

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

MUSCOGEE CREEK NATION, *et. al.*,

Plaintiffs,

V.

POARCH BAND OF CREEK  
INDIANS, *et. al.*,

Defendants.

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Case No. 2:12-cv-01079-MHT-CSC

Judge Myron H. Thompson

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

## **I. INTRODUCTION**

Defendants the United States Department of the Interior (“Interior”), Tara MacLean Sweeney, David Bernhardt, and David Vela (collectively, “Federal Defendants”), hereby move to dismiss the Second Amended Complaint and Supplemental Complaint (“Second Amended Complaint”), ECF No. 190, filed filed by Plaintiffs Muscogee Creek Nation, Hickory Ground Tribal Town, and Mekko George Thompson (collectively “Plaintiffs”) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

This dispute is part of a deeper conflict regarding the Poarch Band of Creek Indian’s (“Poarch Band”) construction and operation of a gaming facility on land located near Wetumpka, Alabama (the “Wetumpka property”). The Wetumpka property, which the Poarch Band purchased in 1980 and is held in trust for its benefit by the United States, is the site of “Hickory Ground,” the last known capital of the Creek Nation in Alabama before its removal to the Indian Territory in the eastern sections of present-day Oklahoma. Plaintiffs claim cultural, historic, and lineal ties to the Wetumpka property and state that it holds religious significance to them. The Second Amended Complaint seeks injunctive and declaratory relief to have the Wetumpka property taken out of trust for the Poarch Band and to have the Poarch Band return the entire Wetumpka property to its natural state. 2d Am. Compl., Prayer for Relief.

Plaintiffs allege in their Amended Complaint that Federal Defendants violated the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. § 5123 (Claim I), the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001-3013 (Claim VII), the Archaeological Resources Protection Act (“ARPA”), 16 U.S.C. §§ 470aa-mm (Claim IX), the

National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 300101–320303 (Claim X), the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb-2000bb-4 (Claim XI), and violated Plaintiffs’ free exercise of religion (Claim VIII). These claims fail and must be dismissed for several reasons. First, Plaintiffs’ IRA claim challenges Interior’s 1984 decision to take land into trust for the Poarch Band. This Court lacks jurisdiction over this count because it is brought well outside the statute of limitations, and Plaintiffs lack standing to challenge the decision. Second, this Court also lacks jurisdiction over Plaintiffs’ NAGPRA claim because the Wetumpka property is not federal land under NAGPRA, and Federal Defendants had no duty to act. Third, Plaintiffs’ allegations under ARPA fail to state a claim because the challenged activities — the Poarch Band’s construction of a gaming facility on its land — are specifically exempted by the statute and applicable regulations and no permit is required. In addition, the Court lacks jurisdiction over this claim because it challenges permits issued more than six years ago. Fourth, the Court is similarly without jurisdiction over Plaintiffs’ NHPA claim because Plaintiffs cannot demonstrate that Federal Defendants failed to take a discrete agency action that they were required to take. They have also failed to state a claim under the NHPA. Fifth, Plaintiffs fail to state a claim under RFRA, given that the Federal Defendants have not substantially burdened Plaintiffs’ exercise of religion. And, finally, Plaintiffs’ claims that NAGPRA and ARPA substantially burden their exercise of religion should be dismissed because the First Amendment and the Religious Land Use and Institutionalized Persons Act are not implicated here. Accordingly, for all these reasons, Federal Defendants move for the dismissal of Plaintiffs’ Second Amended Complaint and Supplemental Complaint.

## II. BACKGROUND

### A. Factual Background

Plaintiffs and the Poarch Band claim cultural affiliation with and descent from Creek Indians that historically inhabited land within the State of Alabama. 2d Am. Compl. ¶¶ 13, 45. In 1980, the Poarch Band acquired approximately 35 acres of land in the proximity of Wetumpka, Alabama. *Id.* ¶ 61. This property included a significant archeological site known as Hickory Ground, which was an early 19th century tribal town of the Creek Nation. *Id.* ¶¶ 1–2, 44–54. In the same year the Poarch Band acquired the land, the NPS included the property as a historic property on the National Register of Historic Places. *Id.* ¶¶ 3, 61. As a result, the land was encumbered with a twenty year covenant with measures to protect the archeological site that elapsed at the end of 2000. *Id.* ¶¶ 50, 285. In 1984, the Poarch Band gained Federal recognition and the land was acquired in trust for the benefit of the Poarch Band under the IRA. *Id.* ¶ 73.

In the early 1990s, the Poarch Band submitted a management agreement to the Bureau of Indian Affairs (“BIA”) as part of a plan to develop the site with a community center, bingo hall, and museum. In 1991, the BIA, as part of its duties under the NHPA, entered into consultation with the Alabama State Historic Preservation Office (“SHPO”) and the BIA proposed archeological excavations as a means to resolve any potential adverse effects to Hickory Ground. Decl. of Devon Lehman McCune (“McCune Decl.”) ¶¶ 2–3, Exs. A, B.<sup>1</sup> The SHPO did not

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<sup>1</sup> This Court may consider materials outside the four corners of the complaint in support of a motion to dismiss without converting it to one for summary judgment when jurisdictional facts are challenged. Factual attacks challenge “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). The Eleventh Circuit has explained that in a factual attack, the presumption of truthfulness afforded a plaintiff under Rule 12(b)(6) does not attach, and the court is free to weigh the

believe excavations would mitigate any potential adverse effects and BIA elevated the matter to the Advisory Council on Historic Preservation (“ACHP”). *Id.* In 1992, ACHP and BIA formally terminated consultation when they failed to reach an agreement. *Id.* BIA approved the management agreement, contingent on further archeological work to recover information that might be lost in development. *Id.* In 1999, the NPS entered into an agreement with the Poarch Band for assumption by the Tribe of certain responsibilities pursuant to the NHPA. 2d Am. Compl., Ex. I (ECF No. 190-1). The Poarch Band began developing the site in 2000.

Plaintiffs submitted many objections and challenges to the Poarch Band’s construction activities over the years. On October 31, 1992, after BIA approved the management agreement, Plaintiff the Muscogee (Creek) Nation (the “Nation”) passed an ordinance objecting to the Poarch Band’s proposed construction and requesting that the BIA investigate alleged violations of section 106 of the NHPA, NAGPRA, ARPA, and the Antiquities Act of 1906. McCune Decl. ¶ 4, Ex. C. On October 19, 2002, Plaintiff Hickory Ground Tribal Town (“HGTT”) submitted its claim for remains or objects and cultural property to the Poarch Band and Interior’s Eastern Area Office. *Id.* ¶ 5, Ex. D. In its submission, HGTT alleged violations of NAGPRA and ARPA and alleged that NHPA section 106 was not properly followed. *Id.* On October 23, 2002, the Muscogee (Creek) National Council submitted correspondence to the NPS seeking further information regarding the 1999 Agreement and the process NPS undertook to review the Poarch Band’s proposal to assume the responsibilities of the Alabama SHPO. *Id.* ¶ 6, Ex. E. In addition

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evidence. *Scarfo v. Ginsberg*, 175 F.3d 957, 960–61 (11th Cir. 1999) citing *Lawrence*, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 412–13 (5th Cir. 1981))) *see also Mowa Band of Choctaw Indians v. United States*, No. 07-0508-CG-B, 2008 WL 2633967, at \*1 (S.D. Ala. July 2, 2008).

to these specific instances, there have been many communications between Plaintiffs, municipalities, and other interested parties and Defendants regarding the Poarch Band's construction activities on the Wetumpka property. The controversy has been reported and commented upon in newspapers, internet sites, and other media outlets.

In 2001, the City of Wetumpka, a member of the Creek Nation, and the Alabama Preservation Alliance filed a complaint against the Poarch Band, the Department of the Interior, the Secretary of the Interior, Assistant Secretary-Indian Affairs, the Indian Gaming Commission, and the BIA in the United States District Court for the Middle District of Alabama. *See* Compl., ECF No. 1, *City of Wetumpka v. Norton*, No. 2:01-cv-1146-WHA-VPM (M.D. Ala. filed Sept. 28, 2001). In their complaint, plaintiffs alleged violations of ARPA, NAGPRA, section 106 of the NHPA, APA, National Environmental Preservation Act, and the Indian Gaming Act. *Id.* The lawsuit was voluntarily dismissed on November 21, 2011. ECF No. 22.

In 1987 to 1988 and 2001, the BIA issued ARPA permits to the Poarch Band for test excavations on Hickory Ground. The BIA issued a permit in 2003 and extended it in 2005 for more extensive data recovery excavations. McCune Decl. ¶ 7, Ex. F. Over the years, BIA investigated two possible ARPA violations. The first occurred in 1991 when the Poarch Band approved archeological work by a professional archeologist, and work was started before the BIA issued a permit. *Id.* ¶ 7, Ex. F. The BIA did not consider this to be an intentional violation and no penalty was assessed. The second occurred in 2001 when the Poarch Band's contractor began construction activities in an area within the boundaries of the archeological site. The BIA could not verify that damages had occurred to the archeological site and no penalty was assessed. *Id.* ¶ 9, Ex. H. On March 12, 2008, Plaintiff Mekko George Thompson contacted the NPS regarding

alleged violations of NAGPRA by Auburn University. *Id.* ¶ 10, Ex. I. Interior investigated these allegations and on April 21, 2009, found that Auburn University was not in violation of the statute. *Id.* ¶ 11, Ex. J.

## **B. Procedural History**

Plaintiffs initially brought this litigation in December 2012. Compl., ECF No. 1. Plaintiffs filed an amended complaint on January 8, 2013. ECF No. 57. On February 27, 2013, Federal Defendants moved to dismiss the amended complaint, as did other defendants. ECF No. 94; *see also* ECF Nos. 74, 75, 77, 88, 90. In January 2018, the court stayed the case pending settlement negotiations. ECF No. 155.

On March 4, 2020, this Court granted Plaintiffs’ motion to amend their complaint and on March 9, 2020, Plaintiffs filed their Second Amended Complaint and Supplemental Complaint. ECF No. 190. The Second Amended Complaint raises eleven counts. Count I asserts that the Federal Defendants violated the Indian Reorganization Act by taking land into trust for the Poarch because it was not under federal jurisdiction in 1934. 2d Am. Compl. ¶¶ 190–99. Counts II through IV “are applicable only if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch.” *Id.* ¶ 200. These counts assert claims based on Alabama common law against the Poarch Defendants for unjust enrichment, promissory estoppel, and outrage, all under Alabama common law.<sup>2</sup> Plaintiff asserts

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<sup>2</sup> Federal Defendants read Counts II–VI to be asserted only against the Poarch Band Defendants and not against Federal Defendants. To the extent they are asserted against Federal Defendants, they should be dismissed for failure to state a claim as they do not identify any final agency action or statute or regulation that Federal Defendants purportedly violated, and for lack of jurisdiction because they do not identify any final agency action or nondiscretionary duty that Federal Defendants were required to take. *See infra* Section IV.

Claims V through IX if the Court determines that Federal Defendants had authority to take the land into trust. *Id.* ¶ 236. Counts V and VI are against the Poarch Defendants for violations of federal common law. *Id.* ¶¶ 237–40.

Count VII asserts that the Federal Defendants and the Poarch Defendants violated NAGPRA in various ways. Count VIII asserts that portions of NAGPRA and ARPA, if construed in a way that would allow anyone other than Plaintiffs to give authority for excavation or removal of remains from the site, violate Plaintiffs’ free exercise of religion under the First Amendment, as well as Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and RFRA. Count IX asserts a violation of ARPA. Finally, Plaintiffs assert Count X, violation of the NHPA, and Count XI, violation of RFRA.

### **III. STATUTORY BACKGROUND**

#### **A. The Indian Reorganization Act of 1934**

In 1934, Congress enacted the IRA to encourage tribes “to revitalize their self-government,” to take control of their “business and economic affairs,” and to assure a solid territorial base by “put[ting] a halt to the loss of tribal lands through allotment.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). This “sweeping” legislation, *Morton v. Mancari*, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to “put an end to tribal organization” and to “dealings with Indians . . . as tribes.” *United States v. Celestine*, 215 U.S. 278, 290 (1909).

The “overriding purpose” of the IRA, however, was more far-reaching than remedying the negative effects of the General Allotment Act. *Morton*, 417 U.S. at 542. Congress sought to “establish machinery whereby Indian tribes would be able to assume a greater degree of self



government, both politically and economically.” *Id.* Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477.

Of particular relevance here, section 5 of the IRA provides in pertinent part that:

[t]he Secretary of the Interior is [hereby] authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land[], water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

...

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108.

Section 19 of the IRA provides an inclusive definition of those who are eligible for its benefits, including eligibility for land into trust acquisitions. That section provides that “‘Indian’ . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . .” 25 U.S.C. § 5129. The IRA also includes within its definition of “Indian” “all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation,” and “all other persons of one-half or more Indian blood.” *Id.*

## **B. The Native American Graves Protection and Repatriation Act**

The NAGPRA, 25 U.S.C. §§ 3001-3013, creates procedures through which lineal descendants and culturally affiliated tribes can recover remains and cultural objects from federal agencies and museums. It was enacted by Congress subsequent to the enactment of ARPA to

protect rights to items of tribal cultural significance, including Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony (collectively “cultural items”). 25 U.S.C. § 3001(3). This repatriation process can proceed on two different tracks, depending on when the cultural items were discovered. Section three of NAGPRA, relevant here, provides guidance for determining who should get ownership or control of Native American human remains and objects discovered and excavated from federal and tribal lands after NAGPRA’s enactment on November 16, 1990. 25 U.S.C. § 3002(a)-(d). The first priority “in the case of Native American human remains and associated funerary objects, is “the lineal descendants of the Native American.” *Id.* § 3002(a)(1). Section 3(c) allows for the intentional excavation or removal of human remains on tribal lands, provided that an ARPA permit is issued by the BIA and consent is given by the tribe owning the land. 25 U.S.C. § 3002(c). NAGPRA is not prospective and is triggered only after a person has made an inadvertent discovery. *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 889 (D. Ariz. 2003), *aff’d* 417 F.3d 1091 (9th Cir. 2005).

### **C. The National Historic Preservation Act**

The NHPA, 54 U.S.C. §§ 300101–317108, “requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishe[d] the Advisory Council on Historic Preservation (“ACHP”) . . . to administer the Act.” *City of Grapevine, Tex. v. Dep’t of Transp.*, 17 F.3d 1502, 1508 (D.C. Cir. 1994). It “neither . . . forbid[s] the destruction of historic sites[,] nor . . . command[s] their preservation.” *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981). Under section 106 of the NHPA, federal agencies “shall take into account the effect of the undertaking on any historic

property,” and “afford the [Advisory Council on Historic Preservation (“ACHP”)] a reasonable opportunity to comment with regard to the undertaking. 54 U.S.C. § 306108. NHPA’s obligations are chiefly procedural in nature; the NHPA is a “stop, look, and listen” statute that merely requires that an agency acquire information before acting. *Ill. Commerce Comm’n v. Interstate Commerce Comm’n*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988).

As a first step in the section 106 process, agency officials assess whether a proposed action meets the definition of “undertaking” in 36 C.F.R. § 800.16(y). 36 C.F.R. § 800.3(a). ACHP promulgates regulations implementing section 106, including the section 800.16(y) definition, pursuant to its authority under 54 U.S.C. § 304108. The NHPA regulations define “undertaking” as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y). If the agency finds there is an undertaking, the action agency must next initiate consultation with the appropriate State Historic Preservation Officer (“SHPO”) and/or Tribal Historic Preservation Officer (“THPO”). The action agency must also plan to involve the public and identify other consulting parties. 36 C.F.R. § 800.3(e-f).

The third step in the section 106 process is for the agency to determine whether effects on historic properties will be adverse, using the criteria specified in the regulations, in consultation with the SHPO. 36 C.F.R. § 800.5(a). If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to 36 C.F.R. § 800.6. *Id.* at 800.5(d)(2).

Fourth, the agency must attempt to reach agreement with other consulting parties in developing and evaluating alternatives to avoid, minimize, or mitigate adverse effects. 36 C.F.R. § 800.6. Although all consulting parties participate in this step, in most cases, only the action

agency and the SHPO must actually reach agreement, as expressed in a Memorandum of Agreement (“MOA”). *Id.* at § 800.6(b)(1). If the ACHP participates, either on its own initiative or at the request of the SHPO, tribe or consulting party, it must also be a signatory to the MOA. *Id.* at § 800.6(c). In the event that consultation does not lead to an MOA, the agency, SHPO or the Council may decide that further consultation will not be productive, and the process moves on to the fifth and final step. *Id.* at § 800.6(c)(8).

When the action agency terminates consultation, it must ask ACHP to comment on the undertaking. 36 C.F.R. § 800.7(a)(1). If the SHPO terminates consultation, the agency and ACHP may continue consultation and execute a MOA without the SHPO’s involvement. *Id.* at § 800.7(a)(2). In the absence of a MOA, the undertaking may proceed, but only if the decision is made by the head of the agency and his or her decision explains the rationale for the decision and produces evidence that the agency considered ACHP’s comments. *Id.* at § 800.7(c)(4).

#### **D. Archaeological Resources Protection Act**

The ARPA was enacted in 1979 with the goal of protecting “archaeological resources” (including remains) “on public lands and Indian lands.” 16 U.S.C. § 470aa. ARPA prohibits the excavation or removal of archaeological resources located on public lands and Indian lands unless done in accordance with a permit or exempted under the Act or implementing regulations. *Id.* at § 470cc. In 1984, the Secretary of the Interior promulgated uniform government-wide regulations under ARPA dealing with the custody of archaeological resources, and amended them in 1995 to implement the requirements of NAGPRA. 43 C.F.R. § 7.13. The amended regulations provide that “[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe *having rights of ownership over such resources*”

and the Secretary of the Interior may “promulgate regulations providing for . . . the ultimate disposition of archaeological resources . . . when such resources have been excavated or removed from public lands and Indian lands.” 43 C.F.R. § 7.13(b)-(c) (emphasis added). The BIA has promulgated specific regulations that confirm the application of NAGPRA to archaeological resources that comprise human remains and other NAGPRA cultural items from Indian lands. *See* 25 C.F.R. § 262.8(a); Protection of Archaeological Resources, 58 Fed. Reg. 65246, 65248 (Dec. 13, 1993).

#### **E. Religious Freedom Restoration Act**

The RFRA provides that “Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . “is the least restrictive means of furthering [a] compelling governmental interest,” *id.* § 2000bb-1. “Government” is defined as “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . .” *Id.* § 2000bb-2(1). This statute was Congress’s response to a First Amendment decision of the Supreme Court that, in Congress’s view, “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” *Id.* § 2000bb(a)(4). RFRA restores the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and “guarantee[s] its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). Although RFRA “restored” the standard by which federal government actions burdening religion were to be judged, it does not expand the

class of actions to which the standard would be applied. *Vill. of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006) (citing *Hall v. Am. Nat’l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996)).

**F. The Religious Land Use and Institutionalized Persons Act**

RLUIPA prevents governments from “impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest, and (B) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§ 2000cc. “RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a ‘substantial burden’ on the exercise of religion.” *Navajo Nation*, 535 F.3d at 1077 (citing 42 U.S.C. §§ 2000cc; 2000cc-1; 2000cc-5(4)(A)). Generally, RLUIPA does not apply to a federal government action, and “even for state and local governments, RLUIPA applies only to government land-use regulations of private land — such as zoning laws — not to the government’s management of its own land.” *Id.* (citing § 2000cc-5(5)).

**G. The Administrative Procedure Act**

The APA waives sovereign immunity for suits seeking relief other than money damages from federal agencies. *See* 5 U.S.C. § 702. The APA does not, through section 702, create an independent basis of jurisdiction. *See Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). With certain exceptions, the APA provides for judicial review of agency action that is made reviewable by statute or for which there is no other adequate remedy in a court. 5 U.S.C. §§ 702, 704. Under the APA, the reviewing court may, *inter alia*, “compel

agency action unlawfully withheld or unreasonably delayed,” or “hold unlawful and set aside agency action” that is arbitrary, capricious, or not in accordance with law. *Id.* § 706. The APA does not apply to certain categories of agency action, including agency action that is “committed to agency discretion by law.” *Id.* § 701(a)(2).

The APA authorizes suits by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . .”

5 U.S.C. § 702. A federal court has authority to review only “final agency action” pursuant to 5 U.S.C. § 704, unless another statute provides a right of action. *Wilderness Soc’y v. Alcock*, 83 F.3d 386, 388 n.5 (11th Cir. 1996). Two conditions must be satisfied for an agency action to be final. “First, the action must mark the consummation of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations and citations omitted).

Absent “agency action” within the meaning of the APA, the action is not reviewable. Section 704 specifies that agency action is not final if the agency “requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.” 5 U.S.C. § 704.

In other words, agency action is not final for purposes of section 704 until “an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule . . . .”

*Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

Courts also have authority to “compel . . . action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). However, “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*.”

*Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 64 (2004). To satisfy that standard, Plaintiffs must identify one of the discrete agency actions in 5 U.S.C. § 551(13) and demonstrate that the action in question is one that is legally required. *See SUWA*, 542 U.S. at 61–63. A court’s power to “compel agency action” is carefully circumscribed to situations where an agency has ignored a specific legislative command. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). The Supreme Court made it clear that a “‘failure to act’ is not the same thing as a ‘denial’” and an agency’s act of saying no to a request properly is challenged under section 706(2) rather than section 706(1). *SUWA*, 542 U.S. at 63.

#### **IV. STANDARDS OF REVIEW**

Federal court jurisdiction is limited, present only where authorized by statute or the Constitution. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Once challenged, the burden of establishing a federal court’s subject matter jurisdiction rests on the party asserting jurisdiction. *Id.* If a plaintiff cannot meet this burden, the case should be dismissed.

A motion to dismiss for lack of subject matter jurisdiction must be granted if the court lacks the statutory authority to hear and decide the dispute. Fed. R. Civ. P. 12(b)(1). Facial attacks on a complaint “require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff’s] complaint are taken as true for the purposes of the motion.” *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). Factual attacks challenge “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” *Id.* at 1529 (citations omitted).



This circuit has explained that in a factual attack, the presumption of truthfulness afforded a plaintiff under Rule 12(b)(6) does not attach, and the court is free to weigh the evidence. *Scarfo v. Ginsberg*, 175 F.3d 957, 960-61 (11th Cir. 1999) (citing *Lawrence*, 919 F.2d at 1529). Where, as here, the defendant challenges subject matter jurisdiction, the burden of establishing jurisdiction falls squarely upon the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A claim may be dismissed under Rule 12(b)(6) either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support a cognizable legal claim. *See Kjellvander v. Citicorp*, 156 F.R.D. 138, 141 (S.D. Tex. 1994). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the specificity in pleading required by Rule 8 necessary to survive a motion to dismiss. The Court stated that a plaintiff's obligation to set forth the "grounds" of its entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citations omitted). The Court added that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted); *see also Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 974 (11th Cir. 2008). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 557). In *Iqbal*, the Supreme Court stated that a claim must have facial plausibility, which "asks for more than a sheer possibility that

a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 678 (internal quotation marks, brackets and citations omitted).

Further, federal courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citation omitted). Under Rule 12(b)(6), "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003); *see also S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 n.10 (11th Cir. 1996) ("As a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss") (citing *Assoc. Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

## V. ARGUMENT

Plaintiffs' claims against the Federal Defendants should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs fail to identify final agency action or a discrete, nondiscretionary duty that Federal Defendants failed to take and accordingly have not established jurisdiction under the APA. In addition, many of Plaintiffs' claims are brought outside the statute of limitations. Plaintiffs also fail to state claims for violation of the IRA, RFRA, the First Amendment, and the RLUIPA.

### A. **Plaintiffs' IRA Claim fails for lack of subject matter jurisdiction and failure to state a claim.**

Plaintiffs' first claim asserts that Federal Defendants violated the IRA by taking land into trust for the Poarch Band. Plaintiffs assert that under the Supreme Court's holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009), Interior can only take land into trust for tribes that were under

federal jurisdiction in 1934 and because the Poarch Band was not federally recognized as a tribe until 1984, Interior's taking of land into trust for the Poarch Band was void *ab initio*. 2d Am. Compl. ¶¶ 191, 197. According to Plaintiffs, therefore, Interior did not have the authority to authorize archeological excavations and gaming on the site is illegal. Plaintiffs' IRA claim should be dismissed because it is brought outside the statute of limitations and Plaintiffs lack standing to bring the claim.

**1. Plaintiffs' IRA claim was brought outside the statute of limitations.**

Plaintiffs' claim should be dismissed for lack of subject matter jurisdiction because it is barred by the applicable statute of limitations. The final agency action challenged, the taking of land into trust, occurred in 1984, almost 29 years prior to the time of Plaintiffs' filing their Complaint (and 25 years prior to the *Carciere* decision).

The Court does not have jurisdiction over Plaintiffs' claims if they are brought outside the statute of limitations. *See Phillips v. United States*, 260 F.3d 1316, 1317 (11th Cir. 2001). Plaintiffs' claim alleging a violation of the IRA is properly analyzed under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220–21 (2012) (challenge of an Interior fee-to-trust decision is a “garden-variety APA claim”). Because the statute of limitations is a jurisdictional limit, “[t]he burden is on the plaintiff to plead and prove compliance.” *Gibbs v. United States*, 865 F. Supp. 2d 1127, 1156 (M.D. Fla. 2012), *aff'd*, 517 F. App'x 664 (11th Cir. 2013) (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987)).

Under the APA, a plaintiff has six years to bring a claim. *See* 28 U.S.C. § 2401(a); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007); *Southwest Williamson Cty. Ass'n v.*

*Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999). The limitations period begins to run from the time of “final agency action.” *Southwest*, 173 F.3d at 1036 (citing 5 U.S.C. § 704); *Alabama v. United States*, 630 F. Supp. 2d 1320, 1325 (S.D. Ala. 2008). The action challenged by Plaintiffs, the United States’ decision to acquire the land in trust for the benefit of the Poarch Band, occurred in 1984. This decision represented the final agency action. *See Patchak*, 567 U.S. at 216–217; *see also McAlpine v. United States*, 112 F.3d 1429, 1432–35 (10th Cir. 1997).

Section 2401(a) operates as a jurisdictional time bar and is not subject to equitable tolling. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34; *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (per curiam) (finding that “[t]he terms ‘upon which the Government consents to be sued must be strictly observed and exceptions are not to be implied’” (citations omitted)). “Failure to sue the United States within the limitations period is not merely a waivable defense. It operates to deprive federal courts of jurisdiction.” *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *see also Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (“Exceptions to the limitations and conditions upon which the government consents to be sued are not to be implied.” (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957))).

Therefore, based upon the applicable six-year statute of limitations, Plaintiffs had until 1990 to challenge the decision to acquire the Wetumpka property in trust. It failed to do so and this Court therefore lacks jurisdiction over this claim. The Eleventh Circuit has specifically found that the statute of limitations to challenge the taking of land into trust for the Poarch Band began running in 1984. *See Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1292 (11th Cir.

2015) (finding that because Alabama was aware that the Secretary took land into trust for the Poarch Band, the statute of limitations began running at that time). The Eleventh Circuit affirmed this holding later, holding that when the plaintiff could have raised a timely challenge to the land-into-trust decision, the statute of limitations had run. *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 944 (11th Cir. 2016). The court noted that “[t]o recognize an exception and permit a collateral challenge nearly 30 years later, where the record clearly reflects that [the plaintiff] could have raised a timely challenge but did not, would turn *PCI Gaming* on its head.” *Id.* Similarly, here, there is no indication that Plaintiffs were not aware that the Secretary took the land into trust for the Poarch Band in 1984. They could have raised a timely challenge but did not. They should not be permitted now to challenge a decision that is over thirty years old.

Should Plaintiffs argue that the statute of limitations did not begin to run until 2006, when they assert that they were informed the Poarch Band planned to excavate the site instead of preserve it from development, the Court should reject this argument for several reasons. 2d Am. Compl. ¶ 196. First, “[u]nder the APA, a right of action accrues at the time of ‘final agency action.’” *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (citing 5 U.S.C. § 704.). The federal agency action taking the land into trust was complete in 1984 and Plaintiffs’ cause of action, if any, accrued then. Second, the representation that Plaintiffs were unaware that excavation was occurring at the site is inconsistent with the Muscogee (Creek) Nation Resolution issued in 1992 that found that the Poarch Band was endangering Hickory Ground. McCune Decl. ¶ 4, Ex. C. The Resolution also indicates that the Nation knew that when the Poarch Band purchased the land in 1980, it entered into a twenty-year protective covenant. Thus, any time

after 2000, the Poarch Band was no longer bound by the covenant to preserve the historical and archeological integrity of the site. In addition, in 2002, Plaintiff HGTT submitted its claim for remains or objects and cultural property to the Poarch Band and Interior's Eastern Area Office, specifically noting that objects had been excavated. *Id.* ¶ 5, Ex. D. In short, Plaintiffs' argument that its injury did not accrue until it received notice of excavation does not withstand scrutiny.

Because the statute is jurisdictional, equitable tolling of their IRA claim is not available to Plaintiffs. Therefore, their IRA claim is barred by the statute of limitations and must be dismissed for lack of jurisdiction.

## **2. Plaintiffs lack standing to bring their IRA claim.**

Plaintiffs also lack standing to assert a claim under the IRA. Plaintiffs' alleged injury, the excavation and disturbance by construction activities on land they claim is historically and religiously significant, does not stem from the United States' acquisition of the Wetumpka property in trust.

"Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1)." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (quoting *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n. 42 (11th Cir.1991)). Before it can reach the merits of Plaintiffs' IRA claim, this Court must first determine that it has the jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998). The threshold inquiry in evaluating Plaintiffs' IRA claim, therefore, is whether they have met their burden and properly invoked this court's limited subject matter jurisdiction. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1002–03 (11th Cir. 2004) (quoting *Wolff v. Cash 4 Titles*, 351 F.3d 1348,

1353 (11th Cir. 2003). Because, as demonstrated below, Plaintiffs fail to meet their burden, this Court lacks jurisdiction to review the merits of Plaintiffs' claim.

Standing is a constitutional requirement imposed pursuant to the "cases and controversies" provision of Article III. *Stalley*, 524 F.3d at 1232. To satisfy the constitutional standing requirements of Article III of the Constitution, Plaintiffs must establish: (1) they suffered an injury in fact; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is likely to be redressed by the proposed remedy. *Parker*, 386 F.3d at 1003–04. "The injury must be 'concrete and particularized,' not 'conjectural' or 'hypothetical,' and 'must affect the plaintiff in a personal and individual way.'" *Id.* at 1021 n.4 (quoting *Lujan*, 504 U.S. at 560 & n.1). Plaintiffs must also establish that the injury is "actual [and] imminent." *Stalley*, 524 F.3d at 1232. When the injury is a threatened injury, it must be "certainly impending" to constitute injury in fact for purposes of standing. *Babbitt v. Farm Workers*, 442 U.S. 289, 298, *vacated by* 442 U.S. 289 (1979) (quoting *Pennsylvania v. W. Virginia*, 262 U.S. 553, 593 (1923)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983); *United States v. Richardson*, 418 U.S. 166, 177–78 (1974); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Plaintiffs must also demonstrate that the injury is fairly traceable to the challenged action, and not injury that results from the independent action of some third party. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–44 (1976). Further, Plaintiffs have the burden of establishing all three prongs of the standing test:

Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's

conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.

*Lujan*, 504 U.S. at 561 (internal quotes and citations omitted).

Here, Plaintiffs' claim of injury fails to meet the second prong of the test because Plaintiffs' alleged injuries by the construction activities on the Wetumpka property is not "fairly traceable" to the United States' acquisition of the land in trust decades ago. Even if the United States had not acquired the land in trust, the Poarch Band would still be the owners of the Wetumpka property and able to manage the land in their own interests as they are now. The covenant entered into by Poarch Band when it first purchased the property in 1980 was for the duration of twenty years, after which the Poarch Band was allowed to use the land, including engaging in construction activities. In sum, any injury Plaintiffs allege is not the result of Interior taking the land into trust in 1984.

Plaintiffs also fail to establish the third prong of the standing test, because declaring the United States' decision to acquire the land in trust unlawful will not redress their alleged injury. There must be a "'substantial likelihood' that this injury will be redressed by the relief [sought]." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 (11th Cir. 1993) (quoting *Duke Power Co. v. Carolina Env'tl Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978)). Plaintiffs assert injury due to "Poarch's construction of a casino over the Plaintiffs' sacred burial grounds, its removal of the Plaintiffs' ancestors from what was intended to be their final resting place, and its mistreatment of the remains and artifacts. . . ." 2d Am. Compl. ¶ 6. But requiring the land to be taken out of trust will not redress this injury. The Poarch Band will still own the Wetumpka property in fee. Plaintiffs' Second Amended Complaint makes clear that it is not solely the construction of a gaming facility that they oppose but any construction on the property,



as well as the removal and alleged mistreatment of remains and artifacts. *See, e.g., id.* ¶¶ 6, 124–130, Prayers for Relief. If the land is not held in trust, the Poarch Band will still have the right to conduct activities on the land. *See Yankton Sioux Tribe v. U.S. Army Corps of Engr's*, 396 F. Supp. 2d 1087, 1094 (D.S.D. 2005) (court found tribe had no standing where it failed to establish a causal connection between the transfer of land and the complained of conduct). Due to the attenuated causation alleged by Plaintiffs, Plaintiffs lack standing to challenge the 1984 decision to take the land into trust and Count I should be dismissed.

**B. Plaintiffs fail to allege jurisdiction for their NAGPRA claim.**

This Court also lacks jurisdiction over Plaintiffs' NAGPRA claim. While NAGPRA contains a private right of action, it does not contain a waiver of sovereign immunity and NAGPRA claims therefore rely on the APA's waiver of sovereign immunity. 25 U.S.C. § 3013; *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886 ("The APA waives the sovereign immunity of the Government for NAGPRA claims."). Here, there has been no final agency action for purposes of the APA because the Wetumpka property is not federal land under NAGPRA, and Federal Defendants had no duty to act.

NAGPRA defines "tribal land" as "(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; (C) any lands administered for the benefit of Native Hawaiians . . ." 25 U.S.C. § 3001(15). NAGPRA does not define the term "reservation." However, "'federal lands' are 'any land *other than tribal lands* which are controlled or owned by the United States' and lands held in trust by the federal government for an Indian tribe are 'tribal,' rather than 'federal.'" *Rosales v. United States*, No. 07-cv-0624, 2007

WL 4233060, \*6 (S.D. Cal. Nov. 28, 2007) (quoting 25 U.S.C. § 3001(15) (internal quotations omitted)).

Under NAGPRA, the Wetumpka property is tribal land. In 1980, the Poarch Band purchased the land in fee. 2d Am. Compl. ¶ 61. In 1984, the United States accepted legal title to the Wetumpka property in trust for the Poarch Band. *Id.* ¶ 73. The Supreme Court has held that “the test for determining whether land is Indian country does not turn upon whether that land is denominated ‘trust land’ or ‘reservation,’” but on whether the land has been “validly set apart” for the use of Indians. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). Soon after, the Supreme Court interpreted the term “reservation,” as used in the Indian country statute, 18 U.S.C. § 1151(a), to include formal and informal reservations. *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). In *Sac & Fox*, the Court stated that Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments. The Court also concluded that tribal trust land outside a formal reservation boundary qualified as “any Indian reservation” under 18 U.S.C. § 1151(a), presumably as an informal reservation.<sup>3</sup> To meet the goals of NAGPRA, the term “any reservation,” as used in the definition of “tribal lands,” may draw on the interpretation of “any reservation” under 18 U.S.C. 1151(a) and refer to both formal and informal reservations. Informal reservations may include tribal trust land outside the boundaries of formal reservations.

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<sup>3</sup> See also *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (tribal trust land outside formal reservation boundary determined to be Indian Country under 18 U.S.C. § 1151(a)); *United States v. Azure*, 801 F.2d 335, 339 (8th Cir. 1986) (actions of the federal government in its treatment of Indian land can create a *de facto* reservation for certain purposes).

Because the Wetumpka property is tribal land, no federal agency NAGPRA duty has been triggered. NAGPRA's division between tribal control on tribal land and federal duties on *federal land* promotes the Tribe's independence and sovereignty. The NAGPRA statute itself as well as the administrative history indicates that tribes are afforded responsibility for compliance on tribal lands, rather than federal agencies:

Section 3(a)(2)(A) of the Act makes it clear that *Indian tribes* have preference regarding custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on their tribal lands second only to lineal descendants. The regulatory text is consistent with Federal recognition of an *Indian tribe's sovereignty regarding administration of their lands* and has not been changed.

NAGPRA Regulations, 60 Fed.Reg. 62134-01 at 62142 (Dec. 4, 1995) (emphasis added); *see also Rosales*, 2007 WL 4233060, at \*8. NAGPRA's regulations further illuminate this division, discussing the steps for the responsible Indian tribe official following notification of an inadvertent discovery on tribal land in one subsection, and the steps for the responsible federal agency official following notification of inadvertent discovery on federal land in another subsection. *Compare* 43 C.F.R. § 10.4(e) ("Tribal lands.") *with* 43 C.F.R. § 10.4(d) ("Federal lands."). At no point does NAGPRA or its regulations assign any nondiscretionary duty to the federal government in the event of an inadvertent discovery on tribal land. Because the discoveries here took place on tribal land, Federal Defendants do not have any nondiscretionary duties that they failed to perform. *See SUWA*, 542 U.S. at 62–64. As such, the Court lacks subject matter jurisdiction under the APA.

Plaintiffs allege that the Defendants failed to consult with Plaintiffs prior to excavation and removal, failed to obtain Plaintiffs' consent, and failed to give custody of human remains and cultural objects found to Plaintiffs. 2d Am. Compl. ¶¶ 241–61. These alleged duties, however,

are not found in the statute. First, the statutory duty of repatriation under 25 U.S.C. § 3005 applies to “Native American human remains and objects *possessed or controlled by Federal agencies and museums.*” *Id.* § 3005(a) (emphasis added). Similarly, Plaintiffs allege that “no final inventory or report regarding the cultural items recovered” was prepared, nor were Plaintiffs consulted regarding such a report. *Id.* ¶ 254. But this requirement also applies only to “[e]ach Federal agency and each museum which has *possession or control* over holdings or collections of Native American human remains and associated funerary objects . . . .” *Id.* § 3003 (emphasis added). Plaintiffs have not alleged, nor can they allege, that any federal agency has “possession or control” of any items from the Wetumpka property.

Plaintiffs also allege that NPS violated NAGPRA “by failing to establish a preservation program for the protection of historic properties that ensures that the agency’s procedures for compliance with section 106 of the NHPA ‘provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of [NAGPRA].’” 2d Am. Compl. ¶ 253. NAGPRA does not contain such a requirement. The NHPA contains such a requirement, but even if that requirement was violated, it would not be a NAGPRA violation. *See* 54 U.S.C. § 306102.

In addition, Plaintiffs allege a violation of 25 U.S.C. § 3002, which covers inadvertent discoveries on both federal and tribal lands. As discussed, *supra*, the Wetumpka property is tribal land for purposes of NAGPRA. Under section 3002, the person who makes an inadvertent discovery must notify “the responsible Federal agency official with respect to Federal lands” or “the responsible Indian tribal official” on tribal lands. 43 C.F.R. § 10.4(b); 25 U.S.C. § 3002(d)(1). Upon notification, the federal official has three days to perform specific

responsibilities, including securing and protecting the discovered items and notifying any affiliated tribes. 43 C.F.R. § 10.4(d). While the federal official “must” take these steps, the responsible Indian tribal official “may” take similar steps. *Compare id.* § 10.4(d) *with id.* § 10.4(e). The only responsibility of a federal agency triggered by an inadvertent discovery on tribal lands relates to permits. *Id.* § 10.4(g) (“All Federal authorizations to carry out land use activities on Federal lands or tribal lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal or tribal official immediately upon the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to § 10.4(b) of these regulations.”). In this case, the United States issued such a permit, which provided that:

Excavation or removal of any Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony must be preceded by consultation with or, in the case of tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization. Consultation should be conducted with the lineal descendants, tribal land owners, Native American representatives, and traditional religious leaders of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be culturally associated with the cultural items or, if the cultural affiliation of the objects cannot be reasonably ascertained, from whose judicially established aboriginal lands the cultural items originated.”

McCune Decl. ¶ 8, Ex. G. In issuing such a permit, the federal agencies’ duties regarding inadvertent discoveries on tribal land was thus satisfied. 43 C.F.R. § 10.4(g).

Plaintiffs also allege a violation of section 3002(c)(1), which refers to permits under ARPA, and specifically, 16 U.S.C. § 470cc. Section 470cc(g)(1) provides that no permit is required “for the excavation or removal by any Indian tribe or member thereof of any archeological resource located on Indian lands of such Indian tribe . . . .” Here, as discussed,

*supra*, the alleged excavation and removals are taking place by the Poarch Band on its own land and no permit is required under this particular section. 2d Am. Compl. ¶¶ 1–2, 6.

Because Plaintiffs fail to allege a duty to act under NAGPRA, they also fail to identify a discrete agency inaction in violation of a nondiscretionary duty, which they must for Federal Defendants to waive their sovereign immunity under the APA. *See SUWA*, 542 U.S. at 64. Accordingly, the Court lacks subject matter jurisdiction over Plaintiffs’ NAGPRA claims.

**C. Plaintiffs’ NHPA claim fails for lack of subject matter jurisdiction.**

Plaintiffs’ Claim X argues that Federal Defendants failed to comply with the NHPA regulations requiring an agency to take certain actions prior to proceeding with construction or other action that might adversely impact a site of historical or cultural significance. 2d Am. Compl. ¶¶ 291–303. Plaintiffs contend that Federal Defendants failed to comply with section 106 of the NHPA, codified at 54 U.S.C. § 306108, and the implementing regulations by failing to meaningfully consult with Plaintiffs, and failing to take into account the impacts on the Wetumpka property of allowing a casino resort and of delegating historic preservation responsibilities to the Poarch Band. *Id.* Plaintiffs further allege that Federal Defendants violated the NHPA by failing to seek ways to minimize, avoid, and mitigate the harm, and by continuing to award the Poarch Band federal historical preservation funds. *Id.* ¶¶ 304–09. Plaintiffs’ NHPA claims must be dismissed because they fail to challenge final agency action and to assert that Federal Defendants did not take a discrete agency action that they were required to take.

Section 106 of the NHPA requires a government agency to “take into account the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 54 U.S.C. § 306108. This requirement is

governed by numerous federal regulations which establish a procedure generally referred to as the Section 106 process. *See* 36 C.F.R. §§ 800–899. “The process is designed to foster communication and consultation between agency officials . . . and other interested parties such as Indian tribes, local governments, and the general public.” *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). “Section 106 of NHPA is a ‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). NHPA is a narrow statute. Its main thrust is to encourage preservation of historic sites and buildings rather than to mandate it. *Nat’l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996), *aff’d* 203 F.3d 53 (D.C. Cir. 1999).

NHPA defines “undertaking” as:

a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

- (1) those carried out by or on behalf of the Federal agency;
- (2) those carried out with Federal financial assistance;
- (3) those requiring a Federal permit, license, or approval; and
- (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320. “As defined by the Advisory Council regulations, an ‘undertaking’ includes ‘new and continuing projects, activities, or programs and *any of their elements not previously considered under section 106.*’” *McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992) (quoting 36 C.F.R. § 800.2(o) (emphasis added). “[U]nless a project is federally funded or federally licensed, § 106 does not apply.” *Menominee Indian Tribe*

*of Wis. v. U.S. Env't'l Prot. Agency*, 360 F. Supp. 3d 847, 855 (E.D. Wis. 2018), *aff'd*, 947 F.3d 1065 (7th Cir. 2020).

Judicial review under the APA is expressly conditioned on the existence of a final agency action, if no other statute provides for this review. *See Gallo Cattle*, 159 F.3d at 1198.

Plaintiffs, however, fail to identify the particular final agency action taken that they challenge.

The Second Amended Complaint therefore does not place Federal Defendants on notice of the alleged actions that Plaintiffs contend are final and that they intend to challenge. Given the long history of this dispute and Plaintiffs' active involvement in objecting to the Poarch Band's activities since the late 1980s, Plaintiffs also must identify when these alleged final agency actions took place. *See supra*, Section II.A. For example, if Plaintiffs' complaint is that Federal Defendants failed to consult with Plaintiffs for construction or excavation of the casino, the statute of limitations would act as a jurisdictional bar to that claim, as discussed in more detail below.

The NHPA does not provide for a private cause of action against Federal Defendants and it may only be enforced by an action brought pursuant to the APA. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094 (9th Cir. 2005). Therefore, the six-year statute of limitations applicable to APA actions applies to Plaintiffs' NHPA claims. *See* 28 U.S.C. § 2401(a); *U. S. Steel*, 495 F.3d at 1280; *Southwest*, 173 F.3d at 1036.

Plaintiffs allege that the funding for the acquisition of the Wetumpka property, accepting the property into trust, approving the Poarch Band's gaming ordinance, permitting excavations, and providing funding for preservation programs all constituted undertakings for which Federal Defendants failed to consult with them under the section 106 process. 2d Am. Compl. ¶ 291–



320. Setting aside whether these instances even constituted an undertaking as defined by the Act, most of these actions clearly occurred outside of the relevant statute of limitations. The BIA issued permits for excavation in 2003 and extended it in 2005. McCune Decl., ¶ 9Ex. G. The approval of gaming ordinances, 2d Am. Compl. ¶ 289, took place well before 2012. Further, Plaintiffs allege that Federal Defendants failed to consult with them, but they allege the duty to consult stems from 54 U.S.C. § 302706, which applies only to listing properties on the National Register of Historic Sites, and § 302702, which applies to tribes assuming the functions of a State Historic Preservation Officer. The property was listed on the National Register in 1980, and Federal Defendants delegated historic preservation duties to the Poarch Band in 1999. Plaintiffs allege that the Federal Defendants should have involved the Advisory Council on Historic Preservation, but also assert that the ACHP responded to claims that the site had been adversely affected in November 2006, more than six years before Plaintiffs brought suit. These actions are well outside the statute of limitations.

The only activities alleged to be an undertaking that might possibly have taken place within the six years prior to Plaintiffs filing this lawsuit is their allegation of the provision of federal funding to the Poarch Band to implement tribal and federal preservation programs. 2d Am. Compl. ¶ 318. Despite failing to provide any further details about these programs, such as the date of funding and the funding agency, these activities do not constitute undertakings for NHPA purposes. Mere provision of funding is not an undertaking. *See Woodham v. Fed. Transit Admin.*, 125 F. Supp. 2d 1106, 1110 (N.D. Ga. 2000) (finding that “federal financial assistance alone is insufficient to trigger the requirements of NHPA.”) (citing *Maxwell St.*

*Historic Pres. Coal. v. Bd. of Trs. of the Univ. of Ill.*, No. 00-C-4779, 2000 WL 1141439, at \*4 (N.D. Ill. Aug. 11, 2000)).

**D. Plaintiffs fail to allege jurisdiction as to their ARPA claim.**

Plaintiffs have failed to allege that this Court has jurisdiction to hear their ARPA claim and it must be dismissed. ARPA, 16 U.S.C. §§ 470aa-mm, sets up a permitting system to regulate excavation and removal of “archaeological resources” from public and Indian lands. Archaeological resources are defined as material remains of past human life or activities that are of archaeological interest. In order to obtain an ARPA permit, one must satisfy the Federal land manager that the “activity is undertaken for the purpose of furthering archaeological knowledge in the public interest.” 16 U.S.C. § 470cc(b)(2). The findings section of ARPA sets forth Congress’s intent to prevent “uncontrolled excavations and pillage” and to facilitate orderly access to archaeological sites by professionals. *See* 16 U.S.C. § 470aa(a)(3). ARPA and its implementing regulations establish a permitting regime to allow those focused on archaeological resources to maintain access to those resources on federal land. Interior has promulgated uniform regulations for protection of archaeological resources under ARPA. *See* 43 C.F.R. Pt. 7. While ARPA does maintain a permitting process, there are exemptions from the permitting process, which include: “general earth moving excavations,” officials carrying out official duties under a federal land manager’s direction, and Indian tribes excavating on their own lands. *See* 43 C.F.R. §§ 7.5(b)(1) and (c); 16 U.S.C. § 470cc(g)(1). Here, Plaintiffs assert various violations of ARPA, all of which fail to state a claim upon which relief may be granted.

Plaintiffs assert that the Federal Defendants failed to get their consent “as *parens patriae* of the lineal descendants of those buried at the Site and as the tribe with the closest cultural and

religious connection to the Site,” before excavation. 2d Am. Compl. ¶ 276. They also assert that Federal Defendants were required to notify, consult, and get consent from Plaintiffs or ensure that the Poarch Defendants did so. Generally, Plaintiffs assert that activities were undertaken on the Wetumpka property without a valid ARPA permit, pursuant to an invalid ARPA permit, or in violation of valid ARPA permits. *See* 2d Am. Compl. ¶¶ 271–79.

Plaintiffs’ allegations fail to state a claim because the challenged activities — the Poarch Band’s construction of a gaming facility on its land — are specifically exempted by the statute and applicable regulations and no permit is required. *See* 2d Am. Compl. ¶ 5 (alleging that the Poarch Band is constructing a gaming facility and related construction on the Wetumpka property). ARPA provides that, “[n]o permit shall be required . . . for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands or such Indian tribe . . . .” 16 U.S.C. § 470cc(g)(1); *see also Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990). In *Attakai*, the court found that the plaintiffs, a neighboring Indian tribe, failed to state a claim for a violation of ARPA because the Indian Tribe did not need a permit “even for excavations of qualifying archaeological resources . . . on its land.” *Id.* (citing 16 U.S.C. § 470cc(g)(1)).

Even though ARPA permits, as noted above, were not required, BIA did issue a permit to Auburn University, dated April 15, 2003. 2d Am. Compl. ¶¶ 108, 114; McCune Decl. ¶ 8, Ex. G. Any challenge to this permit is outside the statute of limitations and this Court accordingly lacks jurisdiction. In addition, under 16 U.S.C. § 470cc(f), enforcement of the permit is committed to the discretion of the Federal land manager (including the imposition of civil penalties or a request to Justice to pursue criminal penalties). Plaintiffs therefore cannot state a

claim for relief that the Poarch Band violated the permit. Accordingly, Plaintiffs cannot plead a cause of action under ARPA and their ARPA claim must be dismissed.

**E. Plaintiffs fail to state a claim for RFRA violations.**

Plaintiffs claim that their religious beliefs have been substantially burdened and assert that Federal Defendants thus violate RFRA. 2d Am. Compl. ¶¶ 321–334. Plaintiffs’ allegations do not support a RFRA claim for two reasons. First, RFRA is not implicated because the Federal Defendants’ actions in this case are not the source of what Plaintiffs contend is a substantial burden placed on their free exercise of religion. Second, the Plaintiffs’ allegations in and of themselves, and regardless of whether they are imputed to Federal Defendants, do not state a claim under RFRA because they do not allege a substantial burden on Plaintiffs’ exercise of religion.

At the heart of Plaintiffs’ RFRA claim are the allegations that the excavation and construction of the casino, parking lots, and other facilities, and operation of the casino on the Wetumpka property prevent Plaintiffs from fulfilling their religious obligations. 2d Am. Compl. ¶¶ 329–33. Plaintiffs assert that their religion requires them to rebury the remains in accordance with Plaintiffs’ traditional religious protocol, and protect the site from improper access and use. *Id.* In order for RFRA to apply to the Federal Defendants, Plaintiffs must demonstrate that “‘there is a sufficiently close nexus between the [Federal Defendants] and the challenged action of [the Poarch Band] so that the action of the latter may be fairly treated as that of the [Federal Defendants themselves].’” *Vill. of Bensenville*, 457 F.3d at 62 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); *Jackson v. Metro. Edison Co.*, 419 U.S. 354, 351 (1974). Plaintiffs cannot do so.

First, Plaintiffs have not identified any federal actions that substantially burden their religious practice. The *Village of Bensenville* decision is instructive. In that case, plaintiffs, two suburbs, a church, and individuals located or residing near Chicago's O'Hare Airport, challenged under RFRA the Federal Aviation Administration's ("FAA") approval of a plan to expand O'Hare requiring the relocation of a church cemetery. 457 F.3d at 57. The plaintiff groups challenged the decision on the basis that it burdened their exercise of religion and that the runway expansion plan, which required the relocation of a cemetery, was not the least restrictive means of satisfying the government's compelling interest in reducing delays. *Id.* In finding that the burden on religious exercise was not fairly attributable to the FAA, the court examined whether the FAA's role in the specific conduct challenged was "[m]ere approval of or acquiescence in" the City's plan or whether the FAA "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [FAA]." *Id.* at 64 (quoting *Blum*, 457 U.S. at 1004). The court noted that "absent government coercion or significant government encouragement of the measure under inspection," *Id.* (quoting *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1581 (D.C. Cir. 1984)), the Supreme Court has held that the federal government may not be held responsible for a measure taken by a private actor. *Id.* The court found that it was the City of Chicago that was the cause of any burden on religious exercise because it was the organizer and builder. The FAA exercised no coercive power nor provided significant encouragement for the project. *Id.* at 65.

Likewise, Plaintiffs do not allege that Federal Defendants exercised any coercive power or provided significant encouragement for the construction activities at the Wetumpka property.

The specific activities that they complain burden their religious exercise, excavation and construction of facilities by the Poarch Band on its own property are the private actions of the Poarch Band. Although Plaintiffs cite to Federal Defendants' issuance or non-issuance of permits, that action is only the mere approval of the Poarch Band's excavation on its land, which is insufficient to justify imposition of RFRA's compelling interest test. *See Vill. of Bensenville*, 457 F.3d at 66; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53–54 (1999). Therefore, RFRA is not applicable to Federal Defendants in this case.

Second, even if Federal Defendants' actions could be considered to be significant encouragement of or coercive power over the specific activities of which Plaintiffs complain, Plaintiffs' RFRA claims would still be subject to dismissal because the governmental action asserted does not "substantially burden" Plaintiffs' exercise of religion. To establish a prima facie RFRA claim, Plaintiffs must allege that a governmental action "substantially burdens" their exercise of religion. *Navajo Nation v. U.S. Forst Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). Under governing Eleventh Circuit precedent, a "substantial burden" is imposed if an action "completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (citing *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir.1995)) (applying RFRA, court found no substantial burden when religion did not require particular means of expressing religious view and alternative means of religious expression were available); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1550 (11th Cir. 1993) (finding a substantial burden when regulation had the effect of mandating religious conduct). "In *Holt v. Hobbs*, the Supreme Court held that a policy

substantially burdens a prisoner's religious exercise if it forces him to choose between engaging in conduct that seriously violates his religious beliefs or facing a serious penalty.” *Robbins v. Robertson*, 782 F. App'x 794, 802 (11th Cir. 2019) (quoting *Holt v. Hobbs*, 574 U.S. 352 (2015)).

Plaintiffs allege that the excavation and construction activities burdens the exercise of their religious practices because it will prevent them from performing significant and important religious activities related to the Wetumpka property, including “return[ing] the bodies of their ancestors, along with their funerary objects,” to the Wetumpka property. *See* 2d Am. Compl. ¶¶ 325, 329. These allegations do not demonstrate government action has completely prevented from engaging in religiously mandated activity, that they are required to participate in an activity prohibited by their religion, or that their religious conduct is being mandated. Plaintiffs do not claim that the government will impose a serious penalty on them from exercise of their religion. Rather, Plaintiffs’ claim that the excavation and construction activities by the Poarch Band effect their emotional experience or diminishes their spiritual fulfillment, which courts have found fall short of the “substantial burden” cognizable under RFRA. *See Navajo Nation*, 535 F.3d at 1069–70; *see also Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) (A “substantial burden” requires “substantial pressure on an adherent to modify his behavior and to violate his beliefs,” including potential sanctions) (citation and internal quotation marks omitted).

The diminishment of a religious experience does not constitute a “substantial burden” under RFRA. *See Navajo Nation*, 535 F.3d at 1069-70; *see also Lyng*, 485 U.S. at 439.<sup>4</sup> In

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<sup>4</sup> As the Ninth Circuit observed in *Navajo Nation*, “[t]hat *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look

*Lyng*, the plaintiff tribes challenged the Forest Service’s decision to construct a logging road on an area of a National Forest that the Tribes considered sacred and where they alleged they practiced their religion. *Id.* at 442-43. In rejecting the plaintiffs’ claims, the Court recognized that the challenged project might “interfere significantly” with the plaintiffs’ religious practices, but emphasized that the government’s actions neither coerced plaintiffs into violating their beliefs, nor denied them rights or privileges enjoyed by other citizens as a penalty for their religious practices. *Id.* at 447–49. In fact, in *Lyng*, the Supreme Court found no cognizable RFRA claim even if it assumed that the proposed logging road “virtually destroy[ed] the . . . Indians’ ability to practice their religion.” 485 U.S. at 451–52 (quoting opinion below, *Nw. Indian Cemetery Prot. Ass’n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1985)). Similarly, in *Navajo Nation*, the Ninth Circuit sitting en banc held that the use of recycled wastewater to create snow for a ski resort located on a peak claimed to be sacred by several Native American tribes was not a “substantial burden” because the plaintiffs were not required to choose between a government benefit and their exercise of religion, or threatened with fines or penalties for practicing their religion. 535 F.3d at 1070-72. In *Snoqualmie Indian Tribe v. FERC*, the plaintiffs alleged that a proposed hydraulic dam would, among other things, deny them access to waterfalls necessary for their religious experiences. 545 F.3d 1207, 1213 (9th Cir. 2008). The court of appeals found that:

[t]he Tribe’s arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government

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to *pre-Smith* [*Empl. Div. v. Smith*, 494 U.S. 872, (1990)] Free Exercise Clause cases, which include *Lyng*, to interpret RFRA.” 535 F.3d at 1071 n.13 (citing 42 U.S.C. § 2000bb(a)(5)).



benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.

*Id.* at 1214. Based on *Lyng* and *Snoqualmie*, Plaintiffs' allegations of the excavation and construction at the Wetumpka property desecrating and damaging the sacred place for the practitioners of their spiritual beliefs are not germane to the question of whether they are being penalized by the challenged actions or deprived of otherwise available benefits.

**F. Plaintiffs' Religious Exercise claim should be dismissed.**

Finally, Plaintiffs' Count VIII asserts that if NAGPRA and ARPA are construed in a manner that results in a substantial burden on Plaintiffs' religion, they violate the First Amendment, RLUIPA, and the RFRA. This count should be dismissed for several reasons.

First, Plaintiffs have not identified any final agency action they are challenging. Instead, they appear to be challenging a ruling that this Court might make. This cannot be the basis for a proper claim against the Federal Defendants.

Second, Plaintiffs' religion has not been substantially burdened by Federal Defendants for the reasons discussed above. To the extent that Plaintiffs are prevented from practicing their religion because they cannot access the site or the remains, this is true regardless of Federal Defendants' actions. Even if the land is not properly in trust, the Poarch Band would own the land in fee and would not have to provide Plaintiffs access.

Third, Plaintiffs have not stated a claim for relief under the First Amendment. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*..." (emphasis added). "As interpreted by the Supreme Court, the Free Exercise Clause of the First Amendment does not prohibit the government from burdening religious practices through generally applicable laws."

*Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007), *aff'd sub nom. Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817 (9th Cir. 2010) (citing *Employment Division v. Smith*, 494 U.S. 872, 890 (1990)). Government programs that have the incidental effect of “mak[ing] it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs” do not violate the Free Exercise Clause. *Lyng*, 485 U.S. at 450–51. Plaintiffs do not demonstrate any law prohibiting the exercise of religion. NAGPRA and ARPA are generally applicable laws aimed at protecting Native American grave sites and archaeological resources, not at the exercise of religion. Plaintiffs therefore cannot state a claim for which relief can be granted.

RLUIPA also does not provide Plaintiffs a cause of action. “RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a ‘substantial burden’ on the exercise of religion.” *Navajo Nation*, 535 F.3d at 1077. Thus, RLUIPA does not apply to the case at bar, as it neither involves a state or local government nor a land use regulation.

And, as discussed above, Plaintiffs have not stated a claim for relief under the RFRA. In short, Plaintiffs have failed to state a claim that NAGRPA and ARPA violate their free exercise of religion.

## **VI. CONCLUSION**

For the foregoing reasons, Plaintiffs’ Second Amended Complaint should be dismissed for lack of jurisdiction under Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6).

Dated: April 23, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties entitled to receive notice.

/s/ Devon Lehman McCune