

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

MUSCOGEE CREEK NATION, *et al.*,

Plaintiffs,

VS.

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

Defendants.

Civil Action Number:
2:12-cv-01079-MHT-CSC

**BRIEF IN SUPPORT OF TRIBAL DEFENDANTS' MOTION
TO DISMISS SECOND AMENDED COMPLAINT**

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INTRODUCTION

In their Second Amended Complaint (SAC, Doc. 190), Plaintiffs Muscogee Creek Nation (MCN), Hickory Ground Tribal Town, and Mekko George Thompson ask this Court to, *inter alia*, undo a 35-year old federal decision to take property into trust for the benefit of the Poarch Band of Creek Indians (PBCI), force PBCI to remove tens of millions of dollars in improvements to land that PBCI has owned for forty years, permanently enjoin PBCI from engaging in any construction, clearing, grading, or other “ground disturbing” activity on its property, and transfer *de facto* control of PBCI’s federal trust land to the Plaintiffs. Attempting to justify their untimely request for this astoundingly broad relief, the Plaintiffs accuse PBCI, the PCI Gaming Authority (PCI Gaming), the officials in charge of those tribal entities, PBCI’s Tribal Historic Preservation Officer (collectively, the Tribal Defendants),¹ various federal officials, and a private contracting company of violating numerous federal laws pertaining to Indian tribes, the preservation of historic, cultural, and archeological resources on federal and Indian lands, and religious freedom. They also allege, for the first time in the SAC, various common law infractions. None of the Plaintiffs’ claims have merit, and they are entitled to none of the relief that they seek.

As set forth in detail below, the Plaintiffs have failed to establish this Court’s subject matter jurisdiction over the Tribal Defendants and over many of their claims. They furthermore

¹ The officials named in the SAC include Defendants Stephanie Bryan, Robert McGhee, Amy Bryan, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Arthur Mothershed, and Garvis Sells, who are sued in their official capacities as members of the PBCI Tribal Council, Westly Woodruff, Stuart Mark Altman, Venus McGhee Prince, Teresa Poust, and Timothy Manning, who are sued in their official capacities as PCI Gaming board members, and Larry Haikey, sued in his official capacity as the Tribal Historic Preservation Officer (THPO). Six members of the Tribal Council, as well as former Tribal Council members Eddie Tullis, Buford Rolin, and David Gehman, were newly added to the case as defendants in their individual capacities (the Individual Defendants) by the SAC. This brief addresses only the claims against the Tribal Defendants; the newly named Individual Defendants are moving separately to dismiss the newly asserted tort claim against them.

have failed to allege facts sufficient to support a claim for relief against the Tribal Defendants under a single one of the scattershot theories set forth in the SAC. Accordingly, the Tribal Defendants have moved to dismiss all claims and now file this brief in support of that motion.

BACKGROUND

The Tribal Defendants dispute many of the SAC's bald assertions and mischaracterizations of alleged facts and will refute them should this case proceed. Nevertheless, those allegations generally must be taken as true at this stage in the proceedings.² The background information set forth here thus consists of material drawn from the SAC, previously filed or referenced documents central to the Plaintiffs' claims, and published federal legal sources. Even so limited, the facts show that the Plaintiffs have no viable claims against the Tribal Defendants.

PBCI is a federally recognized Indian tribe. SAC ¶ 12; *see also* 84 Fed. Reg. 1200, 1203 (Feb. 1, 2019) (listing federally recognized tribes). It is a successor-in-status to the Creek Nation and has been a party to federal treaties dating as far back as the early 19th century. *See, e.g.*, 49 Fed. Reg. 24083 (June 11, 1984); Treaty of Fort Jackson, Aug. 9, 1814, 7 Stat. 120 (reserving land for "friendly" Creek Indians). PCI Gaming is a tribal enterprise wholly owned by PBCI that is responsible for gaming activity on PBCI lands, including the land at issue here. SAC ¶¶ 20-21.

In 1980, PBCI acquired property in the vicinity of Wetumpka, Alabama (the Wetumpka property) that is sometimes referred to as Hickory Ground. *Id.* ¶ 61. While seeking funding to aid its acquisition of the Wetumpka property, PBCI applied for a grant from the Alabama Historical

² As noted below, to the extent of the Tribal Defendants' factual challenge to this Court's subject matter jurisdiction, no presumption of truth attaches to allegations on that point, and the Court is free to consider evidence beyond the pleadings.

Commission (AHC). *See generally* Doc. 190-1, Ex. A, 3-7.³ In support of its grant request, PBCI noted that the property was set for commercial development by its then-current owner, that it “may very well be bulldozed and cleared soon,” and that the proposed acquisition would prevent the land’s imminent commercial development and facilitate the protection and study of its archaeological resources. Doc. 190-1 at 5-6.⁴ At the same time, PBCI’s application letter contemplated the potential future development of the property after its acquisition, indicating 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.” *Id.* at 4. Although the proposal described in PBCI’s grant application letter never came to fruition,⁵ PBCI ultimately obtained exclusive fee ownership of the property and entered into a written protective covenant to preserve it for 20 years. *See* SAC ¶ 62; July 28, 1980 Protective Covenant, filed herewith as Exhibit A to the Declaration of Lori Stinson. That written protective covenant made no reference to the Plaintiffs, as intended third party beneficiaries or otherwise. *See* Stinson Decl., Ex. A. The covenant also contemplated archaeological investigation of the property, mandating the placement of “any archaeological data and material recovered” from the property with an appropriate institution. *See id.* at 2. The written protective covenant expired by its own terms on July 3, 2000. *See id.*; SAC ¶ 79.

³ All pin cites to previously filed documents are to the ECF generated page numbers.

⁴ Much of the fee land surrounding the Wetumpka property, including part of the Hickory Ground site, was indeed commercially developed many years ago, some with archaeological excavation. *See, e.g.*, Doc. 179-1 at 6 (referencing human remains in the possession of Defendant Auburn University that were excavated from the Hickory Ground historic site on fee land adjacent to the Wetumpka property during the 1990s); Doc. 190-1 at 5 (describing commercial developments on surrounding property).

⁵ For example, the proposal described in the application letter envisioned joint ownership of the Wetumpka property by PBCI and a foundation managed by Plaintiff Muscogee Creek Nation. *See* Doc. 190-1 at 5-6. This never came to pass.

In 1984, the United States confirmed PBCI's tribal status and acknowledged that PBCI, like other federally recognized tribes, is eligible for special services and programs provided by the United States to Indians. *See id.* ¶ 12; 84 Fed. Reg. at 1203; 49 Fed. Reg. at 24083. Prior to formally acknowledging PBCI's status, the United States posted public notice of its proposed decision and invited public comment. 49 Fed. Reg. at 24083. The proposed decision received no objections. *Id.* The United States subsequently accepted title to the Wetumpka property into trust for PBCI in 1984 and declared it part of PBCI's initial reservation in 1985. SAC ¶ 73 (citing Federal Register notices of reservation designation); 1984 Trust Deed, filed herewith as Exhibit B to the Stinson Declaration.

During the nearly thirty years between the United States' decision to accept the Wetumpka property into trust for PBCI and the filing of the initial complaint in this case, PBCI and/or trained archeologists conducted a number of archaeological investigations and excavations on and around the property. *See, e.g.,* SAC ¶¶ 101-02, 107, 116; Doc. 190-1 at 145. The Plaintiffs raised concerns and objections regarding that archaeological activity at the Wetumpka property over at least two decades before filing suit. In October of 1992, Plaintiff MCN formally suspended its government-to-government relationship with PBCI over allegations that PBCI had allowed excavations, including of human remains, on the property. *See* Doc. 95-6 at 2, 4-5.⁶ In October of 2002, more than a decade before the original complaint, Mekko Thompson, writing on behalf of Plaintiff Hickory Ground Tribal Town, expressed dismay at the archaeological excavation of human remains from the Wetumpka property and threatened litigation, citing many of the federal statutes and legal arguments relied upon in the SAC. *See*

⁶ The letter from MCN suspending the government-to-government relationship states that MCN would take additional steps "in consultation with" Mekko Thompson, indicating that all Plaintiffs were aware of the alleged violation in 1992. *See* Doc. 95-6 at 4.

Doc. 95-7 at 4-6. That same month, MCN sent a letter objecting to the National Park Service's (NPS) 1999 agreement allowing PBCI to assume historic preservation responsibilities at the Wetumpka property. *See* Doc. 95-8; SAC ¶ 81.

The Plaintiffs and PBCI engaged in numerous consultations through the years regarding the appropriate disposition of remains and objects excavated at the Wetumpka property during and prior to the Phase III archaeological excavation described in the SAC, with extended discussions specifically involving reinternment of excavated human remains beginning more than six years prior to the December 12, 2012, filing of the original complaint. *See, e.g.*, SAC ¶¶ 137, 139 (noting that PBCI notified Plaintiffs of a Phase III archaeological excavation in 2006); Doc. 190-1 at 128 (indicating that re-interment discussions began in May of 2006). In a 2008 letter to NPS, Mekko Thompson specifically stated that representatives of Plaintiffs MCN and Hickory Ground Tribal Town traveled to Wetumpka on May 9, 2006, to discuss reinternment of 57 or more sets of human remains—the same number alleged to have been excavated from the Wetumpka property. *See* Doc. 95-11; SAC ¶ 117. Despite their repeated and longstanding objections to archaeological excavations on the property and many years of consultations with PBCI, the Plaintiffs have never alleged that any of the remains or objects recovered from the Wetumpka property belonged to any identifiable individual.

PBCI, through PCI Gaming, for many years has operated a gaming facility at the Wetumpka property pursuant to its inherent sovereign authority as recognized in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.* *See, e.g.*, SAC ¶¶ 20-21; Doc. 190-1 at 145 (referencing a proposed expansion of existing gaming facilities on the Wetumpka property in 2006). When Plaintiffs filed their initial complaint in December 2012, PBCI had completed a Phase III archeological excavation of the Wetumpka property and was engaged in additional

construction activity, including the construction of a casino expansion, a hotel, and resort facilities. *See* SAC ¶¶ 102, 150, 165-66; Doc. 159 at 5. That construction activity was completed no later than 2014. *See* SAC ¶ 132.

The Plaintiffs contend that any excavation, “ground disturbing, clearing, grading, leveling, or construction activity at the Hickory Ground Site” is offensive to them and unlawful and should be enjoined in perpetuity. *See, e.g., id.* Prayer for Relief ¶¶ (d)(i). They further allege that any person who sets foot on at least some portions of the Wetumpka property “without prior authorization [from the Plaintiffs] and cleansing rituals” or consumes or possesses alcohol “anywhere near” such portions of the property unlawfully offends their religious beliefs. *See* SAC ¶¶ 327-28. Taken together, these statements indicate that almost any conceivable active use of the Wetumpka property by PBCI, including, but not limited to, residential, commercial, and municipal uses, would be objectionable and offensive to the Plaintiffs.

STANDARD FOR MOTION TO DISMISS

When deciding a motion to dismiss, the court generally assumes the facts set forth in the complaint to be true for purposes of the motion and construes them in the plaintiff’s favor. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1268 (M.D. Ala. 2019) (citations omitted). In addition to the facts so construed, the court may consider matters of public record and documents attached to or referenced in the complaint as well as documents attached to the motion, so long as those documents are central to the complaint and their authenticity is not disputed. *Horsely v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002); *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999); *Annen v. Fed. Nat’l Mortg. Ass’n*, 2016 WL 11567870, **3-4 (N.D. Ga. Nov. 16, 2016). Furthermore, where a defendant makes a factual challenge to allegations of subject matter jurisdiction, “no presumptive truthfulness attaches to

[the] plaintiff’s allegations,” and the Court is free to consider evidence outside of the pleadings in order to determine its jurisdiction. *Willett v. United States*, 24 F. Supp. 3d 1167, 1173 (M.D. Ala. 2014) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

In order to survive a motion to dismiss, the complaint must set forth allegations establishing a claim to relief that is “plausible on its face.” *Id.* at 1180 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The allegations “must be enough to raise a right to relief above the speculative level;” the use of “mere labels and conclusions ... will not do.” *Twombly*, 550 U.S. at 555. “Crucially ... the court need not accept as true ‘conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts.’” *Coral Ridge*, 406 F. Supp. 3d at 1268 (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT AND ANALYSIS

The Plaintiffs, having waited to bring suit until decades after learning of relevant federal decisions and allegedly offensive conduct by the Tribal Defendants, now seek staggeringly sweeping relief that is not justified by any of the litany of federal statutes or common law doctrines cited in the SAC. For the reasons explained below, the Plaintiffs’ claims should be dismissed in their entirety due to this Court’s lack of subject matter jurisdiction and the Plaintiffs’ failure to state a single claim upon which relief—certainly the relief sought in the SAC—can be granted against the Tribal Defendants. *See* Fed. R. Civ. P. 12(b)(1) & (6).

As an initial matter, the Court lacks subject matter jurisdiction over the Plaintiffs’ claims against the Tribal Defendants due to sovereign immunity. Settled principles of federal Indian law, discussed in detail *infra*, provide that one of the many aspects of inherent tribal sovereignty is a broad immunity from suit without tribal consent or an unmistakable congressional

abrogation of immunity. Neither condition being met here, the Tribal Defendants are immune from suit and the Court lacks subject matter jurisdiction over all claims against them.

The Plaintiffs' Indian Reorganization Act (IRA) claim fails for multiple reasons in addition to sovereign immunity. First, the Court lacks subject matter jurisdiction over the IRA claim because the Plaintiffs lack Article III standing to pursue it. Second, like many of the statutes cited in the SAC, an IRA claim can be asserted, if at all, only pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 510, *et seq.* Because the APA does not provide a right of action against non-federal parties, the IRA claim (and all other APA claims asserted in the SAC) necessarily fails to the extent that it is asserted against the Tribal Defendants. And to the extent that the Plaintiffs seek to assert an APA-based IRA claim against the Federal Defendants—the only defendants subject to such a claim—this Court lacks subject matter jurisdiction over that claim because it is hopelessly time-barred.

The alternatively pled common law claims against the Tribal Defendants fare no better.⁷ Plaintiffs' claims for unjust enrichment and promissory estoppel are both time-barred and barred by the statute of frauds, and the facts alleged, even when taken in the light most favorable to the Plaintiffs, do not establish all of the elements of either claim. Accordingly, the Court should dismiss all common law claims against the Tribal Defendants.

The Plaintiffs' remaining statutory claims also are defective for various reasons, each of which is discussed in detail below. Briefly stated, the statutes upon which these claims are based (1) are inapplicable to the Tribal Defendants on their face or under the facts presented; (2) do not create private rights of action; (3) do not create any judicially enforceable rights against any

⁷ The Plaintiffs' state law outrage claim is asserted only against the Individual Defendants and Martin Construction, and thus is not addressed herein.

entity; or (4) do not and cannot provide the relief that the Plaintiffs seek. For all of these reasons, the Plaintiffs' statutory claims should be dismissed in their entirety.

Even assuming, *arguendo*, that the Plaintiffs had some viable right of action against the Tribal Defendants under any of the legal theories laid out in the SAC, none of those theories justifies the incredibly sweeping, intrusive relief that the Plaintiffs seek. Neither the common law doctrines nor the federal statutes envision stripping a sovereign government of ownership, jurisdiction, and control of its property, ordering the permanent following of such property, or requiring the removal of scores of millions of dollars of development and real property improvements, at a cost of untold jobs and community wide economic injury. The SAC should be dismissed—even if it states some valid claim—to the extent that it seeks unavailable relief.

Finally, because all claims against the Tribal Defendants are due to be dismissed and it would be impossible for this action to fairly proceed without PBCI's involvement, the entire SAC should be dismissed under Rule 19.

I. The Tribal Defendants' sovereign immunity deprives the Court of subject matter jurisdiction over all claims against them.

A. Defendants PBCI and PCI Gaming enjoy sovereign immunity.

Defendants PBCI and PCI Gaming are immune from suit, and this court accordingly lacks subject matter jurisdiction over all claims against those defendants. The "Supreme Court has made clear that a suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity." *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1226 (11th Cir. 2012). The Eleventh Circuit repeatedly has recognized that federal courts lack subject matter jurisdiction over unconsented suits against PBCI, and it also has confirmed "that PCI [Gaming] shares in the Tribe's immunity because it operates as an arm of the Tribe." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287

(11th Cir. 2015); *see also Williams v. PBCI*, 839 F.3d 1312, 1325 (11th Cir. 2016) (affirming that the district court lacked subject matter jurisdiction over an ADEA claim against PBCI due to the Tribe's sovereign immunity); *Freemanville Water Sys., Inc. v. PBCI*, 563 F.3d 1205, 1209-10 (11th Cir. 2009) (affirming district court's dismissal of claims against PBCI and PCI Gaming on the grounds that their sovereign immunity deprived the district court of subject matter jurisdiction); *Sanderford v. Creek Casino Montgomery*, 2013 WL 131432 at *2 (M.D. Ala. Jan. 10, 2013) ("Defendant Creek Casino is indistinguishable from the Tribe for the purposes of tribal sovereign immunity."); *Allman v. Creek Casino Wetumpka*, 2011 WL 2313706, at *2 (M.D. Ala. May 23, 2011) (holding that PBCI's sovereign immunity extended to one of the Tribe's gaming facilities).

The Plaintiffs do not allege that Defendants PBCI and PCI Gaming have waived their immunity or that Congress has abrogated it. In fact, the SAC does not even allege that this Court has jurisdiction over those two defendants. *See* SAC ¶¶ 37-42 (alleging the Court's jurisdiction over all other defendants, but omitting any reference to PBCI or PCI Gaming). Because PBCI and PCI Gaming enjoy sovereign immunity, this Court lacks subject matter jurisdiction to hear claims against them. *See Williams*, 839 F.3d at 1325; *PCI Gaming*, 801 F.3d at 1287-88; *Freemanville*, 563 F.3d at 1206-07. All claims against PBCI and PCI Gaming should be dismissed with prejudice pursuant to Rule 12(b)(1).

B. The Tribe's sovereign immunity also applies to the tribal officials sued in their official capacities.

Sovereign immunity also deprives the Court of subject matter jurisdiction over claims against the members of the PBCI Tribal Council, the PCI Gaming board, and the THPO who are sued in their official capacities (the Tribal Officials). It is settled law that tribal officials are protected by their tribe's sovereign immunity when acting in their official capacity and within

the scope of their authority. *See generally Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999). Under the doctrine first elucidated in *Ex parte Young*, 209 U.S. 123 (1908), however, tribal officials can sometimes be sued for prospective declaratory and injunctive relief to stop ongoing violations of federal law. *See, e.g., Tamiami Partners*, 177 F.3d at 1226. The Plaintiffs allege that the *Young* doctrine gives this Court jurisdiction over their claims against the Tribal Officials. SAC ¶ 39. They are incorrect.

The *Young* doctrine is inapplicable for at least two reasons here. First, the Plaintiffs generally seek not to stop ongoing violations of federal law, but to adjudicate the legality of discrete past acts. *Young* does not apply in such circumstances. *See, e.g., Nicholl v. Attorney Gen. of Ga.*, 769 F. App'x 813, 815-16 (11th Cir. 2019). Second, even if the Plaintiffs alleged ongoing violations of federal law, the *Young* doctrine is applicable to claims, such as the Plaintiffs' IRA claim, that implicate "special sovereignty interests." *Hollywood Mobile Estates Ltd. v. Cypress*, 415 F. Appx. 207, 211 (11th Cir. 2011). The Plaintiffs simply cannot circumvent tribal sovereign immunity. Accordingly, this Court lacks jurisdiction over their claims against all Tribal Defendants, and those claims should be dismissed under Rule 12(b)(1).

1. *The Young doctrine is inapplicable because the Tribal Officials are not engaged in ongoing violations of federal law.*

As an initial matter, the *Young* doctrine is inapplicable to the extent that the Plaintiffs' claims are based on alleged past violations of federal law. The "*Young* doctrine applies only to ongoing and continuous violations of federal law. In other words, a plaintiff may not use the doctrine to adjudicate the legality of past conduct." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999) (citing, *inter alia*, *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986)); *Nicholl*, 769 F. App'x at 815-16 (holding the *Young* doctrine inapplicable to a claim based on an alleged past violation of law, even where the effects of that violation remained in

place); *Jones v. Tyson Foods, Inc.*, 971 F. Supp. 2d 671, 680-81 (N.D. Miss. 2013) (holding *Young* inapplicable where the plaintiff alleged an ongoing injury arising out of past violations of federal law); *Burrell v. Teacher's Ret. Sys. of Ala.*, 2009 WL 113692, at *3 (M.D. Ala. Jan. 16, 2009) (finding the *Young* doctrine inapplicable, in part, because the claims “addresse[d] past conduct, not ongoing violations of federal law”); *Baily v. Montgomery*, 433 F. Supp. 2d 806, 810-11 (E.D. Ky. 2006) (holding *Young* inapplicable where plaintiff alleged unlawful past conduct and sought injunctive relief barring its repetition).

For Count I of the SAC (the IRA claim), the Plaintiffs fail to adequately allege any violation of federal law by the Tribal Defendants, past or ongoing. That count principally—and erroneously—asserts that the United States violated federal law when it took the Wetumpka property into trust for PBCI in 1934. *See* SAC ¶¶ 190-99. It goes on to baldly state a legal conclusion that gaming conducted by PBCI on the property violates IGRA because the land is not properly in trust, *id.* ¶¶ 193, 199, but this allegation is inherently contradictory and invalid. The fact of the matter is that the land is held in trust, and gaming conducted on it is therefore lawful under IGRA. *See* SAC ¶ 73 (acknowledging that the land is in trust, but alleging that the entrustment decision was improper); *id.* ¶ 286 (conceding that the Wetumpka property includes reservation and trust lands). But assuming, counterfactually, that the land was not held in trust, it would be owned by Poarch in fee and, as the Plaintiffs concede, it would “be subject to state, not federal, law.” *Id.* ¶ 194. In other words, because the land is trust land, PBCI’s gaming is lawful under IGRA; if it was not trust land, IGRA would be inapplicable, and there would be no violation of federal law. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) (holding that IGRA regulates gaming activity on Indian trust lands “and nowhere else”). In

neither case would Count I allege an ongoing violation of federal law by the Tribal Defendants, so the *Young* doctrine is inapplicable to that claim.

For newly asserted Counts II, III, V, and VI, the alleged violations of law by PBCI officials relate to the excavation and reburial of remains and objects from the Wetumpka property, ostensibly without proper consultation with or deference to the Plaintiffs, and the construction of a hotel and resort and gaming facilities on the property. *See generally* SAC ¶¶ 201-20, 237-40. Taking the SAC's allegations at face value, all excavation was completed by 2011 and reinternment took place in April of 2012—well in advance of the initial complaint—and construction activities were concluded by 2014, five years before the Plaintiffs sought leave to file the SAC that first asserted these claims. *See id.* ¶¶ 102, 132, 150, 158-59. Again, there is no allegation of any ongoing and continuing violation of federal law to support application of the *Young* doctrine.

This same timeline of events bars the *Young* doctrine's application to the Plaintiffs' federal statutory claims against the Tribal Officials. Count VII, alleging violations of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001, *et seq.*, accuses the Tribal Defendants of failing to follow appropriate procedures for consulting with the Plaintiffs before and during intentional excavations and construction on the Wetumpka property. *See* SAC ¶¶ 246-50, 255, 258. All excavations having been completed by 2011 and all construction by 2014, claims based on those activities do not allege any ongoing violation of federal law.⁸

⁸ Insofar as the Plaintiffs allege that they are entitled to repatriation of certain remains or artifacts under NAGPRA and that those remains or artifacts are being wrongfully withheld from them, SAC ¶¶ 251-52, they may allege an ongoing violation of federal law to that limited extent. But any such claim, in addition to failing for reasons set forth below, is separate and distinct from allegations based on the conduct of long completed archaeological excavations or the

Count IX, based on the Archeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa, *et seq.*, alleges that the Tribal Defendants made false statements to obtain ARPA permits for the long-since concluded excavations, failed to consult with the Plaintiffs prior to the issuance of those permits, failed to comply with the permits and curate archaeological resources, and performed unpermitted excavations, all before 2011. *Id.* ¶¶ 102, 273-80. And Count X, alleging violations of the National Historic Preservation Act (NHPA), likewise focuses overwhelmingly on asserted failures to consult with the Plaintiffs prior to undertaking excavation and construction activities, *id.* ¶¶ 291-311, with additional allegations of failure to mitigate harm to resources during the construction that concluded no later than 2014. *Id.* ¶¶ 305-09. Once again, all of the conduct underlying these allegations has long since ended and cannot provide the basis for claims to proceed under the *Young* doctrine.

The *Young* doctrine does not afford the Plaintiffs a means of circumventing PBCI's sovereign immunity from litigation challenging the legality of past conduct. Accordingly, all claims against the Tribal Officials based on alleged past violations of federal law must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

2. *The Young doctrine is inapplicable because the Plaintiffs' claims implicate PBCI's special sovereignty interests in the Wetumpka property.*

Even where its ordinary prerequisites are satisfied, the *Young* doctrine does not apply in cases implicating "special sovereignty interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). This is such a case. In *Coeur d'Alene*, the Supreme Court declined to allow the Coeur d'Alene Tribe (CDT) to proceed with a suit seeking a declaration of its ownership of shore and submerged lands surrounding and underlying Lake Coeur d'Alene and

acquisition, in fee or trust, of the Wetumpka property. The *Young* doctrine does not allow the Plaintiffs to pursue these latter claims.

nearby rivers and streams. *See id.* at 264-65. CDT named state officials as defendants, *id.* at 265, asserted “an ongoing violation of its property rights in contravention of federal law,” and sought prospective, non-monetary relief, which the Supreme Court acknowledged “is ordinarily sufficient to invoke the *Young* fiction.” *Id.* at 265, 281. Nevertheless, the Supreme Court did not allow the suit to proceed under the *Young* doctrine because it implicated “special sovereignty interests”—namely, the State of Idaho’s sovereign and regulatory interests in its lands. *Id.* at 281-83. As the Court explained, “if [CDT] were to prevail, Idaho’s sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.” *Id.* at 287. The Supreme Court held that these “special circumstances” barred reliance on the *Young* doctrine to circumvent sovereign immunity. *Id.*

The Plaintiffs in this case seek relief every bit as intrusive on PBCI’s sovereign interests as the relief that CDT sought in *Coeur d’Alene*. They explicitly seek, *inter alia*, (1) to revoke the trust status of the Wetumpka property, which would convert it to ordinary private property and completely destroy PBCI’s sovereign and jurisdictional authority over it, (2) to have the property placed in a constructive trust (with themselves as beneficiaries assuming *de facto* control of the property), and (3) issuance of an affirmative injunction directing PBCI to remove tens of millions of dollars in fixtures and to effectively leave the land untouched in perpetuity. *See generally* SAC, Prayer for Relief. In no uncertain terms, the Plaintiffs seek to “remove ... land from the tribe’s jurisdiction or permanently deprive the tribe of its property interests.” *Cypress*, 415 F. App’x at 211 (recognizing the special circumstances exemption but declining to apply it where the tribal property interest at issue was a leasehold rather than a jurisdictional or permanent proprietary interest). Accordingly, *Young* is inapplicable, the Tribal Officials are protected by PBCI’s sovereign immunity, and the Court lacks subject matter jurisdiction over the

Plaintiffs' claims against them. All of the claims against the Tribal Officials should be dismissed with prejudice pursuant to Rule 12(b)(1).

II. The Plaintiffs' IRA claim should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Count I of the SAC alleges a violation of the Indian Reorganization Act, 25 U.S.C. §§ 5101, *et seq.*, a federal statute that, *inter alia*, gives the Secretary of the Interior the discretionary authority to acquire lands in trust for the benefit of Indians.⁹ *See* 25 U.S.C. § 5108. The Secretary exercised this discretionary authority to take the Wetumpka property into trust for PBCI in 1984. *See* Stinson Decl., Ex. B. The Plaintiffs allege that the Secretary lacked authorization to take land into trust for PBCI, that the Secretary's decision should be treated as void *ab initio*, and that the Wetumpka property's trust status should be revoked, leaving the property in the fee simple ownership of PBCI. SAC ¶¶ 197-98.

The Plaintiffs' IRA claim fails for several reasons in addition to the Tribal Defendants' sovereign immunity. As an initial matter, this Court lacks jurisdiction over the claim because the Plaintiffs do not have Article III standing to challenge the trust status of the Wetumpka property. If the Plaintiffs did have standing, they could not state an IRA claim against the Tribal Defendants because such a claim may be brought only under the APA, which does not provide a right of action against nonfederal parties. Finally, even if the Plaintiffs could bring an APA-based IRA claim against the Tribal Defendants (and to the extent that they have alleged such a claim against the Federal Defendants), any such claim is hopelessly time barred and beyond this Court's subject matter jurisdiction.

⁹ The IRA was previously codified at 25 U.S.C. §§ 461, *et seq.*

A. The Plaintiffs lack standing to challenge the Secretary's 1984 decision.

The Plaintiffs lack standing to bring an IRA-based challenge to the Wetumpka property's trust status because their alleged injuries are not fairly traceable to the Secretary's 1984 entrustment decision and could not be redressed by a favorable ruling on this claim in any event. Standing is a jurisdictional issue that must be assessed at the time the complaint is filed. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264-65 (11th Cir. 2011). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted." *Id.* at 1265 (emphasis added & citation omitted). Supreme Court precedent "make[s] clear that 'standing is not dispensed in gross.' To the contrary, 'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Where a plaintiff lacks standing to pursue any particular claim or relief, the court lacks jurisdiction, and the relevant claim must be dismissed. *See Hollywood Mobile*, 641 F.3d at 1265.

To establish standing, a plaintiff must show (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely, not merely possible, to be redressed by a favorable decision from the court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hollywood Mobile*, 641 F.3d at 1265-66. An alleged injury is only redressable "when a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that *directly redresses* the injury suffered." *Hollywood Mobile*, 641 F.3d at 1266 (emphasis added) (citation omitted).

The Plaintiffs’ alleged injuries arise out of archaeological excavations and construction activities on the Wetumpka property and the ostensible mistreatment of excavated remains and artifacts, all of which allegedly occurred in violation of various federal statutes and a putative commitment by PBCI to preserve the Wetumpka property in perpetuity. *See, e.g.*, SAC ¶¶ 4-8. The Plaintiffs do not allege that their injuries arise out of the conduct of gaming activity on the property *per se*; they would have suffered the same alleged injuries if the property had been excavated and used as the site for a shopping mall, restaurant, sports stadium, apartment complex, or any other major public amenity. While their allegations arguably satisfy the first prong of the standing inquiry, the Plaintiffs can go no further on their IRA claim. Their own factual allegations and internal tensions in their legal theories demonstrate that they cannot (1) fairly trace their alleged injuries to the Secretary’s decision to take land into trust for PBCI or (2) obtain redress of their alleged injuries through any relief available under that act.

First, the Plaintiffs’ alleged injuries are not fairly traceable to the Secretary’s decision to accept land into trust for PBCI. PBCI acquired the Wetumpka property in fee in 1980, four years prior to the Secretary’s decision to take it into trust. *See id.* ¶ 61; Stinson Decl., Ex. B. When PBCI acquired the property, it entered into a written protective covenant to preserve the property for 20 years. SAC ¶ 62; Stinson Decl., Ex. A. Once that covenant expired in 2000, PBCI was free to engage in the archaeological excavations, construction, and other activities that serve as the basis for the complaint regardless of whether the Secretary had taken the land into trust.¹⁰ *Accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991) (“[A]n expired contract has by its own terms released all its parties from their respective contractual obligations”).

¹⁰ Indeed, when PBCI applied for a grant to assist its acquisition of the property in 1980, it explicitly contemplated the possibility of eventually developing the property and committed to conducting “a scientifically sound archaeological program” in advance of such development. Doc. 190-1 at 4.

Because the Secretary's 1984 decision to take the Wetumpka property into trust was not a necessary prerequisite to any excavation, construction, or other ground disturbing activity on the property and did not authorize or approve any such activity, any alleged injuries based on or arising out of that activity are not fairly traceable to the Secretary's decision. *Accord Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 396 F. Supp. 2d 1087, 1093-94 (D.S.D. 2005) (dismissing similar claims on standing grounds where the tribal plaintiff could not tie potential non-compliance with federal statutes to a federal land-transfer decision). The Plaintiffs therefore lack standing to challenge that decision, and their IRA claim should be dismissed pursuant to Rule 12(b)(1).

Second, the Plaintiffs' alleged injuries are not redressable through their IRA claim. The reason for this is simple. The requested and only potentially available remedy for the Plaintiffs' IRA claim is to have the trust status of the Wetumpka property revoked. That would not undo the archaeological excavation or development on the property or address any of the Plaintiffs' concerns about the treatment of excavated remains and resources.¹¹ On the contrary, it would severely reduce the likelihood of the Plaintiffs obtaining the redress of the injuries alleged in the SAC, as the property's reversion to fee simple ownership would render the litany of federal preservation statutes relied upon in other counts of the SAC inapplicable to the property. *See, e.g.*, 16 U.S.C. §§ 470aa – 470bb (providing that ARPA applies only to public lands and Indian

¹¹ The Plaintiffs do allege that gaming on the property would be unlawful but for the Secretary's decision to take the Wetumpka property into trust, implying that such activity would cease if they prevail on their IRA claim, but that is irrelevant to their standing. *See, e.g.*, SAC ¶¶ 193, 199. While the Wetumpka property's trust status is instrumental to PBCI's ability to conduct gaming on the property pursuant to IGRA, the Plaintiffs have not alleged that they are injured by the conduct of gaming activity *per se*, nor have they sought any relief specifically addressing gaming activity. Their alleged injuries arise out of archaeological excavations and development on the property—injuries unchanged by the ultimate purpose or use of the development.

lands held in trust by or subject to alienation restrictions imposed by the United States); 25 U.S.C. §§ 3001-3002 (providing that NAGPRA applies only to federal lands and Indian reservation lands); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 514-15 (4th Cir. 1992) (citing several cases for the proposition that the NHPA is a narrow statute triggered only when the federal government has control over a project). In other words, were the Plaintiffs to succeed on their IRA claim, the alleged statutory grounds for the Court to order the Tribal Defendants to refrain from any construction, excavation, or other activities on the property, to restore the property to some prior state, or to treat excavated remains and other archeological resources in any specific manner would fall away. Rather than redressing their alleged injuries, a favorable ruling on the Plaintiffs' IRA theory effectively would foreclose their desired remedies.

Having had these fatal standing problems pointed out in multiple motions to dismiss their First Amended Complaint, which asserted only statutory claims, the Plaintiffs attempt to sidestep them in the SAC by asserting new common law causes of action against the Tribal Defendants. *See* SAC, Counts II-III & V-VI. Specifically, they now plead state and federal common law claims for promissory estoppel and unjust enrichment in the alternative, making the Court's disposition of the IRA claim determinative as to which are operable. *See* SAC ¶¶ 200, 236. Presumably, they will contend that this confers standing to litigate their IRA claim. It does not.

As noted above, it is black letter law that a plaintiff must establish standing independently for each claim in the complaint and each form of relief requested. *See, e.g., Town of Chester*, 137 S. Ct. at 1650. If the Plaintiffs lack standing to litigate their IRA claim—and they do—they cannot manufacture standing by saying that the Court must decide the IRA claim to ascertain which of their remaining claims are operative. Instead, the Court must dismiss the IRA

claim due to lack of standing, then address the claims that the Plaintiffs have identified as operative in the event that the Court does not rule in their favor on the IRA claim.¹²

Even if it were possible for a plaintiff to generate standing to litigate a claim in the way that the Plaintiffs appear to have attempted, the effort would be unsuccessful in this case. This is because, as discussed in detail above and below, the Plaintiffs' common law claims themselves are subject to dismissal for lack of subject matter jurisdiction (due to sovereign immunity) and failure to state a claim. Because the common law claims fail regardless, there would be no need for the Court to address the merits of the IRA claim to determine which are operable even if it were otherwise appropriate to do so.

For all of the foregoing reasons, the Plaintiffs lack standing to challenge the Secretary's 1984 decision to accept the Wetumpka property into trust. The Court accordingly lacks subject matter jurisdiction over Count I of the SAC and should dismiss it under Rule 12(b)(1).

B. The Plaintiffs cannot state an IRA claim against the Tribal Defendants.

Even if they had standing to challenge the Secretary's 1984 entrustment decision, the Plaintiffs' IRA claim would still be subject to dismissal for failure to state a claim to the extent that it is asserted against the Tribal Defendants. The IRA itself provides no right of action for the Plaintiffs to sue the Tribal Defendants or anyone else. Rather, as the Eleventh Circuit recently held, "[t]he proper vehicle for [a plaintiff] to challenge the Secretary's decisions to take land into

¹² The Plaintiffs also contingently assert a common law outrage claim seeking monetary damages exclusively against the Individual Defendants and Martin Construction, who are not parties to this motion or targets of the IRA claim. *See* SAC Count IV. To the extent that the Plaintiffs may argue that their method of pleading their outrage claim—such that it is operative only if the Court rules in their favor on the IRA claim—somehow grants them standing to assert the IRA claim against the Tribal or Federal Defendants, this is subject to the same problems as their alternative federal and state common law claims against the Tribal Defendants. That problem is magnified by the fact that, in this instance, the Plaintiffs would be attempting to generate standing to sue one group of defendants and obtain one type of relief by asserting an entirely separate, contingent claim seeking a completely different form of relief against an entirely different group of defendants.

trust for the Tribe is an APA claim.” *PCI Gaming*, 801 F.3d at 1291 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012), for the proposition that “a challenge to the Secretary’s land-into-trust decision [i]s a ‘garden-variety APA claim’”); *see also Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015) (*en banc*). Of course, “it is well settled that suits under the APA may not be pursued against *nonfederal* entities, nor may federal courts enjoin nonfederal entities based on the conduct of federal agencies held to run afoul of the APA.” *Friends of Lydia Ann Channel v. U.S. Army Corps. of Eng’rs*, 701 Fed. App’x 352, 358 (5th Cir. 2017) (citing numerous federal appellate decisions); *see also Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) (“[N]othing in the APA authorizes claims against nonfederal entities”); *Sw. Williamson Cty. Cmty. Ass’n, Inc. v. Slater*, 173 F.3d 1033, 1035-36 (6th Cir. 1999). Because a challenge to the Secretary’s decision to accept the Wetumpka property into trust may be brought, if at all, only under the APA, and an APA claim cannot be brought against nonfederal parties such as the Tribal Defendants, Count I of the SAC should be dismissed under Rule 12(b)(6) for failure to state a claim against the Tribal Defendants.

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

Even if the Plaintiffs had standing to challenge the Secretary’s 1984 decision and could do so through a claim against the Tribal Defendants (and to the extent that they do so through a claim against the Federal Defendants), their claim still must be dismissed on the grounds that it is long since time barred. As noted above, the only avenue for challenging a land-into-trust decision by the Secretary of the Interior is through a direct APA claim. *See, e.g., Patchak*, 567 U.S. at 220; *PCI Gaming*, 801 F.3d at 1291; *Big Lagoon*, 789 F.3d at 953. The statute of limitations for bringing a claim under the APA is six years, and it “begins to run when the

agency issues the final action that gives rise to the claim.” *PCI Gaming*, 801 F.3d at 1292; *see* 28 U.S.C. § 2401(a). The Secretary took the Wetumpka property into trust in 1984—more than thirty-five years ago, and nearly thirty years before the Plaintiffs filed this lawsuit. *See* Stinson Decl., Ex. B. The untimeliness of any challenge to the Secretary’s decision to accept the Wetumpka property into trust for PBCI is readily apparent.

PCI Gaming is directly on point and controlling. There, the State of Alabama sued PBCI and other tribal parties attempting, *inter alia*, to set aside the Secretary’s decisions to take the Wetumpka property and other lands within the exterior geographic boundaries of the State into trust for PBCI. When PBCI moved to dismiss on the grounds that the State’s suit constituted an improper collateral attack on federal agency action, the State attempted to amend its complaint to add a direct APA claim against the Secretary. *See PCI Gaming*, 801 F.3d at 1292. The Eleventh Circuit upheld the denial of leave to amend, holding that the proposed amendment would have been futile because the statute of limitations to bring an APA challenge to the Secretary’s 1984 decision had run by 1991. *Id.*

The State, as the Plaintiffs presumably intend to do here, tried to argue around the obvious time bar by alleging that the Secretary’s entrustment decision was *ultra vires* and that its challenge thus was not subject to the APA’s statute of limitations. *Id.* While acknowledging the existence of an exception allowing otherwise untimely as-applied challenges to certain *ultra vires* agency decisions, the Eleventh Circuit held that exception inapplicable to the Secretary’s 1984 decision, explaining that Alabama was contemporaneously aware of the decision and could have timely challenged it, but did not. *Id.* (citing *Big Lagoon*, 789 F.3d at 954 n.6). As the Court of Appeals succinctly explained, “[b]ecause Alabama could have brought a timely APA

challenge, we will not carve out an exception to the six-year statute of limitations ... to disturb the Secretary's long ago decisions to take the lands in question into trust." *Id.*

Less than a year after it decided *PCI Gaming*, the Eleventh Circuit reviewed another challenge to the trust status of PBCI trust lands, this one by the Escambia County tax assessor. *See PBCI v. Hildreth*, 656 F. App'x 934 (11th Cir. 2016). The assessor, Hildreth, also "argue[d] that the Secretary's ultra vires decision to take the land into trust constitutes a valid exception to the APA's limitations period." *Id.* at 943. The Court of Appeals was unpersuaded, noting that it had "rejected the same argument on similar facts in *PCI Gaming*" and that allowing a party with prior notice of the Secretary's land entrustment decision to challenge that decision "nearly 30 years later ... would turn *PCI Gaming* on its head." *Id.* at 943-44.

PCI Gaming and *Hildreth* mandate dismissal of the Plaintiffs' challenge to the Wetumpka property's trust status. Like the State of Alabama and Hildreth, Plaintiffs had contemporaneous knowledge of the Secretary's decision and could have brought a timely APA challenge, but chose not to do so. *See, e.g.*, SAC ¶¶ 216-17 (indicating that the Plaintiffs would have opposed the trust acquisition of the Wetumpka property had they known that Poarch would eventually excavate and develop it, necessarily implying contemporaneous awareness of the decision). Even if they counterfactually deny contemporaneous knowledge of the decision, it is indisputable that the Plaintiffs were aware of the Secretary's decision, the Department of the Interior's taking action based on that decision, and of PBCI's allegedly offensive activity on the Wetumpka property more than 10 years prior to filing this lawsuit in December 2012. *See, e.g.*, Doc. 190-1 at 128 (referencing intertribal discussions of reinternment of remains excavated from the Wetumpka property as far back as May 2006); Doc. 100 at 22 (Plaintiffs' brief referring to October 2002 NAGPRA claim by Plaintiffs regarding Hickory Ground excavations); Doc. 95-8

(2002 letter from MCN complaining that NPS entered into an agreement for PBCI to assume historic preservation responsibilities on the Wetumpka property without consultation with MCN); Doc. 95-7 (2002 letter from Mekko Thompson objecting to excavations on the Wetumpka property, alleging violations of various federal statutes, and claiming ownership, apparently under NAGPRA, of “all remains or objects” excavated from the Wetumpka trust property). Accordingly, even assuming, *arguendo*, that the APA’s six-year limitations period did not begin to run until the Plaintiffs were aware of any or all of those events, it would still bar the Plaintiffs’ IRA claim.

Because the Plaintiffs’ failed to bring their IRA claim within the APA’s six-year limitations period, this Court lacks subject matter jurisdiction over that claim and should dismiss it with prejudice under Rule 12(b)(1). *See, e.g., Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006).

III. The Plaintiffs’ promissory estoppel claim fails a matter of law.

The Plaintiffs assert a promissory estoppel claim primarily against the Tribal Defendants based upon their failure to keep an alleged promise to “preserve” Hickory Ground in perpetuity.¹³ This claim fails for several reasons, including: (1) it is untimely; (2) it is barred by the statute of frauds; and (3) the Plaintiffs have not alleged any of the essential elements of the claim. It should be dismissed.

¹³ The SAC includes two counts of promissory estoppel, one under state law and one under federal common law, offered in the alternative such that only one will be operative depending on the Court’s disposition of the IRA claim. *See* SAC Counts III and VI; ¶¶ 200, 236. As the Plaintiffs allege that the controlling law is substantially the same regardless of which claim is operative and base the alternative claims on the same facts, *id.* ¶¶ 238, 240, the Tribal Defendants will treat them as a single claim for purposes of this brief. The Tribal Defendants will do the same for the Plaintiffs’ alternatively plead unjust enrichment claims.

A. The promissory estoppel claim is time barred.

Alabama law imposes a two year statute of limitations on claims for promissory estoppel. *See* Ala. Code § 6-2-38(l); *Ala. Space Sci. Exhibit Comm’n v. Odysseia Co., Ltd.*, 2016 WL 9781806, at *11 (N.D. Ala. Sept. 30, 2016). A claim for promissory estoppel accrues, for limitations purposes, when the plaintiff knew or had reason to know of the defendant’s breach of the alleged promise. *See Ala. Space*, 2016 WL 9781806, at *11; *see also, e.g., Nettles v. AT&T*, 55 F.3d 1358, 1363-64 (8th Cir. 1995); *Moisiuc v. Argent Mortg. Co., LLC*, 2019 WL 1330283, at *3 (S.D. Tex. Mar. 25, 2019) (holding that “the latest a cause of action for promissory estoppel could accrue is when the promisor breaches his promise” (citation omitted)); *Newberg v. Schweiss*, 2009 WL 3202380, at *4 (D. Minn. Sept. 30, 2009); *Weiss v. Smulders*, 96 A.3d 1175, 1187 (Conn. 2014). Alabama courts have not recognized promissory estoppel as a possible continuing tort.

The Plaintiffs alleged in 1992 that PBCI was taking actions that allegedly “threatened” the “cultural, historical and archeological integrity of the site,” and they knew no later than 2002 that excavations, including of human remains, had occurred at the site. *See* Docs. 95-6, 95-7. The record further shows that the Plaintiffs sent representatives to Wetumpka, Alabama to discuss reinternment of excavated human remains on May 9, 2006—more than six and a half years prior to the filing of the initial complaint in this case. Doc. 190-1 at 128; Doc. 95-8. Even the SAC concedes that the Poarch Band notified the Plaintiffs of a Phase III excavation at the site by 2006, that the Plaintiffs began an extended dialogue with the Poarch Band that year, and that Mekko Thompson visited Alabama that year to discuss the issues with representatives of the Poarch Band and Auburn University. *See* SAC ¶¶ 137-42. Based on these established facts and allegations, it is impossible for the Plaintiffs to bring a timely promissory estoppel claim today,

and it was impossible for them to do so when they filed the initial complaint in the waning days of 2012. Therefore, the promissory estoppel claim should be dismissed.

1. *The Plaintiffs' contention that they seek a constructive trust does not extend the limitations period.*

The Plaintiffs have argued that their promissory estoppel claim is not subject to a two-year statute of limitations because it is “rooted in equity and seek[s] the equitable remedy of an injunction and constructive trust.” Doc. 179 at 11. Thus, they assert, the promissory estoppel claim is “in the nature of recovery of real property” under Alabama Code § 6-2-33(2) and the applicable statute of limitations is ten years. The Plaintiffs’ attempt to evade the applicable statute of limitations by seeking inapplicable relief to which they are not entitled is unavailing.

To begin, constructive trust is not an independent cause of action, but “a remedy imposed to prevent the enjoyment of a fraud or of a breach of a fiduciary duty.” *Gulf States Steel, Inc. v. Lipton*, 765 F. Supp. 696, 704 (N.D. Ala. 1990), *aff’d*, 934 F.2d 1265 (11th Cir. 1991); *see also Otwell v. Ala. Power Co.*, 944 F. Supp. 2d 1134, 1160 n.22, 1161 (N.D. Ala. 2013), *aff’d*, 747 F.3d 1275 (11th Cir. 2014) (noting defendant was entitled to summary judgment on plaintiffs’ claim for the remedy of a constructive trust). Two of the cases that the Plaintiffs cited in support of their motion for leave to amend illustrate underscore the limited availability of this remedy. In *Radenhausen v. Doss*, 819 So. 2d 616 (Ala. 2001), for example, the Alabama Supreme Court explains that constructive trust, as sought by defendants in counterclaiming for breach of fiduciary duty, conversion, and fraud, “is an equitable remedy; and a request to impose such a trust is not a cause of action that will stand independent of some wrongdoing.” *Id.* at 620. Likewise, in *Knowles v. Canant*, 51 So. 2d 355 (Ala. 1951), the Alabama Supreme Court held that constructive trust arises whenever the legal title to property has been “obtained through actual fraud, misrepresentation, concealments, or through undue influence, duress, taking

advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest." *Id.* at 333, 357. Plaintiffs have not plead fraud or breach (or even the existence) of any fiduciary duty here, and the alleged facts would not support any such claim. On the contrary, the alleged facts are that PBCI agreed to a written, 20-year preservation covenant when it acquired the Wetumpka property—with no assistance from the Plaintiffs—and that it began to develop the property after that agreement expired in a manner that is offensive to the Plaintiffs. SAC ¶¶ 62, 79, 100. Constructive trust is not an appropriate remedy under these facts, and the Plaintiffs' request for this unavailable remedy cannot alter the limitations period for their promissory estoppel claim.

Plaintiffs further argued in support of their motion for leave that their promissory estoppel claim should be treated as neither a tort claim nor an implied contract claim, relying on *Auburn Univ. v. IBM*, 716 F. Supp. 2d 1114, 1118 (M.D. Ala. 2010). Their reliance is misplaced. While this court opined in *Auburn* that "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," it plainly meant that not all such claims should be treated as torts claims and not all should be treated as contract claims, not that some should be treated as neither. *See id.* (finding that the unjust enrichment claim at issue presented a "classic tort injury" to which the two year limitations period applied). And because the Plaintiffs' promissory estoppel claim accrued, at the latest, on May 9, 2006—more than six years and a half years prior to the filing of their initial complaint—it is time barred regardless of whether it is

subject to the two-year tort limitations period set forth in Ala. Code § 6-2-38(l) or the six year contract statute of limitations set forth in Ala. Code § 6-2-34(9).¹⁴

Lastly, it is significant that the Plaintiffs only request a constructive trust in the event that the Court enters a judgment in their favor on the IRA claim alleged in Count I of the SAC. *See* SAC Prayer for Relief (a), (b)(ii). Accordingly, any arguments that seeking a constructive trust alters the limitations period and statute of frauds are unavailable to the extent that the Court rules against the Plaintiffs on that claim.

2. *The Plaintiffs do not seek recovery of land.*

Plaintiffs contend that the limitations period for their promissory estoppel claim is governed by Ala. Code § 6-2-33(2), which addresses “[a]ctions for the recovery of lands, tenements or hereditaments or the possession thereof.” Consistent with its language, this statute has been held to apply to cases where the *recovery* of possession of or title to land is at issue. *See, e.g., I-359, Inc. v. AmSouth Bank*, 980 So. 2d 419, 423 (Ala. Civ. App. 2007) (holding that a 10-year statute of limitations applied to claim of breaches of covenants regarding title); *Williams v. Kitchens*, 74 So. 2d 457, 463 (Ala. 1954) (indicating that a suit for the “recovery of land” is for “the immediate enjoyment of its possession, and will not lie for any property whereon no right of entry exists.”). Here, Plaintiffs do not seek to “recover” the Wetumpka property and have made no claim that they own or should actually own it. Instead, they object to the Tribal Defendants’ development of property that PBCI independently acquired from a third party.

The Plaintiffs’ failure to seek recovery of the land differentiates their case from those in which courts applied the ten-year statute of limitations in Ala. Code § 6-2-33(2). Unlike the

¹⁴ Indeed, based on Plaintiff Thompson’s October 19, 2002, letter to PBCI and federal officials threatening legal action over excavations at the Wetumpka property, *see* Doc. 95-7, it appears that the Plaintiffs’ promissory estoppel claim accrued more than 10 years prior to the filing of the initial complaint, which would render their constructive trust argument moot.

present case, those cases typically involve disputes where a party sought a constructive trust because possession or title to the property was disputed. *See Haavik v. Farnell*, 87 So. 2d 629, 630 (Ala. 1956) (seeking an order giving plaintiff title to certain lands held by his former wife and his sister); *Henslee v. Merritt*, 82 So. 2d 212, 214 (Ala. 1955) (seeking to establish trust in widow's favor over land sold for division among devisees of deceased husband's will); *Sykes v. Sykes*, 78 So. 2d 273, 274 (Ala. 1954) (seeking to have trust in real property decreed in plaintiff's favor as the equitable owner of real estate purchased during her marriage to defendant). In this case, the Plaintiffs do not claim that they are the rightful owners of the Wetumpka property or dispute PBCI's title to it. Thus, the ten year statute of limitations does not apply, and the Plaintiff's promissory estoppel claim is time barred.

B. The statute of frauds bars the Plaintiffs' promissory estoppel claim.

The Plaintiffs' promissory estoppel claim also fails because it would violate the statute of frauds. Alabama law does not allow the use of promissory estoppel to enforce an agreement that is void under the statute of frauds. *See Branch Banking & Tr. Co. v. Nichols*, 184 So. 3d 337, 347-48 (Ala. 2015); *see also Boman v. City of Gadsden*, 220 So. 3d 298, 303 n.3 (Ala. 2016); *Martin Marietta Materials, Inc. v. Limestone Redbay, Inc.*, No. 7:12-CV-02765-HNJ, 2017 WL 3444738, at *7 (N.D. Ala. June 30, 2017). And under Alabama's statute of frauds, an agreement that cannot be performed within one year is void unless made in writing. Ala. Code § 8-9-2(1); *see also Boman*, 220 So. 3d at 303 n.3 ("Had an unwritten agreement existed, however, it appears it would be void under the Statute of Frauds because such an agreement by its terms could not be performed within one year of its making."); *Lee v. Town of Good Hope*, 1998 WL 465114, at *11 (N.D. Ala. June 24, 1998). Given that a promise to protect land "in perpetuity" by its very terms cannot be performed within one year, the statute of frauds bars the Plaintiffs'

promissory estoppel claim unless the Tribal Defendants made the alleged promise in an enforceable written contract. They did not.

The Plaintiffs have not alleged the existence of any written agreement between the parties wherein the Tribal Defendants committed to preserve the subject property in perpetuity in exchange for the Plaintiffs' not objecting to "Poarch's acquisition of the property, either in fee or trust, and in supporting Poarch's federal recognition." See SAC ¶¶ 214-17. At most, they allege that the Poarch Band committed to preserving the property in a letter to a third party, the Alabama Historical Commission, seeking a federal historic preservation grant administered by that Commission. See SAC ¶¶ 64, *et seq.* (citing SAC Ex. A, Doc. 190-1). But that application letter is not a contract, nor does it set forth an unequivocal commitment to preserve the property in perpetuity without development. On the contrary, it explicitly contemplates eventual development, stating 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." Doc. 190-1 at 4. Nor does the letter reflect other terms of any alleged agreement between the Plaintiffs and the Tribal Defendants; indeed, it sets forth no consideration or commitment by the Plaintiffs and makes no reference whatsoever to PBCI's eventual federal recognition or transfer of the property into trust. See *generally* Doc. 190-1, Ex. A. Accordingly, to the extent that the Plaintiffs rely upon the letter as the writing necessary to satisfy the Statute of Frauds, their argument fails because that letter does not set out all essential terms of the alleged agreement. See *Lambert v. First Fed. Mortg.*, 47 F. Supp. 3d 1310, 1319 (N.D. Ala. 2014) (holding that an alleged agreement violated the statute of frauds where the plaintiffs were "attempting to enforce what they claim to be a verbal contract with some terms reduced to writing ... and at least one essential term *not in writing*").

Finally, should the Plaintiffs attempt to assert that any as-yet unidentified written contract compliant with the statute of frauds does encapsulate the entire agreement that they seek to enforce via promissory estoppel, their claim still would fail because promissory estoppel cannot be invoked to enforce an agreement set forth in a valid, written contract. *Madison County v. Evanston Ins. Co.*, 340 F. Supp. 3d 1232, 1291 (N.D. Ala. 2018) (“A promissory estoppel claim has no viability in the presence of a valid breach-of-contract claim regarding the same promise.”); *see also Aldridge v. DaimlerChrysler Corp.*, 809 So. 2d 785, 794 (Ala. 2001) (indicating that Alabama courts proceed to promissory estoppel analysis only *after* they have “determined that no binding contract existed”). In short, the statute of frauds bars enforcement of the Tribal Defendants’ alleged perpetual preservation promise to the extent that it was not fully set forth in a valid written contract, and Alabama law provides that promissory estoppel is unavailable to enforce promises that are set forth in such a contract.¹⁵ The facts of this case thus leave the Plaintiffs with no avenue to assert a viable promissory estoppel claim.

C. The Plaintiffs have failed to allege the elements of promissory estoppel.

Even if the Plaintiffs’ promissory estoppel claim were timely and not barred by the statute of frauds, it would still fail because the Plaintiffs have not alleged facts establishing the essential elements of promissory estoppel. Under Alabama law, there are four elements of promissory estoppel: (1) the defendant made a promise; (2) 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; and (4) injustice can be avoided only by enforcing the promise. *AAL USA, Inc. v. Black Hall Aerospace, Inc.*, No. 2:16-CV-02090-KOB,

¹⁵ PBCI did enter into a written, enforceable agreement to preserve the property for 20 years. *See* Stinson Decl., Ex. A. That agreement expired in 2000, the Plaintiffs do not allege its breach, and any such claim would be hopelessly time barred in any case. *See* SAC ¶¶ 62, 100. To the extent that the Plaintiffs ask this Court to equitably impose a perpetual preservation agreement on the Tribal Defendants, they effectively ask it to nullify the written agreement’s express term.

2018 WL 3368855, at *5 (N.D. Ala. July 10, 2018) (citing *Branch Banking*, 184 So. 3d at 347). The Plaintiffs have failed to allege that the Tribal Defendants made an enforceable promise, that those defendants should have reasonably expected forbearance based on that purported promise, or that the Plaintiffs detrimentally relied on that promise.

1. *The Plaintiffs have not alleged an enforceable promise.*

The Plaintiffs generally allege that PBCI “promised to preserve the Hickory Ground Site in perpetuity.” SAC ¶ 215. It is unclear from the allegations in the SAC, however, what “preserve” means and thus exactly what the Plaintiffs allege that PBCI promised to do. Because the alleged promise is not sufficiently clear or specific, it cannot be enforced by this Court. Moreover, the principal document that the Plaintiffs rely upon as evidence of an alleged promise also contains numerous statements contradicting those relied upon by Plaintiffs, revealing that PBCI, in fact, made no promise at all.

In order “for a promise to create an estoppel, the promise must be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms.” *Wyatt v. BellSouth, Inc.*, 176 F.R.D. 627, 631 (M.D. Ala. 1998). To allege that Poarch Band promised to preserve the property in perpetuity, without any development, destruction, or excavation, Plaintiffs cherry-pick a smattering of phrases from the aforementioned grant application letter that PBCI submitted to the Alabama Historical Society. *See* SAC ¶¶ 64, 67. Yet other parts of the same letter contemplate development of the property, archeological excavation, and plans to minimize destruction of unstudied archeological remains. *See generally* Doc. 190-1, Ex. A. Contemplation of development and archeological excavation and commitments to minimize damage to archeological resources are inconsistent with, and flatly contrary to, PBCI’s alleged promise to perpetually preserve property without any excavation, destruction, or

development. And a mere promise to “minimize destruction” is far too general and lacking in specifics to be enforced by a Court. *See, e.g., Aldridge*, 809 So. 2d at 794 (holding that a promissory estoppel claim failed because the alleged promise was “general” and not specific); *Bates v. Jim Walter Res., Inc.*, 418 So. 2d 903, 905 (Ala. 1982) (holding that a promissory estoppel claim fails where the alleged promise did not contain material terms); *Walk, Inc. v. Zimmer*, 2014 WL 2465311, at* 9 (N.D. Ala. May 30, 2014) (dismissing promissory estoppel claim that alleged promise in “non-specific terms”).

Not only is the alleged promise insufficiently specific, even a cursory review of the five-page letter leads one to the inescapable conclusion that PBCI made no promise at all to preserve the Wetumpka property in perpetuity, without development, excavation, or destruction, as the Plaintiffs allege. Indeed, the letter read as a whole, as it must be, makes clear that Poarch Band intended to develop the property in the future. Specifically, the letter indicates that:

[T]hrough proper archeological methods and techniques these below the surface features can reveal a tremendous amount of information about the Creek way of life in the late 1700’s and 1800’s. Upon gaining fee-simple title to the land as called for in this proposal plans will be developed to minimize continued destruction of the archeological resources. Prior to any development of the property, a scientifically sound archeological program will be conducted to mitigate or minimize effects upon the historic resources.

Doc. 190-1 at 4. Because the very document on which the Plaintiffs rely contemplated the eventual development and excavation of the property and did not unequivocally promise to preserve it in perpetuity, their promissory estoppel claim fails.

The Plaintiffs also rely, to a much lesser extent, on written congressional testimony submitted by PBCI’s Chairman in 1983, after PBCI acquired the property, regarding PBCI’s plans for certain unrelated trust funds. The SAC alleges that PBCI “‘propose[d] to use part of this money to make that site, not only available to all of our people, but to the general public as well.’” SAC ¶ 70. It also quotes a portion of the testimony wherein PBCI’s Chairman “‘proposes

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.* ¶ 72. This testimony is non-specific and unenforceable. The statements do not amount to an unequivocal commitment to maintain the property in perpetuity without development, destruction, or excavation. Rather, it amounts to a non-specific “proposal” to “preserve and present” the site to Indian and non-Indian people. This is not a statement that a court could possibly enforce and thus cannot be the basis for a promissory estoppel claim.¹⁶ Because the Plaintiffs have not alleged any judicially enforceable promises by PBCI, their promissory estoppel claim fails. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) (holding that at the motion to dismiss stage “when the exhibits contradict the general and conclusory allegations of the pleading, the exhibit govern”); *see e.g., Cantrell v. City Federal Sav. & Loan Ass’n*, 496 So. 2d 746, 751 (Ala. 1986) (holding that statements made were not a promise and without a promise upon which they could have relied, plaintiffs could not recover on a promissory estoppel theory).

2. *PBCI could not have reasonably foreseen that the Plaintiffs would rely on statements made in the grant application letter and congressional testimony.*

The promissory estoppel claim also fails because PBCI could not have reasonably foreseen that the Plaintiffs would rely upon the purported promises at issue. First, because PBCI made no promise to preserve the property in perpetuity and in fact represented in its grant application that it contemplated development in the future, it could not have reasonably foreseen that the Plaintiffs would misconstrue the letter and rely on their erroneous interpretation. Nor could PBCI have reasonably foreseen that the Plaintiffs would rely upon a vague proposal contained in congressional testimony about unrelated funding. Second, the fact that PBCI did not

¹⁶ The testimony also was given after PBCI acquired the property, meaning that the Plaintiffs could not possibly have relied upon it to forebear opposing that acquisition.

make the alleged representations to the Plaintiffs, but to the Alabama Historical Society and Congress, further undermines any claim that it should have anticipated the Plaintiffs' reliance. Third, the grant application letter describes an unrealized "plan" for PBCI and MCN to jointly own and manage the Wetumpka property, which obviously did not occur. *See* Doc. 190-1 at 5 ("Under this plan, the property will be jointly owned by both groups of Creeks. They will be equally responsible for the protection and care of the site."). PBCI could not reasonably be expected to foresee the Plaintiffs' reliance on statements extracted from a proposal that never came to fruition. In the absence of foreseeable reliance, the Plaintiffs cannot state a claim for promissory estoppel.

3. *The Plaintiffs have failed to allege facts establishing detrimental reliance.*

The Plaintiffs also have not alleged facts establishing the essential element of detrimental reliance, which is the "gravamen of the claim of promissory estoppel" *Wyatt v. BellSouth, Inc.*, 18 F. Supp. 2d 1324, 1326 (M.D. Ala. 1998); *see also Madison County*, 340 F. Supp. 3d at 1290-91. To establish detrimental reliance, a party must show that it was damaged as a result of its reliance on another; in other words, there must be a link between the reliance and the detriment. *Accord Bosarge Offshore, LLC v. Compass Bank*, 943 So. 2d 782, 787 (Ala. 2006) ("The notion that *detrimental* reliance is untethered to damage ... is completely unfounded.").

The Plaintiffs ground their promissory estoppel claim on their assertion that, based on an alleged promise from the Tribal Defendants, they refrained from objecting to: (1) PBCI's 1980 acquisition of the Wetumpka property in fee; (2) PBCI's 1984 federal recognition; and (3) the United States' decision to take the property into trust in 1985. *See* SAC ¶¶ 61, 73, 214-17. And they allege that they were harmed by subsequent excavation and construction activity on the property. But the Plaintiffs do not and cannot establish any causal connection between their

withholding of objections and their alleged harm. They thus necessarily fail to show detrimental reliance.

As to the first assertion, the Plaintiffs do not claim they had any legal or practical authority to prevent PBCI from acquiring the property in fee. They did not own the land when PBCI initially purchased it, nor did they provide any funding for its acquisition. Because they lacked any authority to prevent the purchase, the Plaintiffs cannot establish that their objection would have carried any weight. And even if they had somehow managed to prevent the Poarch Band from acquiring the property, their own evidence indicates that the result would have been imminent commercial development of the property in the 1980s—meaning that even a successful objection would not have prevented their asserted injury. *See* Doc. 190-1 at 5. The Plaintiffs therefore cannot establish that, by refraining from objecting to PBCI's fee acquisition of the subject property, they *detrimentally* relied on any representation by the Tribal Defendants.

The Plaintiffs' second and third assertions are equally unavailing. They cannot show that their objection would have prevented the Poarch Band's 1984 federal recognition or the United States' taking of the property into trust in 1985. And even if the Plaintiffs had successfully opposed either action, PBCI still would have held the land in fee with the right to excavate and develop the property as it saw fit after the expiration of the 20-year preservation covenant. Once again, there simply is no connection between the Plaintiffs' withholding of objections and the harm that they allege. Because the Plaintiffs cannot show detriment resulting from their alleged inaction in reliance on PBCI's putative promise, they cannot establish a viable promissory estoppel claim.

IV. The Plaintiffs' unjust enrichment claim should be dismissed.

Like their promissory estoppel claim, the Plaintiffs' unjust enrichment allegations fail to state a claim. The claim fails as a matter of law because: (1) the Plaintiffs have not adequately alleged necessary elements; (2) it is untimely; and (3) it is barred by the statute of frauds.

A. The elements and limitations of unjust enrichment.

“To prevail on a claim of unjust enrichment, the plaintiff must show that the defendant holds money which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.” *Scrushy v. Tucker*, 955 So. 2d 988, 1011 (Ala. 2006) (emphasis omitted) (quoting *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1122-23 (Ala. 2003)). Importantly, the plaintiff asserting unjust enrichment must show not only that the defendant has been unjustly enriched, but also that the alleged unjust enrichment came *at the plaintiff's expense*. See *United States ex rel. Mathews v. Decatur Hotels, L.L.C.*, 2008 WL 11375354, at **6-7 (N.D. Ala. Aug. 21, 2008) (analyzing *Scrushy*, *Dickinson*, and other Alabama case law); *see also Rutledge v. Aveda*, 2015 WL 2238786, at **13-14 (N.D. Ala. May 12, 2015) (dismissing a claim by a plaintiff who alleged that the defendant unjustly retained a benefit provided by third parties); *accord Tiller v. State Farm Mut. Auto. Ins. Co.*, 549 Fed. App'x 849, 856-57 (11th Cir. 2013) (applying Georgia law to hold that “a transfer of some benefit from plaintiff to defendant is an element of an unjust enrichment claim” and noting that its holding “conforms to the traditional notion of unjust enrichment”). Additionally, Alabama law imposes, at the outside most, a six-year limitations period on claims for unjust enrichment—a limitations period that the Plaintiffs have not met. See *Snider v. Morgan*, 113 So. 3d 643, 655 (Ala. 2012) (noting that Alabama courts have not determined whether the statute of limitations for unjust enrichment is two or six years). And like a claim for promissory estoppel, claims for

unjust enrichment are subject to the statute of frauds. *Branch Banking*, 184 So. 3d at 347 (holding the statute of frauds bars both promissory estoppel and unjust enrichment claims).

B. The Plaintiffs do not allege that the Tribal Defendants have retained a benefit that rightfully belongs to the Plaintiffs.

The Plaintiffs allege that the Tribal Defendants were unjustly enriched by: (1) acquiring the property at issue at no cost and without objection by the Plaintiffs; (2) allegedly “destroying a large part” of the Hickory Ground site to accommodate construction of a profitable hotel and gaming facility; and (3) continuing and expediting construction of that facility without adequately notifying or consulting with the Plaintiffs and over their objections. *See* SAC ¶¶ 202, 208-09, 211. Even if accepted as true, these allegations do not provide grounds for the Plaintiffs to state a viable unjust enrichment claim because the Plaintiffs have not identified any benefit retained by the Tribal Defendants that rightfully belongs to the Plaintiffs.

Judge Hopkins’ opinion in *Decatur Hotels* illustrates the problem with the Plaintiffs’ unjust enrichment theory. There, the plaintiff, a former employee of the defendant hotel company, filed False Claims Act and unjust enrichment claims alleging that the hotel company had submitted improper claims for reimbursement under a federal program intended to provide housing for individuals displaced by Hurricane Katrina. *See generally Decatur Hotels*, 2008 WL 11375354. In rejecting the unjust enrichment theory, the court emphasized that the plaintiff was “not seeking restitution from [defendant] for something which she claims it holds that rightfully belongs to her.” *Id.* at *6. Instead, the plaintiff argued that Alabama law allowed her to maintain an unjust enrichment claim merely based on the defendant’s alleged unjust receipt of a benefit from a third party. *Id.* at **6-7. The Court rejected the plaintiff’s argument, holding that an “unjust enrichment claim cannot proceed as a matter of law” when the defendant “does not have in its possession any money belonging to [the plaintiff].” *Id.* at *7 (internal quotation omitted)

(citing *Hancock-Hazlett Gen. Constr. Co., Inc. v. Trane Co.*, 499 So. 2d 1385, 1387 (Ala. 1986)); *see also Rutledge*, 2015 WL 2238786, at **13-14 (holding that a plaintiff failed to alleged the elements of unjust enrichment when she contended that it was unjust for the defendants to retain benefits provided by third parties).

The Plaintiffs' unjust enrichment claim suffers the same flaw as those at issue in *Decatur Hotels* and *Rutledge*. While the Plaintiffs contend that the Tribal Defendants were unjustly enriched by acquiring the subject property "at no cost," SAC ¶ 202, they do not contend that they bore the cost of the property or otherwise were deprived of a benefit by the Poarch Band. On the contrary, the SAC explicitly alleges that the Poarch Band acquired the property via a federal grant and a donation from the former landowner. *Id.* ¶ 61. To the extent that the Plaintiffs assert that they should be able to recover based on a benefit conferred on the Tribal Defendants by third parties, they fail not only to allege the necessary elements of unjust enrichment, but also the basic minimum requirements of Article III standing. *See Rutledge*, 2015 WL 2238786, at **13-14 (citing *U.S. ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 92 (D.D.C. 1998) (holding that where the alleged unjustly retained benefit was conferred by someone other than the plaintiff, the plaintiff lacks standing to sue for unjust enrichment), *rev'd on other grounds by* 173 F.3d 870 (D.C. Cir. 1999); *see also Bykov v. Radisson Hotels Int'l, Inc.*, 221 F. App'x 490, 491-92 (8th Cir. 2007) (affirming dismissal of unjust enrichment claim on standing grounds where plaintiff's employer, rather than plaintiff, paid allegedly overstated hotel bill). And while the Plaintiffs allege that the Tribal Defendants were unjustly enriched by constructing and operating a commercial development on the subject property many years after acquiring it, SAC ¶¶ 209-12, the Plaintiffs offer no explanation of how that allegedly unjust enrichment could be construed as a benefit that rightfully belongs to them. Simply put, the legal theory of unjust

enrichment does not match the injuries that the Plaintiffs allege. The unjust enrichment claim fails as a matter of law, and the Court should dismiss it.

C. The Plaintiffs’ unjust enrichment claim is untimely and barred by the statute of frauds.

As explained in *Snider*, while the statute of limitations for unjust enrichment in Alabama is unsettled, it certainly is no more than six years. *See Snider*, 113 So. 2d at 655. Accordingly, to the extent that the Plaintiffs’ claim of unjust enrichment is based on any of: (a) PBCI’s acquisition of the property “at no cost to Poarch” in 1980, SAC ¶ 202; (b) the United States’ formal acknowledgement of PBCI’s tribal status and acceptance of the property into trust without objection from the Plaintiffs in 1984, *id.* ¶¶ 205-08; or (c) PBCI’s allowing archaeologists to perform excavations on the property beginning in or before 2006 in violation of an alleged promise to preserve the property without excavation, *id.* ¶ 209, any such claim was time barred when the Plaintiffs filed their original complaint in December 2012.

Alabama law does appear to allow for a form of continuing unjust enrichment under limited circumstances, with the *Snider* court holding that an unjust enrichment claim might be viable where a defendant was obligated to undertake serial performances and had been unjustly enriched by failing to do so within the limitations period, *see Snider*, 113 So. 2d at 655-56, but no such serial performance obligation is present here. PBCI’s acquisition of the land in fee, its transfer of the land into trust, and its breach of an alleged obligation to perpetually preserve the property were all discrete events, each of which occurred outside of the limitations period. Any unjust enrichment claim based on those actions is therefore time barred and futile, providing a further reason for Court to deny the Plaintiffs’ request to add a claim of unjust enrichment.

The Plaintiffs’ unjust enrichment claim suffers also suffers from the same statute of frauds problem as their promissory estoppel claim. Alabama law does not allow the use of unjust

enrichment to enforce an agreement or promise that is void under the statute of frauds. *See Branch Banking*, 184 So. 3d at 347-48; *Davis v. Wells Fargo Home Mortg., Inc.*, 2016 WL 393850, at **4-5 (N.D. Ala. Feb. 2, 2016) (“Because Wells Fargo’s alleged oral promise to postpone foreclosure is barred by the Statute of Frauds, the Plaintiff’s unjust enrichment and fraud claims, which are based on that same oral promise, are likewise barred.”). The Plaintiffs’ unjust enrichment claim relies upon the same purported representations as their promissory estoppel claim, and it accordingly fails for reasons previously addressed. *See* SAC ¶¶ 202-03.

D. The Plaintiffs’ contention that they seek a constructive trust does not revive their unjust enrichment claim or take it outside the statute of frauds.

Just as they did for promissory estoppel, the Plaintiffs argued in support of their motion for leave to amend that their claim for unjust enrichment is subject to a ten year statute of limitations and falls outside the statute of frauds because it seeks constructive trust as a form of relief. That argument fails in the unjust enrichment context for all of the reasons that it fails in support of promissory estoppel. *See supra* Part III.

V. **The Plaintiffs have failed to state a claim on which any relief can be granted under NAGPRA and cannot obtain their requested relief in any event.**

Count VII of the SAC alleges that PBCI and the Federal Defendants have committed numerous violations of NAGPRA. Broadly speaking, these putative violations consist of: (1) alleged failures to appropriately consult with or obtain consent from the Plaintiffs prior to archaeological excavation or construction on the Wetumpka property; (2) not transferring custody of remains and artifacts to the Plaintiffs; and (3) alleged failures to comply with NAGPRA reporting and record-keeping requirements. *See generally* SAC ¶¶ 244-55. For reasons explained in detail below, none of the alleged conduct by the Tribal Defendants constitutes a violation of NAGPRA. Moreover, even if the Plaintiffs had successfully alleged NAGPRA violations, any such violations cannot justify the vast majority of the relief demanded in the

SAC. Accordingly, the Plaintiffs' NAGPRA claims should be dismissed in their entirety for failure to state a claim pursuant to Rule 12(b)(6). And to the extent that they seek relief that is unavailable as a matter of law, they are not redressable and should be dismissed for lack of standing under Rule 12(b)(1).

A. The Plaintiffs misconstrue key aspects of NAGPRA.

While the SAC purports to identify numerous violations of NAGPRA, it does not state any claims for which relief can be granted against the Tribal Defendants under that statute. To understand why, it is helpful to briefly review relevant provisions of NAGPRA and its implementing regulations.

First, NAGPRA applies only on federal and tribal lands, and it applies differently on each. The Wetumpka property is tribal land, which NAGPRA defines as including "all lands within the exterior boundaries of any Indian reservation." 25 U.S.C. § 3001(15)(A); *see* SAC ¶ 73 (citing Federal Register notices declaring the Wetumpka property part of PBCI's reservation).¹⁷

Second, NAGPRA imposes specific duties on "Federal agencies," which it defines as "any department, agency, or instrumentality of the United States" other than the Smithsonian, 25 U.S.C. § 3001(4), and on "museum[s]," which are defined, with certain exclusions not relevant here, as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." *Id.* § 3001(8). Neither the definition of "federal agency" nor the definition of "museum" includes Indian tribes or tribal enterprises; in fact, NAGPRA separately defines "Indian tribe" as "any tribe, band, nation ... which is recognized as eligible for the special

¹⁷ NAGPRA excludes tribal lands from its definition of "federal lands." *See* 25 U.S.C. § 3001(5).

programs and services provided by the United States to Indians because of their status as Indians.” *Id.* § 3001(7). PBCI is an Indian tribe; it is not a federal agency or a museum as those terms are defined for NAGPRA. *See, e.g., Hawk v. Danforth*, 2006 WL 6928114, at *1 (E.D. Wis. Aug. 17, 2006) (“NAGPRA applies mainly to federal agencies and museums, and the Tribe is neither.”)

Third, for purposes of determining ownership of human remains and objects, NAGPRA provides a ranked preference list topped by “lineal descendants,” followed by “the Indian tribe ... on whose tribal lands such objects or remains were discovered.” *Id.* § 3002. “Lineal descendant,” in turn, is defined as “an *individual* tracing his or her ancestry directly and without interruption ... 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) (emphases added); *see also id.* § 10.14(b) (repeating this definition). This definition excludes Plaintiffs MCN and Hickory Ground Tribal Town from qualifying as lineal descendants, as neither of those tribal governmental entities are individuals. Additionally, “[t]his standard requires that the earlier person be identified as an individual whose descendants can be traced.” *Id.* § 10.14(b). Accordingly, in the absence of an individually identified earlier person whose descendants can be traced, there necessarily cannot be “lineal descendants” as that term is used in NAGPRA. PBCI, as the Indian tribe on whose tribal lands all remains and artifacts at issue in this case were discovered, is the rightful owner of such remains and artifacts under NAGPRA’s preference list in the absence of any lineal descendants.

B. The Plaintiffs allege no viable NAGPRA claims against the Tribal Defendants.

The aspects of NAGPRA discussed above provide critical context for the assessment and rejection of the Plaintiffs’ NAGPRA claims against the Tribal Defendants. For example, many of the alleged violations rest, in whole or in part, on the erroneous premise that the Plaintiffs are or

represent the “lineal descendants” of persons whose remains were excavated at Hickory Ground. *See, e.g.*, SAC ¶¶ 118, 250-52, 256-59. It is clear that the Plaintiffs are not lineal descendants for NAGPRA purposes, however, because they cannot (and do not even attempt to) identify any known, historical Native American individual whose remains or funerary objects are at issue, and thus do not satisfy the definition of lineal descendants set forth in 43 C.F.R. §§ 10.2(b)(1), 10.14(b). The SAC’s repeated statements that Plaintiffs are or represent the lineal descendants of individuals whose remains were excavated from the Wetumpka property constitute, in the context of NAGPRA, legal conclusions that are not entitled to any presumption of validity. Moreover, in the absence of any attempt to identify the alleged historic individuals whose remains or belongings they claim are at issue, the Plaintiffs’ bald assertions that they qualify as lineal descendants for NAGPRA purposes are perfect examples of the sort of “labels and conclusions” and “naked assertion[s] devoid of further factual enhancement” that “will not do” to sustain a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted) (citing *Twombly*, 550 U.S. at 555, 557).

Because the Plaintiffs have not adequately alleged that they are the lineal descendants of identified individuals whose remains have been recovered from the Wetumpka site, they have no ownership interest in such remains under NAGPRA. The act specifically provides that where lineal descendants, as defined in the act’s regulations, cannot be ascertained, remains and associated funerary objects unearthed on Indian lands belong to “the Indian tribe ... on whose tribal land such objects or remains were discovered.” 25 U.S.C. § 3002(a)(2)(A). Here, that is PBCI. Therefore, absent adequate allegations of lineal descent from an identified individual—allegations that the SAC makes no pretense of making—any human remains or associated funerary objects discovered on the Wetumpka property belong to PBCI. Any allegations or

claims for relief against the Tribal Defendants that hinge upon the Plaintiffs’ alleged ownership or entitlement to custody of such objects (or PBCI’s lack thereof) should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as should any allegation that PBCI failed to comply with requirements to consult with or obtain the consent of lineal descendants. *See, e.g.*, SAC ¶¶ 244, 248, 250-52.

The Plaintiffs’ claims based on alleged violations of putative requirements for the Tribal Defendants to consult with or obtain the consent of MCN or obtain certain permits prior to the intentional excavation or removal of remains or artifacts from Wetumpka property also fail to state a valid claim. *See, e.g.*, SAC ¶¶ 244-45, 248-50, 257-58. For example, the Plaintiffs allege that the Tribal Defendants violated NAGPRA by failing to comply with the requirements for obtaining an ARPA permit (which they contend required their consultation and consent as lineal descendants, *inter alia*) prior to engaging in intentional archaeological excavations at the Wetumpka property. *Id.* ¶ 244, 248, 250, 256-58. This argument initially fails because the Plaintiffs are not lineal descendants, and their consultation and consent thus are not required under the relevant ARPA regulations. *See* 25 C.F.R. § 262.5(d) (requiring consent of “the appropriate Indian tribe” as determined under § 262.8(a)); § 262.8(a) (incorporating NAGPRA’s ranked preference list, where the tribe on whose Indian lands an excavation occurs is second only to lineal descendants). Putting that aside, the Plaintiffs’ argument still would fail because even assuming, *arguendo*, that a violation of ARPA constitutes a violation of NAGPRA, ARPA explicitly provides that “[n]o permit shall be required ... for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe” 16 U.S.C. § 470cc(g)(1). Because the Wetumpka property is PBCI’s “Indian land,” ARPA explicitly exempts the Tribal Defendants from its permitting requirements with

respect to intentional excavations at the Wetumpka property. The Tribal Defendants’ alleged non-compliance with those permitting requirements thus does not violate ARPA and cannot possibly constitute a NAGPRA violation by extension.¹⁸ The Plaintiffs’ attempt to conjure a NAGPRA violation from an alleged failure to comply with inapplicable provisions of ARPA fails as a matter of law, and should be dismissed pursuant to Rule 12(b)(6).

The Plaintiffs’ allegations that the Tribal Defendants violated NAGPRA’s inadvertent discovery provisions also fail to state a claim, albeit for slightly different reasons. Preliminarily, the Plaintiffs have failed to adequately allege that inadvertent discoveries occurred. After making no allegation of inadvertent discoveries in their original or First Amended Complaint, *see generally* Docs. 1, 57, they now offer wholly conclusory and unsupported allegations “on information and belief” that such discoveries took place. *See* SAC ¶¶ 134-35, 255. While courts sometimes construe allegations made on information and belief as satisfying the *Iqbal* pleading standard in appropriate circumstances, those courts still require plaintiffs to provide a “factual basis other than ... speculation” supporting such allegations. *Daisy, Inc. v. Pollo Operations, Inc.*, 2015 WL 1418607, at *6 (M.D. Fla. Mar. 27, 2015) (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009)); *see also, e.g., Sream, Inc. v. Hookah Me Up, Inc.*, 2019 WL 2269740, at *2 (S.D. Fla. Feb. 5, 2019) (“Factually unsupported allegations based ‘on information and belief’ are not entitled to assumption of truth.”); *Philistin v. Ocwen Loan Servicing, LLC*, 2019 WL 1474329, at **2-3 (S.D. Fla. Mar. 18, 2019). The Plaintiffs offer no factual basis for their newfound “belief” that the Tribal Defendants made and ignored

¹⁸ The Plaintiffs’ failure to state a claim against the Tribal Defendants under ARPA is discussed in more detail below.

inadvertent discoveries of “cultural items” as that term is defined in NAGPRA.¹⁹ *See* 25 U.S.C § 3001(3). Indeed, any such belief is strongly undermined by the fact that trained archaeologists from Auburn University conducted a Phase III archaeological excavation of the site before the Tribal Defendants started construction of the facility expansion during which the inadvertent discoveries supposedly occurred. *See* SAC ¶¶ 100-104, 108, 230-32, 255. There is no reason to infer that trained archaeologists conducting an excavation “designed to record the data a site contains before the project proceeds to construction and the site is lost,” SAC ¶ 103, would fail to identify or record NAGPRA qualified cultural items, instead leaving them to be lost during subsequent construction. Because the Plaintiffs have failed to adequately allege that inadvertent discoveries occurred at all, they fail to state a claim based on violations of duties triggered by such discoveries, and all such claims should be dismissed under Rule 12(b)(6).

Even if the SAC adequately alleged that cultural items were inadvertently discovered during the construction activity that occurred between 2012 and 2014, it still would fail to state a viable inadvertent discovery NAGPRA claim against the Tribal Defendants for several reasons. The provision of NAGPRA and the accompanying regulation pertaining to inadvertent discoveries on tribal lands direct the discovering party to (1) notify appropriate tribal officials, (2) cease ongoing construction or related activity in the area for thirty days after such notice is certified received, (3) take reasonable efforts to protect inadvertently discovered cultural items.

¹⁹ To be clear, NAGPRA does not apply to all discoveries of any Native American archaeological deposits or artifacts, even on federal and tribal lands. Its inadvertent discovery provision, 25 U.S.C. § 3002(d), is only applicable to and triggered by the discovery of “cultural items” as defined in the act. It certainly does not apply to soil, to the extent that the Plaintiffs’ allegations are based on the moving of soil that once was located in the vicinity human remains. *See* SAC ¶ 231 (alleging that moving soil was an outrageous desecration of human remains); 43 C.F.R. § 10.2(d)(1) (defining “human remains” as “the physical remains of the body of a person of Native American ancestry”).

See 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4.²⁰ Importantly, because any alleged inadvertent discoveries in this case took place on PBCI's tribal lands, PBCI was the only entity entitled to receive notice under these provisions and, to the extent that tribal consent or authorization was required to resume activities, PBCI was the tribe to provide it. *See* 25 U.S.C. § 3002(d)(1); 43 C.F.R. § 10.4(b), (e); *see also Rosales v. United States*, 2007 WL 4233060, at *8 (S.D. Cal. Nov. 28, 2007) (explaining that federal officials must be notified when discovery occurs on *federal* lands, and tribal officials must be notified when discoveries occur on *tribal* lands). Because the Plaintiffs were not entitled to notification, the Tribal Defendants did not violate NAGPRA by not providing it and the Plaintiffs were not injured by not receiving it. Any claims based on alleged inadvertent discoveries therefore must be dismissed with prejudice pursuant to Rule 12(b)(6) and under Rule 12(b)(1) on the grounds that the Plaintiffs' lack of any injury, much less one fairly traceable to a violation by the Tribal Defendants, deprives them of standing to assert this claim.

The Plaintiffs also erroneously allege a NAGPRA violation arising out of the Tribal Defendants' putative violation of an NPS agreement pursuant to which PBCI assumed certain historic preservation responsibilities. SAC ¶¶ 245, 249. The NPS agreement, however, was entered into between PBCI and NPS pursuant to the NHPA, and the provisions that the Plaintiffs accuse PBCI of violating reference only certain obligations under the NHPA. *See id.*; Doc. 190-1 at 115, 117. While the Tribal Defendants address the Plaintiffs' failure to state a claim under the NHPA below, even if PBCI had violated its agreement with NPS, there is no indication that the Plaintiffs have any right to enforce that agreement at all, much less to assert a NAGPRA claim based on any such breach. The NPS agreement also appears to be the basis for the Plaintiffs' assertion that the Tribal Defendants are delegees of federal functions and thus constitute federal

²⁰ Paragraph 255 of the SAC cites different subsections of § 3002, but from context it is clear that the Plaintiffs intended to refer to 25 U.S.C. § 3002(d).

actors, liable as federal officials. *See* SAC ¶ 246. Whatever the merits—or lack thereof—of this argument as to the federal functions identified in the NPS agreement, it has no relevance to the Plaintiffs’ NAGPRA claim. As noted above, PBCI is not a federal agency as that term is defined in NAGPRA, and the NPS agreement does not delegate to PBCI responsibility for any federal obligations imposed by NAGPRA. To the extent that the attempt to base any NAGPRA claim on the NPS agreement, their claim should be dismissed pursuant to Rule 12(b)(6).

Finally, the SAC alleges that the Tribal Defendants have violated NAGPRA by not providing a final inventory or report regarding cultural items recovered from the Wetumpka property. *See* SAC ¶ 254. This is incorrect. The final inventory/report obligation is found in 25 U.S.C. § 3003 and expanded upon in 43 C.F.R. § 10.9, both of which explicitly apply only to museums and federal agencies. *See id.*; *Hawk*, 2006 WL 6928114, at *1. PBCI, as explained above, is neither a federal agency nor a museum. The final inventory requirement is this inapplicable on its face to the Tribal Defendants, and the Plaintiffs’ claim based on alleged noncompliance with that requirement must be dismissed under Rule 12(b)(6).

In sum, none of the ostensible violations of NAGPRA alleged in the SAC give rise to a viable claim against the Tribal Defendants. The Court accordingly should dismiss Count VII in its entirety for failure to state a claim and, to the extent that it fails to allege injuries that are fairly traceable to any conduct by the Tribal Defendants, for lack of subject matter jurisdiction due to the Plaintiffs’ lack of standing.

C. NAGPRA does not require that burial sites be maintained in a pristine, undisturbed condition and cannot justify the relief sought in the SAC.

The Plaintiffs appear to assume, incorrectly, that NAGPRA empowers them to demand that the Wetumpka property remain entirely undisturbed and that any remains found there be left in place or, if already removed, returned to their initial resting place, with no further activity

occurring on the site. *See, e.g.*, SAC ¶¶ 256-61. NAGPRA does not contemplate or confer any such right on the Plaintiffs or anyone else.²¹ Rather, it explicitly contemplates the removal of human remains and associated objects and provides steps to be taken for the preservation and transfer or repatriation of such remains to their rightful Indian owners. *See, e.g.*, 25 U.S.C. § 3002(c) (providing for the “intentional removal ... or excavation” of protected Indian cultural items, which is defined to include human remains); 43 C.F.R. § 10.3 (permitting the excavation and removal of human remains and protect objects and providing appropriate procedures to follow). The only provision of NAGPRA that provides for a cessation of construction or other activity on property containing protected resources is § 3002(d), which provides, in the event of an inadvertent discovery of cultural items on tribal lands, that construction or other activity shall be suspended for thirty days to allow the tribe on whose lands the discovery occurred to take steps to protect and preserve such objects pending their repatriation.

There is nothing whatsoever in NAGPRA that grants the Plaintiffs the power to insist that the PBCI forever cease construction or any other activities on its own lands or preserve those lands in any particular condition. Accordingly, to the extent that the Plaintiffs’ request for a permanent injunction on construction or other activity at the Wetumpka site or their demand that the site be restored to some pre-existing condition with remains replaced in their original locations are based on NAGPRA, they far exceed the scope of relief available under that act (or any other law). The Court should dismiss the Plaintiffs’ NAGPRA claims against the Tribal Defendants in their entirety for all of the reasons stated above, but even if it does not, it should dismiss them to the extent that they seek relief beyond what is available under the act.

²¹ As explained above, the Plaintiffs are not “lineal descendants” for NAGPRA purposes, but even lineal descendants would not be entitled to the relief that the Plaintiffs seek.

VI. The Plaintiffs have failed to state a claim upon which relief can be granted against the Tribal Defendants under ARPA.

The Plaintiffs have failed to state a claim on which relief can be granted against any of the Tribal Defendants under ARPA. As an initial matter, ARPA does not provide for a private right of action. *See Cohen’s Handbook of Federal Indian Law* (2005 ed.), § 20.02(2)(d) (*Cohen*) (“ARPA does not authorize private actions in federal court.”); *Chevins v. Pub. Serv. Corp. of Colo.*, 176 F. Supp. 3d 1088, 1094 (D. Colo. 2016). The act is generally directed to federal officials, and while it certainly proscribes certain activities by non-federal entities and individuals, the enforcement mechanisms for these prohibitions consist of statutorily defined civil and criminal penalties. *See* 16 U.S.C. §§ 470ee, 470ff; 43 C.F.R. §§ 7.15-7.17. Importantly, enforcement of ARPA’s civil penalties is left to the relevant federal land manager, and there is a specific provision providing that private parties who provide information that results in assessment of civil penalties against a violator are entitled to share in the proceeds of the penalty. *See id.*; *Cohen*, § 20.02[d]. Such an enforcement regime clearly does not contemplate—indeed it leaves no room for—private civil actions seeking to enforce ARPA, particularly against nonfederal actors. *See, e.g., Lopez v. Jet Blue Airways*, 662 F.3d 593, 596-97 (2d Cir. 2011) (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)) (explaining that federal statutes only give rise to a private right of action where the “text and structure of a statute yield a clear manifestation of congressional intent to create” one); *Love v. Delta Air Lines*, 310 F.3d 1347, 1351-54 (11th Cir. 2002) (discussing and applying *Sandoval*). Accordingly, the Plaintiffs’ ARPA-based claims against the Tribal Defendants should be dismissed for failure to state a claim upon which relief can be granted.

Even if ARPA did authorize private civil enforcement actions, the SAC would not state any valid ARPA claims against the Tribal Defendants for several reasons. First, many of the

Plaintiffs' ARPA allegations pertain to ostensible non-compliance with ARPA permitting requirements or ARPA permits. *See, e.g.*, SAC ¶¶ 275, 277-80. These allegations necessarily fail to state a claim because ARPA expressly exempts the Tribal Defendants from its permitting requirements for excavations on PBCI tribal lands. *See* 16 U.S.C. § 470cc(g)(1) ("No permit shall be required ... for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe"); *see also Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990). *Attakai* is directly on point, as it involved the dismissal of ARPA claims for failure to state a claim when the alleged ARPA violations arose out of the Hopi Tribe's activities on Hopi lands. 746 F. Supp. at 1411. As the court explicitly recognized, "no permit is required, even for excavations of qualifying archaeological resources, by an Indian Tribe on its land." *Id.* To the extent that the SAC's ARPA claims against the Tribal Defendants hinge on alleged non-compliance with ARPA permitting requirements or failure to adhere to the terms of such permits,²² they fail as a matter of law and should be dismissed with prejudice.

The SAC also fails to state any ARPA claim against the Tribal Defendants to the extent that it alleges violations by federal defendants or violations of any duties, such as those set forth in 43 C.F.R. Part 7 and 26 C.F.R. Part 79, that apply only to federal actors. *See, e.g.*, SAC ¶¶ 277-78. By its express terms, 43 C.F.R. Part 7 applies only to "Federal land managers," which "[i]n the case of Indian lands ... means the Secretary of the Interior. 43 C.F.R. §§ 7.1(a), 7.3(c)(2). The Tribal Defendants do not control and are not responsible for the alleged actions of the Secretary of the Interior or any other federal officials, and to the extent that putative claims

²² To the extent that the Tribal Defendants allegedly failed to comply with permits that they did obtain, any such alleged violations would still constitute lawful exercise of PBCI's statutory authority to excavate its own lands without an ARPA permit.

against the Tribal Defendants are based on the alleged action or inaction of such officials, they should be dismissed for failure to state a claim. Similarly, 36 C.F.R. Part 79 prescribes “standards, procedures, and guidelines to be followed by Federal agencies” to preserve federally owned and administered archaeological collections. 36 C.F.R. § 79.1(a). It has no applicability to the Tribal Defendants, and any claim against those defendants based on those regulations should be dismissed with prejudice.

Additionally, while it appears the Plaintiffs now have abandoned any attempt to ground ARPA claims on construction or related activities on the Wetumpka property, it is important to note that ARPA does not apply to such activities. On the contrary, ARPA applies only to “purposeful excavation and removal of archaeological resources,” not “construction activities [or] ... excavations which may, or in fact inadvertently do, uncover such resources.” *Attakai*, 746 F. Supp. at 1410; *see also San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 888 (D. Ariz. 2003) (“No ARPA permit is required to conduct activities ... entirely for purposes other than the excavation or removal of archaeological resources.”), *aff’d*, 417 F.3d 1091 (9th Cir. 2005). This is particularly significant given that most or all ARPA permitting activities and excavation of human remains from the Wetumpka property were completed prior to December 2006—more than six years before the Plaintiffs filed their initial complaint. *See* SAC ¶¶ 117, 137, 139; Doc. 190-1 at 128 (indicating that re-interment discussions began in May of 2006); Doc. 95-11; Doc. 95-9 (ARPA permit issued to Defendant Auburn University on April 15, 2003). Thus, to the extent that the Plaintiffs seek to base ARPA claims on such activity (particularly to the extent that those claims rely on the APA—*see* SAC ¶ 274), it appears that their claims are time barred.

The remaining allegations supposedly supporting the Plaintiffs' ARPA claims can be summarily addressed. *See* SAC ¶¶ 275-76, 278, 281. The Plaintiffs' attempt to state ARPA claims based on alleged violations of the NPS agreement, *see id.* ¶¶ 275, 278(d), fails for reasons discussed *supra*—because the NPS agreement incorporates only the NHPA, not other federal statutes. Alleged ARPA violations contingent on the Plaintiffs status as lineal descendants of those whose remains were recovered from the Wetumpka property, *see id.* ¶ 276, fail because the Plaintiffs do not satisfy the statutory definition of lineal descendants. *See supra* Part V; 25 C.F.R. § 262.8(a) (incorporating NAGPRA's ranked preference list for ownership of cultural items and providing that all other items excavated from Indian lands remain the property of the Indian tribal landowner). Assertions that the Tribal Defendants violated ARPA by failing to keep a non-existent agreement to perpetually preserve Hickory Ground, *see* SAC ¶¶ 275, 278(d), fail because ARPA imposes no such requirement and because, as discussed *supra*, the Tribal Defendants made no such agreement.

For all of the foregoing reasons, the Plaintiffs have failed to state any valid ARPA claim against the Tribal Defendants, and Count IX of the SAC should be dismissed with prejudice as to those defendants. But even if that were not the case, the Plaintiffs would not be entitled to the relief that they seek for alleged violations of ARPA. The act includes statutorily defined civil and criminal penalties, neither of which approach the relief prayed for in the SAC. *See* 16 U.S.C. §§ 470ee – 470ff. The SAC's attempt to incorporate NAGPRA's remedy provision into ARPA by reference is without support in either statute, and would not avail them in any case given that NAGPRA likewise does not contemplate the type of relief requested here. *See supra* Part V.C. The unavailability of the requested relief provides a separate and independent basis for the dismissal of the Plaintiffs' ARPA claims against the Tribal Defendants.

VII. The Plaintiffs have failed to state a claim on which relief can be granted under the NHPA.

The Plaintiffs cannot state a claim against the Tribal Defendants under the NHPA because that act does not create a private right of action generally and, in particular, does not give rise to a private right of action against nonfederal defendants. It is well settled that the NHPA does not give rise to any private right of action and can be enforced only against federal officials, if at all, through an action brought under the APA. *See, e.g., Karst*, 475 F.3d at 1295 (“NHPA, like NEPA, contains no private right of action”); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir. 2005) (affirming dismissal of NHPA claim on the grounds that the act creates no private right of action); *Sisseton-Wahpeton Oyate v. United States Dep’t of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009) (holding that “no private right of action was created by the NHPA”); *Martin v. Wilcox Cnty., Ala.*, 2014 WL 1202943, at *1 (S.D. Ala. Mar. 21, 2014) (“[T]he NHPA creates no private right of action in favor of the plaintiff against either the federal government or others.”); *Martin v. Ala. Historical Comm’n*, 2014 WL 28850, at *3 (M.D. Ala. Jan. 2, 2014) (dismissing NHPA claims on the grounds that the act does not create a private right of action). Because the NHPA creates no private right of action and an APA claim cannot be brought against nonfederal parties, the Plaintiffs necessarily fail to state a claim against the Tribal Defendants under the act. *See, e.g., Friends of Lydia Ann*, 701 F. App’x at 358; *Karst*, 475 F.3d at 1298; *Martin*, 2014 WL 28850, at *3.

The Plaintiffs try to avoid this fatal flaw in their NHPA claim by alleging that the Tribal Defendants are a *de facto* federal agency to the extent that NPS has contractually delegated duties to PBCI under the NHPA and thus are subject to suit through the APA. *See* SAC ¶¶ 288-90. This is incorrect. The APA applies to federal agencies, which it defines as “each authority of the Government of the United States” 5 U.S.C. § 551. The Tribal Defendants are not an

“authority of the Government of the United States.” And the mere existence of a contractual relationship or funding agreement between PBCI and a federal agency such as NPS does not change that fact. *See, e.g., Ritter v. Cecil Cty. Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 327 (4th Cir. 1994) (holding the APA inapplicable to a claim against a state agency that administered a federally funded housing program); *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994) (holding that a state agency, even if completely funded by and subject to a contractual relationship with a federal agency, was not subject to suit under the APA); *Robbins v. N.Y. Corn & Soybean Growers Ass’n, Inc.*, 244 F. Supp. 3d 300, 304-05 (N.D.N.Y. 2017) (holding that a state entity that collected assessments for a federal agency and was subject to federal audits but had no federal employees was not subject to suit under the APA); *Chevins*, 176 F. Supp. 3d at 1094-95 (holding that a plaintiff could not state a claim against a state agency for direct violation of the NHPA or violation of the terms of a National Forest Service permit).

Even if it were possible for a nonfederal actor to be subject to suit under the APA when performing delegated federal functions, there is no evidence that the Tribal Defendants took on such a role in this case. On the contrary, the NPS agreement that the Plaintiffs cite throughout the SAC provides for PBCI’s assumption of roles normally performed by a state agency under the NHPA. *See, e.g.,* Doc. 190-2 at 188, ¶ 12 (stating that the NPS will provide notice to relevant state and federal agencies that PBCI “has assumed the role of the State Historic Preservation Officer on tribal lands for the purposes of consultation on Federal undertakings pursuant to section 106” of the NHPA); *id.* at 116 (describing the duties assumed by PBCI under the agreement). The Tribal Defendants are unaware of any authority indicating that such an assumption of state agency duties opens the door for the Plaintiffs to bring suit against the Tribal Defendants under the APA. *Accord, e.g., Sw. Williamson*, 173 F.3d at 1035 (“By its own terms,

the APA does not apply to state agencies.”); *Day*, 23 F.3d at 1064; *Chevins*, 176 F. Supp. 3d at 1094-95.

In light of the foregoing, the specific instances of the Tribal Defendants’ ostensible non-compliance with the NHPA alleged in the SAC are immaterial. Nevertheless, the Tribal Defendants will briefly address some of the many flaws in the Plaintiffs’ assertions.

Part A of Count X claims that the Federal and Tribal Defendants failed to consult or to meaningfully consult with the Plaintiffs prior to PBCI undertaking excavation and construction activities on the Wetumpka property. *See* SAC ¶¶ 291-96. These allegations rely on a duty supposedly established by 54 U.S.C. § 302706. SAC ¶ 291. That provision provides that “a Federal agency” shall consult with certain tribes when “carrying out its responsibilities under section 306108 of this title.” § 302706(b). Section 306108, in turn, directs “[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking” or the authority to license such an undertaking to “take into account the effect of the undertaking on any historic property.” *Id.* These provisions are inapplicable here because (1) the Tribal Defendants are not a federal agency, (2) they certainly are not the head of a federal agency, and (3) their excavation of and construction on their own tribal lands was not a federal undertaking. Additionally, the record shows that the excavation in question took place more than six years prior to the filing of the initial complaint, meaning that any APA claim based on an alleged failure to consult with the Plaintiffs prior to that activity is time barred. *See* SAC ¶¶ 137, 139 (noting that PBCI notified Plaintiffs of a Phase III archaeological excavation in 2006); Doc. 190-1 at 128 (indicating that re-interment discussions began in May of 2006); Doc. 95-9 at 2 (ARPA permit for Auburn University to conduct Phase III archaeological excavation at Wetumpka property issued on April 15, 2003). Finally, the record reflects that the Tribal

Defendants, while under no legal obligation to do so, did in fact engage in years of discussions with the Plaintiffs regarding the reinternment of human remains and funerary objects excavated from the Wetumpka property. *See, e.g.*, SAC ¶ 159 (indicating that PBCI proceeding with reinternment of excavated human remains “after six years of negotiations”); Doc. 95-1 at 3 (2008 letter from Mekko Thompson indicating that he traveled to Wetumpka on May 9, 2006, at PBCI’s invitation “to discuss reinternment of 57 or more sets of human remains”). The Plaintiffs’ dissatisfaction with the result of that consultation does not give rise to a valid claim under the NHPA, or any other law. *See, e.g., Neighborhood Ass’n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 60 (1st Cir. 2006) (recognizing that the NHPA “is a procedural statute that requires agency decisionmakers to stop, look, and listen, but not to reach particular outcomes” (citation omitted)); *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005) (noting that the NHPA is a procedural statute that “does not itself require a particular outcome”). Part A of Count X does not come close to stating a viable claim against the Tribal Defendants.

Part B of Count X alleges that 54 U.S.C. § 306108 requires Interior to “take into account” the effect of any federal undertaking on a National Register-listed historical site in consultation with relevant tribes, that the NPS agreement imposes this same obligation on PBCI, and that PBCI failed to comply with this requirement in connection with its excavation of the Wetumpka property or construction of its gaming facility.²³ SAC ¶¶ 297-98, 300. These allegations fail to state a claim against the Tribal Defendants for many of the same reasons as those in Part A of Count X, and the Tribal Defendants will not repeat them here. Additionally, the allegation that

²³ Part B of Count X, and many other portions of the SAC, includes separate allegations against the Federal Defendants that, while wholly without merit, are beyond the scope of the Tribal Defendants’ motion.

the NPS agreement transfers federal agency obligations under § 306108 to PBCI is flatly contradicted by the agreement, which directs PBCI not to consult with third parties, but to “[c]onsult *with the appropriate Federal agencies* in accordance with Section 106 of the Act.”²⁴ Doc. 190-1 at 116 (emphasis added); *id.* at 118 (stating that PBCI has assumed the role of the State Historic Preservation Officer, as opposed to that of the head of a federal agency, for purposes of § 106 consultations). That the NPS agreement did not transfer to the Tribal Defendants the duties that Part B of Count X claims were violated provides yet another ground for finding that Part B fails to state a claim against the Tribal Defendants.

Part C of Count X alleges that 36 C.F.R. § 800.6 imposes on PBCI, via the NPS agreement, the obligation to consult with MCN regarding how to avoid, minimize, or mitigate adverse effects of its construction project on the Wetumpka property. SAC ¶ 304. In addition to failing for reasons already discussed, Part C rests on a flawed premise. As previously explained, under the NPS Agreement, PBCI assumed the role of the State Historic Preservation Officer (SHPO), not the role of a federal agency. *See* Doc. 159-3 at 116, 118. 36 C.F.R. § 800.6 does not require SHPOs to consult with tribes or third parties. Instead, it provides that an “agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes” *Id.* To the extent that it applied to excavation and construction at the Wetumpka property at all, § 800.6 may have required a relevant federal official to consult with PBCI and even MCN. But it plainly imposes no requirement for SHPO/THPOs to consult with third parties.

Part D of Count X repeats the error of Part C by incorrectly assuming that the NPS agreement imposed federal agency consultation requirements on PBCI. In fact, Part D expressly asserts that PBCI’s alleged failure to notify and consult with the Plaintiffs violated, *inter alia*,

²⁴ Section 106 of the NHPA is the provision codified, as amended, at 54 U.S.C § 306108.

Paragraph 1.G of the NPS agreement, the provision directing PBCI to “[c]onsult *with the appropriate federal agencies* in accordance with Section 106 of the Act” on particular matters. Doc. 190-1 at 116 (emphasis added). As the Plaintiffs are not federal agencies, PBCI’s alleged failure to consult with them necessarily did not violated its obligations under Paragraph 1.G or any other provision of the NPS agreement.

Part E of Count X focuses on allegations that the injuries asserted in the SAC could have been mitigated if the Federal and Tribal Defendants had complied with their ostensible obligations under the NHPA. *See* SAC ¶¶ 312-13. Because there is no viable NHPA-based claim against the Tribal Defendants for reasons already identified, this argument is irrelevant as to those defendants. Moreover, because the NHPA does not give the Plaintiffs the right to insist on any course of action, any claim that the consultation they claim to have been entitled to would have produced a different outcome is entirely speculative.²⁵

For all of the foregoing reasons, the Plaintiffs have failed to state a claim upon which relief can be granted against the Tribal Defendants under the NHPA. All such claims should be dismissed with prejudice under Rule 12(b)(6).

VIII. The Plaintiffs have failed to state a claim against the Tribal Defendants under the Religious Freedom Restoration Act.

Count XI of the SAC alleges that the Tribal Defendants have violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*, by: (1) allowing unauthorized persons to access the Plaintiffs’ ceremonial grounds; (2) altering or disturbing those grounds via excavation and construction; (3) serving or allowing the presence of alcohol near those grounds; (4) preventing the Plaintiffs from ensuring that the remains of their ancestors are restored to their original resting places; and (5) reintering excavated remains without required protocol. SAC ¶¶

²⁵ The allegations in Part F of Count X apply exclusively to NPS funding decisions and are beyond the scope of the Tribal Defendants’ motion. *See* SAC ¶¶ 316-19.

327-29. The Plaintiffs further allege that these activities require them to choose between committing acts of civil or criminal disobedience and following their religious beliefs that require appropriate reinternment of remains excavated from the Wetumpka property, and that this results in the Federal and Tribal Defendants placing a substantial burden on the Plaintiffs' exercise of their religion in violation of RFRA. *Id.* ¶¶ 330, 333. These allegations fail to state a RFRA claim against the Tribal Defendants for several reasons.

A. RFRA is inapplicable to the Tribal Defendants.

Like many of the statutes on which the Plaintiffs attempt to rely, RFRA does not apply to the Tribal Defendants. RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion” 42 U.S.C. § 2000bb-1(a). It goes on to define “government” as “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.” § 2000bb-2(1). The term “covered entity” is then defined as “the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.” § 2000bb-2(2). Because RFRA applies only to certain “government[s]” and does not include Indian tribes or tribal governments within its definition of that term, the statute by its terms is inapplicable to the Tribal Defendants.²⁶ The Plaintiffs’ RFRA claims against those defendants thus fail as a matter of law.

Should the Plaintiffs attempt to evade RFRA’s inapplicability by arguing that the Tribal Defendants have acted under color of federal law, presumably citing the NPS agreement, any such argument is invalid. As an initial matter, private actors such as PBCI and the THPO presumptively do not act under color of law. *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992) (“Only in rare circumstances can a private party be viewed as a ‘state actor’”). To establish

²⁶ Even the SAC acknowledges that RFRA applies to “federal governmental action.” SAC ¶ 322.

that a defendant acts under color of law, a plaintiff must show that the defendant “‘exercised power by virtue of [federal] law and made possible only because the wrongdoer is clothed with the authority of [federal] law.’” *Florer*, 639 F.3d at 922 (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).²⁷ In order to meet this burden, a plaintiff must show that (1) the alleged deprivation in question was caused by a right or privilege created by the government or a rule imposed by the government and (2) the person(s) charged with the alleged deprivation may fairly be characterized as a governmental actor. *Id.* at 922 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *Harvey*, 949 F.2d at 1130. The Plaintiffs cannot carry their burden of establishing that the Tribal Defendants acted under color of federal law when engaging in the activities that allegedly constitute RFRA violations.

The Plaintiffs fail the first step of the color of law analysis because they cannot identify any federally established privilege or rule that compelled the Tribal Defendants’ to engage in the activities that allegedly burden their religious exercise. The only allegations in the SAC pertaining to the Tribal Defendants’ exercise of federal authority or responsibility relate to the NPS agreement. And as discussed *supra*, the only federal duties delegated under that agreement are limited functions under the NHPA. None of those functions required excavation or construction on the Wetumpka property or the presence of people or alcohol in its vicinity. Nor does the NPS agreement evince a federally created privilege authorizing such activity. Simply put, the federal government did nothing to authorize PBCI to take any of the challenged actions; PBCI, as the owner of the Wetumpka property, elected to and had the authority to perform those acts of its own volition. The Plaintiffs thus fail to satisfy the first prong of the color of law

²⁷ This standard is drawn from § 1983 case law. Courts have held that the inquiry into whether a defendant acted “under color of law” is the same in the context of § 1983, RFRA, and RLUIPA actions. *See Florer*, 639 F.3d at 922.

analysis. *See Florer*, 639 F.3d at 923-24 (holding that allegations that the government “allowed” the defendant to conduct the activity in question did not satisfy the test because the government did not “dictate” the activity).

The Plaintiffs also fail the second step of the analysis, as the Tribal Defendants cannot fairly be characterized as a state actor when performing the allegedly burdensome acts. The Tribal Defendants can be considered governmental actors only if there exists “such a close nexus between the [government] and the challenged action that seemingly private behavior may be fairly treated as that of the [government] itself.” *Florer*, 639 F.3d at 924 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001)). The Eleventh Circuit recognizes three tests for determining whether such a nexus exists: the public function test, the state compulsion test, and the nexus/joint action text. *Harvey*, 949 F.2d at 1130. None of those tests are satisfied here.

The public function test requires a plaintiff to show that the defendant is exercising powers or performing functions “that are ‘traditionally the *exclusive* prerogative of the State.’” *Id.* at 1131 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)). “Few activities are exclusively reserved to the states” under this test. *Harvey*, 949 F.2d at 1131 (citation omitted). It is not enough that the defendant performs a function having great public importance, even when such performance is highly regulated and overseen by the government. *See Jackson*, 419 U.S. at 352-353. Rather, the scope of activities that satisfy the public function test is exceedingly narrow and includes only actions “traditionally associated with sovereignty, such as eminent domain” *Id.* at 353. *See also Florer*, 639 F.3d at 924 (“The public function test is satisfied only on a showing that the function at issue is both traditionally and exclusively governmental.” (citation omitted)); *Harvey*, 949 F.2d at 1131; *N.B.C. v. Commc’ns Workers of Am., AFL-CIO*, 860 F.2d

1022, 1026 (11th Cir. 1988) (“The public function test for state action has been limited strictly”).²⁸

The Tribal Defendants undertook—and the Plaintiffs allege—no public functions here. Conducting or allowing archeological excavations, constructing a resort, hosting business patrons, serving alcohol, and reinterring excavated archeological items fall well short. *See, e.g., Harvey*, 949 F.2d at 1131 (holding that involuntary commitment of the mentally ill does not clear the bar for the public function analysis); *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837 (11th Cir. 1993) (holding that a corporation created for the purpose of assuming the duties of a county hospital authority and actually assuming such duties was not performing a public function for state action purposes). The Tribal Defendants are not state actors under the public function test.

The Plaintiffs likewise fail to satisfy the other state action tests. They cannot seriously allege state compulsion, as they can point to no governmental directive or mandate that the Tribal Defendants perform any of the acts allegedly burdening the Plaintiffs’ exercise of their religion. *See Harvey*, 949 F.2d at 1130-31 (holding that the state compulsion test was not satisfied where state law permitted, but did not require or encourage involuntary commitment). Nor can they satisfy the nexus/joint action test, which requires a showing that the government “has ‘so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.’” *Id.* at 1131 (alteration in original) (quoting *NBC*, 860 F.2d at 1026). Importantly, federal regulation, the existence of a contract between the federal government and the defendant, and even federal funding of an activity are insufficient to meet

²⁸ The few activities found to satisfy the public function test include “the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection and, in at least limited circumstances, the operation of a municipal park.” *Santiago v. Puerto Rico*, 655 F.3d 61, 69 (1st Cir. 2011) (citation omitted). “These activities are characterized by exclusivity born of pervasive government involvement.” *Id.*

this test. *See Harvey*, 949 F.2d at 1131 (citing multiple cases). Whatever limited involvement the federal government may have had in the Tribal Defendants activities on the Wetumpka property, it plainly was not a joint participant in PBCI's efforts to conduct archeological excavations and construct and operate resort facilities.

In sum, RFRA is inapplicable to the Tribal Defendants on its face. And even if it were possible for to state a RFRA claim against an entity outside the statute based on a state action theory, the Plaintiffs' allegations fall well short of establishing that the Tribal Defendants qualified as state actors when taking the actions that allegedly burden the Plaintiffs' exercise of their religion. The RFRA claim against the Tribal Defendants should be dismissed under Rule 12(b)(6).

B. The facts alleged in the SAC do not give rise to a RFRA violation.

Even if RFRA were applicable to the Tribal Defendants, the facts alleged in the complaint do not give rise to a RFRA violation. In order to implicate RFRA, governmental action must "substantially burden" a person's exercise of religion without compelling justification. 42 U.S.C. § 2000bb-1. In order to constitute a "substantial burden" under RFRA, governmental activity must "completely prevent[] the individual from engaging in religiously mandated activity" or constitute "pressure that tends to force adherents to forego religious precepts or ... that mandates religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (citations omitted); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) ("Under RFRA, a substantial burden is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." (citations omitted)).

The Plaintiffs allege that their religion requires them to ensure that their ancestors' remains and funerary objects are kept or reinterred in their intended final resting places and to prevent anyone from entering or approaching ceremonial grounds without proper authorization and rituals or while intoxicated or in possession of alcohol. SAC ¶¶ 325-28. They allege that the Tribal Defendants have placed a substantial burden on their religious exercise by (1) allowing or directing excavation and construction on the Wetumpka property that disturbed the remains of their ancestors, (2) failing to reinter those remains in their original resting places with proper ceremony, and (3) allowing unauthorized persons and the presence of alcohol near the ceremonial grounds. *Id.* ¶¶ 325-29. They further allege that, as a result of the Tribal Defendants' actions, they are forced to choose between exercising their religious obligations and committing unspecified acts of civil or criminal disobedience. *Id.* ¶ 330.

The Plaintiffs' argument can be boiled down to a claim that their religious beliefs require them to have full and unfettered access to and control of PBCI's property, including the ability to exclude visitors from it and to prevent the conduct of business on it. Neither RFRA nor any other law grants them the right to impose what amounts to a "religious servitude" over PBCI's lands. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452-53 (1988). On the contrary, it is settled that denial of access to or control over another's property does not constitute a substantial burden on religious practice. *See, e.g., id.*; *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 2013 WL 4500572, at *10 (C.D. Cal. Aug. 16, 2013), *aff'd*, 603 F. App'x 651 (9th Cir. 2015).

Lyng is instructive. There, the plaintiffs argued that expansion of a federal highway and timber harvesting on publicly owned land would substantially burden their religion by causing serious and irreparable damage to sacred sites in the area. *See Lyng*, 485 U.S. at 442-43. The

Court accepted that the challenged projects “could have devastating effects on traditional Indian religious practices,” which required, *inter alia*, “privacy” and “undisturbed naturalness” on government lands that they held sacred. *Id.* at 450-53. But it pragmatically noted that the plaintiffs’ “beliefs could easily require *de facto* beneficial ownership” of public lands, and that “the Constitution simply does not provide a principle that could justify upholding [their] legal claims.”²⁹ *Id.* Here, the Plaintiffs expressly seek the remedy that the *Lyng* Court identified as a troubling possibility—*de facto* beneficial ownership of another’s property. And here, as in *Lyng*, there is no sound legal basis for awarding it.

Other case law is in accord. In the *La Cuna* litigation, the plaintiffs challenged a federal decision allowing the construction of a fenced solar generation plant that prevented them from accessing religiously significant sites on federal land. *See La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior*, 2012 WL 2884992, at **1, 6 (C.D. Cal. July 13, 2012) (*La Cuna I*); *see also La Cuna*, 2013 WL 4500572 (*La Cuna II*), at *2. As here, the plaintiffs alleged that they were being forced to choose between foregoing access to sites important to their religious duties and being subject to criminal trespass. *See La Cuna II*, 2013 WL 4500572, at *10; *La Cuna I*, 2012 WL 2884992, at *6. The court rejected the claim, citing *Lyng* for the proposition that “Plaintiffs face no civil or criminal sanction for practicing their religion—the choice to use those parts of the [site at issue] is simply not available to them.” *La Cuna II*, 2013 WL 4500572, at *10. As the court explained, there is a legally significant difference between government action that interferes with one’s ability to practice one’s religion and coercing someone to practice their religion under fear of civil or criminal sanction. *La Cuna*

²⁹ As the Ninth Circuit noted in *Navajo Nation*, the fact that *Lyng* was a Free Exercise Clause case rather than a RFRA case “is of no material consequence” in light of Congress’s explicit instruction for courts to look to *Lyng*-era case law to interpret RFRA. *See Navajo Nation*, 535 F.3d at 1071 n.13.

I, 2012 WL 2884992, at *8 (citing *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008)). Barring access to a site falls into the former category, and does not constitute a substantial burden. *See id.* (“[N]o one is forcing Plaintiffs to trespass.”).

Similarly, in *Slockish v. United States Federal Highway Administration*, a group of plaintiffs argued that the destruction of ancient burial grounds and the construction of a guardrail blocking access to the site substantially burdened and interfered with their religious exercise. *See* 2018 WL 4523135, at *2 (D. Or. Mar. 2, 2018), *report and recommendation adopted*, 2018 WL 2875896 (D. Or. June 11, 2018). Relying on *Lyng* and *Navajo Nation*, the court found no substantial burden because the plaintiffs failed to show that they were being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit was being conditioned upon conduct that would violate their religious beliefs. *Id.* at *5. “‘Were it otherwise,’” the court noted, “[e]ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires.” *Id.* at *3 (quoting *Navajo Nation*, 535 F.3d at 1063).

The Plaintiffs’ RFRA claims, in essence, amount to a desire for the federal government or the Tribal Defendants to enact or apply laws in a way that facilitates and favors the Plaintiffs’ exercise of their religion over PBCI’s property rights or any other competing interests. The law does not require or even allow that; on the contrary, “[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.” *Lyng*, 485 U.S. at 452. There being no public program prohibiting the Plaintiffs’ exercise of their religion in this case, this Court cannot allow the Plaintiffs’ religious preferences to trump the Tribal Defendants’ rights in their lands. The Plaintiffs’ RFRA claim should be dismissed pursuant to Rule 12(b)(6).

IX. NAGPRA and ARPA do not violate federal law or the Constitution.

Count VIII of the SAC erroneously alleges that NAGPRA and ARPA, if interpreted as they are written, substantially burden the Plaintiffs' exercise of their religion in violation of the First Amendment of the United States Constitution, RFRA, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Specifically, they claim that NAGPRA and ARPA are unconstitutional to the extent that they require or allow any tribe other than MCN to consent to the excavation or removal of artifacts from the Wetumpka property or give any other tribe a higher priority of ownership in such artifacts, because such an outcome would unjustifiably impose a substantial burden on their religious beliefs. SAC ¶¶ 266-70. This argument fails for several reasons.

Count VIII initially fails because it relies on a fatally flawed premise. It is not ARPA and NAGPRA that give PBCI primacy of ownership over artifacts excavated from PBCI's tribal lands. On the contrary, it is only pursuant to those statutes that the Plaintiffs have any possible claim to ownership of archeological resources recovered from land that they do not own. Much like the Plaintiffs' RFRA argument, then, Count VIII of the SAC amounts to a demand that federal law be interpreted and applied in a way that elevates the Plaintiffs' religious beliefs above all other considerations, including PBCI's property rights. As discussed *supra*, the law does not and cannot allow that.

Additionally, to the extent that Count VIII alleges that ARPA and NAGPRA's provisions governing ownership of archeological artifacts amount to a First Amendment violation, it fails to state a claim against the Tribal Defendants because the First Amendment is inapplicable to tribal governments. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained

by those constitutional provisions framed specifically as limitations on federal or state authority.”); *Dallas v. Hill*, 2019 WL 403713, at *2 (E.D. Wis. Jan. 31, 2019) (“As an initial matter, the First Amendment ... does not apply to Indian tribes and tribal officials.”). Additionally, ARPA and NAGPRA are neutral laws of general applicability that in no way target or restrict religious practices as such. Accordingly, and contrary to the SAC’s assertion in ¶¶ 266-67, they ““need not be justified by a compelling governmental interest even if [they have] the incidental effect of burdening a particular religious practice.”” *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 20 F.3d 419, 423 (11th Cir. 1994) (quoting *Church of the Lukumi Bablua Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)). The SAC thus fails to allege a First Amendment violation.

To the extent that Count VIII alleges that ARPA and NAGPRA violate RFRA, it fails to state a claim against the Tribal Defendants for all of the reasons set forth above in response to the Plaintiffs’ RFRA claim. Finally, Count VIII fails to assert an RLUIPA violation for at least three reasons. First, RLUIPA, like RFRA, does not apply to Indian tribes. *See* 42 U.S.C. § 2000cc-5(4) (providing a definition of “government” that does not include tribes or tribal officials). Second, an RLUIPA violation requires a substantial burden on religious exercise, which does not exist here for reasons discussed above in Part VIII.B. *See, e.g., Midrash Sephardi*, 366 F.3d at 1225. Third, there is no land use regulation at issue here, which is a necessary prerequisite to an RLUIPA claim not involving an institutionalized person. *See, e.g.,* 42 U.S.C. § 2000cc(a)(1) (barring the imposition or implementation of “a land use regulation in a manner that imposes a substantial burden” on religious exercise); *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (indicating that RLUIPA targets land use regulation and religious exercise by institutionalized

persons). Count VIII thus fails to state a claim generally, and particularly against the Tribal Defendants, and the Court should dismiss it pursuant to Rule 12(b)(6).

X. The Plaintiffs have not identified any legal basis for the sweeping relief sought in the SAC.

For all of the reasons discussed above, none of the Plaintiffs’ allegations of statutory and common law violations state a claim on which relief can be granted against the Tribal Defendants. Even if the Court were to conclude otherwise, however, it is readily apparent that there is no basis for it to award the sweeping relief requested in the SAC. In particular, the Plaintiffs have identified no legal basis—and none exists—to remove the Wetumka property from trust, to permanently enjoin the Tribal Defendants from “undertaking or providing assistance for any further ground disturbing, clearing, grading, leveling, or construction activity” on the property, to order PBCI to tear down improvements on the property and restore it to its pre-construction condition, or to require the replacement of excavated remains and artifacts in their original location. SAC Prayer for Relief. All of these remedies far exceed those available under or contemplated by any of the federal statutes or common law doctrines set forth in the SAC.

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

reinter any remains in situ, or (3) any other form of relief that would amount to granting them *de facto* ownership of PBCI's property.

XI. Because the Plaintiffs have no valid claims against PBCI and this case cannot appropriately be resolved in its absence, the entire SAC should be dismissed pursuant to Rule 19.

As explained throughout this brief, all of the Plaintiffs' claims against PBCI and the other Tribal Defendants are barred by sovereign immunity or fail to state a claim and should be dismissed. The SAC therefore should be dismissed as to all Defendants, as it is clear that PBCI is a required party under Fed. R. Civ. P. 19(a) and that adjudication of the case in its absence could not provide an adequate remedy without prejudicing PBCI's interests in the extreme. Rule 19(b) therefore requires dismissal of the entire case.

Rule 19(a) provides that a party is necessary if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may: (i) as a practical matter impair or impede that [party's] ability to protect the interest; or (ii) 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)(1). "[P]ragmatic concerns, especially the effect on the parties and the litigation, control' this analysis." *Fla. Wildlife Fed'n, Inc. v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306, 1316 (11th Cir. 2017) (quoting *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003)). If a necessary party cannot be joined, Rule 19(b) directs the court to consider whether the case can proceed in its absence, taking into account: (1) whether a judgment rendered in the missing party's absence might prejudice it or existing parties; (2) the extent to which the court could structure a judgment to limit that prejudice; (3) whether a judgment in the missing party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy of the case was dismissed for

nonjoinder. Fed. R. Civ. P. 19(b). Where the missing party cannot be joined due to sovereign immunity, courts are required to give special solicitude to its interests under this test “out of recognition that any consideration of the merits in the sovereign’s absence is ‘itself an infringement on ... sovereign immunity.’” *Fla. Wildlife*, 859 F.3d at 1318 (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008)).

PBCI is indisputably a necessary party under Rule 19(a). The overarching objective of the SAC’s claims against the Tribal and Federal Defendants is to deprive PBCI of jurisdiction and control over part of its reservation, to order it to expend substantial resources to remove scores of millions of dollars in real property improvements from its land, and to literally dismantle one of its major economic engines. PBCI thus has an incredibly strong interest relating to the subject matter. And it is clear that allowing this matter to proceed against the Federal Defendants in PBCI’s absence, potentially leading to an order affecting the status of the PBCI Reservation or otherwise directing action on its property, could both impair PBCI’s ability to protect its interest and subject the Federal Defendants to a risk of incurring multiple or inconsistent obligations with respect to complying with a potential court order and their trust duties to PBCI as a federally recognized Indian tribe. Under these circumstances, the pragmatic concerns of Rule 19(a) are easily satisfied. *See, e.g., Fla. Wildlife*, 859 F.3d at 1316-17 (holding that a suit over a Florida water control project could not proceed against a federal agency in the absence of a state entity that operated and maintained much of the project, as in injunction of the former would impede the latter’s discretion and impair cooperation between the entities); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012) (affirming dismissal of a case brought by one Indian tribe that, if adjudicated, would have prejudiced the interests of another tribe that could not be joined); *Hardy v. IGT, Inc.*, 2011 WL 3583745, at *5 (M.D. Ala.

Apr. 23, 2011). While this Court in *Hardy* “struggle[d] to envision a more severe practical impediment to [PBCI’s] interests” than a determination that gaming on its reservation was illegal, this case clears that bar by asking the Court to determine that the existence of the Reservation itself, as well as all of PBCI’s activities on it, are unlawful. *Hardy*, 2011 WL 3583745, at *5. PBCI is unquestionably a necessary party under Rule 19(a).

It is beyond dispute that this case cannot proceed in equity and good conscience without PBCI’s involvement and that PBCI is accordingly indispensable under Rule 19(b). In addition to being a fundamental “affront to [PBCI’s] sovereignty,” *Fla. Wildlife*, 859 F.3d at 1318, adjudicating this case in PBCI’s absence, given the relief that the Plaintiffs seek, would risk inevitably and catastrophically affecting PBCI’s interests, and there is no way that the Court could tailor or limit any order adverse to PBCI’s interests to avoid that result. *Id.* at 1318-19; *Pit River Home & Agric. Co-op Ass’n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994) (recognizing propriety of dismissal of suit implicating tribal property and governance when necessary tribal defendant could not be joined); *Rosales*, 2007 WL 4233060, at *5 (holding that a tribe was an indispensable party to a suit against federal officials seeking to enjoin the tribe’s activities on its own property); *see also Hardy*, 2011 WL 3583745, at *6 (noting that the Rule 19(b) prejudice test is “essentially the same as the practical impediment of an interest test under Rule 19(a)”). Nor would a judgment in PBCI’s absence be adequate, as it would not be binding on PBCI and thus could not achieve the Plaintiffs’ aims. *See Fla. Wildlife*, 859 F.3d at 1319; *Hardy*, 2011 WL 3583745, at *7. And while dismissing the entire case may mean that the Plaintiffs lack a remedy for their alleged injuries, that potential prejudice cannot, as a matter of law, outweigh the prejudice to PBCI of proceeding with this case in its absence. *See Fla. Wildlife*, 859 F.3d at 1320 (citing *Pimentel*, 553 U.S. at 872); *Pit River*, 30 F.3d at 1102-03;

Hardy, 2011 WL 3583745, at *7 (holding that the prejudice of allowing a suit to go forward in PBCI's absence outweighed the prejudice of leaving a plaintiff without a remedy).

Simply stated, there is no way that any aspect of this case fairly could or should move forward without PBCI's participation. Thus, to the extent that the Court dismisses all claims against PBCI, it should dismiss the entire case pursuant to Rule 19.

CONCLUSION

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

Respectfully submitted this 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 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/Mark H. Reeves

Mark H. Reeves