

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

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

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

Mark H. Reeves, Georgia Bar No. 141847
Kilpatrick Townsend & Stockton LLP
Enterprise Mill
1450 Greene St., Suite 230
Augusta, GA 30901
Phone: 706.823.4206
Email: mreeves@ktslaw.com
(Admitted *pro hac vice*)

Catherine F. Munson, D.C. Bar No. 985717
Kilpatrick Townsend & Stockton LLP
607 14th Street, N.W.
Washington, D.C. 20005
Phone: 202.508.5800
Email: cmunson@ktslaw.com
(Admitted *pro hac vice*)

Charles A. Dauphin, ASB-5833-H65C
Dauphin Paris, LLC
300 Vestavia Parkway, Suite 3400
Vestavia Hills, AL 35216
Phone: 205.979.6019
Email: cdauphin@dauphinparis.com

Attorneys for Tribal Defendants

TABLE OF CONTENTS

INTRODUCTION.....	1
STANDARD	2
I. The Tribal Defendants have sovereign immunity from all claims asserted.	3
A. PBCI and PCI Gaming have sovereign immunity.	3
1. <i>The APA does not apply to PBCI or any nonfederal party</i>	4
2. <i>There can be no implied waiver of tribal sovereign immunity</i>	4
3. <i>PBCI did not assume federal functions.</i>	5
4. <i>Even if the NPS Agreement waived PBCI’s tribal sovereign immunity for certain claims, it would not do so for most or all of the Plaintiffs’ claims.</i>	8
5. <i>The Plaintiffs’ cases do not support their argument.</i>	9
B. The Tribal Officials have sovereign immunity in their official capacities. ...	12
1. <i>The Plaintiffs do not allege ongoing violations of federal law</i>	13
2. <i>PBCI’s special sovereignty interests bar application of Ex parte Young.</i>	17
II. The Plaintiffs’ Indian Reorganization Act claim should be dismissed.....	20
A. The Plaintiffs lack standing to bring their IRA claim.....	21
1. <i>The Plaintiffs have not established traceability</i>	21
2. <i>The Plaintiffs have not established redressability.</i>	23
B. The Plaintiffs’ IRA claim is time barred.....	24
1. <i>The Secretary’s 1984 decision was not ultra vires</i>	26
2. <i>The Plaintiffs knew the true state of affairs and did not act</i>	27
3. <i>The Secretary’s 1984 decision does not apply to the Plaintiffs at all, and certainly has not been applied by any final agency action within six years of the complaint.</i>	30
a. ARPA permits do not support the Plaintiffs’ IRA claim.	31

b.	The 2008 NAGPRA claim does not support the IRA claim.	34
III.	The Plaintiffs’ promissory estoppel claim fails as a matter of law.	35
A.	The promissory estoppel claim is time barred.	35
1.	<i>Promissory estoppel claims have a two-year limitations period</i>	36
2.	<i>The promissory estoppel claim is not a claim for the recovery of land.</i> ..	37
3.	<i>The facts do not support imposition of a constructive trust.</i>	40
a.	There is no fraud or confidential relationship.	40
b.	There is no public dedication of the Wetumpka property.....	42
4.	<i>The promissory estoppel claim is untimely regardless.</i>	44
B.	The Plaintiffs have not alleged facts establishing a promissory estoppel claim.	45
1.	<i>PCBI did not specifically promise to preserve the Wetumpka property “in perpetuity.”</i>	46
2.	<i>An express, written preservation agreement superseded any ostensible perpetual preservation promise</i>	47
3.	<i>Any promise to preserve the property “in perpetuity” is unenforceable</i> ..	49
4.	<i>PBCI could not have reasonably expected the Plaintiffs to rely on an abandoned joint venture proposal, and the Plaintiffs could not reasonably have done so</i>	51
IV.	The Plaintiffs’ unjust enrichment claims fails as a matter of law.	52
A.	The Tribal Defendants are not holding any money or property that was conferred by or that rightfully belongs to the Plaintiffs.....	53
B.	The Plaintiffs’ unjust enrichment claim is untimely.	55
C.	The Plaintiffs’ unjust enrichment claim is barred by the statute of frauds. .	57
V.	The Plaintiffs have failed to state a valid NAGPRA claim or request available relief.....	58
A.	NAGPRA provisions governing federal lands are inapplicable.....	59
B.	The Tribal Defendants did not engage in unlawful intentional excavations. 60	

C.	The Plaintiffs have no viable claims based on hypothetical inadvertent discoveries.....	62
D.	The Plaintiffs are not “lineal descendants” under NAGPRA.	64
E.	Much of the relief that the Plaintiffs’ seek is unavailable under NAGPRA..	66
VI.	The Plaintiffs have failed to state a claim under ARPA.....	67
VII.	The Plaintiffs have failed to state a claim under the NHPA.....	70
A.	The Plaintiffs overstate the responsibilities assumed by PBCI.	70
B.	The Plaintiffs identify no undertakings that can support their NHPA claims.	72
C.	There is no private right of action against the Tribal Defendants under the NHPA.....	74
VIII.	The Plaintiffs have failed to state a claim under RFRA.....	75
A.	RFRA is inapplicable to the Tribal Defendants.	75
B.	The facts alleged do not establish a RFRA violation.....	78
IX.	NAGPRA and ARPA are not unlawful or unconstitutional.	81
X.	The relief the Plaintiffs seek is unavailable as a matter of law.	83
XI.	All of the Plaintiffs’ claims should be dismissed pursuant to Rule 19.....	84

TABLE OF AUTHORITIES

Cases

<i>Ala. Space Sci. Exhibit Comm’n v. Odysseia Co., Inc.</i> , 2016 WL 9781806 (N.D. Ala. Sept. 30, 2016)	35, 36, 37
<i>Alabama v. PCI Gaming Auth.</i> , 801 F.3d 1278 (11th Cir. 2015)	15
<i>Alaska v. Native Vill. of Venetie Tribal Gov’t.</i> , 522 U.S. 520 (1998)	60
<i>Am. Clinical Labs. Ass’n v. Azar</i> , 931 F.3d 1195 (D.C. Cir. 2019)	26
<i>Am. Gen. Life & Acc. Ins. Co. v. Underwood</i> , 886 So. 2d 807 (Ala. 2004)	56
<i>Am. Mfrs. Mut. Ins. Co. v. Sullivan</i> , 526 U.S. 991 (1999)	78
<i>Attakai v. United States</i> , 746 F. Supp. 1395 (D. Ariz. 1990)	69, 79
<i>Auburn Univ. v. IBM Corp.</i> , 716 F. Supp. 2d 1114 (M.D. Ala. 2010)	37, 55, 56, 79
<i>Beatty v. Kurtz</i> , 27 U.S. 566 (1829)	43
<i>Bebee Props., LLC v. Ard</i> , 241 So. 3d 719 (Ala. Ct. App. 2017)	40
<i>Belcher v. Birmingham Tr. Nat’l Bank</i> , 348 F. Supp. 61 (N.D. Ala. 1968)	39
<i>Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc.</i> , 690 F. Supp. 2d 1267 (M.D. Ala. 2010)	53
<i>Big Lagoon Rancheria v. California</i> , 789 F.3d 947 (9th Cir. 2015) (en banc)	25, 27, 29
<i>Bodi v. Shingle Springs Band of Miwok Indians</i> , 832 F.3d 1011 (9th Cir. 2016)	11
<i>Branch Banking & Trust Co. v. Nichols</i> , 184 So. 3d 337 (Ala. 2015)	58
<i>Branch Banking & Trust v. McDonald</i> , 2013 WL 5719084 (N.D. Ala. Oct. 18, 2013)	38
<i>Breland v. City of Fairhope</i> , 229 So. 3d 1078 (Ala. 2016)	36
<i>Burrell v. Teacher’s Ret. Sys. of Ala.</i> , 2009 WL 113692 (M.D. Ala. Jan. 16, 2009)	18

<i>Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes</i> , 786 F. App'x 837 (10th Cir. 2019)	10
<i>Carroll v. LJC Def. Contracting, Inc.</i> , 24 So. 3d 448 (Ala. Civ. App. 2009)	41
<i>Casey v. Travelers Ins. Co.</i> , 585 So. 2d 1361 (Ala. 1991)	50
<i>Cass v. Fuller</i> , 2016 WL 8078145 (N.D. Ala. Nov. 9, 2016)	42
<i>Citizens against Casino Gambling in Erie Cnty. v. Hogan</i> , 2008 WL 2746566 (W.D.N.Y. July 8, 2008)	23
<i>City of Oxford v. FAA</i> , 428 F.3d 1346 (11th Cir. 2005)	6, 72
<i>Clarke v. Tannin, Inc.</i> , 301 F. Supp. 3d 1150 (S.D. Ala. 2018)	42, 43
<i>Club One Casino v. Bernhardt</i> , 959 F.3d 1142 (9th Cir. 2020)	60
<i>Comanche Nation v. United States</i> , 2008 WL 4426621 (W.D. Okla. 2008)	81
<i>Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.</i> , 692 F.3d 1200 (11th Cir. 2012)	4, 11
<i>Cook v. United Health Care</i> , 2010 WL 3629766 (M.D. Ala. Sept. 10, 2010)	47
<i>Crompton v. Tuskegee Univ.</i> , 2016 WL 9735710 (M.D. Ala. July 8, 2016)	49
<i>CTIA-Wireless Ass'n v. FCC</i> , 466 F.3d 105 (D.C. Cir. 2006)	74
<i>Davidson v. Maraj</i> , 609 F. App'x 994 (11th Cir. 2015)	47
<i>Davis v. Univ. of Montevallo</i> , 638 So. 2d 754 (Ala. 1994)	49
<i>Dep't of the Army v. Blue Fox, Inc.</i> , 525 U.S. 255 (1999)	8
<i>Dine Citizens Against Ruining Our Env't v. BIA</i> , 932 F.3d 843 (9th Cir. 2019), <i>cert denied</i> , 2020 WL 3492672 (June 29, 2020)	85
<i>Doe, 1-13 v. Bush</i> , 261 F.3d 1037 (11th Cir. 2001)	6
<i>Downs v. McNeil</i> , 520 F.3d 1311 (11th Cir. 2008)	33

<i>Enter. Mgmt. Consultants v. United States</i> , 883 F.2d 890 (10th Cir. 1989)	85
<i>F.E.B. Corp. v. United States</i> , 818 F.3d 681 (11th Cir. 2016)	33
<i>Fed. Nat’l Mortg. Ass’n v. GNM II, LLC</i> , 2014 WL 1572584 (M.D. Ala. Apr. 17, 2014)	42
<i>Fla. Ass’n of Rehab. Facilities, Inc. v. Fla. Dep’t of Health & Rehab. Servs.</i> , 225 F.3d 1208 (11th Cir. 2000)	13
<i>Fla. Keys Citizens Coal. Inc. v. West</i> , 996 F. Supp. 1254 (S.D. Fla. 1998)	30, 34
<i>Florida v. Seminole Tribe of Fla.</i> , 181 F.3d 1237 (11th Cir. 1999)	11
<i>Foshee v. Gen. Tel. Co. of S.E.</i> , 322 So. 2d 715 (Ala. 1975)	53, 54
<i>FSRJ Props., LLC v. Walker</i> , 195 So. 3d 970 (Ala. Civ. App. 2015)	39
<i>Fuller v. Davis</i> , 594 F. App’x 935 (10th Cir. 2014)	13, 16
<i>Functional Music, Inc. v. FCC</i> , 274 F.2d 543 (D.C. Cir. 1958)	30
<i>Furry v. Miccosukee Tribe of Indians of Fla.</i> , 685 F.3d 1224 (11th Cir. 2012)	4
<i>Garland v. Clark</i> , 88 So. 2d 367 (Ala. 1956)	43
<i>Geyser v. United States</i> , 2018 WL 6990808 (C.D. Cal. Aug. 30, 2018)	23
<i>Glass v. Cook</i> , 57 So. 2d 505 (Ala. 1952)	38
<i>Glovis Ala., LLC v. Richway Transp. Servs., Inc.</i> , 2020 WL 3630739 (S.D. Ala. July 3, 2020)	36
<i>Green v. Abony Bail Bond</i> , 316 F. Supp. 2d 1254 (M.D. Fla. 2004)	76
<i>Hancock-Hazlett Gen. Constr. Co. v. Trane Co.</i> , 499 So. 2d 1385 (Ala. 1986)	53
<i>Harvey v. Harvey</i> , 949 F.2d 1127 (11th Cir. 1992)	76
<i>Higdon v. Smith</i> , 565 F. App’x 791 (11th Cir. 2014)	78

<i>Hollywood Mobile Estates, Ltd. v. Cypress</i> , 415 F. App'x 207 (11th Cir. 2011)	18, 19
<i>Hope for Fams. & Cmty. Serv., Inc. v. Warren</i> , 721 F. Supp. 2d 1079 (M.D. Ala. 2010)	44
<i>Horsely v. Feldt</i> , 304 F.3d 1125 (11th Cir. 2002)	49
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997)	18, 19
<i>In re Takata Airbag Prod. Liab. Litig.</i> , --- F. Supp. 3d ---, 2020 WL 2764196 (S.D. Fla. May 27, 2020)	55
<i>Jackson v. Astrue</i> , 506 F.3d 1349 (11th Cir. 2007)	33
<i>James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority</i> , 359 F. Supp. 611 (E.D. Va. 1973)	10
<i>Jamul Action Comm. v. Chaudhuri</i> , 200 F. Supp. 3d 1042 (E.D. Cal. 2016)	74
<i>Kansas v. Nat'l Indian Gaming Comm'n</i> , 151 F. Supp. 3d 1199 (D. Kan. 2015)	17
<i>Key Med. Supply, Inc. v. Burwell</i> , 764 F.3d 955 (8th Cir. 2014)	26
<i>La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior (La Cuna I)</i> , 2012 WL 2884992 (C.D. Cal. July 13, 2012)	80
<i>La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior (La Cuna II)</i> , 2013 WL 4500572 (C.D. Cal. Aug. 16, 2013), <i>aff'd</i> , 603 F. App'x 651 (9th Cir. 2015)	79, 80
<i>Landis v. Neal</i> , 374 So. 2d 275 (Ala. 1979)	40
<i>Larson v. Domestic & Foreign Commerce Corp.</i> , 337 U.S. 682 (1949)	26
<i>Legel v. IRS Dep't of Prof'l Responsibility</i> , 2011 WL 5914236 (S.D. Fla. Nov. 28, 2011)	68
<i>Line v. Ventura</i> , 38 So. 3d 1 (Ala. 2009)	41
<i>Lockhart v. Kenops</i> , 927 F.2d 1028 (8th Cir. 1991)	79
<i>Lyng v. Nw. Indian Cemetery Protective Ass'n</i> , 485 U.S. 439 (1988)	79

<i>Manybeads v. United States</i> , 730 F. Supp. 1515 (D. Ariz. 1989)	79, 82
<i>Martin v. Ala. Historical Comm’n</i> , 2014 WL 28850 (M.D. Ala. Jan. 2, 2014)	71, 72, 74
<i>Martin v. Am. Med. Int’l, Inc.</i> , 516 So. 2d 640 (Ala. 1987)	41
<i>Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak</i> , 567 U.S. 209 (2012)	22
<i>Mazer v. Jackson Insurance Agency</i> , 340 So. 2d 770 (Ala. 1976)	53, 54
<i>McGirt v. Oklahoma</i> , 140 S. Ct. 2452 (2020) (No. 18-9526)	19
<i>Midrash Sephardi, Inc. v. Town of Surfside</i> , 366 F.3d 1214 (11th Cir. 2004)	78, 81, 82
<i>Myers v. Bowman</i> , 713 F.3d 1319 (11th Cir. 2013)	76
<i>Named Individual Members of San Antonio Conservation Society v. Texas Highway Department</i> , 446 F.2d 1013 (5th Cir. 1971)	12
<i>Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.</i> , 89 F.3d 908 (1st Cir. 1996)	60
<i>Navajo Nation v. U.S. Forest Serv.</i> , 535 F.3d 1058 (9th Cir. 2008)	78, 81
<i>Nicholl v. Atty. Gen. of Ga.</i> , 769 F. App’x. 813 (11th Cir. 2019)	12, 13, 14, 16
<i>Oklahoma v. Hobia</i> , 775 F.3d 1204 (10th Cir. 2014)	73
<i>Patchak v. Salazar</i> , 632 F.3d 702 (D.C. Cir. 2011)	22
<i>Pit River Home & Agr. Co-op Ass’n v. United States</i> , 30 F.3d 1088 (9th Cir. 1994)	84
<i>Poarch Band of Creek Indians v. Hildreth</i> , 656 F. App’x 934 (11th Cir. 2016)	27
<i>Poarch Band of Creek Indians v. Moore</i> , 2016 WL 4778788 (S.D. Ala. Aug. 10, 2016)	27
<i>Portofino Seaport Vill., LLC v. Welch</i> , 4 So. 3d 1095 (Ala. 2008)	53
<i>Pritchett v. Turner</i> , 437 So. 2d 104 (Ala. 1983)	51

<i>Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation</i> , 673 F.3d 315 (10th Cir. 1982)	8
<i>Rayburn ex rel. Rayburn v. Hogue</i> , 241 F.3d 1341 (11th Cir. 2001)	77, 78
<i>Rease v. Harvey</i> , 238 F. App'x 492 (11th Cir. 2007)	33
<i>Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.</i> , 980 F.2d 1043 (5th Cir. 1993)	4
<i>Ritchey v. Dalgo</i> , 514 So. 2d 808 (Ala. 1987)	42, 43
<i>Rosales v. Dutschke</i> , 279 F. Supp. 3d 1084 (E.D. Cal. 2017), affirmed by 787 F. App'x 406 (9th Cir. 2019)	84
<i>Rosales v. United States</i> , 2007 WL 4233060 (S.D. Cal. Nov. 28, 2007)	59, 62, 63
<i>Rumford v. Valley Pest Control, Inc.</i> , 629 So. 2d 623 (Ala. 1993)	36
<i>Sanderlin v. Seminole Tribe of Fla.</i> , 243 F.3d 1282 (11th Cir. 2001)	4, 11
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	4
<i>Selma Hous. Dev't Corp. v. Selma Hous. Auth.</i> , 2005 WL 1981290 (S.D. Ala. Aug. 16, 2005)	36
<i>Shanks v. Dressel</i> , 540 F.3d 1082 (9th Cir. 2008)	74
<i>Sheridan Kalorama Hist. Ass'n v. Christopher</i> , 49 F.3d 750 (D.C. Cir. 1995)	72
<i>Slockish v. U.S. Fed. Highway Admin.</i> , 2018 WL 4523135 (D. Or. March 2, 2018), adopted in relevant part by 2018 WL 2875896 (D. Or. June 11, 2018)	80
<i>Snider v. Morgan</i> , 113 So. 3d 643 (Ala. 2012)	55, 56
<i>South Carolina Wildlife Federation v. Limehouse</i> , 549 F.3d 324 (4th Cir. 2008)	12
<i>Spears v. Warden</i> , 605 F. App'x 900 (11th Cir. 2015)	32
<i>Stand Up for California! v. U.S. Dep't of the Interior</i> , 919 F. Supp. 2d 51 (D.D.C. 2013)	23

<i>Summit Med. Assocs., P.C. v. Pryor</i> , 180 F.3d 1326 (11th Cir. 1999)	12, 13
<i>Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.</i> , 177 F.3d 1212 (11th Cir. 1999)	8
<i>TOMAC v. Norton</i> , 193 F. Supp. 2d 182 (D.D.C. 2002)	22
<i>Town of Chester v. Laroe Estates, Inc.</i> , 137 S. Ct. 1645 (2017)	24
<i>United States v. Roberts</i> , 185 F.3d 1125 (10th Cir. 1999)	60
<i>Upstate Citizens for Equal., Inc. v. United States</i> , 841 F.3d 556 (2d Cir. 2016)	22
<i>Va. Off. for Prot. & Advoc. v. Stewart</i> , 563 U.S. 247 (2011)	18
<i>Verizon Maryland, Inc. v. Public Service Commission of Maryland</i> , 535 U.S. 635 (2002)	18
<i>Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown</i> , 875 F.2d 453 (5th Cir. 1989)	7
<i>Villareal v. R.J. Reynolds Tobacco Co.</i> , 839 F.3d 958 (11th Cir. 2016)	33
<i>Walk, Inc. v. Zimmer, Inc.</i> , 2014 WL 2465311 (N.D. Ala. May 30, 2014)	48, 50
<i>Weaver v. James Bonding Co.</i> , 442 F. Supp. 2d 1219 (S.D. Ala. 2006)	76
<i>West v. Atkins</i> , 487 U.S. 42 (1988)	76
<i>Whatley v. Ohio Nat'l Life Ins. Co.</i> , 2019 WL 6173500 (M.D. Ala. Nov. 19, 2019)	48
<i>White Holding Co., LLC v. Martin Marietta Materials, Inc.</i> , 423 F. App'x 943 (11th Cir. 2011)	48, 54
<i>White v. Microsoft Corp.</i> , 454 F. Supp. 2d 1118 (S.D. Ala. 2006)	53
<i>Williams v. Kitchens</i> , 74 So. 2d 457 (Ala. 1954)	39
<i>Wind River Mining Corp. v. United States</i> , 946 F.2d 710 (9th Cir. 1991)	27
<i>Woodham v. Fed. Trans. Admin.</i> , 125 F. Supp. 2d 1106 (N.D. Ga. 2000)	73, 74

<i>Wyoming v. United States</i> , 279 F.3d 1214 (10th Cir. 2002)	26
---	----

Statutes

16 U.S.C. § 470cc(a)	67
16 U.S.C. § 470cc(c)	32
16 U.S.C. § 470cc(g)	69
16 U.S.C. § 470ee(a)	69
16 U.S.C. §§ 470aa - 470bb	21
25 U.S.C. § 3001(15)(B)	60
25 U.S.C. § 3002(d)(1)	62, 63
25 U.S.C. § 5108	26
28 U.S.C. § 2401(a)	33
42 U.S.C. § 5304(g)(3)(D)	10
43 U.S.C. § 7.35	68
5 U.S.C. § 551	5
5 U.S.C. § 702	5
54 U.S.C. § 302302	5
54 U.S.C. § 302704	6
54 U.S.C. § 306102(b)(5)(C)	9
54 U.S.C. § 306108	72
Ala. Code § 6-2-33	35
Ala. Code § 6-2-38(l)	35
Ala. Code. § 8-9-2(1)	58
Alabama Code § 6-2-33	37
Alabama Code § 6-2-33(2)	55
Code 1940, Tit. 7, § 20	39

Other Authorities

NHPA § 101(b)(3)	5
------------------------	---

Regulations

25 C.F.R. § 262.5	61
25 C.F.R. § 262.5(c)(1)	68
25 C.F.R. § 262.5(c)(i)	61
25 C.F.R. § 262.5(d)	61

25 C.F.R. § 262.8	62
25 C.F.R. § 262.8(a)	61, 69
25 C.F.R. § 262.8(a)(2)	65
25 C.F.R. § 265.5(d)	69
36 C.F.R. § 800	6, 71
36 C.F.R. § 800.2(a)	7
36 C.F.R. § 800.2(c)(1)	72
36 C.F.R. § 800.3(c)	72
36 C.F.R. § 800.5(a)	72
43 C.F.R. § 10.14(b)	64
43 C.F.R. § 10.2(a)(5)	65
43 C.F.R. § 10.2(b)(1)	64
43 C.F.R. § 10.3(c)(1)	61
43 C.F.R. § 10.3(c)(4)	61
43 C.F.R. § 10.4(e)	63
43 C.F.R. § 7.12	73
43 C.F.R. § 7.5(a)	67
43 C.F.R. § 7.5(b)(3)	69
43 C.F.R. § 7.5(b)(1)	69

INTRODUCTION

This case is much more straightforward than the voluminous briefing might imply. The Plaintiffs are angry about archaeological excavation and development that took place years ago on property that the Tribal Defendants¹ acquired from a third party four decades ago. While no one questions the sincerity of the Plaintiffs' feelings, their anger does not give rise to any valid legal claims. Indeed, as explained in the various motions to dismiss, every one of the eleven counts set forth in the Second Amended Complaint (SAC, Doc. 190) is fatally flawed as a matter of law, whether due to a lack of subject matter jurisdiction, sovereign immunity, expired statutes of limitations, the lack of a private right of action, or simple non-existence of necessary elements. The Plaintiffs decry the Tribal Defendants' reliance on these "technical legal reasons" supporting dismissal of the SAC, perhaps hoping that the Court will look past the law and focus exclusively on their version of the facts. Plaintiffs' Response to Tribal Defendants' Motion to Dismiss Second Amended Complaint (Plaintiffs' response), Doc. 212 at 18.² This the Court cannot do. Instead, because the Plaintiffs have failed to set forth a single valid claim against the Tribal Defendants or any other Defendants as a matter of law, the Court should dismiss the SAC in full.

BACKGROUND

The Tribal Defendants' brief in support of their motion to dismiss the SAC (their principal brief, Doc. 202) sets forth key background facts relevant to their motion. *See id.* at 14-18. The Plaintiffs' recitation of background facts confirms key points set forth by the Tribal Defendants, including that Defendant PBCI acquired the Wetumpka property in 1980 subject to a 20-year preservation covenant that the Plaintiffs do not contend was violated. *See* Doc. 212 at 19. And

¹ As in their initial motion and brief, the Tribal Defendants comprise the Poarch Band of Creek Indians (PBCI or the Tribe), PCI Gaming, and all tribal officials sued in their official capacities. *See* Doc. 202 at 13 n.1

² Pin cites to previously filed documents are to the ECF-generated page numbers atop each page.

while the parties disagree on the interpretation and significance of a funding application letter that PBCI submitted to the Alabama Historical Commission describing a subsequently abandoned plan to jointly acquire and maintain the property with Plaintiff Muscogee (Creek) Nation (MCN), Doc 190-1 at 3-7, no one disputes the letter's authenticity or content.

The Plaintiffs do, however, grossly mischaracterize the substance of the October 19, 2002, letter (Doc. 200-2 at 20-25), signed by Plaintiff Thompson and others on behalf of Plaintiff Hickory Ground Tribal Town and copied to Plaintiff MCN. As explained in the Tribal Defendants' principal brief, Doc. 202 at 16, that letter establishes that in October 2002, more than ten years before filing this lawsuit, all Plaintiffs had actual knowledge of "facts displayed in the written record that not less than three (3) sets of human remains have been excavated and removed from the property without prior consultation with Hickory Ground Tribal Town." Doc. 200-2 at 22. In their response, the Plaintiffs try to back away from this clear and concrete statement of contemporaneous knowledge by saying that the letter referred only to "rumors through third parties that Poarch may be disturbing the site" and stated that the Plaintiffs "hope[d] this is not the case." Doc. 212 at 19 n.2. The assertion that the 2002 letter referred only to "rumors" is manifestly irreconcilable with that document's explicit reference to "facts displayed in the written record." Moreover, the quoted language regarding the Plaintiffs' "hope [that] this is not the case" is extracted from a separate paragraph of the letter that made unsupported allegations regarding PBCI's treatment of excavated remains, not questioning whether excavation occurred. *See* Doc. 200-2 at 22. The record is clear on this point, and the Plaintiffs' effort to muddy it is unavailing.

STANDARD

The Tribal Defendants have already addressed the standard for the Court's evaluation of their motion. *See* Doc. 202 at 18-19. They revisit the issue here only to reemphasize that when a defendant makes a factual challenge to subject matter jurisdiction, as the Tribal and Federal

Defendants do with respect to many claims, a plaintiffs' allegations are not entitled to a presumption of truthfulness, and the Court is free to consider material outside of the pleadings. *See id.* (citing cases). The Plaintiffs' response never acknowledges this rule.

ARGUMENT AND ANALYSIS

I. The Tribal Defendants have sovereign immunity from all claims asserted.

Tribal sovereign immunity deprives the Court of subject matter jurisdiction over all of the Plaintiffs' claims against the Tribal Defendants. *See* Doc. 202 at 21-28. The SAC fails to even allege jurisdiction over PBCI and PCI Gaming, both of which unquestionably enjoy tribal sovereign immunity, and the tribal officials sued in their official capacities share in the Tribe's immunity. *See id.* Nothing in the Plaintiffs' response brief refutes these facts.

A. PBCI and PCI Gaming have sovereign immunity.

Despite not alleging subject matter jurisdiction over PBCI or PCI Gaming or otherwise questioning their sovereign immunity in the SAC, the Plaintiffs argue in their response brief that PBCI forfeited its sovereign immunity by entering into an agreement (the NPS Agreement, Doc. 190-1, at 115-19) with the National Park Service (NPS) whereby PBCI assumed certain, limited responsibilities under the National Historic Preservation Act (NHPA). *See* Doc. 212 at 22. Specifically, the Plaintiffs contend that when an entity is "delegated federal responsibilities ... the delegee steps into the shoes of the agency that made the delegation in the first place." *Id.* at 23. This includes, according to the Plaintiffs, amenability to suit under, and acceptance of the federal immunity waiver set forth in, the Administrative Procedure Act (APA). *Id.* So, under the Plaintiffs' theory, PBCI's assumption of the limited responsibilities set forth in the NPS Agreement—a document that makes no mention of the APA or any waiver of tribal sovereign immunity—impliedly waived PBCI's tribal sovereign immunity from all of the claims set forth in the SAC. That is not the case for several reasons.

1. *The APA does not apply to PBCI or any nonfederal party.*

The Plaintiffs' argument fails first and most obviously because it relies on the APA as the basis for bringing claims against the Tribal Defendants. The APA applies only to federal agencies, not nonfederal entities such as Indian tribes and tribal enterprises. *See* Doc. 202 at 68-69; *see also Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1055 (5th Cir. 1993) (holding, in a suit seeking to enjoin a state agency's expenditure of federal funding, that a district court lacked jurisdiction to enjoin a state agency under the APA). The existence of a contract or funding relationship between a federal agency and nonfederal defendant does not alter this fact. *See* Doc. 202 at 69 (citing multiple cases). Because PBCI and PCI Gaming are not federal agencies, the APA and its immunity waiver are *per se* inapplicable to them.

2. *There can be no implied waiver of tribal sovereign immunity.*

Putting aside the fatal fact that the APA is inapplicable to any of the Tribal Defendants, the Plaintiffs' claim also fails because they do not identify an express waiver of PBCI's sovereign immunity. Instead, they ask this Court to infer a waiver from PBCI's assumption of certain obligations in the NPS Agreement. That is impermissible. Waivers of tribal sovereign immunity cannot be implied from tribal conduct, but must be clear and unequivocal. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1206-08 (11th Cir. 2012); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1234 (11th Cir. 2012). The Eleventh Circuit has gone so far as to explain that even an express promise by a tribe to comply with a specific law "could not, without more, constitute an express and unequivocal waiver of its immunity from suit." *Furry*, 685 F.3d at 1236; *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1287-89 (11th Cir. 2001) (holding that a tribe's promise to comply with federal law, made in connection with receipt of federal funding, did not waive its immunity from suits brought under the laws with which it promised to comply). Any argument

that PBCI lacks immunity because it signed the NPS Agreement, which is completely silent as to tribal sovereign immunity, or because it accepted federal benefits in the form of historic preservation responsibilities or preservation grant funds, *see* Doc. 212 at 26, is irreconcilable with Supreme Court and Eleventh Circuit precedent barring the implication of a waiver of tribal sovereign immunity on the basis of a tribe's conduct.³

3. *PBCI did not assume federal functions.*

Even if it were possible to infer a tribe's waiver of immunity from its assumption of federal functions, the Plaintiffs' argument still would fail because the responsibilities that PBCI assumed under the NPS Agreement are not federal.

The NPS Agreement expressly provides that PBCI is assuming "the functions of a State Historic Preservation Officer" (SHPO) under the NHPA, not those of NPS or any other federal agency. Doc. 190-1 at 115; *id.* at 118, § 12 (calling for NPS to issue a notice to "make clear that the Tribe has assumed the role of State Historic Preservation Officer"). It then proceeds to identify discrete responsibilities that PBCI assumed from among those "set out in Section 101(b)(3)" of the NHPA. Doc. 190-1 at 115, § 1. That provision describes "the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program." NHPA § 101(b)(3), codified as amended at 54 U.S.C. § 302302. Accordingly, to the extent that PBCI "step[ped] into

³ The Plaintiffs do not argue that there is a congressional abrogation of PBCI's immunity, and any such argument would fail. The APA waives only the immunity of the United States and provides that it does *not* "affect[] other limitations on judicial review," which would include tribal sovereign immunity. 5 U.S.C. § 702; *see also* 5 U.S.C. § 551. Like waivers, congressional abrogations of tribal sovereign immunity must be "unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citation omitted). Given the APA's express limitation to federal authorities and lack of any reference to tribal sovereign immunity, it plainly does not include an unequivocal expression of congressional intent to abrogate such immunity.

the shoes” of anyone when it signed the NPS Agreement, Doc. 212 at 23, it stepped into those of a state entity—the SHPO—and not those of NPS.

Further examination of the NPS Agreement reinforces this conclusion. The Plaintiffs imply, for example, that PBCI assumed a blanket obligation to “[f]ollow Section 106 of the NHPA in accordance with the regulations codified at 36 C.F.R. § 800 *et seq.*” Doc. 212 at 23 (citing Doc. 191-1 at 117, § 5). But § 5 of the NPS Agreement refers only to the performance of the SHPO consulting duties assumed in § 1(G) of that agreement—consulting with and providing feedback to federal agencies in connection with federal undertakings on tribal lands—not a general assumption of all federal functions involved in the § 106 process.⁴ Doc. 191-1 at 117, § 5; *see, e.g., City of Oxford v. FAA*, 428 F.3d 1346, 1356-57 (11th Cir. 2005) (reviewing the SHPO’s role in consulting with federal agencies). Similarly, § 7 of the NPS Agreement, which the Plaintiffs also cite as an example of PBCI’s putative assumption of “federal responsibilities,” Doc. 212 at 23, provides that PBCI will act “in accordance with Section 101(d)(4)(C)” of the NHPA. Doc. 191 at 117, § 7. Section 101(d)(4)(C) of the NHPA, however, deals exclusively with tribal rights to assume certain SHPO functions—not with the delegation or assumption of any federal functions. *See id.*, codified as amended at 54 U.S.C. § 302704. Once again, PBCI is a delegee of state historic preservation responsibilities, not federal functions. As “the federal APA clearly does not apply to state agencies,” it cannot apply to PBCI as a delegee of state agency duties. *Doe, 1-13 v. Bush*, 261 F.3d 1037, 1055 (11th Cir. 2001); *see also* Doc. 202 at 22, 68-69 (further explaining why an APA claim against PBCI is non-viable).

⁴ As the Federal Defendants note in support of their motion to dismiss, the Plaintiffs have identified no relevant federal undertakings on which to base NHPA claims under the APA. *See* Doc. 200 at 30-34. Other failings of the Plaintiffs’ NHPA claims are discussed in detail in the Tribal Defendants’ principal brief, Doc. 202 at 68-73, and below.

The Plaintiffs attempt to evade the fact that PBCI did not assume federal functions by citing an NHPA regulation requiring federal agencies to “ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance” and providing that the relevant “agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with Section 106.” 36 C.F.R. § 800.2(a). This regulation is completely irrelevant, however, because the Plaintiffs have not identified any federal undertakings over which PBCI has jurisdiction or for which PBCI has been delegated legal responsibility for compliance with § 106. PBCI assumed SHPO functions in the NPS Agreement, not jurisdiction over federal undertakings. It is telling that § 800.2 identifies SHPOs not as legally responsible “agency officials,” but rather as parties with whom responsible federal agencies should consult during the § 106 process. *See* § 800.2(c)(1). Additionally, § 800.2(a) specifically provides that the “statutory obligation ... to fulfill the requirements of section 106” remains with the relevant federal agency, implying that it is the agency itself, not an agency official and certainly not a SHPO or tribe assuming SHPO responsibilities, that retains ultimate responsibility for ensuring compliance with § 106 and is subject to suit under the APA for any actionable noncompliance. *Id.*; *see also Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (“By its terms, only a federal agency can violate section 470f.”⁵).

Because PBCI is not a federal agency and assumed only SHPO responsibilities rather than federal functions, the Plaintiffs’ attempt to leverage the NPS Agreement to bring an APA claim against PBCI as a federal delegee fails.

⁵ The Fifth Circuit’s reference to § 470f refers to 16 U.S.C. § 470f, which previously codified § 106 of the NHPA. Section 106 is now codified at 54 U.S.C. § 306108.

4. *Even if the NPS Agreement waived PBCI's tribal sovereign immunity for certain claims, it would not do so for most or all of the Plaintiffs' claims.*

The Plaintiffs' theory suffers additional shortcomings. Even if PBCI had waived its sovereign immunity by signing the NPS Agreement *and* could be considered a federal actor for APA purposes as a result of its assumption of SHPO responsibilities, neither of which is the case, PBCI still would retain immunity from the Plaintiffs' claims to the extent that they are not based on alleged violations of the specific responsibilities assumed in the NPS Agreement. Federal law requires that both the immunity waiver set forth in the APA and waivers of tribal sovereign immunity be strictly construed and limited to their terms. *See, e.g., Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (holding, in an APA case, that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1224-25 (11th Cir. 1999) (holding that where a tribe waived immunity as to certain claims, other claims falling outside the scope of the waiver remained barred by tribal sovereign immunity); *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.3d 315, 320 (10th Cir. 1982) (holding that a waiver of tribal sovereign immunity "is to be strictly construed" and that a waiver of immunity from one claim does not waive immunity from other claims). Accordingly, even if the NPS Agreement had waived PBCI's sovereign immunity, any such waiver would be limited to claims based directly on violations of federal obligations that PBCI actually assumed through that agreement.

As explained above, the responsibilities that PBCI assumed under the NPS Agreement are far narrower than the Plaintiffs contend. Rather than assuming full federal responsibility for compliance with the NHPA § 106 process for all purposes and in all respects on PBCI trust lands, as the Plaintiffs insinuate, PBCI assumed limited, expressly delineated SHPO responsibilities. *See* Doc. 190-1 at 115-18 (setting out the responsibilities assumed by PBCI). The Plaintiffs ignore this

fact. The overwhelming majority of their claims, if not all of them, are not based on alleged violations of the SHPO-type NHPA responsibilities that PBCI assumed under the NPS Agreement. Most of their NHPA claims instead allege violations of the § 106 process by the Federal Defendants, with erroneous, unsupported add-on assertions that those violations are also attributable to PBCI and thus give rise to claims under the APA. *See generally* SAC at 65-69. Any alleged waiver of PBCI's immunity could not possibly extend to claims based on ostensible violations of § 106 duties that PBCI did not assume.

The Plaintiffs also appear to argue, in passing, that because one provision of the NHPA, 54 U.S.C. § 306102(b)(5)(C), cross-references a provision of the Native American Graves Protection and Repatriation Act (NAGPRA), the NPS Agreement defeats PBCI's immunity from all of the Plaintiffs' NAGPRA-based claims. *See* Doc. 212 at 22. They then go yet another step further, implying that the passing reference to "archeological resources" in 36 C.F.R. § 800.2(a)(1)—an NHPA regulation that, as discussed above, is inapplicable to PBCI—waives PBCI's immunity from all APA claims based on the Archaeological Resources Protection Act (ARPA). *See* Doc. 212 at 22. These arguments are absurd. PBCI plainly did not assume federal NAGPRA and ARPA compliance obligations in the NPS Agreement, and its assumption of limited SHPO functions via that agreement cannot possibly be stretched so far as to effectuate a waiver of its immunity from any and all third party APA claims alleging violations of any statute mentioned anywhere in the NHPA. The Plaintiffs tellingly cite no authority supporting such a result.

5. *The Plaintiffs' cases do not support their argument.*

The cases ostensibly supporting the Plaintiffs' contention that they can bring an APA claim against PBCI are inapposite. First, the Plaintiffs appear to contend that the PBCI's assumption of SHPO responsibilities under the NPS Agreement operates as an acceptance of the APA's immunity waiver as a matter of law under *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes*, 786

F. App'x 837 (10th Cir. 2019). *See* Doc. 212 at 24-25. But *Caddo Nation*, which involved Department of Housing and Urban Development's (HUD) delegation of certain duties to the Wichita Tribe, is readily distinguishable. The statute authorizing the HUD delegation explicitly required the delegee to "assume the status of a responsible federal official under the National Environmental Policy Act" and to "accept the jurisdiction of the federal courts for the purpose of enforcement of his responsibilities as such an official." 42 U.S.C. § 5304(g)(3)(D); *see Caddo Nation*, 786 F. App'x at 840 & 840 n.4. In other words, the HUD delegation at issue in *Caddo Nation* required an express waiver of sovereign immunity by the delegee, and the Wichita Tribe provided such a waiver. *Caddo Nation*, 786 F. App'x at 841 (noting that the Wichita Tribe "***affirmatively waived its sovereign immunity*** in the certification included in the [environmental assessment]" (emphasis added)). The Plaintiffs have identified no such express waiver of PBCI's immunity here, and, as noted above, a waiver of tribal sovereign immunity cannot be implied. Because PBCI did not expressly waive its immunity, *Caddo Nation* is inapposite.⁶

The Plaintiffs also rely on dicta in a decades old Virginia district court opinion, *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va. 1973). *See* Doc. 212 at 25. In *James River*, the Richmond Metropolitan Authority (RMA), a political subdivision of the Commonwealth of Virginia, asserted Eleventh Amendment immunity from a litany of federal statutory claims arising out of the RMA's construction of a highway system. *See generally James River*, 359 F. Supp. at 618-23. The district court held that the RMA, as a political subdivision of a state, was not entitled to Eleventh Amendment immunity as a matter of law. *Id.* at 623. It then went on to posit, in dicta, that even if the RMA otherwise would have

⁶ Notably, the court in *Caddo Nation* dismissed all claims against the Wichita Tribe that were not directly grounded in the federal duties assumed by the Tribe and within the scope of the Tribe's affirmative immunity waiver. *See* 786 F. App'x at 839.

had immunity, it would have waived that immunity by “purposefully avail[ing] itself of the benefit of federal law.” *Id.* at 624. This dicta has no relevance here.

Tribal sovereign immunity is different than Eleventh Amendment immunity, and it has been well-settled, largely in the decades since *James River*, both that tribal immunity cannot be impliedly waived and that tribal nations do not waive their immunity by “availing” themselves of federal laws. *See, e.g., Contour Spa*, 692 F.3d at 1206-08 (holding that tribal sovereign immunity is different than Eleventh Amendment immunity and that tribes, unlike states, do not waive their immunity by removing a suit to federal court or by filing suit in federal court); *see also Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1021-22 (9th Cir. 2016) (citing *Hard Rock* and holding that there could be no waiver of tribal sovereign immunity absent “an unequivocal expression of the Tribe’s intent to waive”). Indeed, the Eleventh Circuit has rejected the argument that a tribe waives its immunity merely by availing itself of federal law, holding that such a result would be “patently inconsistent” with the rule against implied waivers of tribal sovereign immunity. *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1243 (11th Cir. 1999) (rejecting the argument that a tribe waived its sovereign immunity by engaging in gaming activity pursuant to the federal Indian Gaming Regulatory Act (IGRA)). And in *Sanderlin*, the Eleventh Circuit went so far as to hold that a tribe’s acceptance of federal funding conditioned on a promise to comply with non-discrimination provisions of the federal Rehabilitation Act did not waive the tribe’s immunity from suits brought under that act. *Sanderlin*, 243 F.3d at 1287-89 (reasoning that “a promise not to discriminate ... in no way constitute[s] an express and unequivocal waiver of sovereign immunity”).

The other cases mentioned in the string cite at the end of the Plaintiffs’ argument likewise offer scant support. *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324 (4th Cir.

2008), involved a claim against a state official, not a tribe or even the state itself, and the court found that the plaintiffs avoided an Eleventh Amendment immunity bar under the *Ex parte Young* doctrine, not by bringing a claim under the APA. *See id.* at 331-32. And *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013, 1028 (5th Cir. 1971), contains no discussion of immunity whatsoever. Neither case is instructive, much less dispositive, as to whether the NPS Agreement subjects PBCI to claims under the APA.

In light of the Plaintiffs' failure to identify any clear and unequivocal waiver or abrogation of PBCI's tribal sovereign immunity from the Plaintiffs' claims, those claims should be dismissed with prejudice for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

B. The Tribal Officials have sovereign immunity in their official capacities.

The Plaintiffs do not dispute the general rule that tribal sovereign immunity extends to tribal officials such as the PBCI Council members, PCI Gaming directors, and Tribal Historic Preservation Officer (THPO) sued here in their official capacities (the Tribal Officials). Instead, they contend that their claims can proceed against the Tribal Officials under the narrow exception to tribal sovereign immunity commonly referred to as the *Ex parte Young* doctrine. *See* Doc. 212 at 26-27. Under *Ex parte Young*, officials who would otherwise enjoy sovereign immunity can sometimes be sued for prospective declaratory or injunctive relief to stop ongoing violations of federal law. *See, e.g., Nicholl v. Atty. Gen. of Ga.*, 769 F. App'x. 813, 815 (11th Cir. 2019); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999); Doc. 202 at 23. But the *Ex parte Young* doctrine is inapplicable here both because the Plaintiffs have not alleged the requisite ongoing violations of federal law and because the Plaintiffs' claims implicate special sovereignty

interests that the Supreme Court has held trump the *Ex parte Young* exception. *See* Doc. 202 at 23-28. The Plaintiffs’ efforts to rebut these arguments are unavailing.

1. *The Plaintiffs do not allege ongoing violations of federal law.*

Recent Circuit precedent explicitly holds that “[t]he *Ex parte Young* doctrine applies only when a ‘violation of federal law ... is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past.’” *Nicholl*, 769 F. App’x at 815 (quoting *Fla. Ass’n of Rehab. Facilities, Inc. v. Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000)); *see also Fuller v. Davis*, 594 F. App’x 935, 940 (10th Cir. 2014) (refusing to apply *Ex parte Young* due to lack of any ongoing violation of law when “[t]he gravamen of [the plaintiffs’] complaint is that they were tricked long ago”). Yet the Plaintiffs contend that the *Ex parte Young* doctrine’s requirement of an ongoing violation of federal law is not, in fact, a temporal inquiry. Rather than asking whether there is an actual, ongoing violation of law, they assert that “the appropriate inquiry ... is whether the plaintiff seeks *injunctive relief*, as opposed to *damages*.” Doc. 212 at 29. Accordingly, the Plaintiffs argue, because their claims against the Tribal Officials seek prospective, non-monetary relief, they fit within the *Ex parte Young* exception despite the fact that they “seek declarations of the illegality of certain of the Tribal Officials’ past conduct” *Id.* (emphasis added).

The Plaintiffs’ characterization of *Ex parte Young* completely ignores half of the test for its applicability and contradicts binding Circuit precedent. *See, e.g., Nicholl*, 769 F. App’x at 815; *Summit*, 180 F.3d at 1337; *see also* Doc. 202 at 23-24 (citing multiple cases holding the *Ex parte Young* doctrine inapplicable to claims seeking declaratory or injunctive relief based on allegedly unlawful past conduct). In *Summit*, the Eleventh Circuit confirmed that the availability of the *Ex parte Young* doctrine “turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief.” *Id.* But the test does not end there. In addition to being limited to prospective

relief, the Eleventh Circuit explained, “the *Ex parte 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.” *Id.* (emphasis added); *see also Nicholl*, 769 F. App’x at 815-16 (holding *Ex parte Young* inapplicable where the complaint “challenged only past conduct”). *Nicholl* is particularly relevant, as it explicitly held the *Ex parte Young* doctrine inapplicable to a claim for injunctive relief directing the defendant to take steps to correct the continuing effects of an alleged past violation of federal law. *See* 769 F. App’x at 815 (noting that the plaintiff sought declaratory and injunctive relief). This binding authority directly refutes the Plaintiffs’ argument that the *Ex parte Young* doctrine’s requirement of an “ongoing violations of federal law” can be brushed aside so long as the plaintiff seeks prospective, non-monetary relief.

Presumably recognizing that their first argument misses the mark, the Plaintiffs also attempt to conjure alleged ongoing violations of federal law by the Tribal Officials. These efforts are as misguided and unavailing as their attempt to redefine the *Ex parte Young* doctrine. *See* Dec. 202 at 24-26.

With respect to the Indian Reorganization Act (IRA) claim set forth in Count I of the SAC, which seeks an order requiring the Secretary of the Interior (the Secretary) to revoke the Wetumpka property’s trust status, the Plaintiffs allege that the Tribal Officials are engaged in an ongoing violation of law by allowing gaming on the property. As the Tribal Defendants have explained, the gaming activity on the Wetumpka property does not violate federal law. *See* Dec. 202 at 24-25. The Plaintiffs contend that this is irrelevant because they allege that gaming on the Wetumpka property violates *state* law. Dec. 212 at 30-31. But the Eleventh Circuit has recognized, in the very context of a suit against PBCI officials alleging that gaming on the Wetumpka property and other Indian trust lands within Alabama violated state law, that *Ex parte Young* is inapplicable to alleged

violations of state law on Indian lands. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015). As the Wetumpka property is indisputably Indian land held in trust by the United States for the benefit of PBCI, *see* SAC ¶ 73 & Doc. 203-2, a claim that gaming on that property violates state law cannot support application of *Ex parte Young*. *See PCI Gaming*, 801 F.3d at 1293 (“Because the lands at issue are properly considered ‘Indian lands,’ the Individual Defendants are immune from Alabama’s state law claim.”).

Like the State of Alabama in *PCI Gaming*, the Plaintiffs want this Court to assume their success on the merits of their IRA claim and apply that holding retroactively for purposes of addressing the threshold, jurisdictional question of the Tribal Officials’ sovereign immunity. That is not how it works. If the Plaintiffs were to succeed in their decades-late effort to have the Wetumpka property removed from trust and the Tribal Officials subsequently conducted gaming there in violation of some state law, then at that point, and only at that point, the Plaintiffs might be able to bring an *Ex parte Young*-style claim against the Tribal Officials based on an ongoing violation of state law, assuming they had standing to enforce state gaming laws. But presently, there is no ongoing violation of law to support applying *Ex parte Young* to the Plaintiff’s IRA claim (or any other claim). *See PCI Gaming*, 801 F.3d at 1292-93.

There is yet another glaring problem with the Plaintiffs’ assertion that gaming activity on the Wetumpka property brings their IRA claim within *Ex parte Young*—namely, that an injunction of gaming activity is not the relief the Plaintiffs seek through that claim. Instead, they seek “an order in the nature of mandamus requiring that Secretary Bernhardt take the Hickory Ground Site out of trust.” SAC at 76, Prayer for Relief ¶ (a). This reveals that the ostensible violation of law that the Plaintiffs seek to address through their IRA claim is not ongoing gaming activity at all. It is the Secretary’s decades-old decision to take the Wetumpka property into trust. Because “a

plaintiff may not use the [*Ex parte Young*] doctrine to adjudicate the legality of past conduct, *Summit*, 180 F.3d at 1337, any argument that the Plaintiffs' IRA claim falls under *Ex parte Young* fails as a matter of law. *See Nicholl*, 769 F. App'x at 815-16.

The Plaintiffs' efforts to identify ongoing violations of law on which to ground their unjust enrichment and promissory estoppel claims (Counts II-III and V-VI) against the Tribal Officials suffer an identical flaw. Rather than alleging ongoing violations of federal (or even state) law, they allege continuing effects of concluded past conduct. For both their unjust enrichment and promissory estoppel claims, the ostensibly unlawful act that the Plaintiffs identify is the Tribal Officials' violation of an alleged promise to permanently preserve the Wetumpka property. While the Tribal Defendants dispute the existence and enforceability of any such promise, any ostensible breaking of it occurred long ago. *See, e.g.*, Doc. 200-2 at 21-23 (alleging violations of the alleged permanent preservation promise prior to October 2002). Even the archaeological excavations and construction activities that followed the alleged breaking of the putative preservation commitment have long since concluded. *See* Doc. 202 at 25 (citing relevant paragraphs of the SAC). The Plaintiffs complain of lingering effects of the Tribal Officials' allegedly unlawful actions—that PBCI now operates a profitable hotel and casino on the property in question and has not reinterred excavated cultural items in their original location, causing the Plaintiffs ongoing offense—but those lingering effects not themselves an ongoing violation of federal law. As the Eleventh Circuit explained in *Nicholl*, where it held that the ongoing effect of an alleged past violation of law “does not transform a one-time past event into a continuing violation,” *Ex parte Young* simply does not apply in such circumstances. *Nicholl*, 769 F. App'x at 816; *see also Fuller*, 594 F. App'x at 940 (finding *Ex parte Young* inapplicable when “[t]he gravamen of [the plaintiffs'] complaint is that they were tricked long ago”); *Kansas v. Nat'l Indian Gaming Comm'n*, 151 F. Supp. 3d 1199,

1225 (D. Kan. 2015) (declining to apply *Ex parte Young* to tribal officials in the context of an equitable estoppel claim alleging that an Indian tribe had acquired land under false pretenses, reasoning that the “alleged misrepresentation happened in the past”).

The Plaintiffs’ claims under NAGPRA (Count VII), ARPA (Count IX), and the NHPA (Count X) all share this fatal flaw of attempting to transform lingering effects of an alleged past violation of law into an ongoing violation of law. *See* Doc. 202 at 25-26. The Plaintiffs’ argument in response—that the continued displacement and, in some instances, storage of archaeological resources does constitute an ongoing violation of federal law—is unavailing. *See* Doc. 212, 33-35. The laws on which the Plaintiffs rely do not bar the displacement or storage of archaeological resources. For the most part, they impose consultation and permitting requirements *in advance* of certain federal undertakings or archaeological excavations. The Tribal Officials’ alleged violations of those requirements are past acts outside the scope of *Ex parte Young*, and the lingering effects of those alleged violations do not constitute ongoing violations of law.

Because they fail to identify actionable, ongoing violations of federal law in connection with Counts I-III, V-VI, and IX-X of the SAC as well as most aspects of Count VII, *see* Doc. 202 at 25 n.8, the Plaintiffs’ efforts to circumvent the Tribal Officials’ sovereign immunity by invoking the *Ex parte Young* doctrine fails as to each of those Counts.⁷ Those claims should be dismissed with prejudice for lack of subject matter jurisdiction.

2. *PBCI’s special sovereignty interests bar application of Ex parte Young.*

The Plaintiffs’ reliance on the *Ex parte Young* doctrine is also misplaced because settled precedent bars that doctrine’s application in cases, such as this one, that implicate special

⁷ For Count VIII, the Plaintiffs allege no violation of law by the Tribal Defendants at all. They merely contend that NAGPRA and ARPA may violate the First Amendment and other statutes intended to protect the free exercise of religion if this Court interprets them in certain ways. *See* SAC at 59-61.

sovereignty interests. The Plaintiffs’ effort to revoke the Wetumpka property’s trust status and usurp PBCI’s control of the property brings this case squarely in line with *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997), the key Supreme Court case establishing the special sovereignty interests exception to the *Young* doctrine. *See* Doc. 202 at 26-28.

In response, the Plaintiffs argue that (1) *Coeur d’Alene* is no longer good law in light of *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), and (2) even if *Coeur d’Alene* remains good law, it is strictly limited to the specific facts before the Supreme Court, which the Plaintiffs claim are distinguishable. *See* Doc. 212 at 36. Neither argument has merit.

The argument that the Supreme Court abrogated *Coeur d’Alene* in 2002 is easily dismissed. In 2011, nine years after the *Verizon* decision, the Eleventh Circuit stated that “[t]he *Young* doctrine does not apply where the relief requested ‘implicates special sovereignty interests,’” then devoted several paragraphs of analysis to *Coeur d’Alene*’s applicability to a claim involving an Indian tribe’s possessory right to a piece of property for the remainder of a lease term. *See Hollywood Mobile Estates, Ltd. v. Cypress*, 415 F. App’x 207, 208, 210-11 (11th Cir. 2011) (quoting *Coeur d’Alene*, 521 U.S. at 281)). While the *Hollywood Mobile* panel ultimately ruled that *Coeur d’Alene* was inapplicable to the facts before it, it would not have identified the special sovereignty interests exception and engaged in a detailed analysis of its applicability if the exception no longer existed. Other courts to acknowledge the special sovereignty exception to *Ex parte Young* post-*Verizon* include the U.S. Supreme Court and this Court. *See, e.g., Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 257-58 (2011); *id.* at 268-70 (Roberts, C.J., dissenting); *Burrell v. Teacher’s Ret. Sys. of Ala.*, 2009 WL 113692, at *3 (M.D. Ala. Jan. 16, 2009) (noting claims implicating “special sovereignty interests” as an exception to the *Ex parte Young* doctrine’s

applicability). Repeated acknowledgement of the special sovereignty interests exception in this and higher federal courts is irreconcilable with the Plaintiffs’ assertion of abrogation.

As to the Plaintiffs’ second argument, it is true that lower courts have been reluctant to significantly expand *Coeur d’Alene*’s special interests exception. It is also irrelevant, because, as the Tribal Defendants show in their principal brief, the relief that the Plaintiffs seek in this case—including, but not limited to revocation of the Wetumpka property’s trust status and the imposition of a constructive trust granting the Plaintiffs effective control over the property in perpetuity—is every bit as intrusive on PBCI’s sovereignty as the land status question in *Coeur d’Alene*.⁸ See Doc. 202 at 26-28. The Plaintiffs argue otherwise, claiming that the facts in this case are more analogous to those in *Hollywood Mobile* than *Coeur d’Alene*. This assertion is specious.

Hollywood Mobile involved a dispossessed lessee’s suit to recover possession of land that it had leased from the Seminole Tribe. As the Eleventh Circuit noted in rejecting application of the special sovereignty interests exclusion, “the requested injunction would merely affect the tribe’s possessory rights to the property for the remainder of the lease term. It would not remove the land from the tribe’s jurisdiction or permanently deprive the tribe of its property interests” like the relief sought in *Coeur d’Alene*. *Hollywood Mobile*, 415 F. App’x at 211. The Plaintiffs’ requested relief here is plainly more akin to that requested in *Coeur d’Alene* than *Hollywood Mobile*. This is not a dispute over a temporary possessory interest such as a leasehold. The

⁸ A small number of the many, many substantial effects of revoking the trust status of the Wetumpka property and the concomitant termination of PBCI’s jurisdiction over the property are discussed below, as the federal preservation statutes at issue in this case apply differently and grant tribes different privileges depending on whether particular lands are Indian lands under a tribe’s jurisdiction. See Parts V-VII, *infra*; see also Brief of Amicus Curiae Muscogee (Creek) Nation at 1, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526) (noting, correctly, as part of MCN’s statement of interest in a case addressing the status of its reservation lands, that the question affected MCN’s “core sovereign interests”).

Plaintiffs seek an order revoking the trust status of the Wetumpka property—an order that would end the land’s reservation status and “remove the land from the tribe’s jurisdiction.” *Id.* In addition, they seek the imposition of a constructive trust giving them control over the Wetumpka property. Such an order would “permanently deprive [PBCI] of its property interests,” *id.*, as would the Plaintiffs’ requests for (1) mandatory injunctive relief requiring the Tribal Defendants to dismantle extensive improvements on the property and restore it to its pre-excavation status and (2) a prohibitory injunction forbidding PBCI from ever developing its property.

The Plaintiffs do not, as they claim, merely “seek injunctive relief to bring Tribal Defendants into compliance with federal law.” Doc. 212 at 40. They seek injunctive relief to strip PBCI of jurisdiction and control over its lands and to transfer that control to themselves as a punishment for alleged past wrongs. The SAC and the relief that it requests represent an all-out assault on PBCI’s core sovereign interests, and the law is clear that such assaults cannot be launched through *Ex parte Young*. The Plaintiffs’ claims against the Tribal Officials are barred by tribal sovereign immunity and should be dismissed for lack of subject matter jurisdiction.

II. The Plaintiffs’ Indian Reorganization Act claim should be dismissed.

In Count I of the SAC, the Plaintiffs assert that the Secretary lacked the authority under the Indian Reorganization Act (IRA) to take the Wetumpka property into trust for PBCI in 1984 and seek an order requiring the Secretary to rescind that decision. *See generally* Doc. 190 at 45-46, 76 ¶ (a). The Plaintiffs lack standing to assert this claim, and it is hopelessly barred by the six-year statute of limitations applicable to APA claims in any event.⁹ *See* Doc. 202 at 28-37; Doc. 200 at 18-25.

⁹ The Plaintiffs open their response with several pages devoted to arguing the putative merits of their IRA claim. *See* Doc. 210 at 21-25. While vehemently disputed, those arguments are irrelevant to the Tribal and Federal Defendants’ jurisdictional arguments and do not require a response here.

A. The Plaintiffs lack standing to bring their IRA claim.

The Court lacks subject matter jurisdiction over the Plaintiffs' IRA claim due to their lack of standing. *See* Doc. 202 at 29-33; Doc. 200 at 22-25. The Plaintiffs have failed to meet their burden of demonstrating both that their alleged injury is fairly traceable to the Secretary's 1984 land entrustment decision and that their alleged injury will be redressed by a favorable decision on their IRA claim.¹⁰ *See* Doc. 202 at 29-33; Doc. 200 at 22-25.

In response, the Plaintiffs claim that their alleged injuries are traceable to the 1984 land entrustment decision because without that decision, the Secretary "would not and could not" have issued ARPA permits allowing excavation, so the excavation would not have occurred and the Tribe's hotel and gaming facility ostensibly would not have been built. Doc. 210 at 30. And they claim that a favorable ruling on their IRA claim will redress their injuries because it will "unwind the illegal excavation and construction." *Id.* at 31. The Plaintiffs are wrong on both counts.

1. *The Plaintiffs have not established traceability.*

As to traceability, the Secretary indeed would not have issued ARPA permits if he had not taken the Wetumpka property into trust for PBCI, as ARPA does not apply to land owned in fee by tribes. *See* 16 U.S.C. §§ 470aa - 470bb. But rather than establishing traceability, this undermines the Plaintiffs' argument. Had the Secretary not taken the Wetumpka property into trust, PBCI would have retained ownership of the property in fee and been free to conduct excavations or otherwise develop the property as it saw fit, with no regard for ARPA (or other statutes on which the Plaintiffs attempt to ground their claims). That the Secretary's decision to take the land into

¹⁰ For purposes of this motion, the Tribal Defendants do not dispute that the Plaintiffs have alleged injury for Article III standing purposes.

trust enabled him to issue ARPA permits is thus wholly irrelevant to the Plaintiffs' standing to bring an IRA claim.

The Plaintiffs' argument that the entrustment decision facilitated PBCI's construction of a gaming facility, which they contend could not have happened absent entrustment, fares no better. As noted in PBCI's principal brief, the Plaintiffs do not complain that they are injured specifically as a result of PBCI's operation of a casino at the Wetumpka site. They contend that they are injured by excavation and construction activity that would have accompanied any development of the property. *See* Doc. 202 at 30-31. Because the land could have been developed without being placed in trust and any development would have caused the same injury to the Plaintiffs as development for a gaming facility, their injuries are not traceable to the Secretary's decision.¹¹

The fact that the Plaintiffs would suffer the same injury from any development of the Wetumpka property distinguishes the cases that they cite. In *Patchak*, for example, the neighboring landowner plaintiffs' injury arose from the fact that 3.1 million people would visit the planned casino annually, causing myriad ill effects that would not have resulted from a less traffic-intensive development. *See Patchak v. Salazar*, 632 F.3d 702, 703-04 (D.C. Cir. 2011), *aff'd sub nom Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209 (2012); *see also Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 565-66 (2d Cir. 2016) (finding traceability where the Secretary's entrustment decision made gaming permissible, the case turned on the lawfulness of gaming at the site, and the plaintiffs "alleged that the casino's operations cause them injury-in-fact"); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 188 (D.D.C. 2002) (finding

¹¹ Any insinuation that the land would not have been developed for any purpose other than gaming is rebutted by the Plaintiffs' own exhibit indicating that the land was slated for non-gaming commercial development as far back as 1980, before PBCI acquired it in fee. *See* Doc. 190-1 at 4-5; *see also* Doc. 202 at 15 n.4.

that an anti-casino group’s alleged injury “from a 24-hour-a-day casino attracting 4.5 million customers per year” was traceable to a land entrustment decision); *Citizens against Casino Gambling in Erie Cnty. v. Hogan*, 2008 WL 2746566, at *19 (W.D.N.Y. July 8, 2008) (finding traceability based on “Plaintiffs’ allegations of injury *from a gaming facility*” (emphasis added)). In *Geyser*, an unpublished district court opinion from California, the court found traceability where the entrustment decision was linked to specific property use plans that the plaintiffs argued would increase traffic, alter the character of the area, and were inconsistent with a pre-existing community development plan. *Geyser v. United States*, 2018 WL 6990808, at *4 (C.D. Cal. Aug. 30, 2018). The court summarily stated that the plaintiffs demonstrated redressability because the Secretary’s decision “anticipate[d] specific development that will in fact cause them harm.” *Id.* at *7. Even assuming this were sufficient to establish traceability, no such immediate link between the Secretary’s decision and the specific development of the property exists here. And in *Stand Up for California!*, the court found that the tribal plaintiff’s alleged injury was traceable to the Secretary’s entrustment decision because it was based on the fact that operating a casino on the property—as opposed to some other type of development—would have a “devastating economic impact” on a plaintiff’s competing casino 30 miles away. *Stand Up for California! v. U.S. Dep’t of the Interior*, 919 F. Supp. 2d 51, 55, 56 n.7 (D.D.C. 2013) (declining to address the standing of other plaintiffs).

Perhaps if the Plaintiffs’ alleged injuries—like those of the plaintiffs in the cases they cite—were the result of a specific type of development at Wetumpka that hinged upon the Secretary’s approval, they might have a traceability argument. As it stands, they do not.

2. *The Plaintiffs have not established redressability.*

The Plaintiffs’ redressability argument fails on the same grounds as their traceability argument. If the Court revoked the 1984 entrustment decision, PBCI would own the Wetumpka property in fee and could develop it free of federal oversight or the strictures of the various federal

statutes on which the Plaintiffs ground many of their claims. *See* Doc. 202 at 31-33; Doc. 200 at 24-25. Such an order would not redress the Plaintiffs' claim that they were harmed by excavation and development of the property.

In response, the Plaintiffs rely on the same cases discussed above, arguing that the tribal defendants in those cases, like PBCI, would still have owned the land in fee and been free to develop it absent the respective entrustment decisions, yet the courts in those cases found redressability. Doc. 210 at 34. But again, the alleged injuries in those cases arose out of the *specific type* of development at issue that was made possible only by virtue of the land's trust status. Here, the Plaintiffs' alleged injury is not tied to the type of development that took place, and thus does not hinge on the entrustment decision. Moreover, the developments at issue in the cases cited by the Plaintiffs had not yet occurred and presumably would be prevented by revocation of the entrustment decisions. Here, excavation and construction activity had been ongoing for many years before the Plaintiffs filed suit, and revoking the property's trust status—the only relief sought in the IRA claim—will not undo the excavation and construction. That the Plaintiffs seek relief that allegedly might “unwind” the excavation and construction activity, to the extent that is possible, in connection with other claims is irrelevant, because “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) (citations omitted). Because the relief that the Plaintiffs seek in the IRA claim will not redress their alleged injury, they lack standing to bring that claim, and it should be dismissed with prejudice under Rule 12(b)(1).

B. The Plaintiffs' IRA claim is time barred.

Even if the Plaintiffs had standing to assert their IRA claim, it would still subject to dismissal on the grounds that it is hopelessly time barred. The Plaintiffs contend that their untimely

challenge to a decades-old agency decision is permissible because it falls within an exception allowing a party to challenge an allegedly *ultra vires* agency action within six years of the agency's first application to the specific challenger. Doc. 210 at 25-26 (asserting that the IRA claim is timely because "Plaintiffs are challenging Interior's action as *ultra vires*, and because Interior did not apply its decision to Plaintiffs until within six years of this lawsuit). They are incorrect.

The "as-applied" exception on which the Plaintiffs rely allows a party to challenge an agency rule or regulation of continuing application more than six years after its promulgation if (1) the agency has taken a final action applying the rule or regulation to the challenger for the first time within the limitations period, (2) the challenger could not have brought a timely challenge to the rule, and (3) the challenger alleges that the rule or regulation was outside the agency's statutory authority. *See, e.g., PCI Gaming*, 801 F.3d at 1292; *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 n.6 (9th Cir. 2015) (en banc). The Plaintiffs assert that the Secretary's 1984 land entrustment decision was an *ultra vires* act that the Secretary applied to them within six years of the December 2012 filing of the initial complaint by (1) granting ARPA permits approving excavations of the Wetumpka property without notifying the Plaintiffs and (2) denying a 2008 NAGPRA claim filed by Plaintiff Thompson. Doc. 210 at 26-28. And while they tacitly acknowledge that the ARPA permits in question were granted more than six years prior to the filing of this lawsuit, they contend that this is immaterial because the APA's limitations period supposedly was equitably tolled until the Plaintiffs obtained copies of the ARPA permits in question. *Id.* at 27.

The Plaintiffs' arguments are unavailing. First, they do not allege *ultra vires* agency action. They merely assert that the Secretary made an error of fact or law in his exercise of validly

delegated authority. Second, they misconstrue the scope and extent of the “as-applied” exception to the APA’s statute of limitations, which does not apply in this instance for several reasons.

1. *The Secretary’s 1984 decision was not ultra vires.*

The Plaintiffs’ *ultra vires* argument stumbles out of the gate because they do not actually allege that the Secretary’s 1984 decision was *ultra vires*. To be sure, the Plaintiffs argue at length that the Secretary made errant factual findings when taking the Wetumpka property into trust.¹² See Doc. 210 at 21-25. Specifically, they contend that the Secretary erred in concluding that PBCI was under federal jurisdiction in 1934, as required for the Secretary to exercise his entrustment authority. *Id.* But they do *not* allege that the Secretary lacks the delegated authority to take land into trust on behalf of tribes that were under federal jurisdiction in 1934; they simply assert that he made an erroneous determination as to whether PBCI is such a tribe.

“Official action is not *ultra vires* or invalid ‘if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.’” *Wyoming v. United States*, 279 F.3d 1214, 1229-30 (10th Cir. 2002) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949)); see also *Am. Clinical Labs. Ass’n v. Azar*, 931 F.3d 1195, 1208-09 (D.C. Cir. 2019); *Key Med. Supply, Inc. v. Burwell*, 764 F.3d 955, 962-63 (8th Cir. 2014); *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir. 1986). Here, it is undisputed that Congress has delegated to the Secretary the authority to take land into trust for Indians and Indian tribes. See 25 U.S.C. § 5108 (“The Secretary is authorized, in his discretion, to acquire ... any interest in lands ... for the purpose of providing land for Indians. ... Title to any lands or rights acquired pursuant to this Act ... shall be taken in the name of the United States in trust for the Indian tribe.”). Because the Plaintiffs simply assert that the Secretary made an errant factual

¹² PBCI strongly disputes this assertion, but the correctness of the Secretary’s 1984 factual findings is not before the Court and is beyond the scope of this brief.

determination in the exercise of this discretionary authority, they have not alleged an *ultra vires* action, and the as-applied exception allowing otherwise untimely APA challenges to *ultra vires* agency actions is inapplicable.

2. *The Plaintiffs knew the true state of affairs and did not act.*

Even if the Secretary's entrustment decision were *ultra vires*, the Plaintiffs still could not proceed under the narrow as-applied exception to the APA's six-year limitations period because they failed to take timely action. The rationale for allowing as-applied challenges is that "the government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Big Lagoon*, 789 F.3d at 954 n.6 (quoting *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); see also *Poarch Band of Creek Indians v. Moore*, 2016 WL 4778788, at *5 (S.D. Ala. Aug. 10, 2016) (rejecting an effort to mount an as-applied APA challenge when the challenger had been "undoubtedly aware of the 'true state of affairs'" for more than six years prior to filing suit), *report and recommendation adopted in relevant part by* 2016 WL 4745185 (S.D. Ala. Sept. 12, 2016). The exception is not intended to benefit dilatory parties or allow challengers to sit on their rights when they could have acted.

It is clear from numerous allegations in the SAC that the Plaintiffs were contemporaneously aware of the Secretary's 1984 decision and understood its legal significance. See, e.g., SAC ¶¶ 205-06, 216. The Eleventh Circuit has twice held that parties with contemporaneous awareness of secretarial decisions to take land into trust for PBCI cannot decades later avail themselves of the as-applied exception to bring an otherwise untimely APA challenge. *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 943-44 (11th Cir. 2016); *PCI Gaming*, 801 F.3d at 1292.

The Plaintiffs attempt to distinguish *PCI Gaming* and *Hildreth* by claiming that the parties seeking to challenge the Secretary's decisions in those cases were immediately aggrieved by

having lands removed from their respective jurisdictions, whereas the Plaintiffs allegedly were not aggrieved by the Secretary's decision until years later. Doc. 210 at 29-30. Assuming, *arguendo*, that the Plaintiffs were not immediately aggrieved by the Secretary's 1984 decision, it is clear that they were aware of it and unhappy with its consequences well more than six years prior to filing this suit on December 12, 2012. For example, Plaintiff MCN formally suspended its government to government relationship with PBCI and censured the Bureau of Indian Affairs (BIA) in 1992 based on, *inter alia*, PBCI's plans to build an Indian lands gaming facility on the Wetumpka property and BIA's alleged failure to consult with MCN and noncompliance with the NHPA, NAGPRA, and ARPA. Doc. 200-2 at 15 §§ 101, 301-03; *id.* at 17 § 402(B). In 2002, Plaintiff Thompson wrote to PBCI and BIA asserting a NAGPRA claim for all human remains and cultural objects excavated from the Wetumpka property, complaining of a lack of consultation in connection with the construction of PBCI's gaming facility on the property, objecting to the excavation of burial sites on the property, and alleging violations of ARPA, NAGPRA, and the NHPA. *Id.* at 20-25. In many ways, Plaintiff Thompson's 2002 letter reads like a prototype of the complaint that the Plaintiffs would file more than a decade later. The Plaintiffs certainly knew the true state of affairs and could have proceeded with the threatened litigation at the time of Plaintiff Thompson's letter, yet they chose not to do so.

Less than a week after Plaintiff Thompson's 2002 letter to PBCI and BIA, the Speaker of the MCN Council wrote to NPS requesting information about PBCI's assumption of SHPO duties for the Wetumpka property—which could not have happened if the land were not in trust for PBCI—alleging statutory violations based on a failure to consult with MCN. *Id.* at 27. And in 2008, Plaintiff Thompson filed a NAGPRA claim noting, *inter alia*, that the Plaintiffs visited Alabama on May 9, 2006, to meet with PBCI officials and Auburn University archaeologists “to

discuss reinterment of 57 or more sets of human remains.” *Id.* at 43. The record indisputably establishes that the Plaintiffs knew, well more than six years before filing this lawsuit, that (1) the Secretary had taken the Wetumpka property into trust, (2) PBCI was planning to develop or actually developing the property, (3) archaeological excavations, including of human remains, were occurring on the property, (4) the federal government had allowed PBCI to assume SHPO responsibilities at the Wetumpka property, (5) PBCI was not performing the SHPO responsibilities to Plaintiffs’ satisfaction, and (6) the Tribal Defendants and Federal Defendants were not consulting with the Plaintiffs in connection with preservation and management of the Wetumpka property as the Plaintiffs believed the law required. These facts were more than sufficient to put the Plaintiffs on notice that they were aggrieved by the Secretary’s 1984 decision. *See, e.g., Big Lagoon*, 789 F.3d at 954 n.6 (holding the as-applied exception inapplicable to the State of California’s effort to challenge land entrustment decision in litigation filed in 2009 because “California understood the ‘true state of affairs’ concerning the BIA’s decision” by 1997); *id.* at 951.

Acknowledging none of these facts, the Plaintiffs argue that they were not aggrieved by the Secretary’s 1984 decision—*i.e.*, that they did not know the true state of affairs—until the Department of the Interior (Interior) issued ARPA permits for excavations on Indian lands at the Wetumpka site without notifying them. They then argue that they were aggrieved again—and that another APA claim accrued—when the Secretary denied a NAGPRA claim submitted in 2008, allegedly based on the fact that the Wetumpka property was held in trust for PBCI. *See* Doc. 210 at 26-28.

The Plaintiffs cite no support for their position that a cause of action under the as-applied exception to the APA’s six-year statute of limitations can accrue repeatedly, well after the specific

challengers have notice of the true state of affairs and the grounds for their challenge. That notion runs contrary to the rationale underlying the exception, which does not support allowing serial challenges or recognizing serial claim accrual dates for a party who has long been aware of its potential claim. *See Big Lagoon*, 789 F.3d at 954 n.6; *Fla. Keys Citizens Coal. Inc. v. West*, 996 F. Supp. 1254, 1256 (S.D. Fla. 1998) (holding that the statute of limitations for an as-applied APA challenge “would not begin to run ... when the Corps *last* applied the regulation, but instead when the Corps *first* applied the regulation to Plaintiffs”); *see also Moore*, 2016 WL 4778788, at *5 (explaining that subsequent accrual of alleged new grounds to challenge a decades old land entrustment decision could not support new as-applied APA claims when the challenger already knew the true state of affairs). Accordingly, the Court should reject the Plaintiffs’ multiple accruals theory and focus on the initial accrual of their as-applied APA claim. Because they knew the true state of affairs more than a decade before filing suit, the Plaintiffs cannot avail themselves of the as-applied exception to the APA limitations period.

3. *The Secretary’s 1984 decision does not apply to the Plaintiffs at all, and certainly has not been applied by any final agency action within six years of the complaint.*

Finally, the Plaintiffs have not shown that the Secretary’s 1984 decision has been “applied” to them at all, and certainly not that it has been applied through final agency action within six years of the complaint. A decision to take land into trust is not a rule or regulation of continuing application; it fixes a property right and is in the nature of a one-time adjudicatory decision to which the as-applied exception is inapplicable. *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). Were this not the case, secretarial land entrustment decisions and the significant rights and expectations that flow from them could never be settled. Because a one-time adjudicatory or quasi-adjudicatory decision such as a land entrustment is not subsequently “applied” to third parties, it cannot support an “as-applied” APA challenge.

Even if the Secretary’s entrustment decision could be applied to the Plaintiffs, they do not identify any final agency action applying it during the six years prior to the December 12, 2012, filing of the complaint. The two ostensible actions that they contend support their as-applied challenge—the issuance of ARPA permits to conduct excavations on the Wetumpka property and the denial of a 2008 NAGPRA claim filed by Plaintiff Thompson—are insufficient.

a. ARPA permits do not support the Plaintiffs’ IRA claim.

No ARPA permits can support the Plaintiffs’ IRA claim for at least two reasons. First, the issuance of ARPA permits does not “apply” the 1984 entrustment decision to the Plaintiffs. Second, there is no allegation that any ARPA permits were issued within six years of the complaint, and at least one was issued nearly a decade earlier.

Interior’s issuance of an ARPA permit does not constitute an “application” of the 1984 entrustment decision to the Plaintiffs. In their response, the Plaintiffs contend that the permits support their as-applied APA challenge because Interior (1) “illegally granted permits to Auburn University to excavate on ‘Indian lands’” and (2) issued ARPA permits “without notifying or consulting with the Muscogee (Creek) Nation, who clearly attached religious and cultural importance to these ‘Indian lands.’” Doc. 210 at 26-27. They do not explain any connection between these two allegations or identify how either applies the 1984 entrustment decision to these specific challengers.

The allegation that Interior “illegally granted permits ... to excavate on Indian lands” plainly does not identify any application of the entrustment decision to the Plaintiffs. If Interior was correct that the lands covered by the permits were PBCI’s Indian lands—which it was—then MCN did not need to consent to the permits and there is no basis for calling them illegal. If Interior had determined, as the Plaintiffs contend it should have, that the Wetumpka property was not held in trust for PBCI, then the property would have been held by PBCI in fee and no permit would

have been necessary. Neither scenario would involve the Plaintiffs in any way, and thus would not apply the Secretary's entrustment decision to them.

Nor does Interior's alleged failure to consult with the Plaintiffs pursuant to 16 U.S.C. § 470cc(c) constitute an application of the 1984 entrustment decision to the Plaintiffs. That statute directs the relevant federal land manager "notify *any* Indian tribe which may consider the site as having religious or cultural importance." *Id.* (emphasis added). Interior's apparent determination that MCN was not such a tribe does not hinge on the property's trust status, and the statute would not apply at all if the land were not held in trust. In either case, Interior's decision not to notify the Plaintiffs in no way applies the 1984 entrustment decision to them.

Assuming, *arguendo*, that Interior's issuance of ARPA permits somehow "applied" the 1984 decision to the Plaintiffs, the fact remains that they have not alleged that any ARPA permits were issued during the six years preceding the filing of the complaint. Indeed, the Plaintiffs fail to allege dates of issuance for any ARPA permits, and the only such permit in the record issued on April 15, 2003, more than nine years before the Plaintiffs filed this suit. Doc. 200-2 at 33.

Recognizing this problem, the Plaintiffs dubiously claim that PBCI first notified them of excavations at the Wetumpka property at some unspecified time in 2006, that they only learned of the "illegally issued" ARPA permits at some unspecified later date, and that the limitations period for the as-applied APA claim was equitably tolled until that unspecified date because the Tribal and Federal Defendants unlawfully failed to notify them of the excavation. Doc. 210 at 27. This argument fails on multiple levels.

First, there is no such thing as equitable tolling of the statute of limitations for bringing an APA claim. While most statutes of limitations can be equitably tolled, those that are jurisdictional in nature cannot. *See Spears v. Warden*, 605 F. App'x 900, 903 n.2 (11th Cir. 2015) ("[T]here is a

general presumption that *non-jurisdictional* federal statutes of limitations are subject to equitable tolling.”); *see also F.E.B. Corp. v. United States*, 818 F.3d 681, 685 (11th Cir. 2016) (affirming that where a “statute of limitations circumscribes the scope of [a] waiver of sovereign immunity, compliance with the limitations period is jurisdictional”). The APA’s statute of limitations, 28 U.S.C. § 2401(a), is jurisdictional, and thus cannot be equitably tolled. *Rease v. Harvey*, 238 F. App’x 492, 496 (11th Cir. 2007) (“We do not have jurisdiction over suits brought against the United States that are barred by section 2401(a).”); *see also* Doc. 200 at 20.

Second, the Plaintiffs have not met their burden of showing that they would be entitled to equitable tolling in any event. *See Villareal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 971 (11th Cir. 2016) (“The party seeking equitable tolling has the burden of proof.”). “Equitable tolling is a remedy that must be used sparingly ... that is, in extreme cases where failure to invoke the principles of equity would lead to unacceptably unjust outcomes.” *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008). To merit equitable tolling, a plaintiff must demonstrate its own diligence and the presence of extraordinary circumstances that prevented timely action. *See id.*; *Jackson v. Astrue*, 506 F.3d 1349, 1355 (11th Cir. 2007). The Plaintiffs have shown neither. While their carefully worded statement that *PBCI* did not notify them of excavations as the *Wetumpka* property until 2006 may be true, as the current record does not clearly establish that *PBCI* itself provided earlier notice, the record is replete with evidence showing that the Plaintiffs knew that excavations were taking place at *Wetumpka* well before 2006. *See supra*. They knew in 2002 that excavations had taken place with federal knowledge and that excavated remains had been “sent to universities for ‘scientific analysis.’” Doc. 200-2 at 23. Diligence would have required them to investigate whether those excavations were conducted pursuant to ARPA permits and why they were not consulted. And according to the 2008 NAGPRA claim letter referenced in the SAC and

in the Plaintiffs’ brief, the Plaintiffs visited Alabama on May 9, 2006—more than six and a half years before filing this suit—to meet with PBCI officials and Auburn University archaeologists “to discuss reinterment of 57 or more sets of human remains.” Doc. 200-2 at 43. Their knowledge of excavations at the property by a major research university provided a further basis for inquiry notice of possible ARPA permits, inquiry the Plaintiffs could have made by simply asking at the May 2006 meeting. The Plaintiffs’ alleged failure to learn of the permit(s) issued years earlier was a simple lack of diligence, and certainly not indicative of extraordinary circumstances.

Third and finally, it is not even clear from the SAC or the Plaintiffs’ response that they lacked actual notice of the ARPA permits prior to December 13, 2006. They claim that their as-applied APA claim “accrued when Plaintiffs obtained records of the permits,” but do not say when that happened. Doc. 210 at 27. This, in and of itself, means that they have failed to meet their burden of establishing diligence and extraordinary circumstances. *See Fla. Keys Citizens*, 996 F. Supp. at 1256-57 (dismissing putative as-applied APA challenge because the plaintiffs did “not inform the Court when these allegedly unlawful applications of the regulation occurred”).

Because the issuance of ARPA permits did not apply the Secretary’s 1984 decision to the Plaintiffs and there is no indication that any such permits issued during the six-year period preceding the filing of the complaint in any event, the Plaintiffs’ attempt to base an as-applied APA challenge to the Secretary’s decision on those permits fails as a matter of law.

b. The 2008 NAGPRA claim does not support the IRA claim.

In addition to relying on the ARPA permits, the Plaintiffs argue that an additional as-applied APA claim accrued in 2009, when Interior denied a NAGPRA claim that Plaintiff Thompson filed against Auburn University. *See* Doc. 210 at 28; Doc. 200-2 at 42-45. This argument also fails. Contrary to the Plaintiffs’ assertion, the denial of Plaintiff Thompson’s 2008 NAGPRA claim was not based on the trust status of the Wetumpka property, but on the fact that

Auburn University did not transfer, possess, or control any cultural items subject to NAGPRA. *See* Doc. 200-2 at 48. Interior's denial of the claim thus did not apply the 1984 entrustment decision at all, much less to the Plaintiffs. Additionally, to the extent that the denial of a NAGPRA claim is the injury allegedly supporting the Plaintiffs' IRA claim, that injury is not redressable because success on the IRA claim would render NAGPRA inapplicable. *See infra*; Doc. 202 at 31-32.

For all of the foregoing reasons, as well as those previously set forth in the Tribal and Federal Defendants' principal briefs, the Plaintiffs' challenge to the Secretary's 1984 entrustment decision is manifestly untimely and should be dismissed for lack of subject matter jurisdiction.

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

The Plaintiffs' promissory estoppel claim fails as a matter of law both because it is barred by the applicable statute of limitations and because the Plaintiffs have failed to allege facts establishing the necessary elements. *See* Doc. 202 at 37-49. The Plaintiffs' response fails to refute these arguments.

A. The promissory estoppel claim is time barred.

Under Alabama law, "promissory estoppel ... claims are subject to a two-year statute of limitations." *Ala. Space Sci. Exhibit Comm'n v. Odysseia Co., Inc.*, 2016 WL 9781806, at *11 (N.D. Ala. Sept. 30, 2016) (citing Ala. Code § 6-2-38(l)). The Plaintiffs make no effort to argue that they brought their promissory estoppel claim within two years of its accrual, nor could they. Instead, they argue that (1) § 6-2-38(l) does not apply—despite case law to the contrary—because that section is limited to claims "in the nature of damages for personal injury," and (2) their promissory estoppel claim is subject to the ten-year limitations period found in Ala. Code § 6-2-33 because they seek a constructive trust as their remedy. Doc. 212 at 41. Neither argument has

merit. And even if either did, the promissory estoppel claim would still be time-barred because the Plaintiffs were on notice of the basis for their claim more than ten years before bringing it.

1. *Promissory estoppel claims have a two-year limitations period.*

The Plaintiffs' assertion that the two-year limitations period in § 6-2-38(l) is limited to personal injury claims is plainly belied by both the text of the statute and case law applying it. The text of the statute establishes a two-year limitations period for "[a]ll actions for any injury to the person *or rights of another* not arising from contract and not specifically enumerated in this section" Ala. Code § 6-2-38(l) (emphasis added). This is a catchall provision that applies to a variety of non-contract claims that do not fall within any other enumerated limitations period. *See Breland v. City of Fairhope*, 229 So. 3d 1078, 1084-85, 1089 (Ala. 2016) (affirming that trial court's determination that claim for negligence relating to plaintiff's right to fill wetland on his property was subject to "two (2) year catch all Statute of Limitations period" of § 6-2-38(l)). Indeed, numerous Alabama state and federal courts have applied § 6-2-38(l) to promissory estoppel and other, similar claims in a variety of situations not involving personal injury. *See, e.g., Ala. Space*, 2016 WL 9781806, at *11 (applying § 6-2-38(l)'s two-year limitations period to a promissory estoppel claim); *Glovis Ala., LLC v. Richway Transp. Servs., Inc.*, 2020 WL 3630739, at *16 (S.D. Ala. July 3, 2020) (applying § 6-2-38(l)'s two-year limitations period to fraud-based claims arising out of ownership of leased tractor trailers); *Selma Hous. Dev't Corp. v. Selma Hous. Auth.*, 2005 WL 1981290, at *19-20 (S.D. Ala. Aug. 16, 2005) (applying § 6-2-38(l) to a fraud claim arising out of defendants' alleged promise to provide funding for low-income housing units); *Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623 (Ala. 1993) (applying § 6-2-38(l) to fraud and negligence claims relating to non-disclosed presence of termites). This Court should as well.

The Plaintiffs try to cast doubt on § 6-2-38(l)'s applicability by citing case law holding that a claim for unjust enrichment can fall under different statutes of limitation depending upon the

nature of the claim and implying that the same is true of promissory estoppel claims. *See* Doc. 212 at 42-44 (citing *Auburn Univ. v. IBM Corp.*, 716 F. Supp. 2d 1114 (M.D. Ala. 2010)). This argument is unavailing. *Auburn University* held that claims for unjust enrichment can be based in either tort—and thus fall under the two-year statute of limitations found in § 6-2-38(l)—or in contract—and thus be subject to the six-year statute of limitation found in § 6-2-34. The Plaintiffs cite no case applying the same analysis to promissory estoppel claims, and the only decision the Tribal Defendants could locate addressing *Auburn University* in the context of a promissory estoppel claim held that claims for promissory estoppel are subject to the two-year limitations period found in § 6-2-38(l) without any discussion of the underlying nature of the claim. *See Ala. Space*, 2016 WL 9781806, at *11.

Because the Plaintiffs’ promissory estoppel is subject to the two-year limitations period found in § 6-2-38(l) and they did not bring suit within two years of learning of the Tribal Defendants’ alleged breach of their ostensible promise, the promissory estoppel claim is time barred and should be dismissed.

2. *The promissory estoppel claim is not a claim for the recovery of land.*

The Plaintiffs also attempt to evade the two-year limitations period by mischaracterizing their promissory estoppel claim as one “in the nature of” a suit for “recovery of land” and thus subject to the ten-year statute of limitations found in Alabama Code § 6-2-33. *See* Doc. 212 at 41-51. Unsurprisingly, however, the Plaintiffs do not cite a single case applying § 6-2-33(2)’s ten-year limitations period to a promissory estoppel claim. Alabama law, including the cases that the Plaintiffs cite, makes clear that § 6-2-33(2)’s reference to claims for “recovery of land” refers to a suit seeking *possession* of real property. The Plaintiffs have no claim of entitlement to, and do not

seek, possession of the Wetumpka property. Section 6-2-33(2)'s ten-year limitations period therefore does not apply, and the promissory estoppel claim should be dismissed as untimely.

The Plaintiffs rely on *Glass v. Cook*, 57 So. 2d 505 (Ala. 1952), to argue that claims “in the nature of” a suit for recovery of land” fall within § 6-2-33 and that a “plaintiff need not literally seek recovery of land” for the ten-year limitations period to apply. *See* Doc. 212 at 47. But *Glass* does not support this assertion, as it involved an action by plaintiff landowners to recover possession of their property through cancellation of a lease that they alleged was procured by fraud. *Glass*, 257 So. 2d at 507. The Plaintiffs’ reliance on *Branch Banking & Trust v. McDonald*, 2013 WL 5719084 (N.D. Ala. Oct. 18, 2013), is similarly misplaced. *McDonald* held, based on binding Alabama Supreme Court precedent, that a plaintiff bank’s claim to impose an equitable mortgage was governed by a ten-year limitations period when the bank (1) alleged that the defendants had failed to make payments due on a commercial note secured by an erroneously canceled real estate mortgage and (2) sought to impose and foreclose an equitable mortgage to take possession of the collateral property. *Id.* at *1, *6. The court rejected the plaintiff bank’s argument, similar to the Plaintiffs’ here, that a ten-year limitations period applied to all of its claims, including those for declaratory relief and unjust enrichment, merely “because those counts are ‘[a]ctions for the recovery of lands.’” *Id.* at *6 (citation omitted). Instead, the court found that the bank’s remaining claims “touch[ed] on contract” or arose from a negotiable instrument and thus were subject to the six-year limitations periods applicable to claims based on contract and negotiable instruments. *Id.* at *6-7. *McDonald* thus undercuts the Plaintiffs’ argument that any claim remotely “in the nature of” one for recovery of land is subject to a ten-year limitations period, regardless of whether it seeks actual possession of the property in question.

Consistent with the approach taken by the Northern District in *McDonald*, and directly relying upon *Glass* and other cases, the Alabama Supreme Court has held 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.***” *Williams v. Kitchens*, 74 So. 2d 457, 463 (Ala. 1954) (emphasis added). The plaintiff in *Williams* sought to have a constructive trust in real property declared based on the defendant’s promise to provide the plaintiff with the remainder after defendant’s life estate in the property. *Id.* at 458-60. Because the plaintiff did not seek immediate possession of the property, the Court rejected the argument that a ten-year limitations period then found in Section 20 of Title 7 of the Code of Alabama applied.¹³ *Id.* at 460-63.

Here, the Plaintiffs have no claim of entitlement to possession of the Wetumpka property, nor do they seek possession through their promissory estoppel claim. They instead seek a “judgment declaring that Poarch should be held to its promises to perpetually preserve the Hickory Ground site under the common law doctrines of unjust enrichment and promissory estoppel” and a constructive trust. Doc. 190 at 76-77. As *Williams* makes clear, merely seeking imposition of a constructive trust or other equitable relief without an immediate right of possession of property does not make a claim a suit for “recovery of land” within the ambit of § 6-2-33(2). The Plaintiffs’ promissory estoppel claim is subject to a two-year statute of limitations, not ten, and it is plainly time barred.

¹³ Code 1940, Tit. 7, § 20 was the predecessor to Ala. Code § 6-2-33 and likewise stated that “‘actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as herein otherwise provided,’ must be commenced within ten years.” *Belcher v. Birmingham Tr. Nat’l Bank*, 348 F. Supp. 61, 82 (N.D. Ala. 1968); *see also FSRJ Props., LLC v. Walker*, 195 So. 3d 970, 976 (Ala. Civ. App. 2015) (“We find [*Kitchens*] instructive, although it was decided before the effective date of the Alabama Rules of Civil Procedure, which merged legal and equitable actions into one ‘civil action.’”). The *Glass* case cited by the Plaintiffs also relied on Code 1940, Tit. 7, § 20.

3. *The facts do not support imposition of a constructive trust.*

While ultimately not integral to the applicable limitations period, the Plaintiffs’ responsive arguments depend heavily on their demand for a constructive trust and an argument that the Tribe “dedicated” the Wetumpka property to the public.¹⁴ The Plaintiffs, however, have not alleged facts supporting the imposition of a constructive trust. And despite spending several pages discussing the notion and implications of public dedication, the Plaintiffs fail to allege any facts to support a claim that PBCI dedicated the Wetumpka property to the public.

a. There is no fraud or confidential relationship.

Imposition of a constructive trust is appropriate only where property is acquired by fraud or through the abuse of a confidential relationship. *See, e.g., Bebee Props., LLC v. Ard*, 241 So. 3d 719, 723 (Ala. Ct. App. 2017) (refusing to overturn trial court’s dismissal of demand for constructive trust where the plaintiff “does not allege any fraud by, or any confidential relation with, [defendant]”); *Landis v. Neal*, 374 So. 2d 275, 281 (Ala. 1979) (holding that “declaration of a constructive trust is inappropriate” because defendant “did not acquire the legal title to this property by fraud, violation of confidence or of fiduciary duty”). Because the Plaintiffs allege neither that PBCI acquired the property by fraud, nor the existence of fiduciary relationship between PBCI and the Plaintiffs, they are not entitled to imposition of a constructive trust.

The Plaintiffs do not allege that PBCI acquired title to the Hickory Ground Site by fraud, but rather that the PBCI “promise[d] that it would perpetually protect the Site” and thereafter failed to do so. Doc. 212 at 52. Those allegations, even taken as true, cannot support a finding of fraud, as there is no allegation that the Tribal Defendants intended to breach any ostensible preservation

¹⁴ As discussed in the Tribal Defendants’ opening brief, the Plaintiffs only request a constructive trust in the event the Court rules in their favor on their claim that Interior lacked authority to take the Wetumpka property into trust for PBCI. Doc. 202 at 41.

promise at the time it was made. *See, e.g., Martin v. Am. Med. Int'l, Inc.*, 516 So. 2d 640, 642 (Ala. 1987) (holding that in the context of a promise to perform or refrain from performing in the future, there is no fraud absent proof of an intent to deceive at the time the promise was made); *Carroll v. LJC Def. Contracting, Inc.*, 24 So. 3d 448, 458 (Ala. Civ. App. 2009) (“Where the misrepresentation relates to some future event, it must be shown that the person making the representation intended not to do the act promised at the time the misrepresentation was made.”).

Nor do the Plaintiffs allege any facts that could support an argument that PBCI acquired title to the Hickory Ground Site by abuse of a fiduciary relationship. They selectively quote case law describing when a fiduciary relationship may arise, but do not point to a single allegation in the SAC that could support the existence of such a relationship here. *See* Doc. 212 at 45 & n.7. No such allegations exist.

The Plaintiffs’ incomplete quotation of *Line v. Ventura*, 38 So. 3d 1, 12-13 (Ala. 2009), is a prime example of their efforts to modify a standard that they cannot meet. *See* Doc. 212 at 45 n.7. The relevant portion of the *Line* opinion states, in full, that a plaintiff seeking to establish a fiduciary relationship must show that:

one person occupies toward another such a position *of adviser or counselor* as reasonably to inspire confidence that he will act in good faith for the other’s interests, or when one person has gained the confidence of another and purports to act or advise with the other’s interest in mind; where trust and confidence *are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.*

Line, 38 So. 3d 1, 12-13 (Ala. 2009) (emphasis added). Plaintiff MCN is a sophisticated tribal nation with tens of thousands of citizens. SAC ¶ 11. There is not a single allegation in the SAC to

support an inference that MCN so trusted PBCI that PBCI “gain[ed] an influence or superiority” or an “overmastering influence” over MCN or that MCN or any other plaintiff was “weak” or “dependent” upon PBCI. The Plaintiffs simply have not alleged a fiduciary relationship with PBCI that could provide a basis for imposing a constructive trust. *See Cass v. Fuller*, 2016 WL 8078145, at *4-5 (N.D. Ala. Nov. 9, 2016) (dismissing breach of fiduciary duty claim where “no rational basis exists to suggest defendant ... possessed an ‘overmastering influence’ over the plaintiff” nor does plaintiff allege “he relied on [defendant] ... for ... investment decisions, or any other recognized basis for a fiduciary relationship to arise”); *Fed. Nat’l Mortg. Ass’n v. GNM II, LLC*, 2014 WL 1572584, at *4 (M.D. Ala. Apr. 17, 2014) (dismissing breach of fiduciary duty claim where a defendant “pleads no set of facts to show special circumstances or a confidential relationship such that could give rise to a fiduciary duty”).

b. There is no public dedication of the Wetumpka property.

Finally, despite making no such claim in the SAC, the Plaintiffs argue that a constructive trust is justified based on PBCI’s ostensible public “dedication” of the Wetumpka property under Alabama common law. Doc. 212 at 47-49. A dedication of land under Alabama common law requires “[1] acts which evidence an unequivocal *intent* by the owner to dedicate the property to a public use *and* [2] an *acceptance* by the members of the public of the property for that public use.” *Ritchey v. Dalgo*, 514 So. 2d 808, 810 (Ala. 1987) (emphasis in original). The dedication must be made to the public, “there being no such thing as a dedication to an individual” or to “a limited group of persons.” *Clarke v. Tannin, Inc.*, 301 F. Supp. 3d 1150, 1158 (S.D. Ala. 2018). To show acceptance by the public, a plaintiff must show “long public use” or “corporate or other public officers adopting the property for the public’s use.” *Ritchey*, 514 So. 2d at 811 (“It is a settled rule

that a dedication has not been made until there has been an *acceptance* of the ‘offer’ to dedicate.”); *see also Clarke*, 30 F. Supp. 3d at 1158. None of these requirements are satisfied here.¹⁵

The Plaintiffs do not allege that PBCI actually dedicated the Wetumpka property to the public for public use. At most, they allege that PBCI recognized the property’s importance to the Plaintiffs and expressed possible future plans to use it for education. Doc. 212 at 49-50. This cannot possibly establish an unequivocal intent to dedicate the property for public use, and certainly not public use as a burial ground, as the Plaintiffs allege. The Plaintiffs thus have failed to satisfy the first element of a dedication claim. *See Clarke*, 301 F. Supp. 3d at 1159 (dismissing dedication claim where “plaintiffs have no evidence that the defendants intended to open the Parcel to use by the public at large”); *Garland v. Clark*, 88 So. 2d 367 (Ala. 1956) (finding no dedication of parking area adjoining cemetery when only those owning cemetery lots used the parking area).

The Plaintiffs also do not allege public acceptance of any putative dedication. They allege no use of the Hickory Ground Site by the public, let alone “long public use” or any adoption of the site by a “corporate or other public officer[]” for the public’s use. *Ritchey*, 514 So. 2d at 811.

Building off of the fabricated public dedication of the Wetumpka property as a burial ground, the Plaintiffs argue, citing *Beatty v. Kurtz*, 27 U.S. 566 (1829), that “the equitable remedy of a constructive trust has special application in the context of burial grounds.” Doc. 212 at 48-49. *Beatty* makes no such holding. In *Beatty*, the defendant declared a portion of his property to be specifically for the German Lutheran church, which then built a church on the property, used the property as a burial ground, and paid all taxes on the property for the next 50 years. *Beatty*, 27 U.S. at 567. At no point during this time did defendant claim any right to possess or use the

¹⁵ The Plaintiffs include the dedication argument in the statute of limitations section of their brief, but it is wholly irrelevant to that argument. Dedication of land is a separate claim under Alabama law, not a defense to or grounds for tolling of a statute of limitations.

property. *Id.* at 571. The Court held that the defendant had dedicated the property to the public for its use as a church and burial ground. *Id.* at 582-84. The facts of *Beatty* are easily and obviously distinguishable from the case at bar, and it offers no help to the Plaintiffs' argument. Having failed to meet either prong of the public dedication test, the Plaintiffs cannot legitimately argue that PBCI dedicated the Wetumpka property to the public.

4. *The promissory estoppel claim is untimely regardless.*

While Alabama law clearly imposes a two-year limitations period on the Plaintiffs' promissory estoppel claim, the record shows that the claim is untimely even under the Plaintiffs' preferred ten-year period.

A claim for promissory estoppel accrues for limitations purposes when the plaintiff knows or has reason to know of the defendant's breach of the alleged promise. *See* Doc. 202 at 38. The Plaintiffs first asserted their promissory estoppel claim when they moved for leave to file the SAC on June 5, 2019. *See* Doc. 159. The SAC acknowledges that the Plaintiffs knew of the facts giving rise to the promissory estoppel claim well before 2009. *See, e.g.,* SAC ¶ 137. The claim therefore is unquestionably untimely if it does not relate back to the original complaint, which the Plaintiffs have not alleged. *See Hope for Fams. & Cmty. Serv., Inc. v. Warren*, 721 F. Supp. 2d 1079, 1174-76 & n.105 (M.D. Ala. 2010) (holding that the plaintiff bears the "burden with respect to the relation back doctrine" and finding that claims did not relate back). And even assuming, *arguendo*, that the promissory estoppel claim does relate back, the record demonstrates that the Plaintiffs knew of facts ostensibly giving rise to the claim at least as early as October 2002, more than 10 years before filing their original complaint. *See* Doc. 200-2 at 22 (referring to "the facts displayed in the written record that not less than three (3) sets of human remains have been excavated and removed from the property").

The Plaintiffs argue that the Court must take the allegations of the SAC as true and that those allegations establish a dispute of fact about the Plaintiffs' knowledge when compared with the Plaintiffs' own 2002 letter setting out many of the same grievances underlying this litigation. *See* Doc. 212 at 46. Not so. The SAC does not deny that the Plaintiffs had notice of the basis for their promissory estoppel claim in October 2002;¹⁶ it is simply and conspicuously silent on the issue. The Plaintiffs do not challenge the authenticity or veracity of the 2002 letter, and its contents are not inconsistent with any allegations in the SAC. The Plaintiffs knew of the grounds for their promissory estoppel claim more than ten years before they filed suit, so the claim is time barred regardless of which limitations period applies.

B. The Plaintiffs have not alleged facts establishing a promissory estoppel claim.

Even if such a claim were timely, the Plaintiffs have not allege the elements of promissory estoppel. *See* Doc. 202 at 44-49. Promissory estoppel requires: (1) the existence of a specific, enforceable promise; (2) that the defendant reasonably should have expected to induce definite and substantial reliance or forbearance by the plaintiff; (3) that did induce such reliance or forbearance; and (4) that injustice can be avoided only by enforcing the promise. *See id.* at 44-45. The Plaintiffs allege that PBCI made such a promise in a preservation grant application (the Grant Application, Doc. 190-1 at 3-7) that it submitted to the Alabama Historical Commission in February of 1980. *See* Doc. 212 at 52-56. But the statements made in the Grant Application—which contemplated a joint venture between MCN and PBCI that never came to fruition—cannot possibly support promissory estoppel.

¹⁶ Any such denial would be patently false and easily disproven by the 2002 letter.

1. *PCBI did not specifically promise to preserve the Wetumpka property “in perpetuity.”*

Throughout this case, the Plaintiffs have selectively mined quotes from the Grant Application to argue the Tribe promised to “preserve the Hickory Ground Site in perpetuity.”¹⁷ See Doc. 212 at 52-54. In reality, the Grant Application described PBCI’s intent to halt *currently planned* commercial development on the property and to use “proper archaeological methods” to study the “archaeological resources,” which the Grant Application refers to as the below-surface remains:

Acquisition of the property is principally a protection measure. Acquisition will prevent development on the property. All historic structures on the site have been destroyed. What is left consists of below surface remains. ***Through proper archaeological methods and techniques these below surface features*** can reveal a tremendous amount of information about the Creek way of life in the late 1700’s and early 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 archaeological resources.

Doc. 190-1 at 4 (emphasis added). In fact, the Grant Application explicitly contemplated future development on the Site, with PBCI committing to conduct “a scientifically sound archaeological program ... to mitigate or minimize effects upon the historic resources” “[p]rior to any type of development.” *Id.* Even assuming that PBCI’s application for funding for an abandoned joint venture with MCN could serve as the basis for binding commitments supporting promissory estoppel, this express contemplation of archaeological study and future development is fundamentally at odds with the Plaintiffs’ assertion of a clear and specific promise of perpetual preservation.

¹⁷ To be clear, the word “perpetuity” is not used in the Grant Application. Nor are any analogous terms such as “forever” or “always.”

In response, the Plaintiffs argue that the Grant Application's express reference to possible future development on the Site is negated by the next paragraph, including by the use of the words "without excavation." Doc. 212 at 55-56. But the next paragraph describes only *potential* possibilities for future uses of the Site, not enforceable promises, and certainly not concrete, perpetual commitments:

There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved. The site *may serve* as an open air classroom where Creek youth can learn of their heritage. Interpretive programs *can be developed* around the vast array of history connected with Hickory Ground. The [Tribe] has already conducted CETA sponsored training in archaeological methods for Creek youth. The Hickory Ground site will continue to enhance their understanding of their history, without excavation.

Doc. 190-1 at 4 (emphases added); *see Davidson v. Maraj*, 609 F. App'x 994, 1001 (11th Cir. 2015) (applying Georgia law to hold that "[p]romissory estoppel does not apply to a promise that is vague, indefinite, or of uncertain duration," and that defendant's alleged promises to enter into joint venture with plaintiff were not "sufficiently definite to support an action for promissory estoppel"). Because the Plaintiffs identify no clear and definite promise to perpetually preserve the property, their promissory estoppel claim fails as a matter of law.

2. *An express, written preservation agreement superseded any ostensible perpetual preservation promise.*

The Plaintiffs offer no response to PBCI's argument that a promissory estoppel claim cannot survive where the alleged promise was superseded by the terms of an express contract. *See generally* Doc. 212 at 40-63; Doc. 202 at 44. It is well-settled under Alabama law that "where an express contract on the same subject matter exists and has not been breached, promissory estoppel cannot function to create liability." *Cook v. United Health Care*, 2010 WL 3629766, at *6 (M.D. Ala. Sept. 10, 2010); *see also Walk, Inc. v. Zimmer, Inc.*, 2014 WL 2465311, at *9 (N.D. Ala. May

30, 2014). In such cases, the express contract controls “as long as the contract purports to address the broadly disputed issues,” even if it is silent about the particular details at issue. *White Holding Co., LLC v. Martin Marietta Materials, Inc.*, 423 F. App'x 943, 947–48 (11th Cir. 2011) (citation omitted) (applying Florida law).

In *Walk*, the plaintiffs entered into an agreement with defendant HMI for the sale of medical practice management technology. 2014 WL 2465311, at *1. Plaintiff Bramlett alleged that HMI's parent company (the Zimmer defendants) promised to use Bramlett's consulting services and to pay Bramlett for those services, which induced plaintiffs “to enter into the Agreement to their detriment.” *Id.* at *1, 8, 10. The executed agreement between the plaintiffs and HMI, however, stated only that Bramlett would “provide assistance reasonably requested by HMI.” *Id.* at *6 (emphasis & citation omitted). The court held that, “the Zimmer defendants may be subject to promissory estoppel claims for promises they may have made concerning the Agreement to induce Plaintiff to action ***only if there is a determination that the Agreement is unenforceable.***” *Id.* at *10 (emphasis added). The court also held that the alleged promises were not sufficiently definite to enforce where Plaintiffs “[did] not specif[y] what terms the Zimmer defendants agreed [to], including for Bramlett's services.” *Id.* The court thus granted the Zimmer defendants' motion to dismiss the promissory estoppel claim. *Id.*; see also *Whatley v. Ohio Nat'l Life Ins. Co.*, 2019 WL 6173500, at *9 (M.D. Ala. Nov. 19, 2019) (granting motion to dismiss promissory estoppel claim under Ohio law where plaintiffs alleged defendants promised to pay commissions payments to broker-dealers that would be passed on to plaintiffs, where defendants complied with the terms of their express contracts with the broker-dealers).

Here, the Plaintiffs allege that PBCI promised to preserve the Wetumpka property forever. Doc. 190 ¶¶ 64, 66-68; Doc. 190-1 at 3-7. PBCI then acquired the property using federal

preservation grant funds, and, “pursuant to standard terms of federal preservation grant awards, a protective covenant was placed on the property for 20 years.” Doc. 190 ¶¶ 61-62; *see also* Doc. 203-1 at 2 (“This covenant shall be for a period of 20 years commencing July 3, 1980 and ending July 3, 2000.”).¹⁸ In other words, shortly after PBCI allegedly promised to “preserve” the Hickory Ground Site “in perpetuity,” it entered into a written agreement expressly committing to preserve the Site for 20 years. This express written protective covenant superseded any other ostensible preservation commitments such that the latter cannot support a promissory estoppel claim. *See Walk*, 2014 WL 2465311, at *9; *see also Davis v. Univ. of Montevallo*, 638 So. 2d 754, 758 (Ala. 1994) (“Courts have been reluctant to permit the enforcement, by the application of the doctrine of promissory estoppel, of promises made contemporaneously with a completed contract”); *Crompton v. Tuskegee Univ.*, 2016 WL 9735710, at *15 (M.D. Ala. July 8, 2016) (dismissing promissory estoppel claim based on alleged promise to make plaintiff a tenured employee where plaintiff entered into a written employment contract after the alleged promise because “the Court must not use promissory estoppel to add or modify” the terms of the contract). This provides a separate and independent basis to dismiss the Plaintiffs’ promissory estoppel claim.

3. *Any promise to preserve the property “in perpetuity” is unenforceable.*

Even if PBCI’s statements in the Grant Application or elsewhere could be construed as a promise to preserve the Wetumpka property forever *and* that promise was not superseded by an

¹⁸ This document can be considered by the court without converting this to a motion for summary judgment because the covenant is specifically referenced in the Complaint. *Horsely v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

express contract, any such promise could not be enforced by this Court both because it would violate the statute of frauds and because it is not sufficiently definite to allow judicial enforcement.

First, the Plaintiffs' efforts to avoid application of the statute of frauds are unavailing. Their promissory estoppel claim is not in "the nature of recovery of land," as discussed in Part III.A.2, *supra*. And, as discussed in Part III.A.3.a, *supra*, the Plaintiffs are not entitled to a constructive trust because they do not allege any facts to show that PBCI acquired the property by fraud or breach of a fiduciary relationship. Lastly, PBCI did not partially perform pursuant to the alleged promises in the Grant Application or elsewhere. Instead, PBCI performed pursuant to the express, written preservation agreement that accompanied its purchase of the property. *See* SAC ¶¶ 62, 100 (alleging that "[a]fter the 20-year covenant expired in July 2000," PBCI 'caused a significant portion of the Hickory Ground Site to be destroyed to make way for its second casino resort'); Doc. 203-1 at 1-2; *see Casey v. Travelers Ins. Co.*, 585 So. 2d 1361, 1364 (Ala. 1991) (holding that defendant's partial releases did not constitute "partial performance" of alleged oral promise to release mortgage because the partial releases "were within the terms of the [written] loan agreements between the parties").

Second, the promise that the Plaintiffs allege is not specific enough for this Court to enforce. *See Walk*, 2014 WL 2465311, at *9 ("[I]n 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." (citation omitted)). The Plaintiffs describe the promise as one to "preserve the Hickory Ground site in perpetuity," but do not address how the Court would enforce such a promise. Doc. 212 at 53 (quoting Doc. 190 at ¶ 202); *see Selma Hous.*, 2005 WL 1981290, at *9 n.22 (holding that alleged "vague, indeterminate promise that Section 8 assistance 'would be available,' without more, is not sufficiently specific to warrant judicial

imposition of a perpetual obligation on [defendant]....”); *Pritchett v. Turner*, 437 So. 2d 104, 110 (Ala. 1983) (finding that covenant purporting to divest children of ownership of property if they allowed their mother “the right of possession or use or benefit” of the land “too vague to be enforced”). Would studying “below surface remains” using “proper archaeological methods and techniques” as proposed in the Grant Application violate the ostensible promise? *See* Doc. 190-1 at 4. Would cooperating with a state research university “on an archaeological excavation to test an area of burial remains” do so? *Id.* at 7. Would, as the Plaintiffs certainly seem to contend, any work to “develop” the property? *Id.* at 4. Would the ostensible promise be violated by the simple act of “holding classes on Creek culture” on the property? *Id.*; *see* SAC ¶ 327 (alleging that the Tribal Defendants are violating the law by allowing people to enter parts of the property “without prior authorization and cleansing rituals”). These few, non-exhaustive examples highlight the lack of specificity that prevents this Court from enforcing the Tribal Defendants’ ostensible promise to “preserve” the property “in perpetuity.”

4. *PBCI could not have reasonably expected the Plaintiffs to rely on an abandoned joint venture proposal, and the Plaintiffs could not reasonably have done so.*

The Tribal Defendants have identified why they could not have reasonably foreseen that the Plaintiffs would rely on ostensible promises set forth in the Grant Application and why the Plaintiffs could not reasonably have done so. *See* Doc. 202 at 47-49. Those reasons include the fact that the proposal embodied in the application never came to be. *Id.* at 48. The Plaintiffs acknowledge, as they must, that the Grant Application contemplated PBCI and MCN’s joint acquisition and ownership of the Wetumpka property. *See* Doc. 212 at 57 (“[T]he acquisition was intended to be a joint project.”); Doc. 190-1 at 5 (“Under this plan the property will be jointly owned by both groups”). The Grant Application is also clear that the future plans and alleged

promises in that document are based upon the assumption that MCN would participate in the “protection and care of the site.” Doc. 190-1 at 5. That did not occur, as the Plaintiffs chose not to join in the project, leaving PBCI to acquire the property on its own. *See* Doc. 212 at 58.

While MCN was certainly within its rights to abandon the proposed joint venture, it cannot do so and then claim that it reasonably relied on plans set forth in the joint venture proposal or that PBCI should have reasonably expected it to do so. MCN’s decision not to bring the proposal to fruition obviated any right to rely on it or reap its benefits. The Plaintiffs’ promissory estoppel claim should be dismissed for this reason, as well as all of the others set forth above and in the Tribal Defendants’ principal brief.

IV. The Plaintiffs’ unjust enrichment claims fails as a matter of law.

The Plaintiffs’ unjust enrichment claim fails both because the Tribal Defendants are not holding any benefit conferred by and rightfully belonging to the Plaintiffs and because the claim is barred by the statute of limitations and the statute of frauds. *See* Doc. 202 at 50-54. The Plaintiffs’ response fails to substantively rebut these arguments. Instead, the Plaintiffs discuss non-issues and cite inapplicable case law.

The Plaintiffs open their argument by attacking a straw man, claiming that the Tribal Defendants “insist” that an unjust enrichment claim can be based only on a defendant’s wrongful retention of money belonging to the plaintiff, but not other property. Doc. 212 at 64. The Tribal Defendants made no such argument and do not dispute that an unjust enrichment claim can be based on a defendants’ unjust retention of money or property, so long as the other elements of the claim are satisfied. The Plaintiffs’ claim fails because they do not establish the necessary elements, not because the alleged unjust enrichment involves realty rather than money.

- A. The Tribal Defendants are not holding any money or property that was conferred by or that rightfully belongs to the Plaintiffs.

The most glaring problem with the Plaintiffs' unjust enrichment claim is the simple fact that the Tribal Defendants are not retaining, wrongfully or otherwise, any money or property conferred by or rightfully belonging to the Plaintiffs. *See* Doc. 202 at 51-53. The "essence" of an unjust enrichment claim is an assertion that the defendant holds either money or property that "in equity and good conscience, belongs to plaintiff[s]." *Hancock-Hazlett Gen. Constr. Co. v. Trane Co.*, 499 So. 2d 1385, 1387 (Ala. 1986). To prevail on an unjust enrichment claim, "a plaintiff must show that the defendant is legally or equitably obligated to pay money to plaintiff." *Foshee v. Gen. Tel. Co. of S.E.*, 322 So. 2d 715, 717 (Ala. 1975); *see also Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc.*, 690 F. Supp. 2d 1267, 1275 (M.D. Ala. 2010) ("[I]n other words, [plaintiff] must show that a defendant holds its money unjustly."); *White v. Microsoft Corp.*, 454 F. Supp. 2d 1118, 1132 (S.D. Ala. 2006) (citing *Foshee*). Additionally, the benefit that the defendant allegedly unjustly holds must have been conferred by the plaintiff. *See Portofino Seaport Vill., LLC v. Welch*, 4 So. 3d 1095, 1098 (Ala. 2008) ("The first requirement of unjust enrichment under either Alabama law or Florida law is that one party must have conferred a benefit on another."). The SAC's allegations simply do not establish these necessary elements.

Instead of identifying money or property that they conferred on PBCI and that they contend rightfully belongs to them, the Plaintiffs rely on (1) their "lack of objection" to PBCI's acquisition of the Wetumpka property and (2) PBCI's "benefit [of] unbridled use" of the property. Neither ostensible benefit suffices to support their unjust enrichment claim.

Citing *Mazer v. Jackson Insurance Agency*, 340 So. 2d 770 (Ala. 1976), the Plaintiffs argue that their "lack of objection" to PBCI's acquisition of the Wetumpka property satisfies the direct benefit requirement of an unjust enrichment claim. Doc. 212 at 65. A lack of objection, however,

is not money or property, nor is it something held by PBCI that rightfully belongs to the Plaintiffs. *Mazer* does not hold otherwise, as it did not involve a claim for unjust enrichment and did not discuss whether the mere lack of objection to the acquisition of property could support such a claim. Instead, the language that the Plaintiffs cite addressed what forbearance could support a claim for promissory estoppel. Presumably, if forbearance of the nature involved in *Mazer* (and relied upon by Plaintiffs) were sufficient to support an unjust enrichment claim, that claim would have been brought in *Mazer*—or at least in some case. Yet the Plaintiffs cannot cite a single decision indicating that the benefit required to support a claim for unjust enrichment “can be an intangible benefit” in the nature of abstention from opposition to the defendant’s acquisition of property from a third party. *See* Doc. 212 at 65-66. Nor do they explain how that intangible benefit could establish that the Tribal Defendants are obligated to pay a liquidated sum to the Plaintiffs. *See Foshee*, 322 So. 2d at 717; *White*, 454 F. Supp. 2d at 1132. Their “lack of objection” cannot establish an unjust enrichment.

The Plaintiffs’ assertion that the Tribal Defendants wrongfully hold the “unbridled” use of the Wetumpka property “where the bridle rightfully belongs to” MCN is wholly unsupported. The Plaintiffs did not confer the right to “unbridled use” of the Wetumpka property on PBCI. PBCI did not acquire the property from the Plaintiffs, and the Plaintiffs have not alleged any basis for asserting that they provided the property or any property interest to PBCI or held an interest in the property sufficient to “bridle” its use. So, to the extent that “unbridled” use of one’s own property could possibly constitute a benefit sufficient to ground an unjust enrichment claim, the simple fact of the matter is that the Plaintiffs did not provide that benefit to PBCI and identify no valid legal grounds for arguing that that benefit rightly belongs to them. *See, e.g.*, Doc. 202 at 51-53; *In re Takata Airbag Prod. Liab. Litig.*, --- F. Supp. 3d ----, 2020 WL 2764196, at *15-16 (S.D. Fla. May

27, 2020) (identifying Alabama as one of many states where a promissory estoppel claim requires a plaintiffs to show “that they *directly* conferred a benefit on Defendants”). They thus have failed to allege basic elements of unjust enrichment, and their claim should be dismissed.

B. The Plaintiffs’ unjust enrichment claim is untimely.

Even if the Plaintiffs had alleged the necessary elements, their unjust enrichment claim still would have to be dismissed because it is time barred. The Plaintiffs contend that their “unjust enrichment claim is a claim in the nature of recovery of real property under Alabama Code § 6-2-33(2), and is subject to a ten-year statute of limitations.” Doc. 212 at 67. As with their promissory estoppel claim, however, the Plaintiffs do not cite a single case applying a ten-year limitations period to an unjust enrichment claim. And as discussed in Part III.A.2, *supra*, the Plaintiffs’ claim thus does not fall within the scope of § 6-2-33 because they do not claim any right to possession of the Wetumpka property. Their unjust enrichment claims are subject to either the two- or six-year limitations periods applicable to tort or contract claims, respectively. *See Snider v. Morgan*, 113 So. 3d 643, 655 (Ala. 2012); *Auburn Univ.*, 716 F. Supp. 2d at 1117-18 (holding that this Court must determine whether the unjust enrichment claim “seeks recovery for an injury that arises from contract” and is thus “subject to the six-year statute of limitation,” or “arise[s] from tort injuries” and is thus “subject to the two-year statute of limitations”); *see also* Doc. 202 at 50, 53.

The Plaintiffs state repeatedly that their unjust enrichment claim is not in the nature of a contract claim and thus is not barred by the six-year limitations period applicable to contract actions. *See, e.g.*, Doc. 212 at 68-69 (“Plaintiffs’ claim for unjust enrichment does not depend on the enforcement of the terms of a contract.”). Assuming, *arguendo*, that the six-year contracts limitations period is inapplicable, then their unjust enrichment claim is instead governed by the two-year catchall statute of limitations applicable to tort actions and is plainly untimely. *See*

Auburn Univ., 716 F. Supp. 2d at 1118 (holding that unjust enrichment claim was barred by two-year limitations period of § 6-2-38(l)).

The Plaintiffs alternatively argue that their claim is for “continuing unjust enrichment” because PBCI’s “obligation to protect the land” requires serial acts of performance, and thus the statute of limitations can never expire. Doc. 212 at 68 (“Here, Poarch is similarly unjustly enriched, because each day it owes an affirmative duty to protect Hickory Ground”). But the continuing claim doctrine, which requires serial or repeated performance obligations, is inapplicable here, where the Tribal Defendants’ alleged wrongdoing is breach of ostensible “promises that it would perpetually protect the Site.” SAC ¶ 202. Such a promise could only be breached one time—when the Tribal Defendants first acted in violation of their ostensible commitment. Once that happened, the property was no longer preserved in perpetuity; the Tribal Defendants could not undertake to preserve the property in perpetuity again the next day. Any unjust enrichment claim that the Plaintiffs may have had accrued at that time, and it is now time barred. *See Am. Gen. Life & Acc. Ins. Co. v. Underwood*, 886 So. 2d 807, 813 (Ala. 2004) (explaining that an unjust enrichment claim accrues “as soon as the defendant receives money and the circumstances imply the obligation to restore it”).

The *Snider* case that the Plaintiffs cite illustrates an example of the type of serial violations that can support a continuing claim for unjust enrichment, which are not present here. As the Plaintiffs note, in *Snider* “the court held that an estate was unjustly enriched each time a payment on a mortgage came due and [the] estate failed to make that payment.” Doc. 212 at 68 (citing *Snider*, 113 So. 3d at 655-56). Stated otherwise, the defendant estate was required to make repeated, serial payments on the mortgage, but wrongfully failed to do so. Each such failure

constituted a separate breach of a discrete performance obligation, resulting in a new wrongful enrichment.

The Plaintiffs have identified no such serial obligations on the part of the Tribal Defendants. Instead, they allege that they continue to be harmed by PBCI's breach of its ostensible perpetual preservation promise, which occurred more than six years prior to the December, 2012, filing of this lawsuit. *See* SAC at ¶ 100 ("After the 20-year covenant expired in July 2000 ... Poarch caused a significant portion of the Hickory Ground Site to be destroyed"), ¶¶ 101-104, 137-38 (prior to 2006, "archaeologists ... conducted a phase III excavation of the Hickory Ground Site" at PBCI's direction), ¶¶ 117-124 (the exhumation and storage of the human remains and associated funerary objects was performed in "a manner that caused, and is continuing to cause, further damage to the items" and in a manner that "is viewed as abhorrent in the Muscogee (Creek) religion"). Such allegations do not support the application of the "serial performance" or "continuing tort" doctrines to extend the statute of limitations indefinitely. The Plaintiffs' unjust enrichment claims are time-barred.

C. The Plaintiffs' unjust enrichment claim is barred by the statute of frauds.

The Plaintiffs' unjust enrichment claim suffers the same statute of frauds problem as their promissory estoppel claim. *See supra*, Part III.B.3; Doc. 202 at 42-44, 53-54. The Plaintiffs contend that their unjust enrichment claim is not barred by the statute of frauds because it does not seek "specific performance of a contractual term" and "does not depend on the enforcement of the terms of a contract." Doc. 212 at 68-69. But that is exactly what the unjust enrichment claim does. In their own words, the Plaintiffs' unjust enrichment claim is based upon "Plaintiffs' acquiescence in Poarch's purchase of Hickory Ground," which was allegedly "exchanged for promises that Poarch would protect the sacred site" in perpetuity. Doc. 212 at 69. Now, the Plaintiffs ask this Court to enter a judgment "declaring that Poarch should be held to its promises to perpetually

preserve Hickory Ground under the Alabama common law doctrine[] of unjust enrichment.” SAC at 76, Prayer for Relief ¶ (b)(i); *see also id.* at 77, ¶ (c)(i). Because a promise to perpetually preserve property is a promise that cannot be performed within one year, the statute of frauds bars its enforcement.¹⁹ Ala. Code. § 8-9-2(1); *Branch Banking & Trust Co. v. Nichols*, 184 So. 3d 337, 346-47 (Ala. 2015) (holding that plaintiffs’ unjust enrichment claim was barred by the statute of frauds because it “turn[ed] on proof of alleged representations or promises that are invalid under the Statute of Frauds”). The Plaintiffs’ unjust enrichment claim should be dismissed.

V. The Plaintiffs have failed to state a valid NAGPRA claim or request available relief.

The Plaintiffs have not stated any valid NAGPRA claims against the Tribal Defendants, and the relief that they seek is not available as a NAGPRA remedy in any event. *See* Doc. 202 at 54-63, 84-85. To briefly summarize the issues, many of the Plaintiffs’ NAGPRA claims fail because they rely on the Plaintiffs being “lineal descendants” of known individuals buried at the Wetumpka property, and the Plaintiffs have not adequately alleged lineal descent from any known individuals as required by NAGPRA regulations. *See id.* at 56-59. Others fail because the provisions on which the Plaintiffs rely are either wholly inapplicable to the Tribal Defendants and their land or are inapplicable under the facts adequately alleged in the SAC.²⁰ *See id.* at 55-56, 58-

¹⁹ The Plaintiffs also erroneously assert that the Tribal Defendants’ statute of frauds argument, which turns on the impossibility of performing a promise to perpetually preserve property within one year, is inconsistent with those defendants’ argument that they lacked a serial performance obligation. *See* Doc. 212 at 68. This argument is a *non-sequitur*. The fact that a single performance cannot be completed in one year does not convert the duty to undertake that single performance into serial duties. To illustrate, if a person promises to hold his breath for two years—a promise that by its terms cannot be performed within one year—and breaks that promise after 60 seconds, he has undertaken and failed to perform a single obligation. He could not be accused of breaking his promise anew with each breath he draws for the remainder of the two years.

²⁰ The Tribal Defendants do not contend, as the Plaintiffs erroneously allege, *see* Doc. 212 at 71, 74, that NAGPRA is completely inapplicable to them. But many provisions of NAGPRA, including several on which the Plaintiffs base their putative claims, explicitly apply only to federal

62. Lack of standing is also a problem, as the Plaintiffs either have not alleged any injury that is fairly traceable to the alleged violations or seek relief that is unavailable under NAGPRA, giving rise to a redressability problem. *Id.* at 61-63. The arguments in the Plaintiffs’ response fail to overcome any of these defects.

A. NAGPRA provisions governing federal lands are inapplicable.

The Plaintiffs argue, based on an erroneous assertion that some of the Wetumpka property does not qualify as tribal land under NAGPRA, that NAGPRA provisions applicable only to federal land apply here. *See* Doc. 212 at 74-75; Doc. 210 at 50-53. They are incorrect. The Plaintiffs concede that all of the Wetumpka property at issue is held in trust by the United States for the benefit of PBCI. *See, e.g.*, Doc. 210 at 50; SAC ¶ 286; *see also* 203 at 1, ¶ 3; Doc. 203-2. And as explained in the Federal Defendants’ principal brief, NAGPRA’s definition of “tribal land” encompasses all such land. *See* Doc. 200 at 26-27. The Plaintiffs insist that portions of the Wetumpka property that they contend are held in trust by the United States for the benefit of PBCI but not formally designated as “reservation” are not tribal land because they are not “within the exterior boundaries of any Indian reservation.” Doc. 210 at 50-53. Courts have rejected similar arguments seeking to narrowly construe the definition of tribal land, and this Court should as well. *See Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. Nov. 28, 2007) (holding that land held in trust for a tribe by the United States was tribal land for NAGPRA purposes and citing supporting case law); Doc. 200 at 26-27 (discussing case law).

Even if the Plaintiffs were correct that portions of the Wetumpka property were not within NAGPRA’s first definition of tribal land, their argument still would founder. By focusing only on the “exterior geographic boundaries” portion of NAGPRA’s tribal land definition, the Plaintiffs

agencies, federal agency officials, and/or museums, none of which includes the Tribal Defendants. *See* Doc. 202 at 55-56, 62.

ignore the additional language encompassing “dependent Indian communities.” *See* 25 U.S.C. § 3001(15)(B). A dependent Indian community includes any land that has been explicitly set aside for an Indian tribe and is superintended by the federal government. *See Alaska v. Native Vill. of Venetie Tribal Gov’t.*, 522 U.S. 520, 527-31 (1998). “Off-reservation trust land is, by definition, land set aside for Indian use and subject to federal control.” *Club One Casino v. Bernhardt*, 959 F.3d 1142, 1150 (9th Cir. 2020) (holding that off-reservation trust parcels constituted “dependent Indian communities”); *see also United States v. Roberts*, 185 F.3d 1125, 1132 (10th Cir. 1999) (explaining that trust land is set aside for Indians and superintended by the United States); *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996). This settled law flatly contradicts the Plaintiffs’ erroneous assertion that off-reservation trust land is not tribal land under NAGPRA. All of the land at issue is tribal land, and sections of NAGPRA applicable only on federal land are irrelevant.

B. The Tribal Defendants did not engage in unlawful intentional excavations.

The Tribal Defendants’ principal brief explains why they did not violate NAGPRA in connection with any intentional excavations at the Wetumpka property, including the fact that Indian tribes are not required to obtain permits to conduct intentional excavations on their own lands. *See* Doc. 202 at 58-59. In response, the Plaintiffs assert that NAGPRA required “anyone other than Poarch itself who engaged in intentional excavation,” including archaeologists and non-tribal individuals, to obtain an ARPA permit. Doc. 212 at 75. Putting aside the merits of this assertion, it is irrelevant to the Plaintiffs’ official capacity claims against the Tribal Defendants. If the Plaintiffs believe that third parties violated NAGPRA or ARPA and that they have viable claims against those parties, they are free to pursue them. The Plaintiffs cite no law, however, supporting the notion that a tribe or its officials can be held responsible for alleged third party violations of a permitting requirement from which they are expressly exempt.

In any event, the Plaintiffs are forced to admit that the NAGPRA regulations on which they rely neither apply to tribal officials nor govern intentional excavations taking place on tribal lands such as the Wetumpka property. *See* Doc. 212 at 76. While the regulations identify numerous steps that federal agency officials “must” take with respect to intentional excavations on federal lands, including extensive notice and consultation requirements that the Plaintiffs allege were violated, *see* 43 C.F.R. § 10.3(c)(1), they provide that tribal officials on tribal lands “may take” certain steps to protect excavated resources, but impose no requirements or obligations. § 10.3(c)(4). Because the NAGPRA regulations at issue impose no mandatory duties on tribal officials with respect to intentional excavations, they cannot support a NAGPRA claim against the Tribal Defendants.

Finally, the Plaintiffs baldly assert that even though the intentional excavations were on PBCI’s tribal land, the Tribal Defendants were required to obtain the Plaintiffs’ consent as the “‘appropriate’ tribe under 25 U.S.C. 3002(c)(2).” Doc. 212 at 76 (citing 25 C.F.R. §§ 262.5(d), 262.8(a)). The cited code section provides that “[t]he intentional removal from or excavation of Native American cultural items from Federal or tribal lands ... is permitted only if ... such items are excavated or removed after consultation with, or in the case of tribal lands, consent of the appropriate (if any) Indian tribe.” § 3002(c)(2). It is clear from context that the “appropriate Indian tribe” is the tribe whose Indian lands are at issue, and the Plaintiffs cite nothing to the contrary. In fact, the ARPA regulations that do they cite confirm this common sense reading. Specifically, 25 C.F.R. § 262.5 makes it clear that it is the Indian tribe that owns or has jurisdiction over the land—PBCI in this case—that must grant permission for a permit to conduct archaeological excavations. *See id.* § 262.5(c)(i) (“For lands of Indian tribes, permission must be granted by the Tribe.”); § 262.5(d) (“If the lands containing the remains or objects are tribal lands, the permittee shall first obtain the written consent of the tribe having jurisdiction over the lands.”). The other regulation

that the Plaintiffs cite, § 262.8, addresses custody of remains or cultural objects after their excavation—not permission to conduct excavations in the first instance. It plainly did not require PBCI to obtain the Plaintiffs’ consent prior to conducting or allowing intentional excavations at the Wetumpka property.

C. The Plaintiffs have no viable claims based on hypothetical inadvertent discoveries.

The Plaintiffs’ claims based on speculative, non-specific allegations of inadvertent discoveries of cultural items during the development of the Wetumpka property suffer multiple, fatal flaws. *See* Doc. 202 at 59-62. Even assuming that the SAC adequately alleged that the Tribal Defendants violated NAGPRA’s inadvertent discovery provisions, which it does not, the Plaintiffs have not demonstrated any actionable injury because those provisions do not require notice to or consultation with the Plaintiffs (or anyone else other than potentially PBCI). *Id.* at 60-61.

In an effort to defend their inadequate allegations, the Plaintiffs cite assertions about the widespread presence of archaeological deposits at the Wetumpka property prior to the Phase III excavation performed by Auburn University archeologists. *See* Doc. 212 at 78-79. These allegations do not support an inference that NAGPRA-covered cultural items remained in the construction zone of the property after the Phase III excavation. *See* Doc. 202 at 59-60. Regardless, the mere presence of archaeological deposits does not trigger NAGPRA’s inadvertent discovery requirements, which come into play only after a person “knows or has reason to know, that such person has discovered Native American cultural items” 25 U.S.C. § 3002(d)(1). “All courts to consider this issue have held an inadvertent discovery does not occur when an agency is placed on notice of likely or certain discovery, but that discovery must be ‘actual.’” *Rosales*, 2007 WL 4233060, at *9 (citing cases). The otherwise unsupported “on information and belief” allegations in the SAC simply do not meet the Plaintiffs’ burden of adequately pleading a § 3002(d) violation.

Assuming, *arguendo*, that they adequately pleaded facts supporting the existence of inadvertent discoveries, the Plaintiffs still have not stated a claim against the Tribal Defendants. They allege, *inter alia*, that NAGPRA required PBCI to “provide immediate notice of the discovery, or ensure that others provided them with immediate notice.” Doc. 212 at 77. NAGPRA imposes no such requirement. It requires a “person who knows, or has reason to know, that *such person* has discovered Native American cultural items on Federal or tribal lands” to notify the appropriate federal or tribal official and take certain other steps. 25 U.S.C. § 3002(d)(1) (emphasis added). If the discovery was made on tribal lands, the person who makes it is required to notify the tribe with jurisdiction—PBCI, in this case. *See id.* Neither NAGPRA nor its regulations impose any obligation on tribal officials to “ensure others provide[] them with immediate notice,” as the Plaintiffs allege. So if Defendant Martin Construction, the entity that the Plaintiffs allege performed the construction work at the Wetumpka property, *see* SAC ¶¶ 132-33, made an inadvertent discovery of cultural items, then Martin Construction, not the Tribal Defendants, had a duty to notify PBCI. And if PBCI itself made such a discovery, which is unlikely since it retained contractors to perform the construction work, then it already had notice—the Plaintiffs would be asking this Court to hold the Tribal Defendants liable for not notifying themselves of their own actions. In any case, it is clear that there was no requirement for anyone to notify the Plaintiffs, so the Plaintiffs have no standing to assert a claim for any putative violation of the notice requirements.

The Plaintiffs also assert that the Tribal Defendants failed to take steps to secure and protect inadvertently discovered cultural items pursuant to 43 C.F.R. § 10.4(e). Doc. 212 at 77. That regulation, in contrast to the one imposing mandatory duties on federal agency officials, identifies steps that “the responsible Indian tribe official may” take. § 10.4(e)(1) (emphasis added); *Rosales*,

2007 WL 4233060 at *8. The Tribal Defendants’ alleged noncompliance with discretionary suggestions cannot support the Plaintiffs’ NAGPRA claim.

D. The Plaintiffs are not “lineal descendants” under NAGPRA.

All of the Plaintiffs’ NAGPRA claims fail to the extent that they rely upon the Plaintiffs’ status as “lineal descendants” of individuals interred at the Wetumpka property. *See* Doc. 202 at 56-58. For purposes of NAGPRA, a “lineal descendant” is a defined term meaning:

an individual who traces his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe ... or by the common law system of descent 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). The regulations further provide that a determination of lineal descent requires “that the earlier person be identified as an individual whose descendants can be traced.”

43 C.F.R. § 10.14(b). Because Plaintiffs MCN and Hickory Ground Tribal Town are not individuals, and because none of the Plaintiffs have identified any “known Native American individual” whose remains or objects are at issue, the Plaintiffs have not alleged facts that could support their putative status as a lineal descendant under NAGPRA.

The Plaintiffs’ responses on this point are easily rejected. First, they argue that § 10.2(b)(1)’s reference to “traditional kinship systems” allows tribes to make their own determinations about who is and is not a lineal descendant. Nothing in § 10.2(b)(1) or § 10.14(b) eliminates the obligation of identifying a “known individual” from whom descent can be traced, however; they simply identify permissible ways of tracing descent from such an individual. Second, the Plaintiffs baldly assert that it “cannot be ruled out” that Plaintiffs MCN and Hickory Ground Tribal Town are individuals. They of course offer no support for the notion that the term “individual” is intended to include governments or collectives, and their half-hearted argument is

undercut by the regulation's definition of "person," which separately includes "an individual" and "any Indian tribe." 43 C.F.R. § 10.2(a)(5). Had "lineal descendants" been intended to include tribal entities, its definition would have used the defined term "person," which includes such entities, rather than the term "individual," which does not. Third, the Plaintiffs argue that the requirement of descent from a "known individual" does not require that the ostensible ancestor be identifiable, merely that they be "known." Ergo, they claim, because the Plaintiffs "know" that those interred at the Wetumpka property are their ancestors, they qualify as lineal descendants. This tautology eviscerates the requirement of "known Native American individual" "whose descendants can be traced," instead allowing an assertion of lineal descendant status by any individual who can trace his or her ancestry to a particular area where remains are located. The Plaintiffs simply have not alleged facts meeting NAGPRA's standard for determining lineal descent.

Finally, the Plaintiffs contend, relying on an ARPA regulation, that lineal descent is immaterial because they assert ownership of cultural items under § 3002(a)(2)(B) as the tribe with the closest cultural affiliation. *See* Doc. 212 at 80 (citing 25 C.F.R. § 262.8(a)(2)). But the relevant NAGPRA regulation governing custody of remains discovered on Indian lands, in contrast to the ARPA regulation that the Plaintiffs cite, does not provide a mechanism by which a tribe can leapfrog the Indian landowner based on a claim of cultural affiliation. *Compare* 43 C.F.R. § 10.6(a) (providing for priority "in the order listed," with tribal landowners preceding tribes claiming cultural affiliation) *with* 25 C.F.R. § 262.8(a) (adopting an "adapted" version of the NAGPRA preference ranking that allows a tribe claiming cultural affiliation to potentially assert a custody claim superior to that of the tribal landowner). The Plaintiffs' erroneous citation of an inapplicable regulation implementing another statute obviously cannot serve as the basis for a NAGPRA claim.

E. Much of the relief that the Plaintiffs’ seek is unavailable under NAGPRA.

Finally, NAGPRA simply does not authorize or contemplate much of the relief that the Plaintiffs seek. *See* Doc. 202 at 62-63. It does not, for instance, allow a tribe to forbid excavations or construction outside of its tribal land or insist that cultural items remain buried in place. At most, it provides for notice, consultation, and the ability to assert a claim for custody or repatriation of cultural items after they are excavated. Accordingly, to the extent that the Plaintiffs’ requested remedy is an order directing the Tribal Defendants to “undo ... the unconsented to actions and restore the Site to its prior condition,” SAC ¶ 261(a), or similar relief, any such claim is not redressable through NAGPRA.

The Plaintiffs disagree, arguing that courts have broad equitable authority to enforce NAGPRA. Assuming, *arguendo*, that this is correct, the Court cannot “enforce” NAGPRA by ordering the Tribal Defendants to take action that NAGPRA does not require. The cases that the Plaintiffs cite, which involve questions of mootness and the hypothetical extent of courts’ jurisdiction to enjoin NEPA violations in APA actions against federal officials, do not establish otherwise. *See* Doc. 212 at 81-82. They certainly do not establish that a NAGPRA plaintiff can obtain relief that goes beyond the enforcement of obligations imposed by that act.

In sum, the Plaintiffs have failed to state any valid NAGPRA claim against the Tribal Defendants. The excavation and construction activities underlying the SAC all took place on Indian land held in trust for PBCI by the United States, and the Tribal Defendants did not violate any of the limited obligations that NAGPRA imposes on Indian tribes in connection with activities on their own lands. And because the land in question is PBCI’s Indian land and the Plaintiffs have not identified any known individuals from whom they can trace lineal descent, the Plaintiffs’ claims of priority of preference to control the disposition of excavated items also fail. The Court should dismiss all NAGPRA claims against the Tribal Defendants.

VI. The Plaintiffs have failed to state a claim under ARPA.

The ARPA claims against the Tribal Defendants should be dismissed because, *inter alia*: (1) ARPA does not authorize private civil actions; (2) Indian tribes are exempt from ARPA's permitting requirements with respect to excavations on their own tribal lands; (3) most of ARPA's obligations apply only to federal agencies, not to the Tribal Defendants, and were not made applicable to the Tribal Defendants by the NPS Agreement; and (4) the Plaintiffs are not "lineal descendants" of known individuals whose remains were excavated. *See* Doc. 202 at 64-67. The Plaintiffs' response fails to rebut any of these arguments.

Regarding ARPA's lack of a private right of action, the Plaintiffs claim that "NAGPRA provides the cause of action" for their ARPA claims. Doc. 212 at 86. To the extent that NAGPRA expressly incorporates provisions of ARPA, the Plaintiffs have already asserted putative violations of those provisions as NAGPRA claims, and those claims fail for reasons previously discussed. *See supra*, Part V. To the extent that any of the allegedly violated provisions of ARPA are not incorporated into NAGPRA, the latter statute cannot provide a private right of action to enforce the former. In any case, the Plaintiffs effectively concede that ARPA provides no right of action.

The Plaintiffs also concede that ARPA does not require PBCI to obtain a permit to conduct archaeological excavations on its own Indian land and that the Wetumpka property meets ARPA's definition of Indian land. But they assert that that exemption does not extend to third parties and that the Tribal Defendants were required to ensure that third parties obtained permits. *See* Doc. 212 at 83-84. Once again, the Plaintiffs cite no authority for their imputed liability theory. ARPA provides that a person seeking to conduct an archaeological excavation on public or Indian lands must apply for a permit and that any permit issued will identify the individual responsible for ensuring compliance. *See* 16 U.S.C § 470cc(a), (e); 43 C.F.R. § 7.5(a). It says nothing about an Indian tribe being responsible for ensuring a third party's compliance. Excavations at the

Wetumpka property were carried out by reputable archaeologists from Auburn University, *see* SAC ¶ 108, who sought and obtained from Interior at least one ARPA permit designating those archaeologists as being “in direct charge” of the excavation.²¹ *See* Doc. 200-2 at 33. Such permits imposed obligations on the permittees, not the Tribal Defendants, and the Plaintiffs cite no authority for holding the Tribal Defendants responsible for any alleged noncompliance.

The Plaintiffs erroneously allege that they have stated a viable ARPA claim against the Tribal Defendants based on a presumptive violation of 25 C.F.R. § 262.5(c)(1), which provides that a tribe’s written consent to excavation on its lands “should” state that no religious or cultural site will be harmed or identify terms and conditions to mitigate such harm. *Id.* Because they are unaware of any such mitigation terms, the Plaintiffs “presume[e]” that the Tribal Defendants “falsely represented that no harm would occur.” Doc. 212 at 84. This presumption is baseless. The regulation in question did not “require[.]” the Tribal Defendants to do anything, as the Plaintiffs falsely state. Doc. 212 at 84; *see e.g., Legel v. IRS Dep’t of Prof’l Responsibility*, 2011 WL 5914236, at *6-7 (S.D. Fla. Nov. 28, 2011) (holding that a regulation saying what a party “should” do does not impose a mandatory obligation). The Tribal Defendants’ “presume[ed]” noncompliance with an optional regulatory suggestion does not give rise to a claim.

Next, the Plaintiffs argue that the ARPA permits in question were improperly issued without their consent. Doc. 212 at 84. ARPA’s regulations provide that a permit to conduct excavations on Indian lands requires “the consent of the appropriate tribal authority or individual Indian landowner.” 43 U.S.C. § 7.35. As with the NAGPRA regulations discussed above, it is clear from context that the regulation is referring to the tribal landowner, and the Plaintiffs cite no

²¹ The fact that Auburn sought and obtained the permit from Interior, as opposed to PBCI, undercuts any assertion that the Tribal Defendants assumed federal ARPA responsibilities.

authority for the proposition that any Indian tribe, regardless of claimed cultural affiliation, is required or even authorized to consent to archaeological excavations on another tribe's trust land. Instead, they again cite one regulation addressing the preference ranking for tribes asserting custody over archaeological resources *after* their excavation—25 C.F.R. § 262.8(a)—and another that explicitly states that where the lands in question are tribal lands, the permittee must “obtain the written consent of the tribe having jurisdiction of the lands.” 25 C.F.R. § 265.5(d). Neither regulation supports the Plaintiffs’ assertion that ARPA required permittees to consult with them before conducting excavations on PBCI’s tribal land.

The Plaintiffs’ final argument is not entirely clear. To the extent that they claim to have stated a viable ARPA claim under 16 U.S.C. § 470ee(a), a provision prohibiting excavation, removal, alteration or defacement of archaeological resources without a permit, *see* Doc. 212 at 85, that argument fails both because § 470ee explicitly incorporates by reference the permitting exception for tribal activities on their own lands and because it is a criminal statute that the Plaintiffs have no authority to enforce. *See* § 470ee(a), (d). To the extent that they assert that the Tribal Defendants’ construction activities violate ARPA and are not subject to 43 C.F.R. § 7.5(b)(1)’s permitting exemption for activities exclusively conducted for purposes other than archaeological excavation, the Plaintiffs, even if correct, would nevertheless fail to state a claim because the Tribal Defendants were not required to obtain an ARPA permit for activities on PBCI’s own Indian lands. *See* 16 U.S.C. § 470cc(g); 43 C.F.R. § 7.5(b)(3); *Attakai v. United States*, 746 F. Supp. 1395, 1410-11 (D. Ariz. 1990) (applying this exemption to dismiss another tribe’s ARPA claims arising from the Hopi Tribe’s construction on its own lands).

For all of the reasons stated here and in the Tribal Defendants’ principal brief, the Plaintiffs have failed to state a claim on which relief can be granted against the Tribal Defendants under ARPA, and their ARPA claims should be dismissed at least as to those defendants.

VII. The Plaintiffs have failed to state a claim under the NHPA.

The Tribal Defendants have explained the many flaws in the Plaintiffs’ putative NHPA claims. *See* Doc. 202 at 68-73. Chief among these are that: (1) the NHPA creates no private right of action, and nonfederal entities such as the Tribal Defendants are not subject to suit under it or the APA; (2) the NPS Agreement did not, as the Plaintiffs erroneously insist, transfer all federal NHPA compliance duties from the United States to PBCI; (3) the Plaintiffs’ putative NHPA claims are untimely; and (4) the NHPA does not impose any substantive requirements or otherwise give the Plaintiffs the right to insist on a particular outcome. *See id.*; *see also* Part I.A.3-4, *supra*.

A. The Plaintiffs overstate the responsibilities assumed by PBCI.

The Plaintiffs open their response by repeating their erroneous assertion that the Tribal Defendants, by entering into the NPS Agreement, assumed “all responsibilities applicable” to the Wetumpka property under the NHPA. Doc. 212 at 86, 92-94. The Plaintiffs tellingly cite the SAC to support this claim rather than the NPS Agreement itself. As explained above and in the Tribal Defendants’ principal brief, the NPS Agreement plainly shows that PBCI assumed only the limited responsibilities typically performed by a SHPO, not all obligations imposed by the NHPA. In fact, immediately after wrongly insisting that the NPS Agreement assigned all NHPA functions to PBCI, the Plaintiffs quickly backtrack by acknowledging that NHPA requirements “primarily apply to Federal agencies” and that the Act allows tribes to assume only “the functions of a [SHPO] with respect to tribal land.” *Id.* at 87.

Despite admitting that PBCI assumed only SHPO functions through the NPS Agreement, the Plaintiffs nevertheless appear to argue that the Tribal Defendants bear full responsibility for

ensuring federal compliance with the entire NHPA § 106 process for any undertaking at the Wetumpka property. *See* Doc. 212 at 91-93. PBCI has generally addressed that argument above and in its principal brief and will not belabor the point here beyond reiterating that it assumed SHPO responsibilities only and did *not*, as the Plaintiffs repeatedly and erroneously allege, take on pervasive “legal responsibility for Section 106 compliance.” Doc. 212 at 93.

The Plaintiffs attempt to buttress their argument that PBCI assumed all “legal and financial responsibility for implementing and complying with the required steps of the Section 106 process” by noting the PBCI “expressly agreed to provide for ‘consultation with representatives of any other tribes whose traditional lands may have been within Poarch’s reservation.’” Doc. 212 at 89 (quoting Doc. 190-1 at 117 ¶ 7). This quotation is accurate, but incomplete. PBCI agreed to provide such consultation “in accordance with § 101(d)(4)(C)” of the NHPA, which applies only to tribal assumption of SHPO responsibilities under § 101(b)(2)-(3) of the Act, not federal functions under § 106. Despite their best efforts, the Plaintiffs simply cannot cite any legitimate basis for thrusting federal § 106 obligations onto the Tribal Defendants. And again, to the extent that the Plaintiffs assert that the Tribal Defendants failed to comply with SHPO obligations under § 101 of the NHPA rather than federal functions, they have no right of action. *See, e.g., Martin v. Ala. Historical Comm’n*, 2014 WL 28850, at *3 n.3 (M.D. Ala. Jan. 2, 2014) (dismissing an NHPA claim against the Alabama Historical Commission despite the plaintiff’s allegation that the Commission “operates under the enumerated powers and duties of the Secretary of the Interior” because “the NHPA applies only to federal agencies” and “it is clear that the Alabama Historical Commission itself is not a Federal agency”).

The Plaintiffs also incorrectly assert that the Tribal Defendants were the “agency official” responsible for compliance with aspects of the § 106 consultation process addressed in 36 C.F.R.

Part 800. *See* Doc. 212 at 93. But these regulations make it abundantly clear that the SHPO function—the only one assumed by PBCI—is discrete from the responsibilities of an agency official. *See, e.g.*, 36 C.F.R. § 800.2(c)(1) (identifying the SHPO, or an Indian tribe that has assumed SHPO functions, as a party with whom the agency official must consult); § 800.3(c) (directing agency officials to consult with the appropriate SHPO or tribe serving in the SHPO role); § 800.5(a) (directing the agency official to consult with the appropriate SHPO/tribal official and potentially other Indian tribes in applying the adverse effect criteria); § 800.6 (same, in the context of resolving adverse effects); *City of Oxford*, 428 F.3d at 1356-56 (discussing federal agencies’ obligations to consult with the SHPO); *Martin*, 2014 WL 28850, at *3 n.3. Any allegation that the Tribal Defendants did not comply with § 106 duties imposed on agency officials by 36 C.F.R. Part 800 is misplaced, as those duties simply are not a part of the SHPO responsibilities that PBCI assumed.

B. The Plaintiffs identify no undertakings that can support their NHPA claims.

The Plaintiffs’ NHPA claims against the Tribal Defendants also fail because the Plaintiffs have not alleged relevant federal undertakings triggering application of the § 106 process. Section 106 requires the “head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking ... and the head of any Federal department or independent agency having authority to license any undertaking” to “take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108. Section 106 obligations thus arise only in the context of an “undertaking” that is federally funded or licensed, and then only on the part of the federal agency having direct or indirect jurisdiction over or authority to license that undertaking. *See Sheridan Kalorama Hist. Ass’n v. Christopher*, 49 F.3d 750, 755-56 (D.C. Cir. 1995) (explaining that unless a project is “either federally funded or federally licensed, § 106

simply does not apply”); *Woodham v. Fed. Trans. Admin.*, 125 F. Supp. 2d 1106, 111 (N.D. Ga. 2000).

The Plaintiffs identify a handful of putative undertakings that they claim triggered the § 106 process: “the issuance of ARPA permits and the decision to allow excavation of the Hickory Ground Site to occur without required ARPA permits,” Doc. 212 at 89, and “construction and operation of the casino and hotel” on the Wetumpka property. *Id.* at 90. None of the alleged undertakings can support an APA claim for an NHPA violation in this case.

With respect to the issuance or non-issuance of ARPA permits, applicable regulations explicitly provide that “[i]ssuance of a permit in accordance with this Act ... does not constitute an undertaking requiring compliance with section 106” of the NHPA. 43 C.F.R. § 7.12. Even if that were not the case, the Plaintiffs do not identify any ARPA permits that were issued or any unpermitted excavations that allegedly occurred within six years of their filing this lawsuit as required to bring a timely APA claim for any alleged violation of the NHPA. These alleged undertakings therefore cannot support the Plaintiffs’ NHPA claims.

The Plaintiffs’ argument that construction and operation of the casino and hotel constitute a federal undertaking for § 106 purposes also misses the mark. They assert that construction of PBCI’s Wetumpka facility is “by its very nature a project conducted with federal approval and extensive federal involvement” because IGRA extensively regulates Indian gaming and the National Indian Gaming Commission receives revenue from tribal gaming operations. *Id.* at 90-92. But the federal government did not construct PBCI’s facility at Wetumpka, and nothing in IGRA gives it any role in permitting or licensing tribal construction projects on tribal property. *See, e.g., Oklahoma v. Hobia*, 775 F.3d 1204, 1206, 1213-14 (10th Cir. 2014) (holding that IGRA did not provide a right of action for a state to enjoin a tribe’s construction of an allegedly unlawful

casino); *Jamul Action Comm. v. Chaudhuri*, 200 F. Supp. 3d 1042, 1051 (E.D. Cal. 2016) (“[T]he Tribe’s construction of a casino on its land is not a major federal action. Neither was the casino’s construction subject to the federal defendants’ approval.” (citations omitted)). Construction of the hotel and casino therefore does not constitute a federal undertaking triggering the NHPA. This distinguishes cases cited by the Plaintiffs, where a federal undertaking was found as a result of requirements for pre-construction federal approval or some other federal licensing or permitting of projects.²² *See, e.g., CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 114 (D.C. Cir. 2006) (“By requiring a ruling on each environmental assessment *prior* to tower construction, the FCC has retained authority over tower construction” such that construction constitutes a federal undertaking.). Because the Plaintiffs have identified no federal undertaking on which to ground any NHPA claims against the Tribal Defendants, those claims must be dismissed.

C. There is no private right of action against the Tribal Defendants under the NHPA.

At the close of their NHPA response, the Plaintiffs erroneously assert that they have a private right of action to sue the Tribal Defendants under the NHPA. *See* Doc. 212 at 94-95. This Court, in rejecting a similar argument, has held that the NHPA does not apply to a state historical commission carrying out delegated NHPA responsibilities and that it does not create a private right of action in any event. *Martin*, 2014 WL 28850, at *3 n.3. The weight and trend of federal authority strongly supports this Court’s holding. *See* Doc. 202 at 68 (citing multiple recent federal district court and appellate opinions); *see also Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008); *Woodham*, 125 F. Supp. 2d at 1111. In response, the Plaintiffs offer a smattering of dated case law and a more recent First Circuit decision that explicitly declines to decide whether a private right

²² Operation of the hotel and casino is likewise not federally funded or licensed, but this is ultimately irrelevant because the SAC alleges failures to consult and comply with the NHPA prior to the pre-construction excavation and construction of the facility, not in connection with its ongoing operation. *See generally* SAC at 64-72.

of action arises under the NHPA. *See* Doc. 212 at 94. The Tribal Defendants stand by their authority. There is no private right of action against the Tribal Defendants under the NHPA. Accordingly, and because the Plaintiffs cannot bring an APA claim against nonfederal parties such as the Tribal Defendants for reasons discussed above and in the Tribal Defendants’ principal brief, Doc. 202 at 22, 68-69, the putative NHPA claims against those defendants must be dismissed for failure to state a claim.

VIII. The Plaintiffs have failed to state a claim under RFRA.

The Plaintiffs have not alleged a viable claim against the Tribal Defendants under the Religious Freedom Restoration Act (RFRA) for several reasons. RFRA is applies only to certain governments not including tribes, and the facts alleged in the SAC do not support a RFRA violation regardless. Doc. 202 at 73-81.

A. RFRA is inapplicable to the Tribal Defendants.

The Plaintiffs do not dispute that RFRA is inapplicable to tribal governments. Instead, they reiterate their erroneous assertion that the NPS Agreement converts the Tribal Defendants into federal actors for all purposes. *See* Doc. 210 at 85. The Tribal Defendants have already addressed this flawed argument above, *see supra*, Part I.A.3-4, and in their principal brief. Doc. 202 at 69-70. They did not assume federal functions under the NPS Agreement, and even if they had, the assumption of a limited federal functions, at most, could only convert PBCI into a federal actor with respect to those narrow functions, not for all purposes.

As anticipated in the Tribal Defendants’ principal brief, the Plaintiffs quickly pivot to arguing that the Tribal Defendants are subject to RFRA because they acted under color of law in allegedly imposing a substantial burden on the Plaintiffs’ religious exercise. For a nongovernmental entity’s action to be under color of law, “[1] the deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is

responsible, and [2] the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *West v. Atkins*, 487 U.S. 42, 49 (1988); *see also Myers v. Bowman*, 713 F.3d 1319, 1329-30 (11th Cir. 2013); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). This is a two-part inquiry; a plaintiff who satisfies only one prong has not established that the action in question was taken under color of law. *See, e.g., Harvey*, 949 F.2d at 1130 (affirming dismissal where plaintiff satisfied the first prong, but not the second); *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1223 n.6 (S.D. Ala. 2006) (finding no state action where the plaintiff satisfied the “state right or privilege prong” but not the “state actor” prong); *Green v. Abony Bail Bond*, 316 F. Supp. 2d 1254, 1258-60 (M.D. Fla. 2004) (same as *Weaver*).

While the Tribal Defendants have explained that the Plaintiffs fail to satisfy either prong of the state action test, the Plaintiffs offer a substantive response only on the second, “state actor” prong. *See* Doc. 210 at 85-89. This concession is fatal, but unavoidable. There is simply no basis for arguing that the Tribal Defendants’ ability to engage in the activities allegedly burdening the Plaintiffs’ religious exercise—namely, allowing people to access the Wetumpka property without the Plaintiff’s approval, altering or disturbing the property, allowing alcohol on the property, limiting the Plaintiffs’ access to the property, and reinterring excavated remains without following particular religious protocols, *see* SAC ¶¶ 327-29—derives from some federally created right or privilege. Any private landowner can control access to its property, alter that property, allow alcohol on the property, and rebury items excavated from the property. The Plaintiffs thus cannot meet the first, “state right or privilege” prong of the state action doctrine, and their state action argument necessarily fails.

While the Plaintiffs do at least address the “state actor” prong of the state action test, their arguments on that prong are unavailing. The parties agree that the Eleventh Circuit recognizes

three possible ways to satisfy the state actor prong: the public function test, the state compulsion test, and the nexus/joint action test. *See* Doc. 202 at 76; Doc. 210 at 86. They disagree on the applicability of two of those tests.²³

The Plaintiffs assert that the public function and nexus/joint action tests are satisfied by PBCI's assumption of SHPO duties in the NPS Agreement. Doc. 210 at 86-89. They are incorrect. As the Tribal Defendants have shown, Doc. 202 at 76-77, the public function test is extremely narrow, and the activities that the Plaintiffs allege burden their exercise of their religion simply are not public functions. Regardless, the Plaintiffs' insistence that PBCI is performing a public function because it assumed federal duties under the NPS Agreement is simply irrelevant. The performance, *vel non*, of PBCI's assumed SHPO responsibilities has no connection whatsoever to the actions allegedly violating RFRA; PBCI's control of access to the property and its decisions to allow alcohol on the premises and construct facilities are completely discrete from the NHPA notice and consultation requirements that the Plaintiffs erroneously claim it assumed. *See generally Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348-49 (11th Cir. 2001) (explaining the general requirement of a direct link between the state and the "*particular conduct underlying a claimant's ... grievance*") (citation omitted). The Plaintiffs cannot satisfy the public function test.

Nor can the Plaintiffs satisfy the nexus/joint action test, as the federal government was not a joint participant in the PBCI activities ostensibly giving rise to the Plaintiffs' RFRA claim. Doc. 202 at 77-78. The Plaintiffs assert that this test is met because several of the SHPO functions that PBCI assumed in the NPS Agreement "require ongoing joint action with the federal and state government" and the United States "assumed oversight of the delegation." Doc. 210 at 87. Again, the Plaintiffs' argument fails because there is no link between the SHPO responsibilities that PBCI

²³ The Plaintiffs do not contend that the state compulsion test is met. *See* Doc. 210 at 86-89.

assumed and the actions that allegedly burdened the Plaintiffs' religious exercise. For the nexus/joint action test to apply, "the governmental body and private party must be intertwined in a symbiotic relationship. ... The Supreme Court has indicated that the symbiotic relationship must involve the 'specific conduct of which the plaintiff complains.'" *Rayburn*, 241 F.3d at 1348 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 991, 1004 (1999)); see *Higdon v. Smith*, 565 F. App'x 791, 792-93 (11th Cir. 2014) (finding the nexus/joint action test unsatisfied where a symbiotic relationship existed but the state did not encourage or sanction the particular conduct giving rise to the plaintiff's claims). To have any hope of stating a RFRA claim against the Tribal Defendants under the nexus/joint action test, the Plaintiffs would have had to allege facts indicating that the Tribal Defendants' ostensible RFRA violation arose out of their performance of assumed SHPO responsibilities. They did not do so, and their argument therefore fails.

B. The facts alleged do not establish a RFRA violation.

Regardless of RFRA's inapplicability to the Tribal Defendants, the Plaintiffs' RFRA claims fail because they have not alleged facts amounting to government imposition of substantial burden on the exercise of their religion. See Doc. 202 at 78-81; Doc. 200 at 37-40. None of the actions alleged in the SAC, much less those ostensibly giving rise to the Plaintiffs' RFRA claims, "completely prevent[] the [Plaintiffs] from engaging in religiously mandated activity" or apply "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); see also *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008).

The Plaintiffs maintain that the Tribal Defendants have completely prevented them from engaging in religiously mandated duties to complete certain religious protocols and return the remains of their ancestors and associated funerary objects to their original resting places and/or are forcing them to choose between fulfilling those duties and facing criminal or civil sanctions.

Doc. 210 at 91. They further contend that they have been “barred from Hickory Ground, because virtually all of it is covered over in concrete and asphalt” and that the Tribal Defendants are “desecrating the site” by, *inter alia*, “allowing prohibited persons and substances in and around the ceremonial grounds.” *Id.* at 93. In short, they argue that their religion requires their unfettered access to the Wetumpka property, the removal of any improvements, and that they have full control over who and what is allowed on the property.

The law is clear that RFRA, the First Amendment, and other federal law aimed at protecting individuals’ free exercise of their religion do not allow an individual to impose a “religious servitude” on another’s property based on the individual’s religious beliefs. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452-53 (1988); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior (La Cuna II)*, 2013 WL 4500572, at *10 (C.D. Cal. Aug. 16, 2013), *aff’d*, 603 F. App’x 651 (9th Cir. 2015); *Attakai*, 746 F. Supp. at 1403; *Manybeads v. United States*, 730 F. Supp. 1515, 1517-18 (D. Ariz. 1989); *see also Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991). The opinion in *Attakai* is blunt and directly on point: “[t]he fact that a person’s ability to practice their religion will be virtually destroyed by a governmental program does not allow them to impose a religious servitude on the property of the government, much less property which the government holds in trust for another sovereign Indian tribe.” *Attakai*, 746 F. Supp. at 1403. The *Manybeads* decision provides additional insight into the rationale underlying this rule. In rejecting a First Amendment claim by Navajo tribal members whose religious beliefs called for them “to remain in perpetuity on property held in trust by the United States for the exclusive use of the Hopi Tribe,” the court explained that “[t]o hold otherwise would afford plaintiffs rights, benefits and privileges not enjoyed by other citizens. The rights claimed by plaintiffs in Hopi lands are in total derogation of Hopi rights in and to their reservation.”

730 F. Supp. at 1517-18; *see also Slockish v. U.S. Fed. Highway Admin.*, 2018 WL 4523135, at *3-6 (D. Or. March 2, 2018), *adopted in relevant part by* 2018 WL 2875896 (D. Or. June 11, 2018). Like the Navajo plaintiffs in *Manybeads*, the Plaintiffs here seek rights in total derogation of PBCI's rights in its own reservation and trust lands. RFRA does not provide such rights.

The Plaintiffs do not dispute this critical point. Instead, they attempt to distract from it by citing minor factual distinctions between the case at bar and the authority cited by the Tribal Defendants. *See* Doc. 210 at 92-94. For example, they claim that *La Cuna* is distinguishable because an earlier opinion in the case found no evidence that the plaintiffs had actually been barred from accessing the disputed site or threatened with arrest. *Id.* at 93 (citing *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior (La Cuna I)*, 2012 WL 2884992, at *7-8 (C.D. Cal. July 13, 2012)). While *La Cuna I* did include those observations, it went on to state that “denial of access is not one of the factors under the substantial burden test.” *La Cuna I*, 2012 WL 2884992, at *8. The distinction that the Plaintiffs attempt to draw thus was rejected as meaningless even by the *La Cuna I* court. More importantly, after the plaintiffs amended their complaint specifically “to allege that they are being put to a choice between practicing their religion and being subject to criminal trespass,” the court once again dismissed their RFRA claim. *La Cuna II*, 2013 WL 4500572, at *10.

The Plaintiffs' attempt to distinguish *Navajo Nation* provides another example. It is inapplicable, they argue, because the plaintiffs there “were not forced ‘to act contrary to their religion under threat of civil or criminal sanctions.’” Doc. 201 at 93 (quoting *Navajo Nation*, 535 F.3d at 1070). But that is no distinction at all, as the Plaintiffs here also are not being forced to act contrary to their religion, or to act in any way at all. They are simply prevented from “dictat[ing]

the decisions that [PBCI] makes in managing ‘what is, after all, *its* land.’” *Navajo Nation*, 535 F.3d at 1073 (quoting *Lyng*, 485 U.S. at 453)).

The Plaintiffs principally rely on *Comanche Nation v. United States*, 2008 WL 4426621 (W.D. Okla. 2008), in support of their putative RFRA claims. That reliance is misplaced, however, because the court applied a very different standard for assessing a substantial burden than the test set forth by the Eleventh Circuit in *Midrash Sephardi* and other case law. In order to find a substantial burden on religious exercise under Tenth Circuit precedent, the *Comanche Nation* court needed only find that a challenged governmental action “‘significantly inhibit[s] or constrain[s] conduct or expression’ or ‘den[ies] reasonable opportunities to engage in’ religious activities.” *Id.* at *3 (citation omitted). That the challenged construction at issue in *Comanche Nation* satisfied the Tenth Circuit’s test does not mean that the Tribal Defendants’ conduct here “completely prevents the [Plaintiffs] from engaging in religiously mandated activity” or applies “pressure that tends to force adherents to forego religious precepts or ... that mandates religious conduct.” *Midrash Sephardi*, 366 F.3d at 1227.

In sum, the Plaintiffs’ RFRA claim fails for multiple reasons. RFRA is entirely inapplicable to the Tribal Defendants, and the ostensibly federal functions assumed by PBCI that the Plaintiffs rely on to evade this fact have no connection to the injuries giving rise to their putative RFRA claims. The Plaintiffs also have not established a substantial burden on their exercise of religion and cannot use their religious beliefs to impose a servitude on PBCI’s trust lands. The Court should dismiss all RFRA claims against the Tribal Defendants.

IX. NAGPRA and ARPA are not unlawful or unconstitutional.

As characterized in their response brief, Count VIII of the SAC asserts that the “Tribal Defendants applied NAGPRA and incorporated provisions of ARPA in a fashion that violated the Free Exercise Clause, RFRA, and [the] Religious Land Use and Institutionalized Persons Act

(“RLUIPA”).” Doc. 212 at 96. The ostensible violations of these religious freedom laws arise out of allowing anyone other than the Plaintiffs to consent to excavation at the Wetumpka property or establish a higher priority of ownership to excavated cultural items.²⁴ *Id.* The Plaintiffs appear to concede that this claim rests on substantially the same, flawed grounds as their RFRA claim. *Id.* at 96-97.

Both the Tribal and Federal Defendants have identified numerous problems with the Plaintiffs’ as-applied religious exercise theory. *See* Doc. 202 at 82-84; Doc. 200 at 41-42. These include that (1) the First Amendment and RLUIPA are inapplicable to the Tribal Defendants, (2) RLUIPA is limited to cases involving land use regulations or institutionalized persons, neither of which are present here, (3) there is no substantial burden on the Plaintiffs’ exercise of their religion, as required to establish a violation of any of the laws in question, and (4) any RFRA claim based on the application of ARPA or NAGPRA fails for all of the reasons as the Plaintiffs’ principal RFRA claim. *See id.* The Plaintiffs’ response rebuts none of those arguments.

The Plaintiffs’ argument can be distilled to the assertion that the First Amendment and various religious exercise statutes are violated unless the United States implements a law elevating the Plaintiffs’ religious beliefs above PBCI’s rights to use and develop its own land. This is specious. Indeed, it is the existence of any such law, not its absence, that would violate the First Amendment. *See, e.g., Midrash Sephardi*, 366 F.3d at 1238 (“The Supreme Court has consistently disapproved of unequal treatment that elevates religion over secular interests.”); *Manybeads*, 730 F. Supp. at 1517-18.

²⁴ It is unclear how this constitutes the Tribal Defendants “appl[ying] NAGPRA and incorporated provisions of ARPA.” Doc. 212 at 96.

To the extent that the Plaintiffs base their argument on claims that NAGPRA intended to elevate their interests, whether as “lineal descendants” or the “appropriate tribe,” over PBCI’s with respect to the Wetumpka property, *see* Doc. 212 at 97-100, those arguments have been refuted already. *See supra* Part V.A.4; Doc. 202 at 56-58. The Plaintiffs offer no support for their contention that the First Amendment or any other statute requires NAGPRA to be applied in a way inconsistent with the text of the statute and its implementing regulations. To the extent that the Plaintiffs assert that NAGPRA is not a neutral law and must be justified by a compelling interest, Doc. 212 at 100-01, they are the ones—as the parties asserting that the law must be interpreted to elevate their religious beliefs above PBCI’s rights—who would bear the burden of establishing that compelling interest. And finally, in asserting that RLUIPA tacitly repealed NAGPRA to the extent that NAGPRA is less protective of their religious exercise, *id.* at 101-02, they still offer no explanation of how a statute that applies only to land use regulations and religious exercise by institutionalized persons has any relevance whatsoever to the case at bar. *See* Doc. 202 at 83-84.

In short, the Plaintiffs offer no viable support for their claim that NAGPRA and ARPA violate the First Amendment, RFRA, or RLUIPA as applied in this case. The Court should dismiss Count VIII of the SAC with prejudice for failure to state a claim.

X. The relief the Plaintiffs seek is unavailable as a matter of law.

As discussed above in the context of the Tribal Defendants’ response to several of the Plaintiffs’ discrete claims and in the Tribal Defendants’ principal brief, *see* Doc. 202 at 84-85, much of the relief that the Plaintiffs seek simply is not available under any of the legal theories that they advance. As the Plaintiffs elected to defend their requested relief in the context of their individual claims in their response and the Tribal Defendants have replied in kind, they will not further belabor the matter here.

XI. All of the Plaintiffs' claims should be dismissed pursuant to Rule 19.

If the Court dismisses any of the Plaintiffs' claims against the Tribal Defendants on the basis of tribal sovereign immunity, it should then proceed to dismiss those claims as to other defendants on Rule 19 grounds. *See* Doc. 202, 85-88. In response, the Plaintiffs argue that Rule 19 dismissal would not be necessary or appropriate because PBCI's interests ostensibly could be represented by the Tribal Officials or perhaps the Federal Defendants. *See* Doc. 212, 102-06. The Plaintiffs are incorrect.

With respect to the Tribal Officials, the Plaintiffs may be correct that they could adequately represent PBCI's interests for Rule 19 purposes if they remained in the suit as defendants. But the Tribal Defendants share in PBCI's immunity, and all claims against them should be dismissed as well. *See supra*, Part I.B; Doc. 202 at 22-28. To the extent that the claims against the Tribal Officials are also dismissed on the basis of sovereign immunity, as they should be, the Plaintiffs' argument that those officials adequately represent PBCI's interests will be moot.

The Plaintiffs' argument that the Federal Defendants can adequately represent PBCI's interests in this litigation is simply incorrect. Federal courts repeatedly have held that the United States cannot adequately represent the interests of an absent tribe in the context of an intertribal conflict. *See, e.g., Pit River Home & Agr. Co-op Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994) (citing several cases); *Rosales v. Dutschke*, 279 F. Supp. 3d 1084, 1092-94 (E.D. Cal. 2017), *affirmed by* 787 F. App'x 406 (9th Cir. 2019); *Rosales*, 2007 WL 4233060 at *5-6. *Dutschke* provides a particularly relevant example. There, plaintiffs alleged that the Jamul Indian Village (JIV) tribal officials violated NAGPRA and committed other legal transgressions by excavating and removing plaintiffs' ancestors' remains from a construction site. *See* 279 F. Supp. 3d at 1088. The court held that the officials had sovereign immunity and then proceeded to dismiss all remaining claims, *sua sponte* including those against federal officials, on Rule 19 grounds. *Id.* at

1092-94; *see also Rosales*, 2007 WL 4233060 at *5-6 (holding that an absent tribe was an indispensable party that could not be joined to a suit against federal agency defendants seeking to enjoin construction on the absent tribe's lands).

Similarly, courts have held that the United States cannot adequately represent the interests of an Indian tribe where the two sovereigns' interests do not necessarily coincide. *See, e.g., Dine Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843, 855 (9th Cir. 2019 (discussing several cases), *cert denied*, 2020 WL 3492672 (June 29, 2020); *Enter. Mgmt. Consultants v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). *Dine Citizens* is instructive. There, plaintiffs sued numerous federal defendants challenging the federal approval of a coal mining operation on Navajo Nation land. The Navajo Nation's Transitional Energy Company, an arm of the Nation that owned the mine at issue, intervened for the limited purpose of moving to dismiss the action on Rule 19 grounds. The Ninth Circuit rejected the plaintiffs' argument that the federal defendants would adequately represent the Navajo Nation's interests, explaining that "while Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the *outcome* of the approvals—the continued operation of the" Nation's facilities. *Dine Citizens*, 932 F. 3d at 855. Similarly, while the Federal Defendants here have an interest in defending their own actions that may generally align with PBCI's interests, the Federal Defendants do not have anything approaching PBCI's interest in the defense of its sovereignty and jurisdiction over its land or the continued operation of its Wetumpka facilities. And at least in some instances, notably the extent of the responsibilities ostensibly shifted from the United States to the Tribe by the NPS Agreement, it is possible that the Tribal and Federal Defendants' interest could diverge more substantially. While the United States can no doubt adequately represent the interests of adequate tribes in some cases, this is not such a case.

Because the claims against PBCI must be dismissed on the basis of tribal sovereign immunity, no remaining defendant(s) can adequately represent its interests, and all of the other requirements for dismissal on Rule 19 grounds are satisfied, *see* Doc. 202 at 86-88, the Court should dismiss the SAC completely.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs have failed to state any viable claims against the Tribal Defendants. All claims against those defendants therefore should be dismissed, and because it would be impossible for this action to proceed in equity and good conscience in the absence of the Tribal Defendants, the SAC should be dismissed in its entirety.

Respectfully submitted this 4th day of September, 2020.

s/Mark H. Reeves

Mark H. Reeves, Georgia Bar No. 141847

Kilpatrick Townsend & Stockton LLP

Enterprise Mill

1450 Greene St., Suite 230

Augusta, GA 30901

Phone: 706.823.4206

Email: mreeves@ktslaw.com

(Admitted *pro hac vice*)

Catherine F. Munson, D.C. Bar No. 985717

Kilpatrick Townsend & Stockton LLP

607 14th Street, N.W.

Washington, D.C. 20005

Phone: 202.508.5800

Email: cmunson@ktslaw.com

(Admitted *pro hac vice*)

Charles A. Dauphin, ASB-5833-H65C

Dauphin Paris, LLC

300 Vestavia Parkway, Suite 3400

Vestavia Hills, AL 35216

Phone: 205.979.6019

Email: cdauphin@dauphinparis.com

Attorneys for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September 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 following:

<p>Lauren J. King Foster Garvey PC 1111 Third Avenue; Suite 3000 Seattle, WA 98101 Email: lauren.king@foster.com</p> <p>Counsel for Plaintiffs</p>	<p>Stewart Davidson McKnight, III Dillard, McKnight, James & McElroy LLP P.O. Box 530333 Birmingham, AL 35253-0333 Email: dmcknight@dillardmcknight.com</p> <p>Counsel for Plaintiffs</p>
<p>Frank Eady Bankston, Jr. Webster Henry Bradwell Cohan Speagle & Deshazo 105 Tallapoosa Street; Suite 101 Montgomery, AL 36104 Email: fbankston@websterhenry.com</p> <p>Counsel for Defendant Martin Construction, Inc.</p>	<p>Dennis Mitchell Henry Webster Henry Bradwell Cohan Speagle & Deshazo PC P O Box 239 Montgomery, AL 36101-0239 Email: mhenry@websterhenry.com</p> <p>Counsel for Defendant Martin Construction, Inc.</p>
<p>Jody Helen Schwarz U.S. Department of Justice, Environment and Natural Resource P.O. Box 7611 Washington, DC 20044 Email: jody.schwarz@usdoj.gov</p> <p>Counsel for Federal Defendants</p>	<p>Devon Lehman McCune US DOJ Environmental & Natural Resources 999 18th St / S Terrace - Ste 370 Denver, CO 80026 Email: devon.mccune@usdoj.gov</p> <p>Counsel for Federal Defendants</p>
<p>David Randall Boyd Griffin Lane Knight Jordan Dorman Walker, Jr. Balch & Bingham LLP PO Box 78 Montgomery, AL 36101 Email: dboyd@balch.com Email: lknight@balch.com Email: dwalker@balch.com</p> <p>Counsel for Defendant Auburn University</p>	<p>Jaime Stone Hammer Morgan Mccue Sport Auburn University 182 South College Street 101 Samford Hall Auburn, AL 36849 Email: jsh0073@auburn.edu Email: mms0116@auburn.edu</p> <p>Counsel for Defendant Auburn University</p>

James Joseph DuBois U. S. Attorney's Office PO Box 197 Montgomery, AL 36101 Email: james.dubois2@usdoj.gov Counsel for Federal Defendants	
--	--

Respectfully submitted,

s/Mark H. Reeves

Mark H. Reeves, Georgia Bar No. 141847

Kilpatrick Townsend & Stockton LLP

Enterprise Mill

1450 Greene St., Suite 230

Augusta, GA 30901

Phone: 706.823.4206

Email: mreeves@ktslaw.com

(Admitted *pro hac vice*)