (as well as, next in priority, the Indian tribe who aboriginally occupied the lands). 25 C.F.R. § 262.8(a)(2). Moreover, the drafters of NAGPRA did not intend that the interests of tribes with the closes cultural affiliation would be disregarded as they have been here. *See* S. Rep. No. 101-473, at 9 (1990) ("The Committee also recognizes that there may be circumstances where human remains or objects found on one Indian tribe's lands may be culturally affiliated with a different Indian tribe. In these situations . . . the Committee intends that a determination of the right of possession shall be based on the best available evidence given the totality of the circumstances.").

3. NAGPRA provides a private right of action and broad equitable authority to the Court to craft a remedy for the Tribal Defendants' violations.

NAGPRA creates a private right of action and vests federal courts with jurisdiction over claims of NAGPRA violations. 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). This provides a private right of action, *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."), and also vests the federal courts with jurisdiction over NAGPRA claims, *e.g.*, *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 259 (3d Cir. 2014) ("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").

On its face, Section 3013 broadly authorizes courts to issue appropriate relief, as necessary to enforce NAGPRA. *E.g.*, *Castro Romero v. Becken*, 256 F.3d 349, 354 (5th Cir. 2001) (characterizing Section 3013 as granting "broad enforcement power"). This includes the type of declaratory, injunctive, and other relief sought by the Plaintiffs. *E.g.*, *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 194 F. Supp. 2d 977, 986 (D.S.D. 2002) ("The Court has the authority to require the Corps to comply with its duties under NAGPRA and its implementing regulations by issuing a writ of mandamus…."); *Bonnichsen v. U.S. Dep't of Army*, 969 F. Supp. 614, 627 (D. Or. 1997) ("Section 3013 establishes a right to declaratory and injunctive relief to redress violations of NAGPRA."). The Tribal Defendants appear to object not to the form of the relief requested, but to the nature or scope of the relief requested. But those objections are premature. *C.f.*, *e.g.*, *Vieux Carre Prop. Owners, Residents & Assocs., 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."); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1184-85 (D. Or. 2010) (noting in an NHPA/NEPA case that the court could order a highway removed, but concluding: "It is premature, in any event, at this stage of the case to set the precise parameters of the Court's equitable authority. 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"). And even if the Tribal Defendants' objections were not premature, the scope of relief the Plaintiffs request is within the Court's equitable powers. *C.f.*, *e.g.*, *West v. Sec'y of Dep't of Transp.*, 206

F.3d 920, 925 (9th Cir. 2000) (stating in a NEPA case that "upon finding that defendants failed to comply with NEPA, our remedial powers would include remanding for additional environmental review and, conceivably, ordering the [highway] interchange closed or taken down."); *Mont. 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 Tribal Defendants mischaracterize the relief the Plaintiffs seek with respect to their NAGPRA claim. Dkt. 202 at 50-51. Importantly, with respect to their NAGPRA claim, the Plaintiffs do ***not*** seek a permanent injunction on any activity at the Hickory Ground Site, or an order that the Hickory Ground Site be maintained in a pristine state forever, as much as the Plaintiffs might desire that. What the Plaintiffs ***do*** request is that the Tribal Defendants be required to comply with NAGPRA. Dkt. 190 at 58. As cases cited in the preceding paragraph illustrate, this could involve some degree of rolling back actions that were taken without NAGPRA compliance; and it is not clear what the outcome of the NAGPRA process would be; but there is at least a possibility that some of the adverse effects could be ameliorated through an appropriate interactive process. The Plaintiffs also request a declaratory judgment that the Tribal Defendants have violated NAGPRA, as well as an order requiring them to comply with NAGPRA going forward, so that this tragedy is not repeated. Dkt. 190 at 78. The Plaintiffs allege that there are still human remains, funerary objects, and other cultural items in the ground at the Hickory Ground Site and on other Poarch lands, Dkt. 190 at 44, that Poarch could also destroy if not held accountable. The requested relief is within this Court's authority to grant.

In summary, the Hickory Ground Site is the Plaintiffs' aboriginal land, from which they were forcibly removed. The individuals buried there are the Plaintiffs' ancestors. The Tribal Defendants must not be allowed to flout NAGPRA, desecrate the Plaintiffs' ancestors' graves, and deprive the Plaintiffs of ownership and control over their ancestors and other cultural items. The Plaintiffs have alleged a viable NAGPRA claim, and this Court has broad authority to issue

appropriate relief. The Tribal Defendants' motion to dismiss the NAGPRA claim should be denied.

F. The Plaintiffs have stated a claim against the Tribal Defendants under ARPA.

Federal law provides that "[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]." Archaeological Resources Protection Act ("ARPA") 16 U.S.C. § 470ee(a); *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). Accordingly, the Hickory Ground Site constitutes "Indian lands" for purposes of ARPA, because it was held in trust by the United States for Poarch when Poarch breached its promises to protect this sacred site from excavation and development.

The permit requirement of ARPA (which is incorporated into NAGPRA) is a vital component of the cultural preservation and protections in those statutes. It is intended to give tribes who "may consider the site as having religious or cultural importance" prior notice of any planned excavation that may harm a religious or cultural site. 16 U.S.C. § 470cc(c). 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.E.2 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.* Even if Poarch itself may not have needed a permit, the people and entities performing excavation and removal of archaeological resources on its behalf did, and Poarch had a duty to ensure that they obtained

the appropriate permits. To the extent any excavation occurred without a permit, as the Plaintiffs have alleged, *see* Dkt. 190 at 63, it violated ARPA.

Worse, the Tribal Defendants violated ARPA even with respect to permits that ***were*** obtained. Plaintiffs allege, on information and belief, that Poarch officials falsely represented in the permit application that no religious or cultural site would be harmed or destroyed by the proposed work at the Hickory Ground Site. Dkt. 190 at 62. Before issuing a permit, BIA regulations required Poarch, as the tribe having jurisdiction over the lands, to "either state that no religious or cultural site will be harmed or destroyed by the proposed work or specify terms and conditions that the permit must include in order to safeguard against such harm or destruction." 25 CFR § 262.5(c)(1). As the Tribal Defendants have given no indication that they required any safeguards (much less that such safeguards were implemented), presumably they falsely represented that no harm or destruction would occur. Having pleaded a plausible claim on this issue, Plaintiffs should be allowed to conduct discovery in order to obtain the information that is in the exclusive possession and control of Poarch about it.

Second, the Tribal Defendants or their agents failed to obtain the Muscogee (Creek) Nation's consent for any permits that were issued. If the lands involved in a permit application are Indian lands, the applicant is required to obtain the consent of the "appropriate Indian tribal authority" for the permit. 43 C.F.R. § 7.35. As discussed in more detail in Section IV.E.2, above, 25 C.F.R. § 262.5(d) provides that "[d]etermination as to which tribe is the appropriate tribe shall be made in accordance with § 262.8(a)," which makes the Muscogee (Creek) Nation the appropriate tribe. The Tribal Defendants' argument that Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are not lineal descendants for this purpose is unavailing, as also discussed in Section IV.E.2, above.

There is also no question that Plaintiffs' ARPA claim is timely under the APA's six-year statute of limitations. Plaintiffs allege that the Phase III excavation ended in 2011, Dkt. 190 at 28, not in 2006 as the Tribal Defendants inexplicably assert. Because the original Complaint in this matter was filed in 2012, there is no statute of limitations that would bar this claim relating

to the Phase III excavation when the allegation is taken as true. In fact, construction activities for the casino resulting in further disturbance of buried human remains and artifacts took place even after the original Complaint was filed. Dkt. 190 at 32 (casino construction activities continued until 2014). The claims from that activity cannot be deemed untimely.

Finally, excavation, removal, damage, alteration, or defacement to archaeological resources at Hickory Ground 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). The casino construction activities are ***not*** exempt from ARPA's prohibition on conducting those activities on Indian lands without a permit. 16 U.S.C. § 470ee(a). ARPA's implementing regulations do provide an exception to the permit requirements for 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). The lands at issue here are "Indian lands," not "public lands" for purposes of ARPA, so this exception does not apply.

Assuming solely for the sake of argument that this exception *could* apply on Indian lands like Hickory Ground, 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 necessarily 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. Treating as true Plaintiffs' well-pleaded

allegations that ancestral remains and artifacts were present throughout the Hickory Ground Site, making it impossible to conduct excavation and construction activity without disturbing them (Dkt. 190 at 30-31, 41), there is no way that this disruption could be deemed not "purposeful" or "incidental" for purposes of the exception, and it should not apply.

NAGPRA provides the cause of action for the Tribal Defendants' ARPA violations. *See* Dkt. 190 at 63. NAGPRA does not merely require one to obtain an ARPA permit, it requires that the items be excavated or removed "pursuant to" that permit, 25 U.S.C. 3002(c)(1)—in other words, with a permit and in accordance with the requirements of that permit. And as discussed above, NAGPRA broadly authorizes the district courts to "issue such orders as may be necessary" to enforce its provisions, which include the incorporated ARPA requirements. 25 U.S.C. § 3013.

G. The Plaintiffs have stated a claim against the Tribal Defendants under the NHPA.

The Tribal Defendants entered into an agreement with the National Parks Service to fulfill all responsibilities and obligations applicable to Hickory Ground under the National Historic Preservation Act ("NHPA") (codified as amended at 54 U.S.C. §§ 300101-307108). Dkt. 190 at 24. As explained in more detail below and alleged in the Second Amended Complaint, the Tribal Defendants became responsible for compliance with NHPA through that agreement, they undertook actions that required certain steps under NHPA, they violated those requirements and those violations are reviewable pursuant to NHPA. Accordingly, Plaintiffs have pleaded a plausible claim under NHPA and the Tribal Defendants' motion to dismiss this claim should be denied.

1. NHPA imposes a mandatory process for assessing impacts on historic places.

The purpose of NHPA is the preservation of historic resources. *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir. 1981). The Hickory Ground Site has been listed on the National Register of Historic Places since 1980. 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(a). 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(c).

2. NHPA's requirements apply to the Tribal Defendants because they assumed NHPA obligations by agreement with the National Park Service.

While NHPA requirements primarily apply to Federal agencies, tribes can assume certain legal obligations under NHPA. 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.

Poarch entered into just such an agreement with Federal Defendants the National Park Service and Department of the Interior for the express purpose of assuming NHPA responsibilities, including with respect to the Hickory Ground Site (hereinafter, 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*. at 115. 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, manage, or mitigate harm to such properties." *Id*.

at 116. 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).

Tribes who assume these responsibilities take legal and financial responsibility for implementing and complying with the required steps of the Section 106 process. 36 C.F.R. 800.2. In carrying out this responsibility, they exercise delegated federal legal authority. *Id*. Therefore, NHPA requirements apply to the Tribal Defendants because they assumed NHPA obligations under the NPS Agreement.

3. 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. *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. United States Army Corps of Engineers*, 205 F. Supp. 3d 4, 8 (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. By these standards, several "undertakings" occurred here.

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 were

issued. *See Sheridan Kalorama Hist. Ass'n*, 49 F.3d at 754 (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. *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).

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 Tribal Defendants to determine whether any portion of that funding was intended or used for any activities concerning the Hickory Ground Site. 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. 938 F. Supp. at 920. 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*, 466 F.3d at 114, but a decision to allow excavation of a known Muscogee (Creek) Nation historic burial and ceremonial site was not.

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 federal approval and extensive federal involvement. 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 and 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).

Subsequent to the *Cabazon* case, 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 makes the planning, construction and operation of the gaming facility an undertaking. *Cf. Fein*, 949 F. Supp. at 379; *CTIA-Wireless*, 466 F.3d at 114-15 (retention of approval authority constituted undertaking). *Compare Ringsred v. City of Duluth*, 828 F.2d 1305, 1306, 1308-09 (8th Cir. 1987) (concluding that a parking ramp to be built adjacent to a pre-IGRA Indian gaming facility was not an undertaking for purposes of NHPA where 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).

4. The Tribal 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). A tribal governmental official who has been delegated legal responsibility for Section 106 compliance must likewise engage in consultation. 36 C.F.R. § 800.2(a) and (c) (tribal governmental official exercising delegated authority may be the agency official and agency official must include as a consulting party in the Section 106 process any tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking); 36 C.F.R. § 800.3(f)(2) (agency official must invite tribes that might attach religious and cultural significance to historic properties to consult). Poarch expressly assumed consultation obligations for purposes of the Section 106 process. Accordingly, Poarch and its Tribal Historic Preservation Officer 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 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 Poarch 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 Tribal Defendants do not dispute this allegation. Their argument that they did engage in some discussions with the Plaintiffs over the years, Dkt. 202 at 59, fails because these discussions did not take place ***before*** the undertaking, as required by the NHPA, and they do not meet the NHPA's specific requirements for consultation. These failures to consult caused real-world harm to Plaintiffs. Poarch's 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 the 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 Tribal Defendants violated NHPA.

4. The Tribal Defendants' NHPA violations are reviewable under NHPA.

The Tribal Defendants' NHPA violations are reviewable under NHPA. 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).

This 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. A.1, above, because the Tribal Defendants were exercising delegated authority, the defense of sovereign immunity is not available.

Moreover, as discussed in Section IV.E.3, above, 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 Tribal 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.

H. The Plaintiffs have stated a claim against the Federal Defendants and Tribal Defendants under RFRA because Tribal Defendants are federal actors whose actions are substantially burdening Plaintiffs' religious exercise.

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 Section IV.E of their Response to Federal Defendants' Motion to Dismiss, incorporated herein by reference, for the sake of convenience and efficiency.

I. This Court should not dismiss Count VIII of the Second Amended Complaint seeking relief from the application of NAGPRA and ARPA in violation of Plaintiffs' rights of religious exercise.

Count VIII of the Second Amended Complaint asserts that the Federal Defendants and the Tribal Defendants applied NAGPRA and incorporated provisions of ARPA in a fashion that violated the Free Exercise Clause, RFRA, and Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Dkt. 190 at 59-61. Those violations consist of (1) allowing any tribe other than the Muscogee (Creek) Nation to consent to excavation of the Hickory Ground Site or (2) providing any entity other than Mekko Thompson and the Muscogee (Creek) Nation with a higher priority of ownership in the remains and other items excavated from the Site. Dkt. 190 at 60-61. Plaintiffs seek relief from this Court to address these violations because Plaintiffs cannot do so without risking civil or criminal penalties.

Federal Defendants and Tribal Defendants contend that Count VIII should be dismissed for largely the same reasons that they argue Plaintiffs' RFRA claim should be dismissed, and because they contend the Religious Land Use and Institutionalized Persons Act ("RLUIPA") does not apply here. Dkt. 200 at 40-41; Dkt. 202 at 70-72.[16] As discussed below, relevant portions of RLUIPA do apply here, and this Court should not dismiss Count VIII for largely the same reasons this Court should not dismiss Plaintiffs' RFRA claim: without compelling justification, Federal Defendants and Tribal Defendants have applied NAGPRA and related

[16] 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 this brief for the sake of convenience and efficiency.

provisions in ARPA to Plaintiffs in a manner that prevents altogether or substantially burdens Plaintiffs' exercise of their religious beliefs.

1. NAGPRA's "ownership or control" rule should be applied to honor Plaintiffs' traditional kinship structure.

Plaintiffs' claims in Count VIII center on Tribal Defendants' and Federal Defendants' interpretation of NAGPRA's "ownership or control" rule, which dictates who has ownership and control over Native American cultural items excavated from a site and who must consent to excavations on tribal land. First, Tribal Defendants did not obtain consent from the Muscogee (Creek) Nation prior to excavating at Hickory Ground, and thus applied NAGPRA and ARPA's requirement to obtain consent for excavation from the "appropriate Indian tribe" to Plaintiffs in a manner that violates the Free Exercise clause of the First Amendment, the Religious Land Use and Institutionalized Persons Act, and the Religious Freedom Restoration Act. *See* Dkt. 190 at 60. Second, the Department of the Interior incorrectly denied Mekko Thompson's NAGPRA claim by applying the ownership or control rule in a manner that violates the Free Exercise clause of the First Amendment, the Religious Land Use and Institutionalized Persons Act, and the Religious Freedom Restoration Act. *See* Dkt. 190 at 60-61. In both cases, Plaintiffs are compelled by their religion to return the remains and cultural items to their original and intended burial places, but if they do so they will face civil and criminal sanctions, violating their religious freedoms and rights.

Under NAGPRA, "lineal descendants" have *first priority, over the tribal landowner*, for ownership and control of Native American cultural items excavated from tribal land. *See* 25 U.S.C. § 3002(a); 25 C.F.R. § 262.8(a); 43 C.F.R. § 10.6(a); *see also* Dkt. 190 at 54, 60. Lineal descendancy, in turn, can be established "by means of the traditional kinship system of the appropriate Indian tribe." 43 C.F.R. §§ 10.2(b)(1), 10.14.

The traditional kinship system of the Hickory Ground Tribal Town holds that all modern-day members of the Tribal Town are lineal descendants of those buried at the original Hickory Ground, as Tribal Town membership is matrilineal. Dkt. 190 at 7, 13. The Tribal Town chief, its

"mekko," represents the Tribal Town; under Hickory Ground Tribal Town's traditional kinship system, this means that Mekko George Thompson represents all lineal descendants of those buried at (and excavated from) the Hickory Ground Site. *Id.* at 13, 31. Because the Muscogee (Creek) Nation is a confederacy of Tribal Towns, the Nation's responsibility under the traditional kinship system is as *parens patriae* representative of the Tribal Towns, also referred to as "Ceremonial Grounds" in Muscogee (Creek) Nation law. *See* Dkt. 190 at 7, 55; *see, e.g.*, Muscogee (Creek Nation) Code, tit. 5, §§ 1-101, 1-104, 2-103, 2-203 (acknowledging "Ceremonial Grounds" as entities under the Nation's jurisdiction and holding the Mekko of each Grounds accountable for aid provided by the Nation), *available at* http://www.creeksupremecourt.com/wp-content/uploads/Title-5.pdf. Thus, under the Muscogee (Creek) Nation's traditional kinship structure, Mekko Thomson "has ownership and right of control over the disposition of" the human remains and associated funerary objects excavated from the Hickory Ground Site. Dkt. 190 at 34; *see also id.* at 55.

2. Congress intended NAGPRA to honor tribes' religious connections with their ancestors by allocating control over remains and cultural objects to the tribes and members that are related to such remains and cultural objects.

NAGPRA and the ARPA provisions it incorporates are laws specifically directed at religion and religious practice. *See* Dkt. 190 at 59. As stated by Senator Inouye in a hearing proceeding NAGPRA's passage, "[i]n light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century," even when "supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community." 136 Cong. Rec. 35,678 (1990) (statement of Sen. Inouye). Thus, NAGPRA "is not about the validity of museums or the value of scientific inquiry" but about those "human rights." *Id.* A House Report discussion of the definition of "sacred objects" also underscores the goal of NAGPRA to honor tribal religions by

requiring repatriation of objects needed for religious ceremonies to the tribe who originally owned the objects: "[i]t is the intent of the Committee to permit traditional Native American religious leaders to obtain such objects as are needed for the renewal of ceremonies that are part of their religions," recognizing that "the practice of some ceremonies has been interrupted" due to circumstances beyond the control of the tribe. H.R. Rep. No. 101-877 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4367, 4373.

In accordance with its objective to protect sacred human remains and objects by honoring tribal religious ties to ancient remains and cultural items, NAGPRA contains requirements (1) to consult with "traditional religious leaders," *see* 25 U.S.C. §§ 3003(b)(1) (regarding human remains and associated funerary objects), 3004(b)(1) (regarding unassociated funerary objects, sacred objects, and cultural patrimony); (2) for a "committee to monitor and review the implementation of the inventory and identification process and repatriation activities" under NAGPRA that includes at least two "traditional Indian religious leaders," *id.* § 3006(a), (b)(1); and (3) defines "sacred objects" as those ceremonial objects needed "for the practice of traditional Native American religions by their present day adherents," *id.* § 3001(3)(C). The law is plainly intended to protect Native American human remains and other cultural items by giving control and ownership to the tribe and individuals with whom they are most closely related.

In recognition of tribes' general opposition to unearthing their ancestors, and to protect the sacred connection between tribes and their ancestors, NAGPRA requires "consent of the appropriate . . . Indian tribe" before intentional excavations on "tribal lands" can occur. 25 U.S.C. § 3002(c)(2).[17] Although neither that section nor the relevant provisions of NAGPRA's implementing regulations, 43 C.F.R. §§ 10.3, 10.5, clarify the meaning of "appropriate" tribe, BIA regulations regarding the issuance of permits for such excavations suggest that "[d]etermination as to which tribe is the appropriate tribe shall be made in accordance with [25

[17] The permit required for intentional excavations under Section 3002(c)(1) is a federal permit issued under ARPA to excavate or remove any archaeological resource located on public lands or Indian lands. 16 U.S.C. § 470cc(a).

C.F.R.] § 262.8(a)." 25 C.F.R. § 262.5(d). That section, in turn, gives first priority to lineal descendants for human remains and funerary objects. 25 C.F.R. § 262.8(a)(1).

As stated above, under the Muscogee (Creek) Nation and Hickory Ground Tribal Town's traditional kinship structure, Mekko Thompson has the right of ownership and control over the human remains and associated funerary objects at the Hickory Ground Site. Dkt. 190 at 34; *see also id.* at 55. Because the traditional kinship structure establishes the Muscogee (Creek) Nation as "*parens patriae* representative of the lineal descendants at the Site and as the tribe with the closest cultural and religious connection to the Site," its consent was needed prior to excavation of Native American cultural items from the Hickory Ground Site. Dkt. 190 at 55, 62 (citing 25 C.F.R. § 262.5(d)). This is consistent with NAGPRA's prioritized purpose of keeping Native American remains and other cultural items with and under the control of their lineal descendants.

3. Tribal Defendants' and Federal Defendants' application of NAGPRA substantially burdens Plaintiffs' exercise of religion in violation of the Free Exercise Clause, RFRA, and RLUIPA.

Because NAGPRA is not a neutral law, to satisfy the Free Exercise Clause it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). NAGPRA's main objectives include returning sacred items and religious objects to their rightful owners, and preventing the unearthing of those items and objects absent consent of those who have ownership and control rights in them. Here, the manner in which Federal Defendants and Tribal Defendants have applied NAGPRA's order of priority to Plaintiffs ignores their traditional kinship structure. In so doing, Federal Defendants and Tribal Defendants have wrenched Plaintiffs' sacred ancestors' remains and cultural items away from them in favor of granting ownership and control to a tribe who only came into possession of the land because of forced removal of the tribe to which the deceased belonged, and who sees fit to mutilate and destroy the remains and cultural items for the sake of profit. *See* Dkt. 190 at 7, 55-57, 60-61;*see, e.g.*, Dkt. 202 at 44-45.

This construction of NAGPRA disregards the Muscogee (Creek) Nation's traditional kinship structure, which holds that the Mekko of a Ceremonial Grounds (i.e., Tribal Town) represents all lineal descendants of those buried at the Tribal Town, and therefore Mekko Thompson has ownership and control rights over the remains and items excavated from the Hickory Ground Site. *See* Dkt. 190 at 7, 50, 55. This traditional kinship structure is driven by Plaintiffs' religiously mandated duties to their ancestors. *Id.* at 50, 60. Thus, Tribal Defendants' and Federal Defendants' construction and application of NAGPRA implements a "religious gerrymander" under which traditional kinship structures of certain religions are disregarded, while others are honored, violating the Free Exercise Clause. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 534-35 (noting that the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs," including "the effect of a law in its real operation" if the operation results in prohibition of a certain religion).

Federal Defendants and Tribal Defendants' application of NAGPRA in allowing excavation to go forward without the Muscogee (Creek) Nation's consent and in denying Mekko Thompson control and ownership of the remains and funerary objects once they were unearthed also violates RFRA for all the reasons stated in Section IV.E of Plaintiffs' Response to Federal Defendants' Motion to Dismiss.

For its part, RLUIPA provides parallel protections to RFRA with respect to land use regulations and institutionalized persons. *See* 42 U.S.C. § 2000cc *et seq.*; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014). RLUIPA's rules of construction, which apply to the federal government and to federal actors, 42 U.S.C. § 2000cc-5(4)(B), state that nothing in RLUIPA shall be construed to repeal federal law "that is *equally as protective* of religious exercise as, or *more protective* of religious exercise than, [RLUIPA]." 42 U.S.C.A. § 2000cc-3(h). Thus, if an existing law such as NAGPRA were less protective of religious exercise than RLUIPA, RLUIPA could be read to repeal it. As discussed above, Tribal Defendants and Federal Defendants have applied NAGPRA's rules regarding who must consent to excavation on tribal land, and who receives the excavated remains and items, in a manner that substantially burdens

Plaintiffs' religious exercise without a compelling government interest. Such construction is less protective of religious exercise than RLUIPA for the reasons in Section IV.E of Plaintiffs' Response to Federal Defendants' Motion to Dismiss. *See also Martin v. Houston*, 196 F. Supp. 3d 1258, 1268 (M.D. Ala. 2016) (plaintiff plausibly alleged RLUIPA violation where zoning statute "applied sufficient pressure on [plaintiff] such that it coerced him to cease his settlement ministry" in violation of his religious beliefs).

Tribal Defendants' and Federal Defendants' application of NAGPRA's rules regarding ownership and control effect a "religious gerrymander" that cannot withstand scrutiny under the Free Exercise clause, and it also violates RFRA and RLUIPA. This Court should therefore deny Tribal Defendants' and Federal Defendants' motions to dismiss Count VIII of the Second Amended Complaint.

J. Poarch is not a necessary and indispensable party under Rule 19.

Poarch argues that its sovereign immunity prevents it from being sued and that this case cannot proceed in its absence under Federal Rule of Civil Procedure 19. As Plaintiffs explain in Section IV.A.1, Poarch does not have sovereign immunity from Plaintiffs' claims against them that arise from actions Poarch took at Hickory Ground as a federal delegee under the NPS agreement. With respect to Plaintiffs' other claims, Poarch is not necessary to this suit. The main purpose of the *Ex Parte Young* doctrine is to provide an avenue for plaintiffs to challenge an action that oversteps a sovereign's bounds by seeking equitable relief against responsible officials to require them to comply with the law. That is precisely what Plaintiffs' claims seek to do here. Quite simply, Rule 19 does not give tribal officials a free pass to violate applicable law. *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000) (even if a tribal entity were indispensable, the plaintiff would simply "need to amend its pleading to seek the injunction against the administrators of the [entity], rather than the [entity] itself," for violations of federal law). Tribal Defendants' motion on this ground should be denied.

Under Rule 19, a party is "required" when (1) "in that person's absence, the court cannot accord complete relief among existing parties;" or (2) the party "claims an interest relating to the subject of the action and is so situated" that moving forward with the case in that party's absence may "impair or impede the [party's] ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a). If the party is "required" but cannot be joined to the lawsuit, the court must then evaluate whether the action should proceed, considering the prejudice to the absent party and the existing parties from rendering a judgment in the party's absence, the extent to which prejudice could be lessened or avoided, whether a judgment in the party's absence would be adequate, and whether the plaintiffs would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(a)-(b). Lawsuits in which a tribe or a tribal entity might have an interest are regularly allowed to proceed when tribal officials are named as defendants. This is because an "absent party with an interest in the action is not a necessary party under Rule 19(a) 'if the absent party is adequately represented in the suit.'" *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

Thus, the Navajo Nation was not a necessary party in a lawsuit by non-Indian entities to enjoin Navajo officials from applying tribal law to them in tribal courts, because "tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief can be accorded among the existing parties without the tribe." *Salt River Project*, 672 F.3d at 1177. The *Salt River* case involved overarching issues of tribal jurisdiction, as the plaintiff alleged that Navajo lacked jurisdiction to regulate employment matters at its on-reservation power plant under the terms of a lease and a federal right-of-way. *Id.* at 1178. The Ninth Circuit rejected the argument that proceeding with the lawsuit would impair Navajo's interests, holding that "Navajo official defendants can be expected to adequately represent the Navajo Nation's interests" for three reasons that also exist here. *Id.* at 1180. First, the officials' interests were aligned with those of the tribe: "the officials are responsible for enforcing the [relevant law] and

there is no suggestion that the officials' attempt to enforce the statute here is antithetical to the tribe's interests." *Id.* Second, "there is no reason to believe the Navajo official defendants cannot or will not make any reasonable argument that the tribe would make if it were a party." *Id.* Third, "there is no indication that the tribe would offer any necessary element to the action that the Navajo official defendants would neglect." *Id.* at 1180-81. So too here. The Defendant tribal officials are "in charge of" the Poarch Band and PCI Gaming, Dkt. 202 at 1, and their interests are aligned with those entities' interests. Furthermore, as both the entities and the officials are represented by the same law firm, there is no reason to believe that the tribal official Defendants will not make any argument that Poarch would make if it were a party. Finally, there is no indication that Poarch would offer any necessary element to the action that the tribal official Defendants would neglect. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) ("[M]ost importantly, the potential for prejudice to the Miami Tribe is largely nonexistent due to the presence in this suit of ... the tribal officials.... These Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests in [the action]."). Numerous other courts faced with this issue have reached the same conclusion in analogous cases, for the same reasons.

In *Sac and Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), the Wyandotte Tribe was not a necessary party to a lawsuit by the State of Kansas and three other tribes to prevent the Secretary of the Interior from taking land into trust for the Wyandotte and approving gaming activities on the same land pursuant to IGRA. The Tenth Circuit reasoned that complete relief could be accorded the parties to the lawsuit because (1) the lawsuit was focused on the propriety of the Secretary's land-into-trust and gaming determinations, and (2) as a practical matter, the Wyandotte's ability to protect its interest in the subject matter of the suit was not impaired. *Id.* at 1258–59. Although "[i]t is undisputed the Wyandotte Tribe has an economic interest in the outcome of this action" in that it "ability to conduct gaming activities on the . . . tract will survive only if all the Secretary's determinations regarding the . . . tract are upheld," the presence of the Secretary as a defendant "greatly reduced" the potential of prejudice to the Wyandotte by virtue

of the Secretary having "virtually identical" interests to the Wyandotte Tribe in defending the decisions. *Id.* at 1259. Thus, even if the Wyandotte had been a necessary party, it was not indispensable because the Secretary's presence in the suit largely offset the potential for prejudice to the tribe. *Id.* at 1259–60*; see also Kansas*, 249 F.3d at 1227 (finding that the Miami Tribe was not a necessary party to a lawsuit challenging the National Indian Gaming Commission's decision that the Miami Tribe's lands were "Indian lands" on which gaming under IGRA was permissible; the potential for prejudice was "largely nonexistent due to the presence in this suit of not only the NIGC and other Federal Defendants, but also the tribal officials . . ."); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118 (E.D. Cal. 2002), *aff'd sub nom. Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) ("although the tribes can claim a legal interest in this lawsuit" challenging their gaming compacts, "they are not necessary parties because their legal interest can be adequately represented by the Secretary"). Poarch and PCI Gaming will likewise not be prejudiced in this case because their interests can be represented by the tribal official defendants and the Federal Defendants.

By way of further example, in *Gingras v. Rosette*, the court held that a tribe was not a necessary party to a lawsuit to declare that the tribe's lending business's lending model was illegal. No. 5:15-CV-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016), *aff'd sub nom. Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019). The presence of tribal officers of the lending business as defendants under *Ex Parte Young* "satisfies the requirements of Rule 19," as "[t]he essential purpose of the *Ex Parte Young* doctrine is to permit suits for injunctive relief against entities such as state agencies which would otherwise be subject to sovereign immunity." *Id.* Similarly, in *Lloyd Noland Found., Inc. v. Tenet Healthcare Corp.*, No. CV-01-S-437-S, 2001 WL 37124708, at *5 (N.D. Ala. June 20, 2001), the court found that an absent party wasn't necessary under Rule 19 because existing parties in the case represented its interests: "because [the defendant] owns and controls [the absent party], defendant has access to all of the resources available to [the absent party]" and "has every incentive to prove that [the absent party] did not breach the stock purchase agreement."

As in the above cases, Poarch and PCI Gaming are adequately represented by the tribal official defendants, and there is no indication that their interests will be neglected, impaired, or impeded given that tribal official defendants control the entities and have the same interests as the entities themselves. Nor is there any reason this court could not accord complete relief among the parties, as Plaintiffs seek only relief enjoining tribal officials from violating applicable law. Poarch and PCI Gaming are not necessary parties to this action, and this Court should deny Tribal Defendants' motion to dismiss under Rule 19.

V. CONCLUSION

For the reasons explained in detail above, the Court should reject the Tribal 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 Tribal 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*
Lauren J. King, Of Counsel