

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

MUSCOGEE CREEK NATION, *et. al.*,

Plaintiffs,

V.

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

Defendants.

)
)
)
)
)
)
)
)
)
)

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

Judge Myron H. Thompson

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

I. INTRODUCTION

Plaintiffs' claims against the Federal Defendants should be dismissed for lack of subject matter jurisdiction and failure to state a claim because Plaintiffs fail to identify final agency action or a discrete, nondiscretionary duty that Federal Defendants failed to take and accordingly have not established jurisdiction under the APA. In addition, many of Plaintiffs' claims are brought outside the statute of limitations, as they challenge agency action that took place long ago. Plaintiffs also have not shown a substantial burden on their exercise of religion. As such, this Court should grant Federal Defendants' Motion to Dismiss, ECF No. 199.

II. ARGUMENT

As an initial matter, Plaintiffs refer in their Opposition in multiple places to discovery and further development of the record. Plaintiffs' claims against the Federal Defendants are brought pursuant to the APA's waiver of sovereign immunity and as such, will be reviewed on an administrative record compiled by the agency. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1262 (11th Cir. 2007) (holding that the “district court did not abuse its discretion in disallowing . . . discovery” beyond the administrative record). Discovery against Federal Defendants is not permitted absent “a strong showing of bad faith or improper behavior” by the agency. *Dep’t of*

Commerce v. New York, 139 S. Ct. 2551, 2573–74 (2019); *Alabama-Tombigbee*, 477 F.3d at 1262. Accordingly, any references to discovery should be disregarded.

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

Plaintiffs’ first claim asserts that Federal Defendants violated the IRA by taking land into trust for the Poarch Band in 1984. Federal Defendants demonstrated in their Memorandum that Plaintiffs’ IRA claim was brought outside the statute of limitations and Plaintiffs lack standing to bring the claim. Fed. Defs.’ Mem. in Support of Their Mot. to Dismiss Pls.’ 2d Am. Compl. & Suppl. Compl. at 18-24, ECF No. 200 (“Fed. Defs.’ Mem.”). In response, Plaintiffs extensively detail a purported lack of government-to-government relationship between the Poarch Band and the United States prior to 1984, when the Poarch Creek became a federally recognized tribe. *See* Pls.’ Resp. & Mem. in Supp. of Resp. to Fed. Defs.’ Mot. to Dismiss 2d Am. Compl. & Suppl. Compl. at 20-24, ECF No. 210 (“Pls.’ Opp’n”). According to Plaintiffs, the Poarch Band was not under federal jurisdiction within the meaning of the IRA, and therefore Interior did not have authority to take the Hickory Ground Site into trust for the Poarch. *Id.* at 23. Whether the Poarch Band was or was not under federal jurisdiction within the meaning of the IRA is irrelevant, because the statute of limitations to challenge Federal Defendants’ action taking land into trust for the Poarch Band has long since passed. In addition, Plaintiffs have not demonstrated standing because they were not injured by Federal Defendants’ actions and this Court cannot redress their alleged injury.

1. Plaintiffs’ IRA claim is barred by the statute of limitations.

Plaintiffs attempt to evade the statute of limitations issue by arguing that the land-into-trust decision was “applied” to Plaintiffs less than six years before the lawsuit was filed. Pls.’

Opp’n at 28–29. They argue that the decision was *ultra vires* and, therefore, the claim only accrued when the agency applied the action to “specific challenger,” here, Plaintiffs. *Id.* at 25. This Court should reject Plaintiffs’ argument that the land-into-trust decision was applied to Plaintiffs through ARPA permits that allowed excavation and by denying Mr. Thompson’s alleged “NAGPRA claim” in 2009. Plaintiffs’ argument is not grounded in applicable law, and would make the statute of limitations meaningless.

Generally, the statute of limitations on an APA claim accrues at the time of the final agency action. *See Alabama v. United States*, 630 F. Supp. 2d 1320, 1325 (S.D. Ala. 2008). Some courts have held that “an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority.” *Wind River Min. Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991) (cataloging cases); *see also Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1270 (M.D. Ala. 2000) (“[A] cause of action challenging a regulation based on the grounds that an agency exceeded its constitutional or statutory authority accrues when the agency applies the regulation to the specific challenger.” (citing *Wind River*, 946 F.2d at 715)). Those cases have been restricted to situations where the plaintiff would not have known it would be injured when the regulation was promulgated or the action of continuing application was taken.

In *Wind River*, the plaintiff challenged application of a land use designation to a particular piece of property. 946 F.2d at 712. The Bureau of Land Management designated 138 roadless Wilderness Study Area in 1979, and the plaintiff challenged that designation in 1989 after it was barred from pursuing its mining claims on property within that area. *Id.* at 711–12. The court allowed the challenge, emphasizing that “no one was likely to have discovered that the

BLM’s 1979 designation of this particular WSA was beyond the agency’s authority until someone actually took an interest in that particular piece of property, which only happened when Wind River staked its mining claims.” *Id.* at 715.

In a similar case to the one at bar, the Ninth Circuit held that a state’s challenge to the BIA’s land-into-trust decision was barred by the statute of limitations. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015), *as amended on denial of reh’g* (July 8, 2015). There, the State of California argued that the tribe lacked standing under the Indian Gaming Regulatory Act because the BIA exceeded its authority when it recognized the tribe and took an eleven-acre parcel into trust in 1994. *Id.* The court held that “[t]he proper vehicle to make such a challenge is a petition for review pursuant to the APA,” noting the Supreme Court’s holding that “a challenge to the BIA’s ‘decision to take land into trust’ is ‘a garden-variety APA claim.’” *Id.* (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220–21 (2012) (citing 5 U.S.C. § 706(2)(A), (C))). “[P]arties cannot ‘use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.’” *Id.* (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). Allowing California to challenge the BIA’s decision to take the eleven-acre parcel into trust on the basis that it was ultra vires, the court held, “would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government.” *Id.* at 954. The court noted that California had not brought an APA challenge, but found that even if it had, it would be barred by the statute of limitations. *Id.*

This Court should similarly reject Plaintiffs’ attempt to make an end-run around the APA by framing their challenge as “ultra vires” or arguing that Federal Defendants’ land-into-trust

decision has continuing application. Plaintiffs here challenge not regulations or the application of a general rule to them, but the specific agency decisions recognizing the Poarch Band as a federally-recognized Indian tribe and taking land into trust. “The proper vehicle for [Plaintiffs] to challenge the Secretary’s decisions to take land into trust for the Tribe is an APA claim.”

Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1292 (11th Cir. 2015) (citing *Match-E-Be-Nash-She-Wish*, 567 U.S. at 220–21); *Poarch Band of Creek Indians v. Hildreth*, 656 F. App’x 934, 943 (11th Cir. 2016) (“In *PCI Gaming*, we held that the “proper vehicle” for challenging the Secretary’s authority to take tribal lands into trust is a timely APA claim pursuant to 5 U.S.C. § 702, not a collateral challenge to a long-ago decision of the Secretary.” (citations omitted)). Plaintiffs’ claim cannot be properly characterized as one that the agency acted *ultra vires*.

Instead, Plaintiffs assert that the Federal Defendants’ decision to take land into trust violated the IRA because the Poarch Band was not under federal jurisdiction in 1934, exactly the claim that the Supreme Court termed “a garden-variety APA claim.” *Match-E-Be-Nash-She-Wish*, 567 U.S. at 220–21. Accordingly, the decision to take land into trust was a final agency action that cannot be challenged at this late date.

Moreover, Plaintiffs were never a disinterested party, as they had the same interest in the Wetumpka site in 1984 as now. Thus, the Eleventh Circuit’s rulings that the time to challenge the land-into-trust decision began to run in 1984 apply here. *PCI Gaming*, 801 F.3d at 1292 (finding that because Alabama was aware that the Secretary took land into trust for the Poarch Band, the statute of limitations began running at that time); *Poarch Band*, 656 F. App’x at 943–44 (finding that plaintiff “was well aware of the Secretary’s decision to take the Poarch Band’s property into trust close in time to the decision”). “To recognize an exception and permit a collateral challenge nearly 30 years later, where the record clearly reflects that [the plaintiff]

could have raised a timely challenge but did not, would turn *PCI Gaming* on its head.” *Id.*

Plaintiffs argue that they thought the land would be left undisturbed, but their decision to rely on the Poarch Band’s alleged representations does not toll the statute of limitations. Further, Plaintiffs had knowledge of disturbance well outside the statute of limitations. *See Fed. Defs.’ Mem.* at 20–21 (documenting knowledge as far back as 1992).

And in any event, the ARPA permits and the resolution of Mr. Thompson’s NAGPRA concerns are not re-applications of the land-into-trust decision. They are wholly separate and occurred well after the land was already taken into trust. The permits themselves are outside the statute of limitations, having been issued in 2003 and renewed in 2005, and are not relevant to the land-into-trust decision. ECF No. 200-2 at 33 (ARPA permit issued in 2003). Nor can Federal Defendants’ response to Mr. Thompson’s 2008 letter be considered a re-application of the land-into-trust decision. ECF No. 200-2 at 42. Federal Defendants investigated Mr. Thompson’s allegations that Auburn University, who was conducting the excavation, failed to comply with NAGPRA’s requirements and determined that the allegations were not substantiated. *Id.* at 47–49. Plaintiffs’ argument that this determination was a re-application of the land-into-trust decision is a red herring and is wholly irrelevant. Plaintiffs’ IRA claim should be dismissed because it was brought outside the statute of limitations.

2. Plaintiffs lack standing to bring their IRA claim.

Plaintiffs also lack standing to assert a claim under the IRA. Plaintiffs’ alleged injury, the excavation and disturbance by construction activities on land they claim is historically and religiously significant, does not stem from the United States’ acquisition of the Wetumpka property in trust. According to Plaintiffs, they are directly injured by Interior’s land-into-trust decision because had Interior not found that the site is “Indian land,” Poarch would have had no

reason to build a casino or to issue ARPA permits. Pls.' Opp'n at 29. Plaintiffs also argue that they are injured by excavation and construction on the site. *Id.* at 29–30. Nothing in Plaintiffs' Second Amended Complaint or Opposition directly ties their injury to the land-into-trust decision, however, and these arguments should be rejected.

Plaintiffs' Opposition and Second Amended Complaint make clear that their injuries do not stem from the gaming facility itself, but from the construction and excavation of the site. Pls.' Opp'n at 30; 2d Am. Compl. ¶¶ 6, 124–130, Prayer for Relief, ECF No. 190. But even if Plaintiffs prevail on their IRA claim and the land is no longer held in trust for the Poarch Band, the Poarch Band will still own the land in fee and have the right to conduct activities on the land. *See Yankton Sioux Tribe v. U.S. Army Corps of Engr's*, 396 F. Supp. 2d 1087, 1094 (D.S.D. 2005) (finding that tribe lacked standing where it failed to establish a causal connection between the transfer of land and the complained of conduct). In addition, Plaintiffs now allege that the Federal Defendants would not have issued ARPA permits absent the land-into-trust decision. This is true, because ARPA only applies to public land and Indian land held in trust by the United States. Thus, the lack of an ARPA permit would not necessarily result in lack of development on the site.¹

Nor could this Court redress Plaintiffs' claims because a finding that the land is not properly held in trust, the only remedy for Plaintiffs' IRA claim, would not remedy Plaintiffs' injuries from construction and excavation, or address Plaintiffs' concerns about the treatment of the remains that have been excavated. Even if the Poarch Band ceased gaming on the site based on a determination that the land is not held in trust, the excavation and construction has already

occurred. A finding that the land is not held in trust would not result in a finding that Plaintiffs are entitled to the remains and other cultural items, nor necessarily to removal of the casino and restoration of the site. Plaintiffs request an injunction “to unwind the illegal excavation and construction,” but the Court does not have authority to enter such an order for violation of the IRA.

Plaintiffs cite a number of cases finding standing where plaintiffs would be affected by gaming facilities. Pls.’ Opp’n at 30–31. For example, courts found standing where landowners near a proposed gaming facility were injured due to increased traffic, aesthetic harm, and environmental harm from the gaming facility construction and operation. *See Match-E-Be-Nash-She-Wish*, 567 U.S. at 213²; *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 565–66 (2d Cir. 2016); *Geyser v. United States*, No. CV 17-7315-DMG (ASX), 2018 WL 6990808, at *7 (C.D. Cal. Aug. 30, 2018). If gaming at a facility stops, traffic to the facility would also stop, for example. But Plaintiffs’ claimed injury is of a different nature and is not based on *operation* of the casino. It is not a neighbor affected by traffic or change in the aesthetics of the area, nor have Plaintiffs alleged they are losing tax revenue or business or recreational opportunities. The cases simply do not support Plaintiffs’ standing argument.

Plaintiffs also cite *Stand Up for California!*, where the Picayune Tribe, which operates a gaming facility, contested a decision that allowed a nearby tribe to conduct gaming on land taken into trust, because the new gaming facility would have had “a devastating economic impact” on the Picayune Tribe. Pls.’ Opp’n at 31 (citing *Stand Up for California! v. U.S. Dep’t of the*

¹ Furthermore, if the land were not held in trust, no construction or excavation would require approval from Federal Defendants.

Interior, 919 F. Supp. 2d 51, 56 n.7 (D.D.C. 2013)). The court found redressability because if the Secretary's determination was overturned, gaming would stop and the economic injury to the Picayune Tribe would not occur. 919 F. Supp. 2d at 56 n.7. Notably, this case involved a decision allowing gaming on the site, in addition to a decision taking land into trust. *Id.* at 54–55. But Plaintiffs do not assert an economic harm from the operation of the casino. Nor do Plaintiffs demonstrate how their injury would be redressed if the gaming facility simply stopped operating at this point.

In short, Plaintiffs have failed to demonstrate that they have standing to assert their IRA claim.

B. Plaintiffs fail to allege jurisdiction or state a claim for violation of NAGPRA.

Plaintiffs' NAGPRA claim must also be dismissed. Plaintiffs have failed to identify a valid waiver of sovereign immunity because they do not identify any NAGPRA duties that the Federal Defendants were required to but failed to take. NAGPRA allows for removal of human remains and other cultural items on tribal lands, provided that an ARPA permit is issued by the BIA and consent is given by the tribe owning the land. The Poarch Band gave its consent for the removal of human remains and other cultural items under NAGPRA, as well as any archaeological resources under ARPA. Federal Defendants issued a permit for the removal of the remains and other cultural items, but then had no authority in determining how or where the remains and other cultural items should be reburied. The Poarch Band controls these remains and other cultural items, and decisions about removal and re-interment fall within the authority of the Poarch Band.

² *Match-E-Be-Nash-She-Wish* also involved only prudential standing, which is a less demanding

1. Plaintiffs have not demonstrated a valid waiver of sovereign immunity.

Plaintiffs' NAGPRA claim relies on the APA's waiver of sovereign immunity, and accordingly Plaintiffs must meet the requirements of the APA, including final agency action. In their response, Plaintiffs attempt to avoid the APA's requirements by asserting that they rely on the second sentence of the waiver of sovereign immunity in 5 U.S.C. § 702. Pls.' Opp'n at 35–41. But this argument fails for several reasons. First, the second sentence applies only to nonstatutory claims brought against the federal government. Plaintiffs' claims are statutory and thus fall solidly within the APA's first sentence waiver of sovereign immunity and must comply with the APA's constraints. *See* 2d Am. Compl. ¶ 33 ("Plaintiffs' claims arise under the Administrative Procedure Act . . ."). Second, the jurisdictional provision in NAGPRA, which Plaintiffs rely on as a private right of action should not be read as a right of action against the United States. The APA already provides such a right of action, and this provision of NAGPRA should be read instead as providing a right of action against non-federal entities.

The APA's waiver of sovereign immunity provides that:

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

5 U.S.C.A. § 702. Courts have held that claims falling within the first sentence of this waiver "are subject to § 704's limitation on what agency actions are subject to judicial review, while 'claims not grounded in the APA, like . . . constitutional claims . . . do not depend on the cause

test than constitutional standing.

of action found in the first sentence of § 702 and thus § 704's limitation does not apply to them.'" *Alegre v. United States*, No. 16-CV-02442-AJB-KSC, 2019 WL 3891036, at *4 (S.D. Cal. Aug. 16, 2019) (quoting *Navajo Nation v. U.S. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017)); *see also Navajo Nation*, 876 F.3d at 1172 (holding that "the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims").

NAGPRA contains a jurisdictional provision that states that:

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.

25 U.S.C. § 3013. According to Plaintiffs, this provision allows them to proceed under the waiver in the second sentence of § 702, and thus not subject to the APA's limitations. This is incorrect.

First, Plaintiffs' claim falls solidly within the first sentence of the waiver. Plaintiffs assert that they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In addition, the second sentence of § 702 only applies to nonstatutory claims, such as constitutional claims. *See, e.g., Navajo Nation*, 876 F.3d at 1170 (noting that "[c]ourts have distinguished between claims brought under the APA and '[c]laims not grounded in the APA, like . . . constitutional claims"); *see also Juliana v. United States*, 947 F.3d 1159, 1167–68 (9th Cir. 2020) (characterizing *Navajo Nation* as "explaining that certain constitutional challenges to agency action are 'not grounded in the APA'"). When Congress amended the APA to add the second sentence to section 702, it "plainly indicated that Congress expected the waiver to apply to nonstatutory actions, and thus not only to actions under the

APA.” *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 186–87 (D.C. Cir. 2006). “‘The committee does not believe,’ the [Senate Report accompanying the amendment] stated, that the amendment’s ‘partial elimination of sovereign immunity, as a barrier to *nonstatutory review* of Federal administrative action, will create undue interference with administrative action.’” *Id.* (quoting S. REP. NO. 94–996, at 8). Plaintiffs’ challenge, therefore, which asserts that the agency violated a statute, must be brought pursuant to the waiver of sovereign immunity in the first sentence of section 702.

Plaintiffs offer no explanation as to why their NAGPRA claim does not fall within the first sentence of the waiver, except to state that NAGPRA provides its own cause of action. Pls.’ Opp’n at 34–35. But the NAGPRA provision should not be interpreted as a private right of action against federal defendants because the APA already provides such a cause of action. *See NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 152 (1st Cir. 1987) (interpreting statute not to provide a cause of action against the federal government because the APA provides such a vehicle). “[C]reating a direct private action against the federal government makes little sense in light of the administrative review scheme set out in the APA.” *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096–97 (9th Cir. 2005). “Whether a federal statute provides a private right of action almost always arises in the context of a claim against a third party, such as a state or private entity, not, as here, against the federal government.” *Id.* (citations omitted). “Even the term ‘private right of action’ is something of a semantic mismatch in the context of a suit to force agency action under a federal statute.” *Id.* “In fact, it is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is hardly ever any need for Congress to do so.” *NAACP*, 817 F.2d at 152. In certain rare cases such a private

right of action may be warranted, such as when Congress provides a cause of action for attorney's fees that are not available under the APA. *Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Office v. R.I. Dep't of Transp.*, 903 F.3d 26, 30 (1st Cir. 2018) (noting that the NHPA may have a private right of action authorizing attorneys' fees).

Or, Congress may indicate in a statute that it intends "to confer a private right of action that differs in its procedural contours from the review that the APA typically provides." *NAACP*, 817 F.2d at 153.

The NAGPRA jurisdictional provision should not be read as providing a separate cause of action against the federal government because it does not clearly indicate that Congress intended to create a private right and a private remedy beyond the APA. *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). For example, § 3013 provides that federal courts have jurisdiction over actions brought pursuant to NAGPRA, but federal courts already have jurisdiction over federal defendants under the general federal jurisdiction statute, 28 U.S.C. § 1331. Section 3013 also provides that courts can issue orders to enforce violations of the section, which, again, is available under the APA as against the federal government. The provision does not provide different contours for review than would be afforded under the APA, and should not be read as providing a separate cause of action as against the federal government. *See NAACP*, 817 F.2d at 153. The provision does allow suits in federal court against other entities, such as a museum, which may include a "State or local governmental agency." 43 U.S.C. § 3001. The provision thus should be read only as providing jurisdiction in the federal courts for litigation against non-federal entities. "As Judge Breyer noted, creating a direct private action against the federal government makes little sense in light of the administrative

review scheme set out in the APA.” *San Carlos Apache Tribe*, 417 F.3d at 1096–97 (citing *NAACP*, 817 F.2d at 152).

The Supreme Court’s decision in *Bennett v. Spear* is instructive. In that case, the Supreme Court refused to read a citizen suit provision of the Endangered Species Act (“ESA”), which authorizes suit against “any person” for violations of any provision of the ESA, as authorizing suit against the Secretary of Interior. *Bennett v. Spear*, 520 U.S. 154, 174 (1997). The Court found that allowing such a suit would “effect a wholesale abrogation of the APA’s ‘final agency action’ requirement.” *Id.* “In contrast, the Court recognized a private right of action against the Secretary under a different provision of the ESA, where the statute expressly authorized suits ‘against the Secretary.’” *San Carlos Apache Tribe*, 417 F.3d at 1096 (citing *Bennett*, 520 U.S. at 173–74). This Court should likewise refuse to allow Plaintiffs to avoid the strictures of the APA by finding a private right of action against the federal government under NAGPRA. There is simply no indication that Congress intended this result.

Indeed, courts have reviewed NAGPRA claims under the APA. *See, e.g., White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014); *Bonnichsen v. United States*, 367 F.3d 864, 879 (9th Cir. 2004) (reviewing Secretary’s NAGPRA determination under APA “arbitrary or capricious” standard of review); *Geronimo v. Obama*, 725 F. Supp. 2d 182 (dismissing complaint under NAGPRA because plaintiff failed to allege any agency action or inaction, as required for waiver of government’s sovereign immunity under the APA); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1213 (D. Nev. 2006). The Ninth Circuit specifically noted that “suits concerning the United States under NAGPRA are not authorized by any specific portion of that statute, but rather under the [APA], which contains an express limited sovereign immunity waiver for suits seeking non-monetary relief against the

United States.” *White*, 765 F.3d at 1024 (quoting 5 U.S.C. § 702). In *Navajo Nation v. U.S. Department of the Interior*, 819 F.3d 1084 (9th Cir. 2016), the court held that final agency action had occurred under the APA, and thus reversed the district court’s decision that it lacked jurisdiction over the plaintiff’s NAGPRA claim. *Id.* at 1090–91.

Because Plaintiffs’ NAGPRA claims falls within the first sentence of the APA’s waiver of sovereign immunity, Plaintiffs are required to challenge final agency action. They have not done so. Plaintiffs also argue that the APA’s “final agency action” requirement is better treated as an element of the cause of action rather than a jurisdictional prerequisite. Pls.’ Opp’n at 38–41. But many courts continue to view “final agency action” as a jurisdictional requirement to fall within the APA’s waiver of sovereign immunity. *See Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 491–92 (5th Cir. 2014) (holding that “there is no subject-matter jurisdiction because the Tribe failed to allege ‘agency action’ sufficient to trigger the sovereign immunity waiver from § 702”); *Facebook, Inc. v. Internal Revenue Serv.*, No. 17-CV-06490-LB, 2018 WL 2215743, at *18 (N.D. Cal. May 14, 2018) (finding that when plaintiff had failed to challenge final agency action, the court cannot determine APA claims “must dismiss them for lack of subject-matter jurisdiction”). And more importantly, the Eleventh Circuit has framed “final agency action” as a jurisdictional requirement. *See, e.g., United States v. Simon*, 609 F. App’x 1002, 1007 (11th Cir. 2015) (“However, the APA limits judicial review to ‘final agency action’ for which there is no other adequate remedy in a court.” (citing 5 U.S.C. § 704)); *Nat’l Parks Conservation Ass’n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) (noting that “federal jurisdiction is . . . lacking when the administrative action in question is not ‘final’ within the meaning of 5 U.S.C. § 704”); *Flat Creek Transp., LLC v. Fed. Motor Carrier Safety Admin.*, No. 1:16-CV-876, 2017 WL 4172613, at *8 (M.D. Ala. Sept. 20, 2017), *aff’d on other*

grounds, 923 F.3d 1295 (11th Cir. 2019) (citing *Nat'l Parks Conservation Ass'n* for proposition that jurisdiction is limited by “final agency action” requirement); *Alabama v. Ctrs. for Medicare & Medicaid Servs.*, 780 F. Supp. 2d 1219, 1226 n.3 (M.D. Ala. 2011), *aff'd*, 674 F.3d 1241 (11th Cir. 2012) (“Regardless of the extent to which the APA has waived sovereign immunity, the Eleventh Circuit and this Court have previously held that the finality of an agency action is a prerequisite for exercising federal jurisdiction.”). This Court should follow these holdings and find that Plaintiffs have not shown subject matter jurisdiction over their NAGPRA claim.

If this Court finds that Plaintiffs have established subject matter jurisdiction, it should dismiss Plaintiffs’ NAGPRA claim for failure to state a claim for which relief can be granted. Once a plaintiff has advanced a valid waiver of the United States’ sovereign immunity, the plaintiff is obligated to advance a cause of action. For an APA cause of action, Plaintiffs need to allege a final discrete agency action within the meaning of a relevant statute. As shown in Federal Defendants’ motion to dismiss, Plaintiffs have failed to do so because the duties Plaintiffs allege only apply to discoveries on federal land, not on the tribal land at issue here.

2. NAGPRA gives responsibility for remains and other cultural items found on tribal land to the landowner tribe.

a. Land held in trust for the Poarch Band is “tribal land” under NAGPRA.

Plaintiffs’ NAGPRA claim is based on the premise that Federal Defendants have a duty to act under NAGPRA because non-Reservation land held in trust by the United States for benefit of the Poarch Band is actually federal land. This interpretation is inconsistent with NAGPRA and the use of similar terms in other statutes.

NAGPRA defines “tribal land” as “(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; [and] (C) any lands administered for

the benefit of Native Hawaiians” 25 U.S.C. § 3001(15). NAGPRA does not define “reservation.” *Rosales v. United States*, No. 07-cv-0624, 2007 WL 4233060, at *6 (S.D. Cal. Nov. 28, 2007). The regulations define tribal lands as including lands “within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States,” as well as “dependent Indian communities as recognized pursuant to 18 U.S.C. § 1151.” 43 C.F.R. § 10.2(f)(2)(i), (ii). At least one court has held that lands held in trust for Indian tribes are “tribal lands” rather than “federal lands” under NAGPRA. *Id.* at § 10.2.

It is reasonable to look to 18 U.S.C. § 1151 to determine how “reservation” should be interpreted, particularly given that the regulations look to that statute to define “dependent Indian communities.” Courts have interpreted “reservation” in 18 U.S.C. § 1151 to include informal reservations and land held in trust for the benefit of Indians. *See Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (interpreting the term “reservation,” as used in the Indian country statute, 18 U.S.C. § 1151(a), to include formal and informal reservations); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). The ARPA also defines “Indian lands” to include land “held in trust by the United States or subject to a restriction against alienation imposed by the United States.” 16 U.S.C.A. § 470bb(4). Thus, it is reasonable here to interpret “tribal lands” as including lands held in trust for a tribe, even when outside the bounds of a formal reservation.

The other parts of the “tribal land” definition indicate that trust land should be included. It would make little sense to exclude non-reservation land held in trust for the benefit of Indians from the definition of “tribal land” when allotments held in trust within the Reservation boundaries, “dependent Indian communities,” and lands administered for Native Hawaiians are

included. 25 U.S.C. § 3001(15); 43 C.F.R. § 10.2. The Supreme Court has defined “dependent Indian communities” in 18 U.S.C. § 1151 to include “a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements — first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.” *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 (1998). Further, “tribal lands” includes lands administered for the benefit of Native Hawaiians. 25 U.S.C. § 3001; 43 C.F.R. § 10.2. It would be inconsistent for “tribal lands” to include non-reservation land set aside and administered for the benefit of dependent Indian communities and Native Hawaiians, but not include land held in trust for the benefit of other federally recognized tribes.

Plaintiffs argue that if “reservation” includes informal reservations, then “all dependent Indian communities” is surplusage because “in many cases, a *de facto* reservation *is* a dependent Indian community.” Pls.’ Opp’n at 52.³ But 18 U.S.C. § 1151 defines “Indian country” as including both land within Indian reservations and dependent Indian communities. The Supreme Court has held that Indian “reservation” includes informal reservations, and did not find that “dependent Indian communities” is surplusage. In addition, as Interior noted when it amended the NAGPRA regulations, “Cohen, in *The Field of Indian Law* (1982:38) concludes that ‘it is apparent that Indian reservations and dependent Indian communities are not two distinct

³ Plaintiffs argue that those conditions are not met here, but do not explain why. If this Court accepts Plaintiffs’ argument that lands held in trust do not fall within the definition of “reservation,” then the Court should determine that the land falls within the definition of “dependent Indian community.” Land held in trust is set aside for the benefit of Indians and is under federal superintendence.

definitions of place but rather definitions which largely overlap.’’ Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62,134, 62,140 (1995).

Holding otherwise would contravene one of the aims of NAGPRA. NAGPRA’s division between tribal control on tribal land and federal duties on federal land promotes the Tribe’s independence and sovereignty. The NAGPRA statute itself, as well as the administrative history, indicates that tribes are afforded responsibility for compliance on tribal lands, rather than federal agencies. *See Rosales*, 2007 WL 4233060, at *8; NAGPRA Regulations, 60 Fed. Reg. at 62,142 (noting that NAGPRA recognizes tribes’ sovereignty regarding administration of their land). NAGPRA’s regulations provide different responsibilities for inadvertent discovery on tribal land than on federal land. *Compare* 43 C.F.R. § 10.4(e) (“Tribal lands.”) *with* 43 C.F.R. § 10.4(d) (“Federal lands.”). At no point does NAGPRA or its regulations assign any nondiscretionary duty to the federal government in the event of an inadvertent discovery on tribal land. Because the discoveries here took place on tribal land, Federal Defendants do not have any nondiscretionary duties that they failed to perform. *See Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 62–64 (2004). As such, the Court lacks subject matter jurisdiction under the APA and fails to state a claim upon which relief can be granted.

b. Plaintiffs do not identify any statutory or regulatory duty the Federal Defendants were required to but failed to take.

Plaintiffs still fail to allege with any specificity the statutory or regulatory duties that Federal Defendants were required to undertake but did not. They assert that Federal Defendants knew about excavation, but provide no detail about when Federal Defendants became aware of it, or what specific duties would have been triggered by knowledge. Plaintiffs also appear to assert that Federal Defendants were required to take action to enforce NAGPRA violations by

others, but do not identify a specific provision that requires Federal Defendants to do so. Pls.’ Opp’n at 64–65. The federal government also enjoys prosecutorial discretion. “If [a statute] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is ‘law to apply’ under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision ‘committed to agency discretion by law’ within the meaning of that section.” *See Heckler v. Chaney*, 470 U.S. 821, 834–35 (1985). Here, Plaintiffs do not demonstrate that Federal Defendants’ enforcement discretion was constrained in a way that makes it reviewable here.

Plaintiffs assert that Federal Defendants have a duty under 25 U.S.C. § 3002(c)(3) to ensure that ownership and control of the excavated cultural items was given to the appropriate parties. Pls.’ Opp’n at 53. But that provision merely provides criteria for determining who gets control and does not itself provide any responsibility for the Federal government to ensure that such control is given, particularly here where the remains and other cultural items were discovered on tribal land and Federal Defendants do not control or possess the remains and other cultural items. In fact, the regulations set up a process by which anyone claiming an interest in remains or other cultural items must file a claim before the remains or other cultural items are repatriated. 43 C.F.R. § 10.15. Plaintiffs do not allege that they have filed such a claim.

Plaintiffs also assert that that the Federal Defendants were required to consult with Plaintiffs, citing 43 C.F.R. § 10.5(a). Pls.’ Opp’n at 54. But these requirements apply only to remains and other cultural items on federal lands, not tribal lands.

The statutory duty of repatriation under 25 U.S.C. § 3005 applies to “Native American human remains and objects *possessed or controlled by Federal agencies and museums.*” *Id.*

§ 3005(a) (emphasis added). Similarly, Section 3003 gives Federal agencies the duty to prepare an inventory of Native American human remains and associated funerary objects, but only if they have “possession or control over holdings or collections” of such items. That is not the case here.

Plaintiffs argue that Federal Defendants have “a legal interest in the cultural items as the owner of all land in question, which falls within the definition of control.” Pls.’ Opp’n at 62 (citing 43 C.F.R. § 10.2(a)(3)(ii)). But neither the statute nor the regulations support this proposition. The regulations do not mention ownership of the land as a consideration in determining “control.” The full definition of “control” from the NAGPRA regulations states that:

The term “control” means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency.

43 C.F.R. § 10.2(a)(3)(ii). The regulations give the example of “a museum or Federal agency that has loaned human remains, funerary objects, sacred objects, or objects of cultural patrimony to another individual, museum, or Federal agency is considered to retain control of those human remains, funerary objects, sacred objects, or objects of cultural patrimony for purposes of these regulations.” *Id.* Federal Defendants do not have control sufficient to treat the items “as part of its collection,” nor do Plaintiffs so allege. The regulations do not support Plaintiffs’ statement that any remains or other cultural items found on federal land are within the control of Federal agencies. Nor do the regulations support any such claim with respect to remains or other cultural items found on tribal land.

Plaintiffs state that “[a]llowing other parties to exert ownership or control over the cultural items without an appropriate determination of who was entitled to ownership and control under NAGPRA constitutes a NAGPRA violation and is reviewable under the APA,” citing the *Navajo Nation* case. Pls.’ Opp’n at 62. But in *Navajo Nation*, the Park Service had physical possession of the remains and other cultural items. 819 F.3d at 1086. The court held that its decision to inventory the remains under NAGPRA was a final agency action under the APA because it was a determination that NAGPRA applied. “By deciding to undertake NAGPRA’s inventory process, the Park Service conclusively decided that it, and not the Navajo Nation, has the present right to ‘possession and control’ of the remains and objects.” *Id.* at 1086 (citing 25 U.S.C. § 3003(a)). The case at bar is not analogous.

Finally, to the extent that Plaintiffs argue that the United States’ general trust responsibility to federally recognized tribes compelled it to take some action even if not specified in NAGPRA, that argument has no basis in law. Federal Defendants’ trust responsibilities are also “defined and governed by statutes rather than the common law.” *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (citation omitted). While common law principles may be used “to inform [the court’s] interpretation of statutes and to determine the scope of liability that Congress has imposed, . . . these common-law principles come into play only if a plaintiff can first ‘identify a specific, applicable, trust-creating statute or regulation that the Government violated.’” *Flute v. United States*, 808 F.3d 1234, 1243 (10th Cir. 2015) (citing *Jicarilla*, 564 U.S. at 177). Plaintiffs have not identified any such trust-creating statute that the government violated, so common law duties are not relevant here. There is no heightened standard for Federal Defendants here.

Plaintiffs have failed to demonstrate that the Federal Defendants violated any NAGPRA duty. This Court should dismiss this claim.

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

Plaintiffs also fail to demonstrate that this Court has jurisdiction over their NHPA claim. Although Tribal Defendants assumed certain historic preservation responsibilities, Plaintiffs argue that the Federal Defendants retained responsibility for NHPA compliance. They vaguely assert various “undertakings” and generally state that “[m]ost or all of the NHPA violations . . . took place within the six years before the Plaintiffs filed their original Complaint,” but fail to specifically detail when each violation occurred. Pls.’ Opp’n at 75. Contrary to Plaintiffs’ assertion, the statute of limitations prevents review of most of Plaintiffs’ allegations. In addition, NHPA does not contain a private right of action, and Plaintiffs again must meet the parameters of the APA, including showing final agency action.

1. The NHPA does not contain a private right of action.

As with the NAGPRA, the NHPA does not provide a private cause of action against the United States. Plaintiffs’ assertion that “[c]ourts across the country have found that [the NHPA] provides private right of action” is misleading for several reasons. *Id.* First, as Plaintiffs acknowledge, the D.C. Circuit and the Ninth Circuit found no private cause of action under the NHPA. *See San Carlos Apache Tribe*, 417 F.3d at 1094; *Nat’l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 915 (D.D.C. 1996), *aff’d*, 203 F.3d 53 (D.C. Cir. 1999) (stating that “neither the language nor the legislative history of the attorneys’ fees provision of the NHPA clearly indicates an intent on the part of Congress to create a private right of action”). But, second, most decisions finding a private right of action pre-date *Sandoval*, 532 U.S. 275 (2001), which changed the analysis for private rights of action. Pls.’ Opp’n at 75; *see also Friends of St.*

Francis Xavier Cabrini Church v. FEMA, 658 F.3d 460, 466 n.2 (5th Cir. 2011) (“[T]he Supreme Court's recent jurisprudence casts serious doubt on the continued viability of the private right of action under the NHPA.”). In fact, one of the cases Plaintiffs cite explicitly notes that *Sandoval* changed the legal landscape on this issue:

We have previously assumed, without deciding, that the NHPA creates some type of private right of action. *See Warwick Sewer Auth.*, 334 F.3d at 166 n.4. Such an assumption subsequently became more tenuous in the wake of the Supreme Court's decision in *Sandoval*, 532 U.S. at 289, 121 S.Ct. 1511 (casting doubt on whether statutory language that “focus[es] on the person regulated ... [or] the agencies that will do the regulating” “rather than the individual[] protected” can create by implication a private right of action to enforce those dictates).

Narragansett Indian Tribe, 903 F.3d at 29.

Since *Sandoval*, courts have held that the NHPA does not provide a private right of action. *See Camden Cnty. Historical Soc’y v. Dep’t of Transp.*, 371 F. Supp. 3d 187, 188–89 (D.N.J. 2019) (“Applying the analytical framework established by the United States Supreme Court in [*Sandoval*], which precedent the Third Circuit followed in *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007) and *McGovern v. City of Philadelphia*, 554 F.3d 114 (3d Cir. 2009), among other cases, the Court holds the NHPA does not create a private right of action.”); *Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Office v. R.I. Dep’t of Transp.*, No. CV 17-125 WES, 2017 WL 4011149, at *5 (D.R.I. Sept. 11, 2017), *aff’d*, 903 F.3d 26 (1st Cir. 2018) (“The Court is satisfied, then, that § 106 of the NHPA does not confer a private right of action.”); *Martin v. Wilcox Cnty. Alabama*, No. CIV.A. 13-0572-WS-B, 2014 WL 1202943, at *1 (S.D. Ala. Mar. 21, 2014) (noting that “the NHPA creates no private right of action in favor of the plaintiff against either the federal government or others”); “the NHPA does not create a private right of action.”; *Martin v. Alabama Historical Comm’n*, No. 2:13-CV-648-MEF, 2014 WL 28850, at *3 (M.D. Ala. Jan. 2,

2014) (holding that NHPA does not create a private right of action); *Sisseton-Wahpeton Oyate v. U.S. 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”); *Friends of Hamilton Grange v. Salazar*, No. 08CIV5220(DLC), 2009 WL 650262, at *18 (S.D.N.Y. Mar. 12, 2009) (“Because, as explained below, the NHPA does not create a private right of action, plaintiffs’ claims require a final decision by the government that could trigger review under the APA.”). Thus, Plaintiffs’ argument that it can proceed under the NHPA’s private right of action is not valid under current precedent.

2. Plaintiffs have failed to identify final agency action.

Because the NHPA does not provide a private cause of action here, Plaintiffs’ claims must proceed under the APA’s waiver of sovereign immunity and Plaintiffs must therefore identify a final agency action they are challenging. *See Friends of Hamilton Grange*, 2009 WL 650262, at *21. “[T]he ‘final agency action’ in an NHPA claim must be a ‘federal undertaking.’” *Karst Env'tl. Educ. & Protect., Inc. v. EPA*, 475 F.3d 1291, 1296 (D.C. Cir. 2007). NHPA defines “undertaking” as:

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

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

54 U.S.C. § 300320.

Plaintiffs’ opposition purports to identify several “undertakings,” none of which is valid. Pls.’ Opp’n at 68–73. Specifically, Plaintiffs assert as “undertakings”: (1) the issuance of ARPA permits; (2) the decision to allow excavation of the site without ARPA permits; (3) the excavation of the site; (4) federal funding; (5) construction and operation of the casino; (6) extension of the NPS Agreement without appropriate review and failure to terminate the agreement for noncompliance. Many of these alleged undertakings occurred more than six years before Plaintiffs brought their complaint and are therefore barred by the statute of limitations. In addition, none of the undertakings Plaintiffs allege is a valid final agency action that would support jurisdiction.

Plaintiffs assert that Federal Defendants’ issuance of ARPA permits constitutes an undertaking under the NHPA, even as they also acknowledge that the issuance of an ARPA permit “does not constitute an undertaking requiring compliance with section 106” of the NHPA. 43 C.F.R. § 7.12; *see also* Pls.’ Opp’n at 69. In addition, Plaintiffs have not identified any ARPA permit issued or renewed after 2005. *See* 2d Am. Compl. ¶ 108 (alleging that permits were issued but failing to provide dates of issuance); ECF No. 200-2 at 34 (ARPA permit issued in 2003). Thus, even if the permits could be considered an undertaking, they cannot be challenged at this date.

Plaintiffs next assert that the entire excavation is an undertaking, but do not point to any government approval of such excavation, with the exception of the ARPA permits that do not constitute an undertaking as a matter of law. It is also nonsensical to argue that issuance of an ARPA permit for excavation is not an undertaking but the actual excavation — which was carried out by non-federal actors— *is* a federal undertaking. In addition, it appears that all excavation of human remains took place before May 6, 2006, as representatives for Plaintiffs

traveled to Wetumpka on that date to discuss re-interment of 57 or more sets of human remains. ECF No. 95-11; 2d Am. Compl. ¶ 117.

Plaintiffs also refer to the “federal ownership” of the property, but fail to recognize that the federal government holds the land in trust for the Poarch Band and does not control the land for its own purposes. Pls.’ Opp’n at 69, 71. In addition, Plaintiffs cite no authority for the proposition that ownership of the property is itself an undertaking, particularly when the land is held in trust. Further, ownership could not be considered an “undertaking” when the federal government has not taken an action of any kind and does not meet the categories listed in the NHPA definition of undertaking. *See* 54 U.S.C. § 300320.

Next, Plaintiffs allege that the excavation was federally funded, in whole or in part. Pls.’ Opp’n at 70. Plaintiffs assert these grants were in violation of Section 110(k) which “prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate.” 36 C.F.R. § 800.9. The only grants Plaintiffs specifically refer to were awarded in 2019, 2018, and 2011, 2d Am. Compl. ¶ 318, years after the excavation and Plaintiffs have not established any link between the grants and the excavation. These grants are also general historic preservation grants and Plaintiffs have not shown that these federal grants are sufficient to give the Federal Defendants “federal approval, supervision, control” over the excavation or project. *See Woodham v. Fed. Transit Admin.*, 125 F. Supp. 2d 1106, 1110 (N.D. Ga. 2000) (holding that “federal financial assistance alone is insufficient to trigger the requirements of the NHPA. Instead, ‘[t]here must, in addition, be some form of federal approval, supervision, control, or at least a certain level of consultation over the spending of the federal funds’” (quoting *Maxwell*

Street Historic Preservation Coal. v. Bd. of Trustees of the Univ. of Ill., No. 00-C-4779, 2000 WL 1141439, at *4 (N.D. Ill. Aug. 11, 2000)). Plaintiffs have not demonstrated that these funds would violate Section 110(k), as it is not alleged or shown that the grants are related to the historic property.

According to Plaintiffs, construction and operation of the casino also constituted an undertaking because the federal government is involved in the Indian gaming industry. Pls.’ Opp’n at 70. But Plaintiffs cite only generally to federal involvement in Indian gaming and do not point to any specific action that Federal Defendants took with regard to the casino at issue. Plaintiffs fail to cite any authority for the proposition that general federal involvement in gaming is sufficient to make a tribe’s construction and operation of a casino a federal undertaking. And, the “involvement” Plaintiffs seem to be alleging is one as a regulator, not as a participant such as a casino owner or operator. Plaintiffs also cite to a National Indian Gaming Commission regulation that requires a tribe give the Commission 120 days’ notice before opening a new gaming facility. Notwithstanding the fact that the Commission is not a party to this action, the provision requires only notice, not approval, and consequently is not a final agency action. *See* 25 C.F.R. § 559.2(a); Pls.’ Opp’n at 71. Plaintiffs therefore have failed to establish that Federal Defendants took final agency action under the NHPA.

Plaintiffs also assert that each extension of the NPS Agreement, allegedly without appropriate review and without terminating the NPS Agreement for noncompliance constituted an undertaking. Plaintiffs do not allege any particular extension of the NPS Agreement that could plausibly constitute final agency action, and the 1999 agreement itself is outside the scope of the statute of limitations.

And, again, Federal Defendants’ general trust responsibility to federally-recognized tribes does not require that Federal Defendants be held to a higher standard of accountability. Plaintiffs have not pointed to any statutory or regulatory requirement that Federal Defendants violated and thus there is no enforceable trust duty. *See Jicarilla Apache*, 564 U.S. at 173–74. Plaintiffs’ NHPA claims must be dismissed because they fail to challenge final agency action and to assert that Federal Defendants did not take a discrete agency action that they were required to take.

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

In Federal Defendants’ opening brief, we showed that Plaintiffs failed to allege jurisdiction and failed to state a claim upon which relief can be granted on their ARPA claim. Fed. Defs.’ Mem. at 33. ARPA, 16 U.S.C. §§ 470aa-mm, sets up a permitting system to regulate excavation and removal of “archaeological resources” from public and Indian lands. The regulations set up exemptions from the permitting process for “general earth-moving excavations,” officials carrying out official duties under a federal land manager’s direction, and Indian tribes excavating on their own lands. *See* 43 C.F.R. §§ 7.5(b)(1) and (c); 16 U.S.C. § 470cc(g)(1). Plaintiffs assert in their Opposition that neither of these exemptions applies because the exemption only applies to the tribe itself and not to anyone performing excavation or removal of archaeological resources on its behalf. Pls.’ Opp’n at 79–80. Plaintiffs further assert that Federal Defendants violated ARPA by failing ensure that the appropriate permits were obtained.

To the extent that Plaintiffs seek to enforce Federal Defendants’ purported duty to ensure that appropriate permits were obtained, Plaintiffs do not have a viable claim. There is no affirmative duty in either the Uniform regulations (43 C.F.R. Part 7) or the Bureau of Indian

Affairs (“BIA”) regulations (25 C.F.R. Part 262) to monitor archaeological sites for excavation without a permit. The regulations give the federal land manager the authority to enforce violations of § 7.4 or violated permit conditions through assessment of civil penalties, but the statute does not require such a penalty be assessed. 43 C.F.R. § 7.15(a)(“*may* assess a civil penalty” (emphasis added)). In addition, the Federal Defendants have prosecutorial discretion and “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)” of the APA. *See Heckler*, 470 U.S. at 832.

Plaintiffs also assert that Federal Defendants violated ARPA by failing to give Plaintiffs notice when it issued ARPA permits. Pls.’ Opp’n at 79. But the Federal Defendants issued an ARPA permit to Auburn University in 2003, *see* ECF No. 200-2 at 33, outside the statute of limitations. Nor have Plaintiffs established that failure of notice could give rise to a cause of action.

In addition, Plaintiffs assert that Federal Defendants violated ARPA because items removed from Indian lands should have remained the property of Plaintiffs, citing 43 C.F.R. § 7.13. Pls.’ Opp’n at 81. Section 7.13(a) provides that archaeological resources removed from Indian land “remain the property of the Indian or Indian tribe having rights of ownership over such resources.” 43 C.F.R. § 7.13(a). Thus, because the Poarch Band is the beneficial owner of the land from which the archaeological resources were removed, they are the property of the Poarch Band, not Plaintiffs. *See id.*; *see also* 25 C.F.R. § 262.8(a) (“Archaeological resources excavated or removed from Indian lands, except for [cultural items under NAGPRA], remain the property of the Indian tribe or individual(s) having rights of ownership over such lands.”). Furthermore, as with other provisions of the Uniform regulations and the BIA regulations, these provisions do not contain an affirmative duty on the part of Federal Defendants.

According to Plaintiffs, federal agencies are also “required to ensure that archaeological resources excavated pursuant to ARPA are curated pursuant to 36 C.F.R. Part 79,” Pls.’ Opp’n at 81, but that Part applies only to “Federally-owned and administered archaeological collections.” *See* 36 C.F.R. Part 79. Consequently, it does not apply here. In addition, the regulations in this part specifically state that “any exchange or ultimate disposition of resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe that owns or has jurisdiction over such lands.” 36 C.F.R. § 79.2(b)(3). Plaintiffs have simply not shown that Federal Defendants were required to take agency action here, and their claim should be dismissed.

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

In our opening memorandum, Federal Defendants demonstrated that Plaintiffs had not stated a claim under RFRA because (1) Federal Defendants’ actions are not the source of the alleged substantial burden on Plaintiffs’ free exercise of religion and (2) Plaintiffs have not alleged a substantial burden on their exercise of religion. Fed. Defs.’ Mem. at 35. In response, Plaintiffs assert that Tribal Defendants are federal actors and that federal actions are preventing them from practicing their religion and forcing them to choose between violating their religious mandates and facing civil or criminal penalties. Pls.’ Opp’n at 82–95. Plaintiffs’ argument is not supported by relevant authority and must be dismissed.

RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) [of this section].” 42 U.S.C. § 2000bb–1 (emphasis added). RFRA defines “government” to include “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” 42 U.S.C. § 2000bb–2(1). Thus, unless

“the government” (in this case, Federal Defendants) has taken an action to substantially burden Plaintiffs’ exercise of religion, there is no valid RFRA claim.

Tribal Defendants’ actions cannot be imputed to Federal Defendants. In arguing that Tribal Defendants are federal actors, Plaintiffs rely upon the general delegation of federal authority in the NPS Agreement. Pls.’ Opp’n at 84–88. First, Plaintiffs fail to cite any case law showing that delegation of authority to tribal governments pursuant to the NHPA makes the federal government liable for their overall conduct. Plaintiffs do not demonstrate that Federal Defendants retained any oversight capacity over the tribe’s actions under the NPS Agreement.

Plaintiffs also fail to connect these delegations of authority to the source of alleged injury to Plaintiffs. The NPS Agreement delegates certain NHPA responsibilities to the Poarch Band, who assumed responsibility on tribal lands for various functions under Section 101(d)(2)(C) of the NHPA. ECF No. 190-1 at 115. In essence, the Poarch Band is acting in place of the State Historic Preservation Officer. *Id.* Plaintiffs do not demonstrate how the assumption of these responsibilities resulted in injury to Plaintiffs. For example, Plaintiffs assert that they are being prevented from returning the remains and funerary objects “to their intended final resting places.” 2d Am. Compl. ¶ 325. They also assert that the drinking of alcohol near the ceremonial grounds violates their religious beliefs. *Id.* ¶ 328. Plaintiffs fail to tie these, or other allegations, to Poarch’s assumption of responsibilities under the NHPA.

More importantly, however, Plaintiffs cannot show a substantial burden on their exercise of religion. Plaintiffs rely heavily on the idea that they are being forced to choose between practicing their religion or facing civil or criminal penalties. Specifically, they assert that they “are not being permitted to complete required religious protocol and return the bodies of their ancestors, along with their funerary objects, to their original and intended final resting places.”

Pls.’ Opp’n at 90. First, Plaintiffs misstate the test. The question is whether the government is imposing a sanction on Plaintiffs for exercising their religious beliefs. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988); *Slockish v. U.S. Fed. Highway Admin.*, Case No. 3:08-cv-1169-YY, 2018 WL 4523135, at *2 (D. Or. Mar. 2, 2018). As the Supreme Court stated in *Lyng*, “[t]he crucial word in the constitutional text is ‘prohibit’” 485 U.S. at 450–51. Government action “which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs” do not constitute substantial burdens on the exercise of religion.” *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citing *Lyng*, 485 U.S. at 450–51). Here, nothing the Federal Defendants have done prohibits Plaintiffs from exercising their religion.

Second, courts in similar cases have found that denial of access to a religious site is not a substantial burden on the exercise of religion. *See, e.g., Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207 (9th Cir. 2008); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 91 (D.D.C. 2017) (finding that granting of an easement for a pipeline under Lake Oahe did not substantially burden tribe’s exercise of religion); *Slockish*, 2018 WL 4523135, at *3–*6. In *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior*, the court rejected the argument Plaintiffs make here, noting that “denial of access to a religiously significant site is not one of the factors under the substantial burden test,” and even if it were, the plaintiffs were “not being forced to do something that specifically contradicts their religious beliefs.” No. 2:11-CV-00395-ODW, 2012 WL 2884992, at *8 (C.D. Cal. July 13, 2012). The court found that the denial of the plaintiffs’ access to a sacred site did not “constitute pressure to violate their religious practices because they face the threat of punishment for

trespassing.” *Id.* “They are not forced to act contrary to and relinquish their religion — no one is forcing Plaintiffs to trespass.” *Id.* Similarly, in *Slockish*, the court held that even when the government destroyed a historic campground and burial grounds that was a sacred site for the plaintiff tribes, no substantial burden on the exercise of religion occurred. *Slockish*, 2018 WL 4523135, at *6.

Moreover, those cases involved government property, and the Supreme Court stated that “[w]hatever rights the Indians may have to the use of the areas, however, those rights do not divest the Government of its right to use what is, after all, *its* land.” *Lyng*, 485 U.S. at 453. The case at bar involves the Poarch Band’s use of its own land. Plaintiffs thus assert that their religious freedom requires limits on how another tribe uses its land. But they cite no cases finding that RFRA requires a tribe or other private party to tailor its use of its own property so as to avoid a burden on the free exercise of religion of others.

Finally, Plaintiffs do not allege that Federal Defendants exercised any coercive power or provided significant encouragement for the construction activities at the Wetumpka property. The specific activities that they complain burden their religious exercise, excavation and construction of facilities by the Poarch Band on its own property are the private actions of the Poarch Band. Although Plaintiffs cite to Federal Defendants’ issuance or non-issuance of permits, that action is only the approval of the Poarch Band’s excavation on its land, which is insufficient to justify imposition of RFRA’s compelling interest test. *See Vill. of Bensenville v. Federal Aviation Admin.*, 457 F.3d 52, 66 (D.C. Cir. 2006). Therefore, RFRA is not applicable to Federal Defendants in this case.

F. Plaintiffs' Religious Exercise claim should be dismissed.

Federal Defendants showed in their Motion to Dismiss that Plaintiffs' Claim VIII should be dismissed for several reasons. Fed. Defs.' Mem. at 40–41. First, Plaintiffs failed to identify final agency action and challenge instead a prospective ruling by this Court. Second, Federal Defendants' actions do not substantially burden Plaintiffs' religion. Third, Plaintiffs have not stated a claim for relief under the First Amendment because they do not point to any law prohibiting the free exercise of religion. In addition, RLUIPA does not apply to the case at bar, as it neither involves a state or local government nor a land use regulation. And, as discussed above, Plaintiffs have not stated a claim for relief under the RFRA. In short, Plaintiffs have failed to state a claim that NAGPRA and ARPA violate their free exercise of religion.

In response, Plaintiffs again argue that Mekko Thompson is a lineal descendant of those buried at Hickory Ground and thus denial of his NAGPRA claim for ownership of the remains and cultural items violated Plaintiffs' religious rights and freedoms. Plaintiffs first argue that NAGPRA is specifically directed at religion and religious practice and, thus, under the Free Exercise Clause, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Pls.' Opp'n to Tribal Defs.' MTD, ECF No. 212, at 99. Plaintiffs argue that the way Federal Defendants and Tribal Defendants have interpreted NAGPRA causes it to violate the Free Exercise Clause. This is wrong.

First, Plaintiffs' challenge is not truly a constitutional challenge, but a challenge to Federal Defendants' decision. In addition, Plaintiffs fail to allege final agency action that would give this Court jurisdiction. They assert that Federal Defendants denied a NAGPRA claim by Mr. Thompson in 2009, but the action they refer to is a finding in response to Mr. Thompson's allegations that Auburn University failed to comply with NAGPRA by things such as not

completing inventories of the remains and other cultural items, not publishing a notice of repatriation, and not consulting with Plaintiffs. ECF No. 200-2 at 42–45, 47–49. Mr. Thompson’s letter cannot be properly characterized as a claim to ownership of the remains, as it is in the nature of a report of failure to follow NAGPRA’s procedures. Interior found that Auburn did not have legal ownership over the materials and thus did not need to follow NAGPRA’s procedures for repatriation. ECF No. 200-2 at 47–49. This cannot be considered a final agency action on application of NAGPRA to Plaintiffs. Thus, Plaintiffs have not shown that the Court has jurisdiction over their claims.

Second, Plaintiffs’ assertion that NAGPRA is not a neutral law and thus must be “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest” takes the wrong approach. Pls.’ Opp’n to Tribal Defs.’ MTD at 99. The Free Exercise Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend 1. “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Plaintiffs argue that NAGPRA is not a neutral law because it is specifically directed at religion and religious practice. Pls.’ Opp’n to Tribal Defs.’ MTD at 99. Even assuming this is true, NAGPRA does not discriminate against religious beliefs or prohibit conduct because it is undertaken for religious reasons. A law is not neutral “if the object of a law is to infringe upon or restrict practices because of their religious motivation.” *Lukumi Babalu*, 508 U.S. at 533. Nothing in NAGPRA meets this category. In any event, Plaintiffs are not challenging NAGPRA

itself, but Federal Defendants' application of NAGPRA. Because the Free Exercise Clause is aimed only at the law itself, this claim must fail.

Next, Plaintiffs argue that RLUIPA has been violated. They acknowledge that RLUIPA applies to "land use regulations and institutionalized persons." Pls.' Opp'n at 100. They fail, however, to identify any land use regulation or institutionalized person that they are challenging. They also fail to address case law establishing that, "[s]ubject to two exceptions not relevant here, RLUIPA does not apply to federal government action" *Navajo Nation*, 535 F.3d at 1077.

They also appear to argue that RLUIPA repealed NAGPRA because NAGPRA is assertedly less protective of religious exercise than RLUIPA. This argument is nonsensical. First, RLUIPA states that it should not be read to repeal federal law that is as or more protective of religious exercise, but it does not imply that less protective laws are repealed. Repeals by implication are disfavored. *See Posadas v. Nat'l City Bank of NY*, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored."). Further, as discussed above, NAGPRA is not a law that impinges on religious exercise, and Plaintiffs do not assert that NAGPRA itself infringes on their religious practice, only that Federal Defendants' application of NAGPRA here does so. Thus, even under Plaintiffs' argument, RLUIPA could not repeal NAGPRA. And notably, NAGPRA provides Plaintiffs' only avenue to claim ownership of the remains and other cultural items and if it is repealed, there is no question but that the remains and other cultural items would belong to the landowning tribe here. This claim should be dismissed.

III. CONCLUSION

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

Dated: September 4, 2020

Respectfully submitted,

JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Devon Lehman McCune
DEVON LEHMAN McCUNE
CO Bar No. 33223
Senior Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Tel: (303) 844-1487
Fax: (303) 844-1350
devon.mccune@usdoj.gov

OF COUNSEL
Stephen L. Simpson
Brittany Berger
United States Department of the Interior
Office of the Solicitor

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties entitled to receive notice.

/s/ Devon Lehman McCune