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

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, HICKORY GROUND TRIBAL TOWN, and MEKKO GEORGE THOMPSON, individually and as traditional representative of the lineal descendants of those buried at Hickory Ground Tribal Town in Wetumpka, Alabama.

Plaintiffs,

v.

Civil Action Number:
2:12-cv-1079-BL-SMD

STEPHANIE A. BRYAN, individually and in her official capacity as Chair of the Poarch Band of Creek Indians Tribal Council; ROBERT R. MCGHEE, individually and in his official capacity as Vice Chair of Poarch Tribal Council and board member of PCI Gaming Authority; AMY BRYAN GANTT, in her official capacity as Treasurer of the Poarch Band of Creek Indians Tribal Council; CHARLOTTE MECKEL, in her official capacity as Secretary of the Poarch Band of Creek Indians Tribal Council; DEWITT CARTER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; SANDY HOLLINGER, individually and in her official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; KEITH MARTIN, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; ARTHUR MOTHERSHED, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; JUSTIN STABLER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council and board member of PCI Gaming Authority; BUFORD ROLIN, an individual; DAVID GEHMAN, an individual; GARVIS SELLS, an individual; BILLY BAILEY, in his official capacity as Acting Poarch Band of Creek Indians Tribal Historic Preservation Officer; TIMOTHY A. MANNING, in his official capacity as Chair of the board of the PCI Gaming Authority; TERESA A. POUST, in her official capacity as board member of the PCI Gaming Authority; BRICE MCGHEE, in his official capacity as board member of the PCI Gaming Authority; EDDIE L. TULLIS, individually and in his official capacity as board member of the

PCI Gaming Authority; RACHEL HARRIS in her official capacity as board member of the PCI Gaming Authority; THE DEPARTMENT OF THE INTERIOR; BRYAN NEWLAND, in his official capacity as Assistant Secretary of Indian Affairs; DEB HAALAND, in her official capacity as Secretary of the United States Department of the Interior; CHARLES F. SAMS III in his official capacity as Director of the National Park Service; and AUBURN UNIVERSITY;

Defendants.

PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE TO POARCH OFFICIALS' MOTION TO DISMISS THIRD AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

TABLE OF ABBREVIATIONS

ACHP:	Advisory Council on Historic Preservation
APA:	Administrative Procedure Act
ARPA:	Archaeological Resources Protection Act
Auburn:	Auburn University
BIA:	Bureau of Indian Affairs
Interior:	United States Department of the Interior
Federal Defendants:	United States Department of the Interior ("Interior"), National Park Service ("NPS"); Bureau of Indian Affairs; Deb Haaland, in her official capacity as Secretary of the United States Department of the Interior ("Secretary"); Bryan Newland, in his official capacity as Assistant Secretary – Indian Affairs; and Charles F. Sams III, in his official capacity as Director of the National Park Service.
Grant Application:	Poarch's Application for Historic Preservation Grant Funds
Hickory Ground or Site:	Hickory Ground Site, as listed on the National Register of Historic Places
ICRA:	Indian Civil Rights Act
IGRA:	Indian Gaming Regulatory Act
Individual Defendants:	Buford Rolin, David Gehman, Stephanie A. Bryan, Robert R. McGhee, Sandy Hollinger, Keith Martin, Arthur Mothershed, Garvis Sells, and Eddie Tullis, in their personal and individual capacities.
IRA:	Indian Reorganization Act
NAGPRA:	Native American Graves Protection and Repatriation Act
NHPA:	National Historic Preservation Act
NPS Agreement:	National Park Service Agreement
NPS:	National Park Service
Poarch, the Band, or Poarch Band:	Poarch Band of Creek Indians

Poarch Officials:	Stephanie A. Bryan, Robert R. McGhee, Amy Bryan Gantt, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Justin Stabler, and Arthur Mothershed, in their official capacities as Poarch Tribal Council members ("Tribal Council Officials"); Timothy Manning, Teresa E. Poust, Brice McGhee, Eddie L. Tullis, Rachel Harris, Robert McGhee, and Justin Stabler, in their official capacities as PCI Gaming Authority members, and Eddie L. Tullis and Robert R. McGhee in their individual capacities ("Gaming Officials"); and Billy Bailey in his official capacity as the Tribal Historic Preservation Officer for Poarch ("Poarch THPO").
RFRA:	Religious Freedom Restoration Act
Secretary:	Secretary of the United States Department of the Interior
SHPO:	State Historic Preservation Officer
TASC:	Plaintiffs' Third Amended and Supplemental Complaint
THPO:	Tribal Historic Preservation Officer

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I. INTRODUCTION

Plaintiffs file this Response to the Motion to Dismiss (Doc. 270) Plaintiffs' Third Amended and Supplemental Complaint (Pls. Third Am. Compl. and Suppl. Compl., Doc. 261) (hereinafter "TASC") filed by Defendants Poarch Officials of the Poarch Band of Creek Indians ("Poarch" or "the Band" or "the Poarch Band"), sued in their official capacities, including members of the Poarch Tribal Council ("Tribal Council Officials"),[1] officials of the PCI Gaming Authority ("Gaming Officials")[2] and the Poarch Tribal Historic Preservation Officer ("Poarch THPO"),[3] (collectively "Poarch Officials").

The Poarch Officials contend that "[t]he statutes on which Plaintiffs ground their claims do not give Plaintiffs control or veto authority over what PCI does on its tribal lands." (Doc. 270 at 94). This statement reveals the heart of the present dispute: the Poarch Officials believe that, since Hickory Ground was placed in trust for their benefit, they do not have to comply with the federal laws Congress has passed to protect the graves of Native Americans on tribal and federal lands. And yet, every day, hundreds (if not thousands) of other tribal nations, museums, universities, and others grapple with the requirements imposed by the Native American Graves Protection and Repatriation Act ("NAGPRA"). The fact that Poarch became a federally recognized tribe in 1984 (and then had Hickory Ground placed in trust for it), does not place the Poarch Officials above the law. No remedy requested in this case constitutes a "veto." Instead, the TASC's Prayer for Relief requests prospective, injunctive relief designed to restrain ongoing violations of law. (*See* Prayer for Relief, Doc. 261 at 131-42, ¶¶ (a)-(aa)).

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[1] Tribal Council Officials include Stephanie A. Bryan, Robert R. McGhee, Amy Bryan Gantt, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Justin Stabler, and Arthur Mothershed. (Doc. 261 at 9, ¶ 35).

[2] Gaming Officials include Timothy Manning, Teresa E. Poust, Brice McGhee, Eddie L. Tullis, Rachel Harris, Robert McGhee, and Justin Stabler, in their official capacities as PCI Gaming Authority members. (*Id.* at 10, ¶ 38).

[3] Poarch THPO includes Billy Bailey in his official capacity as the Tribal Historic Preservation Officer for Poarch. (*Id.* at 10, ¶ 39).

The arguments in this case are extensive, the Poarch Officials' Motion to Dismiss is lengthy, and so is Plaintiffs' Response. But before the Court turns its attention to each count and the relevant authorities, it is worth emphasizing that this is *not* a case where any party disputes the fact that the burials of (at least) 57 humans were disturbed and exhumed at the direction of the Poarch Officials. Further, this excavation was not inadvertent. It was intentional and it took place at a site listed on the National Register of Historic Places—a site Auburn University ("Auburn") archaeologists had determined was filled with human remains and archaeological resources. And Poarch was only able to purchase the Hickory Ground Site ("Hickory Ground" or the "Site") in the first place because Poarch Officials promised to protect it. Instead, they built a casino on it.

The issue of sovereign immunity has been reviewed by the Eleventh Circuit. On remand, the Poarch Officials appear to have dramatically limited the scope of their asserted affirmative defense. Just the same—and because of the Eleventh Circuit's instruction to address the Poarch Officials' assertion of sovereign immunity claim-by-claim—Plaintiffs have addressed the potential issue of sovereign immunity with regard to each claim brought against the Poarch Officials (both directly under *Ex parte Young*, as well as pursuant to their delegated federal authority).

At this point in the litigation, the critical issues stem less from an assertion that sovereign immunity requires dismissal, and more from the Poarch Officials' mischaracterization of the facts in the TASC and the exhibits the parties have filed to date. At this point, the Rule 12(b)(6) stage—and not the summary judgment stage—it would not be appropriate to grant the Poarch Officials' Motion to Dismiss based on their mischaracterizations of the facts that contradict the plausible allegations in the TASC. Dismissal at this stage, based on a motion that relies heavily on disputed statements of fact, is premature and inappropriate.

For the reasons discussed in greater detail below, Plaintiffs respectfully ask that the Court deny the Poarch Officials' Motion to Dismiss.

II. PROCEDURAL BACKGROUND

Plaintiffs filed this lawsuit on December 12, 2012. (Doc. 1) [hereinafter "Original Complaint"]. Auburn alone answered the Original Complaint, (Doc. 73), and all other Defendants filed motions to dismiss the Original Complaint prior to filing responsive pleadings. *See* (Docs. 74-77, 90, 94-95). Plaintiffs filed their Second Amended and Supplemental Complaint on March 9, 2020. (Doc. 190). Auburn filed its answer to the Second Amended Complaint on March 23, 2020. (Doc. 194). All other Defendants filed motions to dismiss the Second Amended Complaint. (Doc. 199-205).

On March 15, 2021, this Court entered its Opinion granting the motions to dismiss and dismissing all claims against all parties. (Doc. 223). This Court grounded its decision to grant the motions to dismiss on two conclusions: (1) that the Poarch Band and the Poarch Officials met the requirements to qualify for the "special sovereignty interests" exception to the *Ex parte Young* doctrine, as articulated by the U.S. Supreme Court in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), and were thus immune from suit; and (2) that under Rule 19 of the Federal Rules of Civil Procedure, the Poarch Band and Poarch Officials met the requirements to qualify as necessary parties to the lawsuit and the lawsuit could not proceed without at least one of them. (Doc. 223 at 13-32).[4] This Court entered its Judgment dismissing the Second Amended Complaint that same day. (Doc. 224).

On May 12, 2021, Plaintiffs filed a Notice of Appeal, challenging this Court's dismissal of claims against the Poarch Officials, the Federal Defendants,[5] the Individual Defendants,[6] and

[4] All pin cites to previously filed documents are to ECF-generated page numbers.

[5] Federal Defendants include the United States Department of the Interior ("Interior"), National Park Service ("NPS"); Bureau of Indian Affairs ("BIA"); Deb Haaland, in her official capacity as Secretary of the United States Department of the Interior ("Secretary"); Bryan Newland, in his official capacity as Assistant Secretary – Indian Affairs; and Charles F. Sams III, in his official capacity as Director of the NPS. (Doc. 261 at 12-13, ¶¶ 53-58).

[6] Individual Defendants include Buford Rolin, David Gehman, Stephanie A. Bryan, Robert R. McGhee, Sandy Hollinger, Keith Martin, Arthur Mothershed, Garvis Sells, and Eddie Tullis, in their personal and individual capacities. (*Id.* at 10. ¶ 40).

Auburn. (Doc. 228). Plaintiffs did not appeal the dismissal of the Poarch Band or the PCI Gaming Authority. Soon after the case was appealed, the parties engaged in settlement discussions for nearly two years. The settlement discussions reached an impasse, and briefs were filed between July 2023 and November 2023. Oral arguments were not held until September 2024.

On October 11, 2024, the Eleventh Circuit issued its Opinion, (Doc. 233), thereafter amended, (Doc. 234), vacating this Court's judgment and remanding the case for further proceedings. The Eleventh Circuit instructed this Court to permit Plaintiffs to amend their complaint to better enable the District Court to analyze Plaintiffs' claims on a claim-by-claim and defendant-by-defendant basis, (Doc. 234 at 15-16, 18), and to clarify which remedies relate to which claims and which defendants. (*Id.* at 11).

Ultimately, the Eleventh Circuit concluded "that the district court erred when it failed to review the Poarch officials' sovereign immunity claim by claim." (*Id.* at 14); (*see also id.* at 15-16) ("Whether *Coeur d'Alene* applies turns on the nature of the claim and relief sought."). The Eleventh Circuit also rejected "the Muscogee Nation's argument that the Supreme Court abrogated *Coeur d'Alene*," and reiterated "that *Coeur d'Alene* remains a *narrow* exception to *Ex parte Young*." (*Id.* at 14) (emphasis added). The Eleventh Circuit instructed this Court to "permit the Muscogee Nation to amend its complaint to remove the Poarch Band and its gaming authority as defendants and to conform the complaint to the requirements of notice pleading." (*Id.* at 18).

Because the Eleventh Circuit concluded that the District Court had improperly dismissed all of Plaintiffs' claims under *Coeur d'Alene*, the Court did not reach the other issues and arguments presented by the parties on appeal, specifically the question of Rule 19's applicability or the various reasons the Federal Defendants argued Plaintiffs' claims should be dismissed. (*See id.* at 23). Instead, the Eleventh Circuit left those for this Court to consider first on remand, "with the benefit of an amended complaint and thorough briefing." (*Id.*). The Eleventh Circuit issued its Mandate on December 3, 2024. (Doc. 235).

On December 10, 2024, this Court reopened the case in accordance with the Eleventh Circuit's Opinion and Mandate, vacating its prior opinion and judgment, reinstating claims

previously dismissed, and ordering that the case proceed. (Doc. 238). On December 11, 2024, the parties filed a Joint Status Report, agreeing that Plaintiffs would file an amended complaint on or before January 15th (Doc. 240).[7] This Court entered a Scheduling Order on December 12, 2024, confirming Plaintiffs may file an amended complaint and establishing a timeline for subsequent proceedings. (Doc. 242).

Plaintiffs filed their proposed TASC on January 15, 2025, along with a Motion for Leave, as the proposed TASC included new allegations concerning new facts and events that had transpired since the filing of the Second Amended Complaint (in addition to separating out the claims and requested remedies defendant by defendant). (Doc. 252, 252-1). Auburn filed a brief in opposition, opposing Plaintiffs' Motion for Leave in part. (Doc. 255). The Poarch Officials also filed a brief in opposition. (Doc. 254). In their opposition brief, the Poarch Officials argued that Counts XXI and XXII in the proposed TASC constitute "impermissible shotgun pleading." (*Id.* at 15). The Poarch Officials, at that time, did not claim that any other counts constituted "impermissible shotgun pleading." The Federal Defendants did not file any brief opposing the proposed TASC.

On September 10, 2025, this Court granted, conditionally, Plaintiffs' Motion for Leave to file the TASC. (Doc. 259). This Court explained that its Order granting the Motion for Leave was conditioned on the following:

> Before actually filing the proposed amended complaint, the plaintiffs should revise the proposed amended complaint as to counts 21 and 22 so that each legal theory in these two counts is pleaded separately. This revision does not allow for the addition of new factual allegations or claims but merely allows for the separation of the existing theories with clarity.

(*Id.* at 2, ¶ 2). This Court gave Plaintiffs fourteen days to correct Counts XXI and XXII. (*Id.* at 2, ¶ 3).

[7] The Joint Status Report includes a minor typographical error and states that "Plaintiffs will file a Third Amended Complaint on or before January 15, 2024" as opposed to January 15, 202**5**. (Doc. 240 at 1, ¶ 1).

On September 24, 2025, Plaintiffs filed a revised TASC. (Doc. 261). In accordance with this Court's instruction, Plaintiffs separated the claims and defendants for the previous Counts XXI and XXII, adding Counts XXIII, XXIV, and XXV. (*Id.*). On February 11, 2026, the Poarch Officials filed their Motion to Dismiss. (Doc. 270).

III. FACTUAL BACKGROUND

The Eleventh Circuit summarized Hickory Ground's history and cultural significance as follows:

> Hickory Ground is a sacred ceremonial ground of the Muscogee Nation that sits on the east bank of the Coosa River. Hickory Ground was the Muscogee Nation's last capital before its forced removal on the Trail of Tears. Like many tribal towns, Hickory Ground contained ceremonial grounds, a council house, a plaza, and graves containing human remains and funerary objects. Because of its historical significance, Hickory Ground is a state-registered archaeological site and was placed on the National Register of Historic Places in 1980.
>
> Although the Muscogee Nation left Hickory Ground on the Trail of Tears, the tribal town that started there, Hickory Ground Tribal Town, persists as a political entity in Henryetta, Oklahoma. Affiliation with Hickory Ground Tribal Town is matrilineal, and the current members of that Tribal Town in Oklahoma are the descendants of the Muscogee buried at Hickory Ground. Each tribal town is led by its "mekko," or chief. Mekko George Thompson has been the "kosa mekko," or Coosa Chief, of Hickory Ground Tribal Town since 1977.
>
> Hickory Ground remains a place of spiritual, religious, and cultural importance to the Muscogee Nation, where Mekko Thompson and other members of the Tribal Town have cultural and ancestral ties. Graves like the ones at Hickory Ground have special significance in Muscogee culture and religion because descendants have a duty to care for their ancestors' graves, which may be disturbed only if certain protocol are followed. Members of Tribal Town governance, like Mekko Thompson's ancestors, also have designated burial locations at Hickory Ground.

(Doc. 234 at 6-7). The following provides additional factual background for the current controversy.

A. Mekko Thompson's connection to Hickory Ground is unique and exceptional.

Mekko Thompson is the direct descendant of Muscogee individuals buried at Hickory Ground in present-day Alabama. (Doc. 261 at 7, ¶¶ 23, 25). In fact, because Muscogee religion dictates that mekkos be buried under the Mekkos' Arbor (the east-facing arbor in the ceremonial

ground), Mekko Thompson would have been able to say with certainty where several of his relatives were buried at Hickory Ground—that is, *before* the Poarch Officials excavated them. (*Id.* at 19, ¶¶ 89-91).

As Mekko, and as a direct descendant of the Muscogee relatives who were buried at Hickory Ground, Mekko Thompson maintains a unique, cultural responsibility to ensure his relatives and all Muscogee people, including deceased ancestors, are treated with the basic human dignity, protocols, and respect that the Muscogee religion requires. (*Id.* at 81, ¶ 364). The destruction of his relatives' burial grounds has caused him extreme anguish, torment, and suffering. (*Id.*)

B. Poarch has no historical connection to Hickory Ground.

Before 1980, Poarch had no connection to Hickory Ground. (*Id.* at 22, ¶ 101). When the individuals who now call themselves "Poarch Creek" submitted an application to become a federally recognized tribe, they told the federal government that their ancestral ties to the Southeast are limited to the areas surrounding Tensaw and Atmore in present-day southwestern Alabama, sites that are more than 120 miles away from Hickory Ground. (*Id.* at 9, 22, ¶¶ 34, 101). This is not surprising because before the 1950s, Poarch had no government or political organization. (*Id.* at 8-9, ¶¶ 27-34); (*see also id.* at 29, ¶ 121(g)) ("'unlike the Creeks in Oklahoma, [Poarch] had no organization'"). Instead, the present-day members of Poarch are the descendants of Creek individuals who betrayed the Muscogee (Creek) Nation and fought alongside Andrew Jackson, in his campaign to remove or kill all Muscogee (Creek) citizens living in the Southeast. (*Id.* at 8-9, ¶¶ 30-32). In exchange for supporting Andrew Jackson, Poarch ancestors were given land grants in and near Tensaw. (*Id.* at 9, ¶¶ 33-34); (*see also* Doc. 261-1 at Ex. B, 36) (Poarch Federal Acknowledgment Memo, Dec. 29, 1983) ("the lands they chose were . . . close to the Tensaw/Little River area"). By agreeing to stay, and by accepting these land grants, they gave up all political rights they had previously held as Muscogee (Creek) Nation citizens and became citizens of Alabama and the United States. (Doc. 261 at 8, ¶ 30).

In 1984, the Department of the Interior ("DOI" or "Interior") granted federal recognition to the group, now known as the "Poarch Band of Creek Indians." (Doc. 261 at 8, ¶ 27). In doing so, Interior stated that "[t]he Poarch Band remained in Alabama after the Creek Removal of the 1830s . . . settl[ing] permanently near present-day Atmore, Alabama." Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24083-01, 24083 (June 11, 1984). At that time, Poarch did not claim to have—and Interior did not recognize Poarch as having—any historical ties or connection to Hickory Ground. *See id.* at 24083-84.

C. Poarch promised to protect Hickory Ground.

In 1980, Poarch (then operating as an incorporated entity because it was not yet a federally recognized tribe) acquired the Hickory Ground property in fee using federal preservation grant funds. (Doc. 261 at 4-5, ¶¶ 9-11). In Poarch's application for the funds, Poarch Officials stated that their "[a]cquisition of the property is principally a protection measure." (Doc. 261-1 at Ex. A, 5) (Grant Application). Poarch Officials further stated that their "[a]cquisition will prevent development on the property." (*Id.*).

When Poarch was awarded the funds, Defendant Eddie Tullis signed a covenant with the Alabama Historical Commission agreeing that the Poarch Officials would "preserve the historical and archaeological integrity of the property for 20 years . . . ." (Doc. 203-1 at 1). The 1980 agreement stated that Poarch would only engage in "developing the site" if such development could be carried out "in such a manner that will not threaten or damage the archeological resource." (*Id.* at 2); (*see also* Doc. 202-2 at Ex. B, 12) (1992 Advisory Council on Historic Preservation Executive Director Report) (noting that Poarch Officials only have "discretion for developing the site so long as this does not threaten or damage the archeological resource.").

D. Interior wrongly placed the Hickory Ground Site in trust for Poarch.

Effective April 12, 1985, the United States accepted legal title to a majority of the Hickory Ground Site in trust for the benefit of Poarch, which Plaintiffs contend was unlawful under the Indian Reorganization Act ("IRA") of 1934. (Doc. 261 at 26, ¶ 118). As described in more detail

in the TASC (*Id.* at 26-30, ¶¶ 117-23), this acquisition was wrongful because, although Poarch had become a federally recognized tribe by that time, it was nevertheless not "under federal jurisdiction" in 1934, as required by the IRA. *See Carcieri v. Salazar*, 555 U.S. 379, 391-92 (2009). This fact has been repeatedly acknowledged by both Poarch and the federal government. (Doc. 261 at 27-29, ¶ 121).

Interior continues to hold Hickory Ground in trust for the Poarch Band, an ongoing act that Plaintiffs contend continues to violate the IRA. (*Id.* at 68, ¶ 296).

E. Poarch hired Auburn to perform Phase I archaeological work in the 1990s.

Seven years after entering into the protective covenant described above, and thirteen years before the covenant's expiration, Poarch Officials told the federal Bureau of Indian Affairs ("BIA") they wanted to build a bingo hall on the site. (Doc. 200-2 at Ex. F, 29) (BIA Briefing Paper, Oct. 1, 2001). In response, the ACHP advised that, under federal law, "[t]he proposed development at Hickory Ground requires approval by BIA before the Poarch Band can commence construction." (Doc. 200-2 at Ex. A, 3) (Advisory Council on Historic Preservation Letter, Apr. 27, 1992). The ACHP also highlighted "the need for [Interior] to resolve under [NAGPRA] of 1990 which tribe within the Creek Nation has closest cultural affiliation with Hickory Ground. . . . before making further decisions on the project at hand." (*Id.*).

The ACHP warned that Poarch's proposed bingo hall would "significantly threaten" the cultural resources at Hickory Ground. (*Id.* at Ex. B, 8). The ACHP further noted that NAGPRA applies to any excavations carried out by Poarch at Hickory Ground, and further, that "[c]ompliance with NAGPRA could have an [sic] significant impact on the ability of the Poarch Band to proceed with development plans at Hickory Ground." (*Id.*) Poarch Officials were instructed to consult with Muscogee (Creek) Nation. (*Id.*) The Poarch Officials, however, failed to do so. (Doc. 261-1 at Ex. N, 276) (Letter from ACHP to National Indian Gaming Commission NEPA Compliance Officer, Nov. 14, 2006).

In 1992, the Muscogee (Creek) Nation National Council passed a resolution condemning the Poarch Officials' planned development of Hickory Ground without consultation. (*See* Doc. 276 at Ex. C, 19) (Muscogee (Creek) Nation Ordinance, NCA92-153, Oct. 31, 1992). The Resolution recommended "that the Bureau of Indian deny approval for any contract or contract agreements which would disturb any human remains or cultural artifacts at the Hickory Ground site in Wetumpka, Alabama . . . ." (*Id.* at 20). At that time, Plaintiffs were concerned that two or more members of Hickory Ground Tribal Town had been exhumed in violation of NAGPRA. (*See id.* at 21). On October 19, 2002, Mekko Thompson sent a letter to the BIA, notifying them that Plaintiffs suspected that three members of Hickory Ground Tribal Town had been excavated at the site, unlawfully, and in violation of NAGPRA. (*Id.* at Ex. D, 26) (Letter from Hickory Ground Tribal Town to Poarch Band). In response, Poarch Officials told the BIA that Mekko Thompson was wrong, as the Poarch THPO stated then that "no archeological resources had been excavated" from the Hickory Ground site. (*Id.* at Ex. H, 41) (BIA Revised Report, May 20, 2002); (*see also id.* at Ex. F, 34) (noting that the Poarch THPO informed BIA "that no archeological resources at the site were being affected.").

BIA investigated Mekko Thompson's claims and, in 2002, concluded that "[t]here is no evidence that archeological resources in the area . . . were or may be damaged." (*Id.* at Ex. H, 44). The BIA further found that "[t]here is no evidence that a violation of NAGPRA occurred on trust lands . . . ." (*Id.*). Furthermore, the BIA was under the impression that "[e]fforts to develop the site apparently ceased after 1993." (*Id.* at Ex. F, 33). The BIA acknowledged that "between 1988 and 1993 [Poarch Officials] sponsored three (3) archeological survey and testing operations [performed by Auburn] to determine if some portion of the site could be developed without damaging archeological resources." (*Id.*). Federal agencies concluded that this "archeological testing and evaluation [in the 1990s was] appropriately conservative." (Doc. 202-2 at Ex. B, 12). The studies did reveal that there was no area at Hickory Ground where cultural resources were "absent," (Doc. 276 at Ex. F, 33), the cultural resources were buried well below the "plow zone," (Doc. 271 at Ex. A, 32) (1990 Auburn Archeologist Report), and ultimately, Auburn's work in the

early 1990s revealed "a greater complexity to the archeological resources at this site than were previously suspected." (*Id.* at 31); (*see also* Doc. 261 at 37, ¶ 160).

The documents show that, as of 2002, BIA concluded there was no evidence that archaeological resources had been damaged and no evidence that a NAGPRA violation had occurred on trust lands, even though Plaintiffs had raised concerns about rumors that Poarch Officials planned to excavate and significantly develop the Site. (Doc. 276 at Ex. H, 44); (*Id.* at Ex. F, 33). Furthermore, the information available at the time suggested that the Poarch Officials ceased their efforts to develop Hickory Ground after 1993. (*Id.* at Ex. F, 33). As of 2002, Plaintiffs' claims had not accrued, or alternatively, if documentation exists to substantiate valid claims prior to 2002, then that information was exclusively in the Poarch Officials' possession, and they fraudulently concealed it.

F. Poarch requested, and accepted, delegated federal authority under the NHPA.

In 1999, Poarch requested that the NPS delegate historic preservation responsibilities for Hickory Ground to Poarch. (Doc. 261 at 30, ¶ 125); (Doc. 261-1 at Ex. J, 249-50) (1999 NPS Agreement). The NPS acquiesced, and on June 10, 1999, the NPS and Poarch signed a National Park Service Agreement ("NPS Agreement") whereby NPS delegated authority under the National Historic Preservation Act ("NHPA") to protect and preserve Hickory Ground, as a historic site, to Poarch. (Doc. 261 at 30, ¶ 126).

By signing the NPS Agreement, Poarch Officials agreed to assume duties and obligations under the NHPA. (*Id.*). Among other things, Poarch agreed to "carry out [] responsibilities for review of Federal undertakings pursuant to Section 106 of the Act in accordance with the regulations (36 CFR Part 800) of the [ACHP]." (Doc. 261-1 at Ex. J, 251 ¶ 5). By signing the NPS Agreement, Poarch Officials also agreed to consult:

> [W]ith representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation . . . .
>
> . . . [and] periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities . . . .

(*Id.*). Furthermore, Poarch Officials contractually agreed that, "[i]n any case where an action arising pursuant to the [NHPA] may affect the traditional lands of another Tribe, the [Poarch THPO] will, on an as-needed basis, seek and take into account the views of that Tribe." (*Id.*). The duties and obligations under the NHPA that Poarch Officials requested and voluntarily assumed were numerous and detailed, and accordingly, the "Tribe [] provided [] the Secretary of the Interior acting through the National Park Service a plan that describes how the functions of the tribe . . .will be carried out[.]" (*Id.* at 249).

G. Poarch broke its promises and desecrated Hickory Ground to build a casino resort.

In violation of its own promises and federal law, the Poarch Officials desecrated Hickory Ground, removing at least 57 bodies, thousands of funerary objects, and sacred artifacts. (Doc. 261 at 40, ¶¶ 172-74). Auburn, at Poarch's request, conducted the excavation. (*Id.* at 37, ¶ 161). The remains and numerous archaeological artifacts laid to rest at Hickory Ground continue to be mishandled and are improperly stored by Auburn and the Poarch Officials, in violation of federal law. (*Id.* at 40-41, ¶¶ 175-79).

The Poarch Officials and Auburn excavated human remains and cultural resources until 2011. (*Id.* at 36, ¶ 155). The Poarch Officials and Auburn, however, have never provided Plaintiffs with documentation detailing when the individual excavations of Mekko Thompson's relatives took place, where they had been buried prior to excavation, or what funerary objects they were buried with—information that would assist Mekko Thompson in identifying the individuals, their clans, and their roles in Hickory Ground Tribal Town. (*Id.* at 19, 38, ¶¶ 89-91, 163-65).

Although their delegated NHPA duties under the NPS Agreement required Poarch Officials to consult with the Nation, and although the Archaeological Resources Protection Act ("ARPA") permit that Auburn obtained required consultation prior to any excavation, (*see* Doc. 261-1 at Ex. W, 308) (Auburn's Federal Archeological Permit) ("Excavation or removal of any Native American human remains . . . must be ***preceded*** by consultation") (emphasis added), neither Auburn nor the Poarch Officials ever engaged in pre-excavation consultation with Plaintiffs

sufficient to satisfy the ARPA permit. (Doc. 261 at 12, 33-34, ¶¶ 51(d), 144); (*see also* Doc. 261-1 at Ex. N, 276) ("[T]here was . . . no consultation with any other Indian tribe, particularly the Muscogee Creek Nation.").[8] And although Mekko Thompson and Hickory Ground Tribal Town members are the direct descendants of the individuals the Poarch Officials ordered exhumed from Hickory Ground, to this day, Auburn and the Poarch Officials have refused to return the human bodies, cultural resources, and sacred funerary objects they wrongfully excavated from beneath the surface of Hickory Ground. (Doc. 261 at 40, 50, ¶¶ 173, 236-36).

The TASC alleges that Poarch Officials violated federal common law, federal statutory law, and their historic preservation duties under the NHPA by desecrating Hickory Ground and by failing to consult with, and obtain consent from, the Muscogee (Creek) Nation before conducting excavation and construction at this sacred and historic site. Poarch's ongoing desecration of Hickory Ground (and ongoing refusal to engage in consultation) continues to cause harm to the Nation, in violation of the laws of the United States. Auburn and the Poarch Officials' ongoing refusal to return and repatriate the human remains and funerary objects to the Nation, Hickory Ground Tribal Town, and Mekko Thompson, constitutes an ongoing violation of federal law, one that continues to cause significant harm and damage.

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[8] When the ACHP was finally notified of Poarch's excavation activities in 2006, it opined that the actions had "adversely affected the National Register-listed property," and that "the archaeological surveys and data recovery were not carried out in compliance with Section 106 of the NHPA." (Doc. 261-1 at Ex. N, 275). The Advisory Council concluded that Section 106 had been violated because:

> [T]here was no Federal agency review of the archaeological investigations carried out by the Poarch Band . . . and no consultation with any other Indian tribe, particularly the Muscogee Creek Nation. The initial notification of the ACHP (see 36 CFR 800.6(a)(1)) did not occur until after the destruction of the site. Furthermore, there is no indication that the public has been notified about the nature of the undertaking and its effects on historic properties (36 CFR 800.3(e)).

(*Id.* at 276).

> Since the Section 106 process must be initiated by a Federal agency *prior to* the initiation of project activities, it is unclear why the applicant, a tribe with a tribal historic preservation office approved by the National Park Service pursuant to Section 101(d)(2) of the NHPA, proceeded with project planning and archaeological investigations.

(*Id.* at 275) (emphasis added).

H. Poarch Officials failed to consult with Plaintiffs prior to reburying Mekko Thompson's relatives.

After concluding excavations in 2011, the Poarch Officials planned to commence construction on their latest casino. Three months prior to breaking ground on that $246 facility, in April of 2012, Poarch Officials sent a letter to Plaintiffs, inviting them to meet with the Poarch Officials to discuss how Plaintiffs' relatives might be reburied. (Doc. 261 at 46, ¶¶ 214-15). Plaintiffs responded promptly upon receiving the letter. (*Id.* at 46, ¶ 218). The Poarch Officials, however, did not even await the Plaintiffs' response, much less give Plaintiffs an opportunity to engage in any dialogue; instead, without consultation, the Poarch Officials reburied Plaintiffs' relatives in a manner that violates Muscogee culture, traditions, and religion. (*Id.* at 47, ¶¶ 221-22). The Poarch Officials' actions in April of 2012 violated NAGPRA and their NPS Agreement, and continues to cause Plaintiffs extreme pain and anguish. (*Id.* at 50, 74, ¶¶ 236, 330).

The Poarch Officials rushed to rebury Mekko Thompson's relatives in the hopes that doing so would prevent a lawsuit from somehow interfering with their ability to construct and operate a casino over the excavated burial grounds. (*Id.* at 48, ¶ 227). The Poarch Officials' unlawful possession and reburial of Plaintiffs' relatives—in violation of Muscogee culture and religion—constitutes an ongoing violation of NAGPRA that continues to cause harm. (*Id.* at 48, ¶ 225).

I. Poarch Officials began additional, new construction in 2022.

Although the casino opened its doors to the public in 2014, Poarch Officials recently undertook additional construction at the sacred Hickory Ground site. (*Id.* at 59-60, ¶ 269). Poarch Chair Stephanie Bryan notified Muscogee Chief David Hill of the planned construction by letter on September 6, 2022, stating that the Poarch Officials planned to commence the new construction in seven to twelve days. (*Id.*). Chief Hill promptly responded on September 9, 2022, expressing concern that no consultation had taken place. (*Id.* at 60, ¶ 270). Because Auburn's "archeological reports on the site indicate that there are no areas that are completely free of archeological resources," (Doc. 200-2 at Ex. F, 30), the Muscogee (Creek) Nation had cause for concern.

Accordingly, the Muscogee (Creek) Nation requested the following information:

- A map of the proposed construction, including the placement of the relocated utility lines.
- A timeline of the proposed construction, including the projected start date.
- Detailed construction plans showing the location of all additions to the casino to be made in this project.
- Detailed drawings showing the location and depth of any excavation and installation of new foundations.
- Detailed drawings showing where the utility lines will be relocated, the excavation for such relocated lines, and the depth and width of that excavation.
- The report from Poarch's THPO concluding that the area affected by the construction activity (including any access or staging areas) is free of any historic or archaeological items, and all maps, studies or other materials relied upon by the THPO or Poarch in reaching that conclusion.
- An accurate topographical map that pre-dates the original construction.
- Any existing surveys of the area encompassing the proposed construction.
- The results of any shovel tests done to confirm that the construction area lacks cultural items (as that term is defined in the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 et seq.).
- Information about any cut or fill that has previously been done on the riverbank.
- A description of the process the Poarch Officials propose to follow in the event of an inadvertent discovery of unanticipated cultural items, human remains (regardless of the level of disturbance of the soil matrix), and/or intact archaeological deposits that still may exist are encountered during construction.

(Doc. 261 at 60-61, ¶ 271). The Poarch Officials, however, refused to provide *any* of this requested information, and instead simply proceeded with additional construction. (*Id.* at 61-64, ¶¶ 273, 280). In February 2023, Plaintiffs received reports that cultural resources, and possibly human remains, had been discovered at Poarch's construction site on Hickory Ground in late January/early February of 2023. (*Id.* at 61, ¶ 275).

Although the Poarch Officials did not provide clear dates or information regarding their 2023 construction, Plaintiffs believe this most recent construction concluded in spring of 2023. (*Id.* at 62, ¶¶ 279-80). The TASC alleges that the Poarch Officials' failure to engage in consultation regarding the human remains and cultural resources at the Hickory Ground site prior to commencing their 2023 construction violates the NHPA and the NPS Agreement the Poarch Officials signed with the NPS.

IV. STATEMENT OF DISPUTED FACTS

Although the parties have not yet engaged in discovery,[9] the Poarch Officials' Motion to Dismiss contains numerous factual allegations that directly contradict allegations made in the TASC and the evidence currently in the record (including exhibits attached to the TASC and exhibits previously and currently filed by various parties). At the Rule 12(b)(6) stage, those disputes cannot support dismissal. The examples below illustrate that problem, but Plaintiffs address the relevant points in greater detail in the specific count sections that follow.

(1) The Poarch Officials state that the Poarch Band is "a successor to the Creek Nation . . . ." (Doc. 270 at 20). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. A tribe cannot be a "successor" to a historical tribe unless it is the "political continuation" of the historical tribe that signed treaties with the United States. *See, e.g.*, *United States v. State of Wash.*, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979). The TASC alleges that Poarch never signed treaties with the United States, lacked historical political organization or sovereignty before the late twentieth century, and did not claim descent from a historic Muscogee Tribal Town or political sovereign when seeking federal acknowledgment. (Doc. 261 at 8, ¶ 30); (*id.* at 16-17, ¶ 74) (citing Doc. 261-1 at Ex. B, 97). The Poarch Band is not a political continuation of the Muscogee (Creek) Nation and is not a "successor" to the Nation.

[9] The Poarch Officials previously filed a motion asking this Court to stay discovery on the basis that the defendants' motions to dismiss "present[] a purely legal question, so neither the parties nor the court have any need for discovery before the court rules on the motion[s]." (Doc. 127 at 3) (citations and quotation marks omitted).

(2) The Poarch Officials state that "[t]oday's [Poarch Band] members are descendants of Creek citizens who traveled to southern Alabama from various Creek tribal towns (including Hickory Ground) . . . ." (Doc. 270 at 21). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. The TASC alleges instead that Hickory Ground Tribal Town was not part of Poarch's historic territory or homelands, that Poarch's historic community was limited to the Atmore and Tensaw area, and that every living member of Hickory Ground Tribal Town in the 1830s was removed on the Trail of Tears, where their present-day descendants live in Oklahoma within the Muscogee (Creek) Nation. (Doc. 261 at 15-16, ¶¶ 70-72); (Doc. 261-1 at Ex. B, 11-12, 21-22, 112).

(3) The Poarch Officials state that Poarch's Application for Historic Preservation Grant Funds ("Grant Application") is a document that "discussed the possibility of . . . subsequent development" at the Site. (Doc. 270 at 22) (citing Doc. 261-1, at Ex. A (Grant Application)). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. The Grant Application that the Poarch Officials filed states that their "[a]quisition will *prevent* development on the property." (Doc. 261-1, at Ex. A, 5) (emphasis added). Indeed, the written covenant the Individual Defendants subsequently signed plainly states that the Poarch Officials were only permitted to undertake development if "developing the site . . . will not threaten or damage the archaeological resource." (Doc. 203-1 at 2); (*see also* Doc. 202-2 at Ex. B, 12) (noting that Poarch Officials only had "discretion for developing the site so long as this does not threaten or damage the archeological resource.").

(4) The Poarch Officials state that "[d]ocuments attached to the TASC evince additional consultation between [the Poarch Band] and MCN at least in 2010 and 2012." (Doc. 270 at 25) (citing Doc. 261-1, Exs. P-S). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. First, the Poarch Officials' reference to former Chairman Buford Rolin's self-serving statement that consultations took place is contradicted by the TASC's statements that they did not. (*See, e.g.*, Doc. 261 at 91, ¶ 422(a)). Second, page 43 of Doc. 200-2 does refer to a visit that Hickory Ground Tribal Town made to Auburn in August of 2007 wherein

Auburn stated they had excavated 57 Hickory Ground individuals; that visit, however, cannot constitute the consultation that ARPA, NHPA, and NAGPRA require, since that consultation was required to happen *before* excavation of Native remains, not after. (Doc. 200-2, at Ex. I, 43); (*see* Doc. 200-1 at Ex. W, 308) (emphasis added) (noting excavation of Native remains must be "*preceded* by consultation.").

(5) The Poarch Officials state that "Plaintiffs explicitly concede that PCI and Plaintiffs engaged in 'six years of negotiations' regarding disposition of remains and artifacts excavated from the Wetumpka property before PCI proceeded with reinterment in April 2012." (Doc. 270 at 104). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. The TASC repeatedly makes clear that consultation did not take place. (*See, e.g.,* Doc. 261 at 12, 33-34, ¶¶ 51(d), 144). The ACHP acknowledged the absolute absence of any attempt by the Poarch Officials to engage in consultation, writing: "[T]here was . . . no consultation with any other Indian tribe, particularly the Muscogee Creek Nation." (Doc. 261-1, at Ex. N, 276). The fact that Plaintiffs attempted to negotiate with Poarch Officials for six years prior to filing the lawsuit, (*see* Doc. 261 at 47, ¶ 221), in no way demonstrates that the Poarch Officials themselves engaged in consultation. (*See* Doc. 261-1, at Ex. N, 276).

(6) The Poarch Officials state that they reinterred the Hickory Ground relatives "on a portion of the Wetumpka property that is to remain undeveloped," and furthermore, that they "informed MCN of the reinterment shortly before . . . ." (Doc. 270 at 26). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. The portion of the property where the Poarch Officials allegedly reinterred Mekko Thompson's relatives is not "undeveloped." It is enveloped by a parking lot and abuts the cement wall of Poarch Band's casino. (Doc. 261 at 47, 67, ¶¶ 222, 290). Furthermore, the manner in which the Poarch Officials "informed MCN" of the reinterment was done in a purposeful manner to exclude Mekko Thompson's and the Nation's ability to have a say in how their relatives would be reinterred, a fracture that continues to cause cultural harm and damage today. (*Id.* at 45-48, ¶¶ 211-29).

(7) The Poarch Officials state that Plaintiff Mekko Thompson "has not identified any 'known individual' whose remains or cultural objects are at issue." (Doc. 270 at 93). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. The TASC alleges that Mekko Thompson and the members of Hickory Ground Tribal Town are the direct matrilineal descendants of those buried at Hickory Ground, that Plaintiffs—and specifically Mekko Thompson—know them by the location of their burials, their clans, and their membership in Hickory Ground Tribal Town, and that Auburn and the Poarch Officials have not provided the information necessary to match excavated remains to named individuals (a standard that is not required by NAGPRA). (Doc. 261 at 7, 18-19, 40, ¶¶ 26, 82, 89-92, 173).

(8) The Poarch Officials state that their "construction work undertaken in 2023 did not excavate beyond a layer of fill dirt used to level the site . . . ." (Doc. 270 at 99). The factual basis for this statement is disputed by the TASC and the exhibits attached thereto. Although the Poarch Officials refused to provide any of the documentation that Plaintiffs requested concerning the cultural resources and possible human remains that were threatened by the Poarch Officials' 2023 construction, (Doc. 261 at 62, ¶ 279), photos taken at the construction site reveal that the work performed involved more than "fill dirt." (Doc. 261 at 62—64, ¶ 280).

V. STANDARD OF REVIEW

A. Standard of review under Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563. "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon

which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (alteration in original) (quoting *Twombly*, 550 U.S. at 555).

"In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.* at 93–94. The court must "'accept[] the complaint's allegations as true and construe[] them in the light most favorable to the plaintiff.'" *Newbauer v. Carnival Corp.*, 26 F.4th 931, 934 (11th Cir. 2022) (citation omitted); *see Arthur v. Thomas*, 974 F. Supp. 2d 1340, 1343 (M.D. Ala. 2013). All reasonable inferences must be drawn in the plaintiff's favor. *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1043 (11th Cir. 2019).

A motion under Rule 12(b)(6) does not pose the question of whether the plaintiff can ultimately prevail on the merits, as "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556; *see also* 5B *Wright & Miller's Federal Practice & Procedure* § 1357 (4th ed. 2026) ("Whether the plaintiff ultimately can prevail on the merits is a matter properly determined on the basis of proof, which means on a summary judgment motion or at trial by the judge or a jury, and not merely on the face of the pleadings."). The burden of persuasion is on the party moving under Rule 12(b)(6) to demonstrate that no legally cognizable claim for relief exists. *Cohen v. Bd. of Trs. of the Univ. of the D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) (quoting 5B *Wright & Miller*, *supra* § 1357 ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists.")). The complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

B. The Poarch Officials rely on evidence that exceeds the scope of Rule 12(b)(6).

The Poarch Officials' Motion to Dismiss misconstrues the limited function of Rule 12(b)(6). Rather than testing the sufficiency of the TASC, the Poarch Officials ask this Court to

disregard the allegations in the TASC as true and instead adopt their factual narrative through contested factual allegations, a sworn affidavit, and selected, self-serving historical correspondence sent by the Poarch Officials themselves. They ask the Court to accept that curated record as established fact and to draw dispositive conclusions regarding accrual, causation, personal participation, injury to Plaintiffs, whether Mekko Thompson is the descendant of the individuals the Poarch Officials excavated, whether consultation actually took place, and the absence of any continuing violation. That is not Rule 12(b)(6). That is summary judgment. *See Roberts v. Carnival Corp*., 824 F. App'x 825, 827 (11th Cir. 2020).[10]

The Court should disregard the disputed facts, mischaracterized history, attorney declaration, and other extrinsic materials submitted in support of the Motion to Dismiss and evaluate the sufficiency of the TASC under Rule 12(b)(6) based on the face of the complaint, accepting Plaintiffs' well-pleaded allegations as true. However, if the Court elects to convert the Motion pursuant to Rule 12(d), Plaintiffs respectfully request notice and a reasonable opportunity to present material pertinent to the motion, including discovery and supplemental briefing, as required by Rules 12(d) and 56. Fed. R. Civ. P. 12(d); *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002). Plaintiffs have not further burdened the Court at this stage with attorney affidavits or additional correspondence because the Motion should be decided under Rule 12(b)(6) standards, and because discovery and record development will follow should Plaintiffs prevail. But if the Court is at all inclined to convert the Poarch Officials' Motion under Rule 12(d), Plaintiffs respectfully request an opportunity to supplement the factual record. *See* Fed. R. Civ. P. 12(d); *Trustmark Ins. Co.*, 299 F.3d at 1267.

[10] Nor should this Court resolve disputed facts under Rule 12(b)(1) where the asserted jurisdictional issues are intertwined with the merits. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990).

VI. ARGUMENT

A. The TASC is not a shotgun pleading.

Contrary to the Poarch Officials' assertions (Doc. 270 at 45-49), the TASC is not a "shotgun pleading" under Eleventh Circuit standards. The Federal Rules of Civil Procedure require that pleadings "give the defendant fair notice of what the [plaintiff's] claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Furthermore, the Supreme Court has "reject[ed] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome" in favor of "the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 47, *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Despite favoring a less formalistic approach, complaints can violate the Rules when they "violate either Rule 8(a)(2) or Rule 10(b), or both," and in those scenarios, the Eleventh Circuit frequently refers to them as "shotgun pleadings." *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015). Specifically, the Eleventh Circuit has "identified four rough types or categories of shotgun pleadings." *Id.* at 1321.

- Type I is a "complaint containing multiple counts where each count adopts the allegations of *all preceding counts*, causing each successive count to carry all that came before and that last count to be a combination of the entire complaint." *Id.* (emphasis added).
- Type II is a "complaint that . . . [is] replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Id.* at 1321-22.
- Type III is a complaint "that . . . [does] not separate[] into a different count each cause of action or claim for relief." *Id.* at 1322-23.
- Type IV is a complaint "asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1323.

The Eleventh Circuit has noted that shotgun pleadings are problematic because they "fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* And therefore, dismissal of shotgun pleadings may be "appropriate where 'it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief.'" *Id.* at 1325 (quoting *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996)).

Because the TASC responds fully to the Eleventh Circuit's pleading instructions and does not otherwise constitute any of the four types of shotgun pleadings under guiding Eleventh Circuit jurisprudence, dismissal of Plaintiffs' complaint based on Rule 8 or Rule 10 as a "shotgun pleading" is inappropriate.

1. The TASC is fully responsive to the Eleventh Circuit's instructions regarding the form pleadings must take.

On appeal, the Eleventh Circuit noted that Plaintiffs' Second Amended Complaint "bears features of 'shotgun pleading'" (Doc. 234 at 16) before, ultimately, instructing the District Court to "permit the [Plaintiffs] to amend [their] complaint . . . to conform the complaint to the requirements of notice pleading." (*Id.* at 18). Specifically, the Eleventh Circuit noted that Plaintiffs' Second Amended Complaint contained: (1) "multiple counts" where "each count adopts the allegations of all preceding counts" (Type I shotgun pleading issue); (2) a lack of clarity in the prayer for relief as to which remedies related to which claims and defendants (Type III shotgun pleading issue); and (3) several counts that assert "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against" (Type IV shotgun pleading issue). (*Id.* at 16) (quoting *Weiland*, 792 F.3d at 1321, 1323). Plaintiffs took the Eleventh Circuit's identification of the Second Amended Complaint's pleading deficiencies to heart and rectified the concerns in the TASC. (*See* Doc. 261).

2. Plaintiffs' TASC is not a shotgun pleading because it no longer contains multiple counts where each count adopts the allegations of all preceding counts.

The Eleventh Circuit indicated that Plaintiffs' Second Amended Complaint was deficient as a pleading because "[i]t contains 'multiple counts' and 'each count adopts the allegations of all preceding counts.'" (Doc. 234 at 16) (quoting *Weiland,* 792 F.3d at 1321). Under *Weiland*, this is a Type I shotgun pleading issue. The *Weiland* Court, however, defines this shotgun pleading as a scenario where the individual counts themselves re-allege all preceding paragraphs, including the allegations contained in all preceding counts. *See Weiland*, 792 F.3d at 1324. As the Eleventh Circuit has explained:

> [T]his Court has condemned the incorporation of preceding paragraphs where a complaint "contains several counts, each one incorporating by reference the allegations of its predecessors [i.e. predecessor *counts*], leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions."

Id. (quoting *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002)). In *Weiland*, the Eleventh Circuit actually found the complaint at issue was *not* a shotgun pleading because "[t]he allegations of each count are not rolled into every successive count on down the line." *Id.*

Indeed, the Eleventh Circuit has consistently held that this type of shotgun pleading *only* occurs when pleadings reincorporate "preceding counts" into *each and every* subsequent count. *See, e.g.*, *Barmapov v. Amuial*, 986 F.3d 1321, 1325 (11th Cir. 2021) ("[Plaintiff's] second amended complaint does not fall into the first category because although nine of the 19 counts incorporate almost every factual allegation in the complaint, *none of them adopts the allegations in the preceding counts*." (emphasis added)); *Jackson v. Bank of America, N.A.*, 898 F.3d 1348, 1358 (11th Cir. 2018) (dismissing the case with prejudice on shotgun pleading grounds, in part, due to "the first sentence of each count adopt[ing] and re-alleg[ing] *all prior paragraphs*" (emphasis added) (citation omitted)).

Plaintiffs recognize the Second Amended Complaint "contain[ed] multiple counts and each count adopt[ed] the allegations of all preceding counts." (Doc. 234 at 16) (internal quotes omitted) (quoting *Weiland*, 792 F.3d at 1321). Plaintiffs also recognize that this deficiency resulted in "the first claim . . . . incorporat[ing] none of the preceding general allegations of the complaint" while "[e]ach later claim incorporate[d] 'the allegations contained in the preceding [p]aragraphs' of the complaint." (*Id.* at 11) (quoting Doc. 190 at 46, 48-49, 53, 59, 61, 64, 72, ¶¶ 201, 214, 221, 237, 239, 241, 262, 271, 284, 321). The result, as the Eleventh Circuit noted, was that "each claim [after the first] incorporat[ed] not only the general allegations of the complaint, but also the allegations specific to earlier claims." (*Id.*).

In response to the Eleventh Circuit's direction, Plaintiffs rectified this deficiency in the TASC. While Count I of the Second Amended Complaint incorporated none of the preceding paragraphs, including the preceding general allegations, in the TASC, Count I properly re-alleges "all of the allegations contained in Paragraphs 1-293" before highlighting the specific factual allegations uniquely relevant to that specific claim. (*Compare* Doc. 190 at 45, ¶ 190); (*with* Doc. 261 at 68, ¶ 294). Similarly, while Count II of Plaintiffs' Second Amended Complaint, and every subsequent count, started with a full incorporation of all "the allegations contained in the preceding Paragraphs" and thus incorporated *preceding counts* (*see, e.g.,* Doc. 190 at 46, ¶ 201), the TASC now *only* incorporates the general allegations before highlighting the specific factual allegations that are uniquely critical to the claim. (*See, e.g.* Doc. 261 at 71, ¶ 316) (with respect to Count II: "Plaintiffs re-allege, as if fully set forth herein, the allegations contained in Paragraphs 1-293."). Each successive count no longer incorporates the allegations from all previous counts before.

The TASC no longer contains multiple counts where each count adopts the allegations of all preceding counts and, therefore, the TASC is not, under *Weiland*, a Type I shotgun pleading.

3. The TASC is not a shotgun pleading because the prayer for relief makes clear what relief is being requested in relation to which claim and which defendant.

The Eleventh Circuit also indicated that Plaintiffs' Second Amended Complaint was deficient as a pleading because "[t]he prayer for relief . . . . does not state which remedies relate to

which claims . . . . [, and does not] state which remedies relate to which defendants." (Doc. 234 at 11). This is a Type III shotgun pleading issue. *See Weiland*, 792 F.3d at 1322-23.

Plaintiffs recognize the Second Amended Complaint failed to clearly distinguish "which remedies relate[d] to which claims" and "which remedies relate[d] to which defendants." (Doc. 234 at 11). In response to the Eleventh Circuit's direction, Plaintiffs' "Prayer for Relief" section is now organized by count, wherein each count clearly identifies which defendant or defendants the count is brought against, as well as the specific type of relief sought for that particular count. (*See id.* at 131-41, ¶¶ (a)-(aa)). For example, Count I of the TASC is brought against "the Department of the Interior and Secretary Deb Haaland, in her official capacity" (*Id.* at 68, ¶ 295) and the relief requested under Count I is clearly spelled out as follows:

> If Plaintiffs succeed with respect to Count I, enter a judgment declaring that Interior lacked authority to take the Hickory Ground Site into trust for Poarch, and an order in the nature of mandamus requiring that Secretary Haaland take the Hickory Ground Site out of trust, thereby returning the site to fee simple ownership[.]

(*Id.* at 131, ¶ (a)). There is no longer any confusion regarding which remedy is requested in relation to which defendant or for which count. (*Id.* at 131-41, ¶¶ (a)-(aa)). The TASC no longer lacks clarity in the prayer for relief and, therefore, this pleading defect has been cured.

4. The TASC is not a shotgun pleading because it no longer contains several counts that contain multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions.

The Eleventh Circuit indicated that Plaintiffs' Second Amended Complaint was also deficient as a pleading because "several counts assert 'multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.'" (Doc. 234 at 16) (quoting *Weiland*, 792 F.3d at 1323). This is a Type IV shotgun pleading issue. *See Weiland*, 792 F.3d at 1323.

Plaintiffs recognize the Second Amended Complaint did not always clearly specify "which of the defendants are responsible for which acts or omissions" and "which of the defendants the [various claims were] brought against." In response to the Eleventh Circuit's direction, Plaintiffs

have rectified this deficiency in the TASC. Instead of having one single "NAGPRA" claim (formerly Count VIII) against all or unspecified defendants (Doc. 190 at 53-59, ¶¶ 241-61), the TASC contains three separate "NAGPRA" styled claims. Count XI is brought against the Federal Defendants (and the Poarch Officials, to the extent they are found to have acted under delegated federal authority) for violations of NAGPRA, Count XII is brought against the Poarch Officials for ongoing violations of NAGPRA pursuant to *Ex parte Young*, and Count XIII is brought against Auburn University for violations of NAGPRA. (Doc. 261 at 89-97, ¶¶ 413-49). The TASC is still divided by claim, but now, at the beginning of each claim, there is a clear statement regarding *who* the claim is brought against and pursuant to which capacity (individual, official, delegated federal authority).

For example, Count II of the TASC states it is against the "Poarch Officials in Their Official Capacities", which includes "the Tribal Council Officials, Gaming Officials, and Poarch THPO, only, in their official capacities." (*Id.* at 71-72, ¶ 317). Similarly, additional clarity has been added regarding the legal theory utilized for each count (*see, e.g.*, *id.* at 72, ¶ 320) ("Under Alabama common law, a claim for unjust enrichment exists where one party has unjustly retained a benefit to the detriment of another, and such retention is inequitable under the circumstances")) and how the specific facts alleged with respect to the claim relate to that theory. (*See, e.g.*, *id.* at 72, ¶ 321) ("Poarch Officials Tullis and Rolin unjustly enriched themselves by . . . ")); (*id.* at 74, ¶ 329 ("The Tribal Council Officials, Gaming Officials, and Poarch THPO further unjustly enriched themselves by . . . ")); (*id.* at 74, ¶ 330 ("The Tribal Council Officials, Gaming Officials, and Poarch THPO once again unjustly enriched themselves when . . . ")); (*id.* at 75, ¶ 333 ("The Poarch Officials continue to be unjustly enriched, in violation of law, because . . . ")).

The TASC no longer contains several counts that assert multiple claims against multiple defendants without specifying the underlying legal theory, the capacity for which they are being sued, or which of the defendants are responsible for which acts or omissions and, therefore, the TASC is not, under *Weiland*, a Type IV shotgun pleading.

5. The TASC is not a "shotgun pleading" for any other reason.

Plaintiffs have made a good faith effort to fully respond to the Eleventh Circuit's guidance. Plaintiffs therefore contend that such efforts have remedied the issues identified by the Eleventh Circuit. However, because the Poarch Officials have bootstrapped their own allegations regarding Plaintiffs' pleading onto the guidance provided by the Eleventh Circuit (Doc. 270 at 45-49), Plaintiffs exercise caution and provide additional responses *infra* to further demonstrate that the TASC does not qualify as a shotgun pleading and no claims should be dismissed on those grounds.

The Poarch Officials claim the TASC must be dismissed as a shotgun pleading "because it includes an extensive array of vague, conclusory, and frequently irrelevant allegations and incorporates them all into each count with no effort to tie the allegations to each claim." (*Id.* at 45). Under *Weiland*, the Poarch Officials' argument refers to a Type II shotgun pleading issue. *Weiland*, 792 F.3d at 1321-22. And while the Eleventh Circuit indicated that the Second Amended Complaint contained Types I, III, and IV defects, the Eleventh Circuit did *not* identify or provide guidance on any Type II defects. (*See* Doc. 234 at 16). In making their argument, however, the Poarch Officials point to the fact that "Plaintiffs present 293 numbered paragraphs or factual allegations over 68 pages" (Doc. 270 at 46) before cherry-picking a few sentences they describe as "vague, conclusory, and immaterial." (*Id.* at 47). None of the Poarch Officials' aspersions, however, address how the TASC fails to give them "adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland*, 792 F.3d at 1323.

The reality is that "[a] dismissal under Rules 8(a)(2) and 10(b) is only appropriate where 'it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief.'" *Id.* at 1325 (quoting *Anderson*, 77 F.3d at 366). In this instance, the TASC does include a lengthy discussion of the general allegations, but none of the allegations are irrelevant and the TASC clearly separates all counts, clearly indicates which party each count is being brought against, and then provides additional context and operative facts for each individual claim, before providing a clear statement of the relief being sought.

To be sure, none of the examples offered by the Poarch Officials demonstrates that the TASC fails to give them adequate notice with regard to the claims brought against them. For instance, the fact that Plaintiffs first received notice of the excavations in 2006 (Doc. 261 at 42, ¶ 191) is not vague or immaterial, and the Poarch Officials have a lot to say about the May 2006 meeting—so it is clear they are not in the dark on this issue and do not lack notice. (*see, e.g.,* Doc. 270 at 25). The Poarch Officials next state that Plaintiffs "baldly assert" they are "'third-party beneficiaries of the NPS Agreement,'" and that this supports dismissal of the TASC as a shotgun pleading. (Doc. 270 at 47) (quoting Doc. 261 at 31, ¶ 131). However, there is ample legal and factual support in the TASC for this conclusion, including, for instance, the fact that Section 7 of the NPS Agreement requires the Poarch THPO "'in accordance with Section 101(d)(4)(C) [of the NHPA], [to] provide for . . . consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation'" (Doc. 261 at 30, ¶ 126(b) (first alteration in original))—a direct reference to the Muscogee (Creek) Nation since the Nation is the only Tribe to ever sign a treaty with the United States including the lands that now comprise the Poarch Reservation. (*Id.* at 3, 17, ¶¶ 4, 75). Paragraph 131 of the TASC, therefore, does not support dismissal.

Finally, what the Poarch Officials refer to as a "lengthy and immaterial quotation from a non-party" (Doc. 270 at 7) (citing Doc. 261 at 50, ¶ 238) is a statement made by Joy Harjo, who the TASC identifies as "a lineal descendant of the Muscogee individuals the Poarch Officials exhumed" (she is a member of Hickory Ground Tribal Town), and thus the Poarch Officials' claim that the paragraph discussing the extraordinary grief, pain, and suffering she continues to endure as a result of the Poarch Officials' ongoing violations of federal law is relevant and does not support dismissal.[11]

[11] The "public comments" included in the TASC and the "'reports of alleged wrongdoing" (Doc. 270 at 47) likewise do not support dismissal. Plaintiffs are not required to produce or attach every single report they can possibly track down to the TASC, especially when no discovery has taken place and the Poarch Officials continue to withhold relevant information they are legally required to share with Plaintiffs.

In short, this "is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Weiland*, 792 F.3d at 1324. Rather, it is clear that the Poarch Officials have had adequate notice given that they have fully responded to all claims filed against them and have never "move[d] for a more definitive statement under Federal Rule of Civil Procedure 12(e)." *Id.* The Poarch Officials have fully responded to the TASC by drafting their own 149-page document that articulates, claim-by-claim and argument-by-argument, their positions without a hint of confusion.

Finally, the Poarch Officials single out three claims—Counts XI, XVII, and XIX—as improper Type IV shotgun pleadings "that address multiple, disparately situated defendants in single counts." (Doc. 270 at 45, n. 14). The Poarch Officials' argument with respect to these three claims is, essentially, that each claim asserts violations of federal law "against both the 'Federal Defendants and Poarch Officials Acting Under Delegated Federal Authority' without any effort to distinguish which allegations pertain to which group of defendants or which defendants are responsible for each putative violations." (Doc. 270 at 90); (*see also id.* at 120-121; 134-135). Counts XI, XVII, and XIX, however, are based on the same facts and conduct underlying Counts XII, XVIII, and XX, respectively. Counts XI, XVII and XIX simply offer an alternative theory of liability and against the Poarch Officials pursuant to their delegated NPS Agreement federal authority (as opposed to a direct action under *Ex parte Young*). (*See* Doc. 261 at 89, 94, 103, 109-10, 111, 114-15, ¶¶ 414, 433, 481, 509, 514, 529).

The fact that a group of defendants are alleged to have acted collectively in any given count does not automatically render the pleading a "shotgun pleading." *See, e.g.*, *Kyle K v. Chapman*, 208 F.3d 940, 944 (11th Cir. 2000) ("The fact that defendants are accused collectively does not render [a] complaint deficient" as a shotgun pleading so long as "[t]he complaint can be fairly read to aver that all defendants are responsible for the alleged conduct."). In the three counts referenced by the Poarch Officials, *both* the Federal Defendants and the Poarch Officials had responsibilities and authority to act as federal officials and carry out federal duties under federal law. To the extent

these responsibilities and/or authority were different for the parties, the TASC makes that clear. For example, in Count XVII, the Plaintiffs plainly articulate allegations that only apply to the Federal Defendants (*e.g.*, Doc. 261 at 106, ¶ 495) ("The NPS further violated the NPS Agreement and the NHPA by failing to . . . "); allegations that only apply to the Poarch Officials acting under delegated federal authority (*e.g.*, *id.* at 107, ¶ 496) ("Poarch Officials' failure to notify and consult with Plaintiffs . . . "); in addition to allegations that equally apply to both parties (*e.g.*, *id.* at 105, ¶ 493) ("The Federal Defendants and Poarch Officials acting under delegated federal authority violated NHPA by . . . ")).

While the Poarch Officials may disagree with the factual allegations and legal theories underpinning Counts XI, XVII, and XIX—as evidenced by the significant amount of writing they dedicate to these three Counts—the form in which the claims are presented "can be fairly read to aver that all defendants are responsible for the alleged conduct." *Kyle K,* 208 F.3d at 944. The TASC, therefore, satisfies the requirement that pleadings "give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland*, 792 F.3d at 1323**.**

The TASC should not be dismissed as a "shotgun pleading."

B. *Ex parte Young* is an appropriate vehicle for all counts against the Poarch Officials and none of the Plaintiffs' claims trigger the *Coeur d'Alene* exception.

1. *Ex parte* Young recognizes a traditional equitable action for ongoing violations of law unless Congress displaces that remedy.

Plaintiffs understand the Eleventh Circuit's instruction and the need to provide a claim-by-claim analysis with regards to the Poarch Officials' assertion of sovereign immunity. That said, the Poarch Officials make a universal argument that *Ex parte Young* "is not a freestanding right of action." (Doc. 270 at 35) (emphasis omitted). The Poarch Officials incorporate this argument to claim that nearly all of Plaintiffs' *Ex parte Young* claims should be dismissed on that basis. *See, e.g.*, (*Id.* at 88) (arguing as basis for dismissal of Count VI); (*id.* at 89, n.29) (arguing as a basis for dismissal of Count VII); (*id.* at 116-17, n.37) (arguing as a basis for dismissal of Count XV); (*id.* at 132) (arguing as a basis for dismissal of Count XVIII). Because

the Eleventh Circuit recognizes that *Ex parte Young* operates as its own traditional equitable action, *see Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1293-95 (11th Cir. 2015), the relevant inquiry is not whether a given statute provides a private right of action, but rather, as explained in greater detail below, the question is whether Congress, in passing the relevant statute at issue, created a detailed remedial scheme that displaces the equitable action available under *Ex parte Young*.[12] The Poarch Officials' argument misunderstands the relevant governing standard altogether.

In a typical private-right-of-action analysis, courts ask whether Congress intended to create a private remedy. *See e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). But when a plaintiff seeks prospective relief against officials to stop an ongoing violation of applicable law—such as under *Ex parte Young*—a different framework applies. *See Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 326-28 (2015). The first step is a "'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law" and seeks prospective relief. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (alteration in original).[13] The second step is to determine whether a detailed remedial scheme displaces the traditional equitable action *Ex parte Young* recognized.[14] *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-76 (1996) ("*Seminole Tribe I*").

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[12] The *Ex parte Young* doctrine serves a critical function, as it is "necessary to permit the federal courts to vindicate federal rights." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

[13] Applicable law is not limited to federal statutes. It can include federal law, federal common law, and, in appropriate circumstances, state law. *See PCI Gaming Auth.,* 801 F.3d at 1290; *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011); *Michigan v.* Bay Mills *Indian Cmty*., 572 U.S. 782, 795-96 (2014).

[14] The same principle applies when officials act under federal authority. For federal officers, the doctrine is often described as nonstatutory review or the *Larson-Dugan ultra vires* officer-suit doctrine. Like *Ex parte Young*, it rests on the premise that sovereign immunity does not protect officials who act beyond lawful authority or in violation of federal law. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689-91 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). The labels differ because *Ex parte Young* developed in suits against state officers, while *Larson* and *Dugan* developed to curb unlawful actions by federal officers. Despite the same core equitable principle, and terms are often used interchangeably. For purposes of the TASC, claims that are brought against Poarch Officials under their delegated federal authority (Counts XI, XIV, XVII, XIX, and XX) refer to the *Larson-Dugan* doctrine or the equitable *ultra vires* action because those are claims against Poarch officials acting as federal officials (and not as tribal officials).

The Supreme Court draws this distinction directly in *Armstrong,* 575 U.S. 320 (2015). There, the Court rejected an implied private right of action under the Supremacy Clause, before holding that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action . . . ." 575 U.S. at 324-27. After distinguishing between an implied cause of action and an equitable action, the Court reviewed whether a statute demonstrated an intent *to foreclose* equitable relief, rather than an intent to create an implied remedy. *Id.* at 328-30. Thus, the Supreme Court has explained that the ability to sue officers for prospective relief is a product of traditional equity and is not dependent on an express statutory cause of action. *See id.* at 326-28.

The Eleventh Circuit likewise has treated this equitable action as available apart from any express statutory cause of action. *See Upside Foods, Inc. v. Comm'r, Fla. Dep't of Agric. & Consumer Servs*., No. 24-13640, 2026 WL 797121, at *7-8 (11th Cir. Mar. 23, 2026); *Ga. Latino All. for Hum. Rts. v. Governor of Ga*., 691 F.3d 1250, 1261 n.7 (11th Cir. 2012). Other circuits agree. The First Circuit has expressly concluded that no "explicit statutory cause of action" is required for an *Ex parte Young* suit seeking declaratory or injunctive relief against officials interfering with federal rights. *Local Union No. 12004 v. Massachusetts*, 377 F.3d 64, 74-75 (1st Cir. 2004). Similarly, the Tenth Circuit has held that "*Ex parte Young* 'does not turn on whether the complaint states a valid cause of action.'" *Columbian Fin. Corp. v. Stork*, 702 Fed. App'x. 717, 720 (10th Cir. 2017) (quoting *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1168 (10th Cir. 2012)).

It is also well-established that the second step is determining whether Congress demonstrated an intent to displace *Ex parte Young* by providing a detailed remedial scheme. *See Seminole Tribe I*, 517 U.S. at 73-74; *see also Vann v. Kempthorne*, 534 F.3d 741, 755 (D.C. Cir. 2008) (explaining that the *Seminole Tribe I* exception applies only "if we can discern an intent to displace *Ex parte Young* suits through the establishment of a more limited remedial regime").

The authorities cited by the Poarch Officials do not establish a contrary rule. *Hartman* was not an *Ex parte Young* suit for prospective relief to stop an ongoing violation of law, but a

gaming-license dispute arising from a prior suspension. *Hartman v. Kickapoo Tribal Gaming Comm'n*, 319 F.3d 1230, 1232-33 (10th Cir. 2003); (Doc. 270 at 36, 87-88). Similarly, *Latham* was an unpublished Ninth Circuit tort suit seeking damages against a tribal casino and the tribe, not prospective relief against tribal officials pursuant to *Ex parte Young*. *Latham v. Gold Country Casino*, 154 F. App'x 675, 676-67 (9th Cir. 2005); (Doc. 270 at 87). *Manzini* addressed whether IGRA itself permits implied remedies, but the District Court did not reject the traditional equitable action recognized in *Ex parte Young* because it was not raised. *Manzini v. Cypress*, 796 F. Supp. 3d 1146, 1161 (S.D. Fla. 2025) (Doc. 270 at 35).

The Poarch Officials also cite the Sixth Circuit's decision in *Michigan Corrections*, (Doc. 270 at 35), but this case likewise demonstrates that the proper inquiry is whether Congress has created a detailed remedial scheme that displaces the equitable remedy otherwise available in *Ex parte Young*. *Michigan Corr. Org. v. Michigan Dep't of Corr*., 774 F.3d 895, 905, 907 (6th Cir. 2014). In *Michigan Corrections*, the Sixth Circuit held that the Fair Labor Standards Act ("FLSA") displaced extra-statutory equitable remedies because the statute expressly provided that the Department of Labor "shall bring *all actions*" to restrain violations of the FLSA's minimum-wage and overtime provisions. *Id.* at 903 (quoting 29 U.S.C. § 211(a)). Thus, the Sixth Circuit concluded that allowing parties to bring *Ex parte Young* actions to correct non-compliance with the FLSA would infringe on Congress' determination that only the Administrator of the Department of Labor's Wage and Hour Division can and should enforce violations of the FLSA. *See id.* at 905-07.

While the Sixth Circuit held FLSA contains express remedies that foreclose equitable suits against government officials, that FLSA analysis is inapplicable to the various claims in the TASC (an issue that will be examined more closely below, claim-by-claim). Whether *Ex parte Young* is displaced ultimately requires an independent inquiry into whether the law purported to be violated contains a detailed remedial scheme demonstrating that Congress intended to displace the type of action Plaintiffs bring. *See, e.g.*, *PCI Gaming Authority*, 801 F.3d at 1288-89 (holding that while *Seminole Tribe I* held IGRA displaced equitable claims related to compact negotiations, it did not address whether other claims for violations of IGRA are displaced). Thus, displacement requires

an independent inquiry for each claim and statutory provision that is being violated. That is consistent with the Eleventh Circuit's instructions to consider *Ex parte Young* on "a claim-by-claim and defendant-by-defendant basis." (Doc. 234 at 14).

In sum, sovereign immunity and right of action are indeed two distinct issues, but they are analyzed differently under the traditional equitable action recognized in *Ex parte Young* to enjoin government officials from ongoing violations of law. The sovereign immunity question is addressed by a "'straightforward inquiry into whether [the] complaint alleges an ongoing violation of law'" and seeks prospective relief. *See Verizon Md., Inc.*, 535 U.S. at 645 (citation omitted). And the equitable action exists unless Congress displaced it with a detailed remedial scheme. *Seminole I*, 517 U.S. at 73-76. This is the framework followed where Plaintiffs' claims seek to enjoin Poarch Officials for an alleged ongoing violation of applicable law.

2. *Coeur d'Alene* does not bar Plaintiffs' claims against the Poarch Officials.

Plaintiffs likewise understand the requirement that Plaintiffs analyze whether the *Coeur d'Alene* exception precludes the availability of *Ex parte Young* on a claim-by-claim basis, and not simply as a whole. (Doc. 234 at 14, 16). The Eleventh Circuit's interpretation of *Coeur d'Alene*, however, controls and applies to any claim where the Poarch Officials assert the exception applies (and will be discussed in a more specific claim-by-claim context below), and thus Plaintiffs find it beneficial to set out the standard articulated by the Eleventh Circuit at the front end, to avoid repetition. When Plaintiffs' claims against the Poarch Officials are examined on a claim-by-claim basis, it is clear that the *Coeur d'Alene* exception does not bar any of them.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Supreme Court held that Idaho's Eleventh Amendment immunity barred federal courts from hearing an *Ex parte Young* claim by the Coeur d'Alene Tribe of Idaho against state officials to determine whether the state or the tribe had ownership interests in certain river banks and submerged lands. 521 U.S. 261, 267 (1997). In doing so, the Court found, "[u]nder these particular and special circumstances, . . . the *Young* exception

inapplicable." *Id.* The Eleventh Circuit has recognized *Coeur d'Alene* as "an unusual case." *Curling v. Secretary of Georgia*, 761 F. App'x 927, 933-34 (11th Cir. 2019).

Although the Eleventh Circuit, in this case, affirmed the continuing precedential weight of the Supreme Court's decision in *Coeur d'Alene*, the Circuit Court also made clear that the narrow exception likely did not apply to Plaintiffs' claims against the Poarch Officials. (Doc. 234 at 21) ("In the light of the narrowness of *Coeur d'Alene*, there is substantial reason to doubt that some of the claims against the Poarch officials satisfy the *Coeur d'Alene* exception to *Ex parte Young*."). In providing this guidance, the Eleventh Circuit set out three elements that must be present in order for the *Coeur d'Alene* exception to apply. (*Id.* at 20). First:

> [A] claim that seeks *Ex parte Young* relief against an official must be the equivalent of an action to quiet title, which means that it shifts "substantially all benefits of ownership and control" of land from the sovereign to an adverse claimant. *Coeur d'Alene*, 521 U.S. at 282. And the adverse claimant must "assert a claim to property antagonistic" to the sovereign. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 219–20.

(*Id.*). Second, a plaintiff's success on the claim "must impair 'special sovereignty interests' with 'far-reaching and invasive relief that would effectively determine that the 'lands in question are not even within the regulatory jurisdiction' of the sovereign." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 281-82). And third, "the lands must be an 'essential attribute of sovereignty' and 'in-fused with a public trust' that the sovereign must respect." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 283)).

Applying these factors to Plaintiffs' claims, the Eleventh Circuit concluded that "the three claims under Alabama law do not implicate the Poarch Band's 'special sovereignty interests'" under *Coeur d'Alene*. (*Id.* at 21) (quoting *Coeur d'Alene*, 521 U.S. at 281); (*see also id.* at 21-22) (quoting *Coeur d'Alene*, 521 U.S. at 281-82) (concluding *Coeur d'Alene* does not apply because "any relief for the state law claims would not remove Hickory Ground from the Poarch Band's 'regulatory jurisdiction' and implicate its 'special sovereignty interests.'").

The Eleventh Circuit further opined that "there is substantial reason to doubt whether Hickory Ground is an 'essential attribute of sovereignty' that is 'infused with a public trust' like

the submerged lands in *Coeur d'Alene*." (*Id.* at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283); (*see also id.*) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). The Circuit Court further reasoned that *Coeur d'Alene* likely did not apply to Plaintiffs' claims because "[a]lthough the casino on Hickory Ground serves a commercial purpose, that enterprise does not implicate concerns about public access to natural resources." (*Id.*) (citing *Coeur d'Alene*, 521 U.S. at 283, 287).

Accordingly, *Coeur d'Alene* does not bar Plaintiffs' claims against the Poarch Officials. In accordance with Eleventh Circuit guidance, the Poarch Officials' assertion of sovereign immunity must be evaluated claim-by-claim, and will be discussed in further detail below.

C. The Poarch Officials fail to demonstrate that Plaintiffs' IRA claim against the Secretary should be dismissed at this stage (Count I).

1. Sovereign immunity does not require dismissal of Count I.

Plaintiffs' IRA claim against the Secretary should not be dismissed on *Ex parte Young* or *Coeur d'Alene* grounds.

First, the Poarch Officials assert that "the Court cannot adjudicate the legality of" the Secretary's 1985 decision to place Hickory Ground in trust "through the *Young* doctrine" because that federal action occurred in the past, and *Ex parte Young* is only available to stop ongoing violations of federal law. (Doc. 270 at 64). This argument conflates multiple issues. As Plaintiffs explain (and incorporate herein) from their Response to the Federal Defendants' Motion to Dismiss, Count I alleges that the Secretary's ongoing maintenance of Hickory Ground's trust status constitutes an ongoing violation of law, for which the Administrative Procedure Act ("APA") § 702 has waived the sovereign immunity of the United States to be sued. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.3, filed Apr. 30, 2026. Next, Plaintiffs also contend that under the Supreme Court's decision in *Corner Post*, the statute of limitations for Plaintiffs' IRA claim in Count I began to run in 2009, as that was when Plaintiffs were first injured. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.4, filed Apr. 30, 2026. Neither of

these legal theories require Plaintiffs to establish anything under *Ex parte Young*, as Count I is brought solely against the Secretary of the Interior, and "Congress waived sovereign immunity for this kind of claim against the Secretary under the Administrative Procedure Act." (Doc. 234 at 17).

The Poach Officials also argue that *Coeur d'Alene* precludes a claim brought solely against the Secretary of the Interior, and *not* against the Poarch Officials. (Doc. 270 at 66-69). However, as the Eleventh Circuit has previously concluded, the remedy Plaintiffs request for Count I—removing Hickory Ground from trust and returning it to its 1984 fee status, "is irrelevant to the Poarch officials' immunity." (Doc. 234 at 17). This is because as far as Count I is concerned, "[t]he only relevant sovereign would be the United States." (*Id.*). Because "the Muscogee Nation seeks the declaration against only the Secretary of the Interior, it would implicate the sovereign immunity of the United States, not the Poarch officials, because it would restrain only the United States from holding Hickory Ground in trust." (*Id.*). It is irrelevant that Count I "could affect the regulatory jurisdiction of the Poarch Band over Hickory Ground" because that does not change the fact that Count I "is against the United States as a sovereign, not the Poarch Band." (*Id.* at 17-18).

The Poarch Officials claim that the Eleventh Circuit's decision "is not binding on this Court" because Chief Judge Pryor and his fellow panelists "adopt[ed] an overly narrow reading of *Coeur d'Alene* inconsistent with the bulk of other federal authority" from other federal courts. (Doc. 270 at 69). The Poarch Officials may disagree with the panel's opinion in this case, but that decision is controlling on the parties in this case, as well as any other case in the Eleventh Circuit. In fact, another panel of the Eleventh Circuit cannot conclude Chief Judge Pryor's analysis of *Coeur d'Alene* is wrong, as only the Circuit Court sitting *en banc*, or the U.S. Supreme Court, can do that. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).[15]

[15] The Poarch Officials' also try to convince this Court to follow the lead of a non-binding Ninth Circuit's decision in *Jamul* that contradicts the Eleventh Circuit's clear guidance in this case. (*See* Doc. 270 at 68-69) (citing *Jamul v. Simermeyer*, 974 F.3d 984, 995-97 (9th Cir. 2020)). The Poarch Officials' reliance on *Jamul* is misplaced. *Jamul* involved a challenge to the tribe's status as a legitimate sovereign government *and* its property interests. *See id.* at 996. Indeed, the *Jamul* Court concluded the tribe's "special sovereignty interests" were implicated because the plaintiff "challenge[d] the Village's existence as a federally

Even if this Court were to accept the Poarch Officials' invitation to reject Chief Judge Pryor's instructions regarding how to apply *Coeur d'Alene*, the parties and the Court cannot escape the Eleventh Circuit's mandate that "[w]hen the district court reviews the Poarch officials' immunity claim by claim on remand, it should compare the Muscogee Nation's claims with the 'particular and special circumstances' of *Coeur d'Alene*." (Doc. 234 at 20). And in considering the "particular and special circumstances" of *Coeur d'Alene*, and especially the third factor set out by the Eleventh Circuit, it is clear that Hickory Ground does not constitute "an 'essential attribute of [Poarch Band's] sovereignty'" because for the Poarch, Hickory Ground has never been "'infused with a public trust' that the sovereign must respect." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 283).

This is in part because the Poarch Band lacks any historical connection to Hickory Ground. (Doc. 261 at 15-17, ¶¶ 70-75); Stmt. Disp. Facts ¶ 2. While Muscogee (Creek) Nation signed multiple treaties that designated Hickory Ground as a part of their historical homelands, Poarch never signed a single treaty that included or dealt with the Hickory Ground Site. (Doc. 261 at 16-17, ¶¶ 74-75); Stmt. Disp. Facts ¶¶ 1-2. At the time that Poarch purchased Hickory Ground, Poarch was a corporation and not a sovereign tribe, and their purchase was only made possible because the Poarch corporation promised to protect Hickory Ground from destruction. (Doc. 261 at 4, 22, ¶ 10, 99); Stmt. Disp. Facts ¶ 3.

Thus, in contrast to Idaho's historic exercise of sovereignty over the State's "submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty." (Doc. 234 at 22); (*see also id.*) ("The Poarch Band acquired Hickory Ground in fee simple in 1980, as any private party would acquire land, as it did before the Secretary decided to hold it in trust."). As the Eleventh Circuit further noted, in contrast to Idaho, "the Poarch Band [does not] hold Hickory Ground to protect common use of public resources." (*Id.*). Although the

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recognized tribe"—something the *Jamul* Court characterized as challenging the "very fact of [the Tribe's] sovereignty." *Id.* In contrast, Plaintiffs are not challenging the fact that Poarch became a federally recognized Tribe in 1984.

Poarch Band's "casino on Hickory Ground serves a commercial purpose, that enterprise does not implicate concerns about public access to natural resources." (*Id.*).[16]

The Poarch Officials are unable to assert a sovereign immunity defense that requires dismissal of Count I.

2. Plaintiffs have standing to bring their IRA claim.

The Poarch Officials also challenge Plaintiffs' ability to establish standing under Count I. Because this issue has been fully briefed in response to the Federal Defendants' motion, Plaintiffs herein incorporate their arguments regarding standing to pursue their IRA claim against the Secretary from their Response to the Federal Defendants' Motion to Dismiss. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.1, filed Apr. 30, 2026. The Poarch Officials' arguments regarding standing are practically the same as those raised by the Federal Defendants, with only one key difference. While the Federal Defendants only challenge Plaintiffs' ability to establish causation and redressability, the Poarch Officials also aver that Plaintiffs have not stated an injury that is "legally cognizable." (Doc. 270 at 50).

The Poarch Officials' convoluted argument theorizes that Plaintiffs could not have been injured by the Department of the Interior's April 2009 decision when the Department relied on the Secretary's prior land into trust decision to *not* enforce NAGPRA because, according to the Poarch Officials, enforcing NAGPRA at Hickory Ground is an act the Secretary "is not legally required to perform . . . ." (*Id.*). The Poarch Officials provide no legal authority for this position in this context (although they make NAGPRA arguments elsewhere), and Plaintiffs have provided ample legal authority demonstrating that the Federal Defendants were required to enforce NAGPRA at the Hickory Ground site—despite their April 2009 decision not to. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.C.3.b, filed Apr. 30, 2026.

[16] Even if the Poarch Officials could somehow demonstrate that they or the Poarch Band are a necessary party under Rule 19 (they cannot, *see infra* Section VI.C.6.a), they would not be able to establish that Count I of the TASC implicates any "special sovereignty interests" under *Coeur d'Alene*.

Even so, the Poarch Officials' unsupported proposition is contradicted by the Federal Defendants' own statements acknowledging that NAGPRA applies to Auburn and the Poarch Officials' unlawful excavations at Hickory Ground. (*See, e.g.*, Doc. 200-2 at Ex. B, 13) ("Does the . . . (NAGPRA) apply? Yes."); (*see also* Doc. 200-2 at Ex. A, 3) ("The proposed development at Hickory Ground requires approval by BIA before the Poarch Band can commence construction."); *id.* (stating that the Interior and BIA must "resolve under the [NAGPRA] of 1990 which tribe within the Creek Nation has closest cultural affiliation with Hickory Ground."). The fact that the Federal Defendants subsequently did an about-face and concluded that Hickory Ground's status as Poarch trust land precludes them from addressing the ongoing NAGPRA violations at Hickory Ground only further underscores that Plaintiffs were not injured by the 1985 land into trust decision until April of 2009, when the BIA and Interior first used that decision as a justification for failing to enforce NAGPRA (a position the BIA maintains in this lawsuit today).

The remainder of the Poarch Officials' arguments mirror those of the Federal Defendants, and for the sake of efficiency, Plaintiffs incorporate herein their arguments and authorities from their Response to the Federal Defendants' Motion to Dismiss.[17] Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.1, filed Apr. 30, 2026.

3. The TASC alleges a plausible violation of the IRA.

Plaintiffs herein incorporate their arguments that the TASC alleges a plausible IRA claim against the Secretary from their Response to the Federal Defendants' Motion to Dismiss. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.2, filed Apr. 30, 2026.

[17] The Poarch Officials claim Plaintiffs are in a "Catch-22 situation." (Dkt. 270 at 51). Plaintiffs are not. There is no dispute about whether Hickory Ground is currently in trust. Hickory Ground is in trust, and therefore, NAGPRA applies. If Plaintiffs prevail on Count I of the TASC, then all of the relatives and cultural resources in Auburn's possession will necessarily be repatriated to Plaintiffs, since the Poarch Officials' primary argument and reason for refusing to allow their return will have been eliminated. *See, e.g.*, (Doc. 270 at 110) ("NAGPRA . . . provides that the Indian tribe on whose tribal lands remains and funerary objects were discovered has the highest claim to such artifacts . . . .").

4. The Secretary continues to violate the IRA.

Plaintiffs herein incorporate their arguments regarding the Secretary's ongoing violation of the IRA from their Response to the Federal Defendants' Motion to Dismiss. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.3, filed Apr. 30, 2026.

5. Plaintiffs' IRA claim for a past violation is timely.

Plaintiffs herein incorporate their arguments regarding the Secretary's past violation of the IRA from their Response to the Federal Defendants' Motion to Dismiss, including the arguments as to why Plaintiffs are entitled to equitable tolling for their IRA claim. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.B.4, filed Apr. 30, 2026.

6. Rule 19 does not require dismissal of Plaintiffs' IRA claim against the Secretary.

Lastly, the Poarch Officials argue that Plaintiffs' IRA claim should be dismissed under Rule 19, asserting that the Poarch is "a necessary party under Rule 19(a)" that cannot be joined due to its sovereign immunity and an "indispensable party under Rule 19(b)" requiring dismissal of the Plaintiffs' IRA claim. (Doc. 270 at 61, 63). A thorough review of Rule 19 and the Eleventh Circuit's guiding precedent reveals that Rule 19 does not require dismissal.

"Rule 19 establishes a two-step inquiry for deciding whether [a party] is indispensable." *Thermoset Corp. v. Building Materials Corp. of America*, 849 F.3d 1313, 1319 (11th Cir. 2017). First, the court must consider whether a party is a "'required party' under clause (a)(1)." *Id.* If, and only if, it is determined that an absent party is a required party under Rule 19(a), does the analysis then proceed to Rule 19(b). *Santiago v. Honeywell International, Inc.*, 768 F. App'x 1000, 1004-5 (11th Cir. 2019) ("[I]t is not enough to dismiss a lawsuit merely because a party is a required (or necessary) party; the absent party must also be found, after an examination of Rule 19(b) factors, to be indispensable to the pending litigation.").

First, with respect to Plaintiffs' IRA claim and for purposes of Rule 19(a), Poarch does not meet the definition of a "required party." Second, even if Poarch did meet the definition of

"required party" under Rule 19(a), the factors in Rule 19(b) support a conclusion that Plaintiffs' IRA claim should proceed against the Federal Defendants without Poarch as a party.

a. Poarch is *not* a required party under Rule 19(a) and thus dismissal is inappropriate.

To dismiss a claim or case under Rule 19, there must first be a determination that an absent party exists that is properly considered a "required party" under Rule 19(a). The Eleventh Circuit has summarized this first step of the analysis as follows:

> A person is a required party—or a necessary party—when (1) "in that person's absence, the court cannot accord complete relief among existing parties," or (2) where the absent party claims an interest relating to the action, disposing of the action without the absent party may "as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1).

Id. at 1004. For the reasons discussed below, Poarch does not qualify as a "required party" under any of the definitions found in Rule 19(a).

i. Poarch is *not* a required party under Rule 19(a)(1)(A) because the Court can accord complete relief among existing parties.

Rule 19(a)(1)(A) states that when a party's absence would prevent the Court from "accord[ing] complete relief among existing parties," then that absent party is a required party. Fed. R. Civ. Pro. 19. With respect to Plaintiffs' IRA claim, the relief requested is for the Court to "enter a judgment that [the Department of the Interior] lacked authority to take the Hickory Ground Site into trust for Poarch, and an order in the nature of mandamus requiring [the Interior Secretary] take the Hickory Ground Site out of trust, thereby returning the site to fee simple ownership." (Doc. 261 at 131, ¶ (a)). If Plaintiffs' IRA claim is successful on the merits, this Court will be able to "accord complete relief among existing parties," a fact that even the Poarch Officials do not dispute. (Doc. 270 at 61-62) (discussing Rule 19(a), but focusing solely on the definitional criteria related to Rule 19(a)(1)(B) and making no argument as to Rule 19(a)(1)(A)).

Given that the Federal Defendants are the named defendants for this claim and full relief is possible, Poarch does not qualify as a "required party" pursuant to Fed. R. Civ. Pro. 19(a)(1)(A).

ii. Poarch is *not* a required party because the Poarch's interests are protected and proceeding in their absence leaves no existing party with additional substantial risks nor inconsistent obligations.

Turning to Rule 19(a)(1)(B), a person is a "required party" if "that person claims an interest relating to the subject of the action" *and*, additionally, "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest" *or* "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1).

Plaintiffs do not dispute that Poarch has "an interest relating to the subject of the action," but the existence of such an interest is not, by itself, sufficient to classify Poarch as a "required party" pursuant to Rule 19(a)(1)(B). Rather, the analysis requires asking two additional questions:

> i. Would disposing of the action in Poarch's absence, as a practical matter, impede their ability to protect their interest relating to the subject of the action?
>
> ii. Would disposing of the action in Poarch's absence, leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest?

iii. The Federal Defendants adequately protect Poarch's interest in this action.

Rule 19(a)(1)(B) does not support dismissal when an absent party's interest can be adequately represented by an existing party to the claim or suit, and federal courts have repeatedly held the federal government can adequately represent a Tribe's interests for purposes of Rule 19 in cases challenging the legitimacy of federal actions taken for the benefit of Tribes. *See, e.g.*, *Kansas v. United States*, 249 F. 3d 1213, 1226-27 (10th Cir. 2001) (concluding that the Tribe was not a required party in a lawsuit challenging an agency decision regarding whether certain land qualified as "Indian land" under federal law because the federal government represented the Tribe's interests); *Washington v. Daley*, 173 F.3d 1158, 1167-69 (9th Cir. 1999) (concluding interested Tribes were not "necessary" parties under Rule 19(a) for a challenge to fishing regulations promulgated under the Magnuson Act); *Southwest Ctr. for Biological Diversity v.*

Babbitt, 150 F.3d 1152, 1153-55 (9th Cir. 1998) (concluding Tribe was not a necessary party under Rule 19 in a lawsuit brought pursuant to the Endangered Species Act challenging federal approval of a water storage facility); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (concluding that "the district court abused its discretion in finding the Wyandotte Tribe was an indispensable party" because "the Secretary's interests in defending his decisions are substantially similar, if not virtually identical, to those of the Wyandotte Tribe."); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F. 3d 1338, 1350-52 (D.C. Cir. 1996), *amended* (Aug. 6, 1996) (concluding interested Tribes not indispensable under Rule 19 in suit against federal government for funding decisions made pursuant to the Indian Self-Determination and Education Assistance Act); *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 541 (D.D.C. 2014) ("Even assuming the other tribes are interested parties, they are not 'indispensable' because the Secretary can adequately represent their interests in this case.").[18]

Generally, whether a joined party can adequately represent the interests of an absent party hinges on whether the parties share the same ultimate objective in the litigation. *See, e.g., Ramah Navajo Sch. Bd.*, 87 F.3d at 1351; *Sac & Fox Nation of Missouri*, 240 F.3d at 1259. In this instance, the IRA claim is brought specifically against the Federal Defendants who share the same ultimate objective in the litigation with Poarch. The Federal Defendants are more than capable of representing the absent interests of Poarch, in particular, because Plaintiffs' IRA claim is focused on whether federal authority existed to take a specific federal action—something the Federal Defendants are in the best position to aggressively defend.

[18] The Poarch Officials' reliance on the Ninth Circuit's decision in *Jamul* is misplaced. *See supra* Section n.15. The same is true for the Poarch Officials' reliance on *Dutschke*. (*See* Doc. 270 at 69-71) (citing *Rosales v. Dutschke*, 279 F. Supp. 3d 1084, 1092-94 (E.D. Cal. 2017)). In *Dutschke*, "plaintiffs directly challenge the [tribe's] identity as a recognized tribe *and* the extent of its interest in the Jamul Indian Cemetery." 279 F. Supp. 3d at 1092 (emphasis added). Here, Plaintiffs do not challenge the Poarch's "identity as a recognized tribe."

iv. Poarch's absence does not subject the Federal Defendants to inconsistent obligations.

Turning to the final clause of Rule 19(a)(1)(B), a party is a "required party" if "that person claims an interest relating to the subject of the action" and, additionally, "disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). When making a determination about whether inconsistent obligations may arise, the Eleventh Circuit has noted that it is important to keep in mind the distinction between "inconsistent obligations" which "occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident" and "inconsistent adjudications" which "occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum." *Winn-Dixie Stores, Inc. v. Dolgencorp*, *LLC*, 746 F.3d 1008, 1040 (11th Cir. 2014) (quoting *Delgado v. Plaza Las Ams., Inc*., 139 F.3d 1, 3 (1st Cir. 1998) (*per curiam*)).

The Poarch Officials argue that if Plaintiffs' IRA claim proceeds without the Poarch Band, Poarch's absence would "subject Federal Defendants to a risk of incurring multiple or inconsistent obligations with respect to complying with a potential court order and their trust duties to PCI as a federally recognized Indian tribe." (Doc. 270 at 62). In making this assertion, the Poarch Officials do not point to any specific inconsistent obligations likely to occur, and the three cases they cite in support of their assertion are simply not relevant to a Rule 19(a)(1)(B) analysis related to "inconsistent obligations" for a claim adjudicating whether the Secretary has the requisite authority to maintain a parcel of land in trust under the IRA. (*See id.* at 62-63).[19] The reality is that

[19] Poarch Officials first cite *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306 (11th Cir. 2017), an action brought against the U.S. Army Corps. of Engineers involving an absent party with 11th Amendment immunity that was found to be indispensable under Rule 19 because—unlike Poarch in this case— the federal government "defers to the [absent sovereign's] discretion to restrict water releases . . . . [s]o any injunction against the [United States] as it relates to water-release

proceeding without Poarch will not "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" because Poarch's absence does not place any risk of incurring inconsistent obligations upon the Federal Defendants. Fed. R. Civ. Pro 19(a)(1)(B). Therefore, Poarch is not properly a "required party" under the final clause of Rule 19(a)(1)(B).

Finally, but significantly, the facts leading to the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) supports Plaintiffs' position that Poarch is *not* a required party for Rule 19 purposes. In *Carcieri*, Rhode Island challenged the Secretary of the Interior's decision to acquire land and hold it in trust for the Narragansett Indian Tribe pursuant to the Indian Reorganization Act, similar to Plaintiffs' IRA claim in this case. *Carcieri*, 555 U.S. at 381-82. Despite the subject matter of the case involving land to be held in trust for Narragansett Indian Tribe, the Tribe was neither a party nor an intervenor.[20]

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decisions . . . could, as a practical matter, potentially affect the [absent sovereign's] discretion." *Id.* at 1317. Such circumstances are not present here.

Poarch Officials next cite *N. Arapaho Tribe v. Harnsberger*, a case involving the legal status of certain lands on the Wind River Indian Reservation—a reservation created by treaty between the United States and the Eastern Shoshone Tribe, neither of whom were parties to the litigation. 697 F.3d 1272, 1275 (10th Cir. 2012). Notably, secretarial action was not the subject of the litigation, and the case did not involve any analysis of Rule 19 in the context of an APA cause of action. *See id.* at 1277-82.The case is inapplicable.

Finally, Poarch Officials cite *Hardy v. IGT, Inc.,* an unpublished, non-binding case where the District Court held that a Tribe was both a necessary and indispensable party in a lawsuit brought against electronic bingo machine manufacturers who had a contractual relationship with the Tribe to "operate[] the electronic bingo machines at the Tribe's casino." No. 2:10-CV-901 WKW, 2011 WL 3583745, at *3, *5-8 (M.D. Ala. Aug. 15, 2011). Specifically, the plaintiff sought rescission of a contract the Tribe had entered into with a vendor, and accordingly, the District Court reasoned that "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are *indispensable*." *Id.* at *6(quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975). Indeed, the few times *Hardy* has been acknowledged by other courts, it has been understood as reaffirming this long-held principle of contract law. *See, e.g.*, *Roche Diagnostics Corp. v. Priority Healthcare Corp.*, No. 2:18-CV-01479-KOB, 2020 WL 2309874, at *11 (S.D. Ala. May 8, 2020) ("The relevant takeaway from *Hardy* is that 'a party to a contract is necessary, and . . . indispensable to litigation *seeking to decimate that contract*."); *Dillon v. BMO Harris Bank, N.A.*, 16 F.Supp.3d 605, 613 (M.D.N.C. 2014) (same). As the current case is not a contract dispute concerning a contract Poarch has effectuated, *Hardy* has no bearing on the Rule 19 analysis here.

[20] The Narragansett Indian Tribe did, however, submit an *amicus* brief for the Court's consideration. *See* Brief for the Narragansett Indian Tribe as Amicus Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 4080368.

Taken together with the fact that "[t]ribal sovereign immunity is a jurisdictional issue" (*Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012) (citing *Seminole Tribe*, 181 F.3d at 1241), it is clear the Supreme Court did not consider an interested-but-absent tribal party to be "indispensable" to a claim challenging the Secretary's authority to take land into trust. If it had, the Supreme Court would have exercised its obligation to join the tribe to the suit in *Carcieri*. Because Plaintiffs IRA claim is, for Rule 19 purposes, indistinguishable from the facts in *Carcieri*, this Court must follow precedent and allow Plaintiffs' IRA claim to proceed without Poarch.

For the foregoing reasons, Poarch is not a "required party" under any definition found under Rule 19(a), thus dismissal of Plaintiffs' IRA claim on the basis of Rule 19 is inappropriate.

b. Alternatively, even if Poarch *is* found to be a required party under Rule 19(a), Plaintiffs' IRA claim should proceed without Poarch as a party pursuant to Rule 19(b).

Even if Poarch were to meet the definition of "required party" under Rule 19(a) (they cannot), the analysis does not end there. *Santiago*, 767 F. App'x at 1004-5. The second step of a Rule 19 analysis—which occurs only after a court has determined an absent party is a "required party" under Rule 19(a)—asks "whether 'in equity and good conscience, the action should proceed' without [the party] under [Rule 19] subsection (b)." *Thermoset Corp.*, 849 F.3d at 1319. Specifically, the Court must consider "four nonexclusive factors" and "[t]o say a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without [the party] puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it ha[s] examined the situation to determine whether it can proceed without [the party]." *Santiago,* 767 F. App'x at 1004-5 (emphasis omitted) (quoting *Provident Trademens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 118-19 (1968)).

Under a Rule 19(b) analysis, "[a]s the party invoking Rule 19, it is [the Poarch Officials'] burden to demonstrate which Rule 19(b) factors require[] dismissal 'in equity and good conscience.'" *Molinos Valle Del Cibao, C. por A. v. Lama,* 633 F.3d 1330, 1347 (11th Cir. 2011).

"Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999). The Poarch Officials have not and cannot meet this burden.

The Poarch Officials only discuss Rule 19(b) twice in their Motion to Dismiss. The first mention merely recites the Rule. (*See* Doc. 270 at 36-37). The second and final discussion of Rule 19 is where Poarch Officials dispense with Rule 19(b)'s elements in summary fashion concluding, in essence, that the Poarch Band's sovereign status is enough on its own to make it an indispensable party pursuant to Rule 19(a) and (b). (*See id.* at 63). This is simply not the case. "In other words, it is not enough to dismiss a lawsuit merely because a party is a required (or necessary) party; the absent party must also be found, after an examination of the Rule 19(b) factors, to be indispensable to the pending litigation." *Santiago*, 768 F. App'x at 1005.

Here, consideration of the four factors do not warrant dismissal under Rule 19. First, under Rule 19(b)(1), it is clear that the Poarch entities' interests will not be prejudiced because their interests will be adequately represented by the Federal Defendants. Second, under Rule 19(b)(2), there is no question that this Court could structure judgment to limit any prejudice to the absent Poarch entities just as it could if they were parties, particularly given the straightforward nature of the relief requested with respect to Plaintiffs' IRA claim. Under Rule 19(b)(3), a judgment in favor of Plaintiffs' IRA claim will be rendered only against the Federal Defendants, which even in Poarch's absence would be more than adequate, as the Secretary and the United States are the only entities with the capability of taking the land out of trust in the event that Plaintiffs prevail. And finally, in consideration of Rule 19(b)(4), if this action is dismissed, Plaintiffs will not have an adequate remedy—a reality that heavily weighs in favor of not dismissing the Plaintiffs' IRA claim under Rule 19.[21]

[21] Notably, the Federal Defendants have taken the position that four factors under Rule 19(b) counsel against dismissal. *See* Brief of Federal Appellees at 17-27, Muscogee (Creek) Nation, et al., v. Rolin, et al., 119

In addition to the preceding reasons outlined in this section, the Court should allow Plaintiffs' IRA claim to proceed without Poarch Officials in "equity and good conscience" because "pragmatic consideration" related to "practical and creative justice" demand such an outcome. Specifically, if Plaintiffs' IRA claim is dismissed due to Rule 19, the Court will be creating a result whereby: (a) federal agency actions taken for the benefit of a single Tribe will, effectively, be forever precluded from judicial review absent the benefitted Tribe's consent to allow that challenge to be considered in a court of law; and (b) this particular desecration of a sacred site—and the potential for future desecrations on the site—will go completely unaddressed due to a discretionary procedural quirk.

Indeed, many agency actions benefit absent sovereigns—including, notably, countless decisions that the Secretary makes in the field of Indian affairs. If the fact that those sovereigns cannot be joined because they enjoy sovereign immunity favors dismissal, and neither Congress's decision to waive the United States' sovereign immunity nor the public's interest in judicial review of agency action provides a sufficient counterweight, then the gamut of federal administrative actions benefitting states, tribes, or other sovereigns will be functionally immunized from judicial review.

Indeed, for this reason, courts decline to dismiss IRA claims when the tribe whose trust land is in question refuses to be joined due to sovereign immunity since, if the courts were to accept that line of reasoning, then "no lawsuit may seek to challenge the transaction absent the beneficiary tribe's consent to waive immunity—even if the transaction were blatantly illegal in a way that severely harms the public interest. Nothing in the law requires such a result." *Federated Indians of Graton Rancheria v. United States Dep't of the Interior*, No. 24-CV-08582-RFL, 2025 WL 2096171, at *1 (N.D. Cal. July 18, 2025).

Count I should not be dismissed under Rule 19.

F.4th 881 (11th Cir. 2024) (No. 21-11643). ("None of the Rule 19(b) factors favors dismissal of the claims against Federal Defendants.").

D. Plaintiffs have stated a viable claim for unjust enrichment under Alabama law against the Poarch Officials (Count II).

1. Plaintiffs' unjust enrichment claim satisfies *Ex parte Young*.

The Poarch Officials do not assert that Plaintiffs are unable to sue the Officials under *Ex parte Young* for Count II; nor have they made any argument that *Coeur d'Alene* requires dismissal of Count III. (*See* Doc. 270 at 71-78). However, given that the Poarch Officials previously told this Court, and the Eleventh Circuit, that all of Plaintiffs' claims against the Officials must be dismissed under *Coeur d'Alene* (Doc. 202 at 26-28), and because the Eleventh Circuit has instructed the parties to analyze the Poarch Officials' sovereign immunity on a claim-by-claim and defendant-by-defendant basis (Doc. 234 at 14, 16), Plaintiffs offer the following for this Court's consideration.

Plaintiffs may pursue their claim for unjust enrichment, under Alabama law, against the Poarch Officials under *Ex parte Young*. "*Ex parte Young*…permits suits against tribal officials for prospective relief against ongoing violations of state law" so long as the "challenged 'conduct occurs outside of Indian lands.'" (Doc. 234 at 13) (quoting *PCI Gaming*, 801 F.3d at 1290). At this stage, this is a "'straightforward' inquiry as to whether [the] complaint alleges an ongoing violation of law" and seeks prospective relief. *Verizon Md., Inc.*., 535 U.S. at 645. With respect to Count II, Plaintiffs: name tribal officials as defendants (Doc. 261 at 72, ¶ 317); allege an ongoing violation of Alabama common law for unjust enrichment (*id.* at 72-75, ¶ 320-33); and request prospective, non-monetary relief (*id.* at 75, ¶ 334). That is enough under *Verizon*.

Second, the Poarch Officials point to no law passed by the Alabama legislature containing a detailed remedial scheme that displaces the availability of *Ex parte Young* for purposes of Count II, and Plaintiffs are aware of none.

Third, because Count II is only applicable "if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch or that continuing to hold the land in trust is an ongoing violation of the IRA" (*Id.* at 71, ¶ 315), if this claim moves forward, then two other facts will be true when it does: (1) Count II will be challenging conduct

on fee simple land, which will satisfy the requirement for state law violations that the challenged conduct occur outside of Indian lands; and (2) Count II will not be subject to analysis under *Coeur d'Alene* because Poarch will not have any "special sovereignty interests" in fee simple land that is not a part of their reservation—a point conceded at oral arguments.[22] Without any "special sovereignty interests" at issue, Poarch Officials are unable to meet the second and third factors espoused in the Eleventh Circuit's *Coeur d'Alene* analysis. (Doc. 234 at 20).

Therefore, Count II satisfies all requirements of the *Ex parte Young* doctrine with respect to Poarch Officials and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs have standing to bring Count II.

Because the Poarch Officials and Individual Defendants advance very similar Article III standing arguments in their motions to dismiss Plaintiffs' unjust enrichment claims, (Doc. 273 at 21); (Doc. 270 at 75), Plaintiffs incorporate herein by reference Section VI.B of their Response to Individual Defendants' Motion to Dismiss. Pls.' Resp. to Individual Defendants Mot. to Dismiss, Section VI.B, filed Apr. 30, 2026.

3. The TASC plausibly alleges unjust enrichment under Alabama law.

Because the Poarch Officials and Individual Defendants advance very similar unjust enrichment arguments under Alabama law in their motions to dismiss Plaintiffs' unjust enrichment claims (*Compare* Doc. 273 at 17-26); (*with* Doc. 270 at 71-75), Plaintiffs incorporate herein by reference Section VI.C of their Response to Individual Defendants' Motion to Dismiss.[23] Pls.' Resp. to Individual Defendants Mot. to Dismiss (Section VI.C).

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[22] *See* September 25, 2024 Oral Arg. Tr. 34:39-35:10 (counsel for Poarch answering: "I would agree with your point, your honor, if they succeeded on the IRA claim, the special sovereignty interest would not apply. I would agree with that."). (available at: https://www.courtlistener.com/audio/94224/muscogee-creek-nation-v-bufordrollin/?q=muscogee&type=oa&order_by=score+desc&court=ca11 (last visited Apr. 29, 2026))

[23] The Poarch Officials additionally cite to *Rutledge v. Aveda* (Doc. 270 at 75), but in *Rutledge*, the Court explained that "[i]t [was] unclear exactly what Rutledge's claim" consisted of, and to the extent Rutledge brought her unjust enrichment claim on behalf of the United States, she lacked standing because the United States, rather than Rutledge, conferred a benefit to the defendants. No. 2:14–cv–00145–AKK, 2015 WL

4. Alabama's Statute of Frauds does not apply.

The Poarch Officials' arguments regarding the application of the statute of frauds are nearly identical to the argument made by the Individual Defendants. (*Compare* Doc. 273 at 29-30); (*with* Doc. 270 at 76-78). For the sake of efficiency and to save the parties' and the Court's resources, Plaintiffs incorporate the Argument, Section VI.D.1, in Plaintiffs' Response to the Individual Defendants' Motion to Dismiss, filed Apr. 30, 2026.

5. Plaintiffs' claim for unjust enrichment under Alabama law is timely.

Because the Poarch Officials and Individual Defendants advance very similar statute of limitations arguments in their motions to dismiss Plaintiffs' unjust enrichment claims (Doc. 273 at 31-32); (Doc. 270 at 70-71, 75-76), Plaintiffs incorporate by reference the argument that Plaintiffs' unjust enrichment claims are timely as set forth in Section VI.E of Plaintiffs' Response to the Individual Defendants' Motion to Dismiss, filed Apr. 30, 2026.[24]

E. Plaintiffs have stated a viable claim for promissory estoppel under Alabama law against the Poarch Officials (Count IV).

1. Plaintiffs' promissory estoppel claim satisfies *Ex parte Young*.

The Poarch Officials do not assert that Plaintiffs are unable to sue the Officials under *Ex parte Young* for Count IV; nor have they made any argument that *Coeur d'Alene* requires dismissal of Count IV. (*See* Doc. 270 at 78-87). However, given that the Poarch Officials previously told this Court, and the Eleventh Circuit, that all of Plaintiffs' claims against the Officials must be dismissed under *Coeur d'Alene* (Doc. 202 at 26-28), and because the Eleventh Circuit has instructed the parties to analyze the Poarch Officials' sovereignty immunity on a claim-by-claim

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2238786, at *13-14 (N.D. Ala. May 12, 2015). Here, in contrast, the TASC alleges that Plaintiffs conferred specific benefits: namely, the lack of opposition to Poarch's acquisition of Hickory Ground and their request to become a federally recognized tribe. *Rutledge* is inapplicable. (*See* Doc. 261 at 72-73, ¶¶ 320-26).

[24] The Poarch Officials, unlike the Individual Defendants, do not argue that Plaintiffs' unjust enrichment claims under federal common law and Alabama common law must relate back under Federal Rules of Civil Procedure 15(c) or Alabama Rules of Civil Procedure 15(c).

and defendant-by-defendant basis (Doc. 234 at 14, 16), Plaintiffs offer the following for this Court's consideration.

On appeal, the Eleventh Circuit stated that "*Ex parte Young* . . permits suits against tribal officials for prospective relief against ongoing violations of state law" so long as the "challenged 'conduct occurs outside of Indian lands.'" (Doc. 234 at 13) (quoting *PCI Gaming*, 801 F.3d at 1290). At this stage, this is a "'straightforward' inquiry as to whether [the] complaint alleges an ongoing violation of law" and seeks prospective relief. *Verizon*, 535 U.S. at 645. With respect to Count IV, Plaintiffs: name tribal officials as defendants (Doc. 261 at 77, ¶344); allege an ongoing violation of Alabama common law with respect to promissory estoppel (Doc. 261 at 78-79, ¶¶ 347, 349, 353); and request prospective relief (*id.* at 80, ¶ 356); (*id.* at 132, ¶ (d)) (requesting the Court to "enter an order in the nature of mandamus requiring the Poarch Officials to restore the Hickory Ground Site . . . to its pre-excavation and pre-construction condition, and further, issue an order enjoining the Poarch Officials from engaging in any activities that violate Poarch's original promise to protect the Hickory Ground Site from excavation or destruction."). That is enough under *Verizon*.

Second, the Poarch Officials point to no law passed by the Alabama legislature containing a detailed remedial scheme that displaces the availability of *Ex parte Young* for purposes of Count IV, and Plaintiffs are aware of none.

Third, Plaintiffs' Count IV is only applicable "if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch or that continuing to hold the land in trust is an ongoing violation of the IRA." (*Id.* at 71, ¶ 315). If this claim moves forward, then two other facts will be true when it does: (1) Count IV will be challenging conduct on fee simple land, which will satisfy the requirement for state law violations that the challenged conduct occur outside of Indian lands; and (2) Count IV will not be subject to analysis under *Coeur d'Alene* because Poarch will not have any "special sovereignty interests" in

fee simple land—a point conceded at oral arguments.[25] Without any "special sovereignty interests" at issue, Poarch Officials are unable to meet the second and third factors espoused in the Eleventh Circuit's *Coeur d'Alene* analysis, (Doc. 234 at 20).

Therefore, Count IV satisfies all requirements of the *Ex parte Young* doctrine with respect to the Poarch Officials and is not subject to dismissal on tribal sovereign immunity grounds.

2. The TASC plausibly alleges promissory estoppel under Alabama law.

Under Alabama law, to state a claim for promissory estoppel, a plaintiff must allege "(1) that the defendant made a promise (2) that the defendant should have reasonably expected to induce action or forbearance of definite and substantial character; (3) the promise did, in fact, induce action or forbearance; (4) and injustice can be avoided only by enforcing the promise." *Sykes v. Payton*, 441 F. Supp. 2d 1220, 1224 (M.D. Ala. 2006) (citing *Bush v. Bush,* 177 So.2d 568, 570 (1964)). The Poarch Officials wrongly treat Count IV as a contract claim, but Count IV is an equitable claim based on definite promises, reliance, breach, and ongoing harm.

Plaintiffs' promissory estoppel claims arise under two distinct promises. First, the TASC alleges that in order to acquire Hickory Ground, Poarch Officials promised to "preserve the . . . Site for the benefit of the Plaintiffs," that the "Site would remain undisturbed and free from excavation," and that the "Site would be used for Creek cultural enrichment and preserved as a sacred Site." (Doc. 261 at 78, ¶ 348). Plaintiffs relied on those promises "to [their] detriment in not objecting to Poarch's acquisition of the [Site] . . . and in supporting Poarch's federal recognition." (*Id.* at 78, ¶ 350). Plaintiffs therefore ask this Court to enter an order requiring the Poarch Officials to restore the Site and to issue an order enjoining the Officials from engaging in any activities that violate the Poarch Officials' promise. (*Id.* at 131-32, ¶¶ (b), (d)).

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[25] *See* September 25, 2024 Oral Arg. Tr. 34:39-35:10 (counsel for Poarch answering: "I would agree with your point, your honor, if they succeeded on the IRA claim, the special sovereignty interest would not apply. I would agree with that."), (available at https://www.courtlistener.com/audio/94224/muscogee-creek-nation-v-bufordrollin/?q=muscogee&type=oa&order_by=score+desc&court=ca11(last visited Apr. 29, 2026)).

The Poarch Officials contend that Plaintiffs' promissory estoppel claims are barred by the statute of limitations and the statute of frauds. (Doc. 270 at 79-80). These defenses fail, however, as both erroneously presuppose that Count IV sounds in contract. First, Alabama case law makes clear that promissory estoppel is an equitable remedy, and the nature of the claim must be analyzed on a case-by-case basis. *See Branch Banking & Tr. Co. v. Nichols*, 184 So. 3d 337, 347 (Ala. 2015), *as modified on denial of reh'g* (July 10, 2015); *see also Wyatt v. BellSouth, Inc.*, 757 So. 2d 403, 406-07 (Ala. 2000). Because Plaintiffs seek restoration of the Site rather than monetary damages for an injury or the enforcement of a specific contractual term, Count IV is properly characterized as one in recovery of hereditaments, for which a ten-year statute of limitations applies. *See* Ala. Code § 6-2-33(2). Count IV, therefore, is timely. Second, the Poarch Officials' promises do not violate the statute of frauds because Plaintiffs do not seek to enforce a contractual agreement between the parties. *See* Ala. Code § 8-9-2 (Alabama statute of frauds code provision applying to agreements between parties). Finally, even though Plaintiffs' claims are not time-barred, the claims nevertheless relate back to the Original Complaint as they arise under the same conduct, transaction, and occurrence the Original Complaint sets forth.[26]

Plaintiffs have properly alleged the requisite elements and facts establishing a plausible claim for purposes of Rule 12(b)(6).

a. Plaintiffs allege an enforceable promise.

The Poarch Officials' promises are specific and definite. In the Poarch Officials' Grant Application for preservation funds to acquire Hickory Ground, the Officials expressly promise that

[26] Here, Plaintiffs' promissory estoppel claim arises from the same conduct alleged in the Original Complaint. (*Compare* Doc. 1 at 6, ¶ 23) (explaining that Poarch's supposed purpose in acquiring the Site "was to preserve the historic property for the benefit of all Creek Indians," and to "protect the archeological remains without excavation."); (Doc. 1 at 9, ¶ 34) (explaining that Poarch "failed to provide notice or initiate meaningful consultation or take into account comments of [the Nation] . . . prior to commencing construction . . ."); (*with* Doc. 261 at 78, ¶ 348) (alleging that Poarch Officials promise to preserve the Site, that it would remain "undisturbed and free from excavation"); (Doc. 261 at 79, ¶ 352) (stating that the Poarch Officials breached their promises by excavating the Site, interfering "with the repatriation and reburial of the Plaintiffs' ancestors' remains" and continuing construction operations at the Site). Therefore, Plaintiffs' promissory estoppel claim in Count IV relates back to the Original Complaint under Federal Rules of Civil Procedure 15(c).

the acquisition '"will prevent development on the property"' and '"insure [sic] against future destruction."' (Doc. 261 at 22-23, ¶¶ 105, 106) (quoting Doc. 261-1, Ex. A at 5-6). The Poarch Officials argue that a promise to "'*minimize* destruction' is far too general and lacking in specifics" to be an enforceable promise. (Doc. 270 at 82) (emphasis added). A plain reading of the Grant Application, however, reveals that the Poarch Officials did not promise to merely "minimize destruction." (*Id.* at 82). Instead, they promised to "*prevent"* it. (Doc. 261 at 23, ¶ 106) (quoting Doc. 261-1, Ex. A at 6) (emphasis added); Stmt. Disp. Facts ¶ 3.

The Poarch Officials also argue that their promises were not specific enough to induce Plaintiffs' reliance. (Doc. 270 at 84). However, the Alabama Supreme Court has recognized that "[a]n express promise is not necessary to establish a promissory estoppel," such that it "is sufficient that there be promissory elements which would lull the promisee into a false sense of security." *Sykes*, 441 F. Supp. 2d at 1224 (citing *Mazer v. Jackson Ins. Agency,* 340 So. 2d 770, 774 (Ala. 1976)). That is precisely what happened here.

Ultimately, the Poarch Officials' mischaracterizations of the TASC cannot erase or outweigh their past statements, nor do they undermine the plausibility of the allegations made in the TASC. As alleged in the TASC, the Poarch Officials' Grant Application promised that:

- A stated goal was to ensure the "*protection* of [Creek] archaeological resources." (Doc. 261-1 at Ex. A, 7-8) (emphasis added).
- "A trained anthropologist would 'act as an advisor to the tribal councils on plans for *permanent protection* of the site."' (Doc. 261 at 23, ¶ 106) (quoting Doc. 261-1 at Ex. A, 7) (emphasis added).
- The purpose '"of the project is to *provide protection* for a particularly important site in Creek History…. Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home . . . . Destruction of archaeological resources in Alabama … destroy[s] the cultural history of Creek people."' (*Id.*) (quoting Doc. 261-1 at Ex. A, 6-8)).

- The preservation funds would be used "'to halt the destruction planned for the site and to insure [sic] against future destruction . . . . [A]cquisition of fee simple title is necessary *to prevent destruction of the site*.'" (*Id.*) (quoting Doc. 261-1 at Ex. A, 6) (emphasis added).

Plaintiffs agree with the Poarch Officials that the Grant Application must be read as a whole. (Doc. 270 at 82). Accordingly, the Poarch Officials' statement in the Grant Application that "[p]rior to any type of development of the property a scientifically sound archaeological program will be conducted to mitigate or minimize effects upon the historic resources" must be read in conjunction with the Poarch Officials' repeated promises of preservation and protection, including in the very next paragraph where they state that:

> The Creek people in Oklahoma's pride in heritage and ties to original homeland can only be enhanced. There is still an existing Hickory Ground tribal town in Oklahoma. *They will be pleased to know their home in Alabama is being preserved*. The site may serve as an open air classroom where Creek youth can learn of their heritage. Interpretive programs can be developed around the vast array of history connected with Hickory Ground. The Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) has already conducted CETA sponsored training in archaeological methods for Creek youth. The Hickory Ground site will continue to enhance their understanding of their history, *without excavation*.

(Doc. 261-1 at Ex. A, 5) (emphasis added); (*see also* Doc. 261 at 23, ¶ 105).

It is reasonable to conclude that the Grant Application contemplated development of a low-impact, outdoor learning space that would support the preservation of Creek culture, as promised in the Grant Application. (*See* Doc. 261-1, Ex. A at 5). The Poarch Officials explicitly promised, however, that any such development would be undertaken only if they could ensure such development would "minimize effects upon the historic resources." (*Id.*). When that statement is read in conjunction with their repeated promises to preserve Hickory Ground "without excavation" (*id.*), it is clear that the Poarch Officials promised to refrain from development that would involve excavation. Stmt. Disp. Facts ¶ 3. No reasonable person reading the Grant Application would anticipate the subsequent excavation of fifty-seven Muscogee ancestors, the destruction of the Hickory Ground Site altogether, and the construction and operation of a $246 million dollar casino

literally on top of the historic ceremonial ground. That is why, in reliance on that promise, they were awarded hundreds of thousands of dollars in historic preservation funds to purchase Hickory Ground. The Poarch Officials promised to protect Hickory Ground. Not destroy it.[27]

The Poarch Officials next aver that Count IV should be dismissed because Plaintiffs failed "to attach [an] allegedly vital correspondence to their complaint." (Doc. 270 at 83) (discussing Doc. 261 at 24, ¶ 107). Rule 12(b)(6) does not require Plaintiffs to attach every example of evidence in their possession that will ultimately substantiate all of their allegations in the TASC. Furthermore, the Poarch Officials have not pointed to a single statement in any of the exhibits attached to the TASC that "contradicts" the allegations in the TASC, and accordingly the Eleventh Circuit's decision in *Griffin Industries* is inapplicable. (Doc. 270 at 84) (citing *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007)).[28] Although the parties will have the opportunity to ask the Court to consider evidence for and against the alleged making of the Poarch Officials' promise, that is for a later stage in these proceedings—not an issue to be adjudicated on a motion to dismiss where the operable question is whether the allegations in the TASC are plausible—which they are.[29]

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[27] The purported inconsistency related to Defendant Tullis' statements rests on a mischaracterization of the TASC's allegations rather than any actual contradiction. (*See* Doc. 270 at 81). Poarch Officials point to Defendant Tullis's testimony that the Site was to be accessible to the "general public," and Plaintiffs' religious belief that burial and ceremonial grounds are sacred and should not be entered or disturbed without proper protocols. (*Id.* at 81); (Doc. 261 at 21, ¶ 93). These propositions are not mutually exclusive. A site may be physically accessible to the public as a factual matter, while still being regarded by Plaintiffs as sacrosanct and subject to religious restrictions. It is not uncommon for cemeteries to be open to the public—while at the same time, understood to be an inappropriate place to build a casino. Thus, the Poarch Officials' attempt to recast these allegations as inconsistent improperly reframes the record, does not create a genuine contradiction, and should be disregarded.

[28] Nor is *Cantrell* of any use, since in that case, the Alabama Supreme Court concluded "there [was] not one shred of evidence" that the defendant made a promise to keep the interest rate at a set amount (the promise alleged by plaintiff in that case). *Cantrell v. City Federal Sav. & Loan Ass'n*, 496 So. 2d 746, 751 (Ala. 1986). Here, there is significant evidence of the Poarch Officials' promise to protect Hickory Ground—much more than a "shred." (*See, e.g.,* Doc. 261-1 at Ex. A, 4-8).

[29] The Poarch Officials aver that any promises they allegedly made in the Grant Application are not actionable because the "application [] was not made *to* Plaintiffs," but instead was submitted to a separate entity. (Doc. 270 at 81) (emphasis added). Putting this argument in the most relevant light under the law,

The TASC also alleges that the "Poarch Officials continue to promise to protect and preserve the Hickory Ground Site every four years when their NPS Agreement is renewed." (Doc. 261 at 78, ¶ 349). And by signing—and every four years renewing—the NPS Agreement, the Poarch Officials promise to protect and preserve Hickory Ground as a historic site on the National Register of Historic Places. Indeed, every four years, the Poarch Officials promise that the Poarch THPO "will, in accordance with Section 101(d)(4)(C) [of the NHPA], provide for … consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," and "will periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities." (Doc. 261 at 30, ¶ 126(b)) (quoting Doc. 261-1 at Ex. J, 251). Every four years, the Poarch Officials promise that if they consider taking an action that "may affect the traditional lands of another Tribe, the [Poarch THPO] will, on an as-needed basis, seek and take into account the views of that Tribe." (*Id.* ¶ 126(c)) (quoting Doc. 261-1 at Ex. J, 251). Like the promises made in the Grant Application, the assurances made by the Poarch Officials every four years in the NPS Agreement constitute enforceable promises to protect and preserve Hickory Ground in accordance with the NHPA.

In sum, the TASC sufficiently and plausibly alleges that the Poarch Officials promised to preserve the Hickory Ground Site, and at the pleading stage, the Poarch Officials' contention that no such promise was made is unavailing. *See Great American Assur. Co. v. Sanchuk, LLC,* No. 8:10-cv-2568-T-33AEP, 2012 WL 195526, at *6 (M.D. Fla. Jan. 23, 2012) (denying Great

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the implication is that the statements in the Grant Application were not shared with or communicated to Plaintiffs, such that the Poarch Officials could not have expected Plaintiffs to rely on them. But the Grant Application itself states that the Poarch Officials had shared the Grant Application *with* Plaintiffs because, at that time, the individuals calling themselves "Poarch" had formulated a "plan" with the Muscogee (Creek) Nation to "jointly own" Hickory Ground. (Doc. 261-1 at Ex. A, 6) ("Under this plan the property will be jointly owned by both groups of Creeks."). It is not reasonable to assume that such a plan had been developed between the Nation and Poarch, but had never been shared with the Muscogee (Creek) Nation. (*See also* Doc. 270 at 85) (describing the "plan" that the Poarch Officials formulated with Muscogee (Creek) Nation prior to submission of the Grant Application). The promises in the Grant Application, therefore, were made *to* Plaintiffs.

American's motion to dismiss Sanchuk's promissory estoppel claim based solely on the allegations in the complaint without adjudicating their accuracy); *see also Evanston Ins. Co. v. Proplogix, LLC*, No. 8:24-CV-2715-VMC-CPT, 2025 WL 1167828, at *9 (M.D. Fla. Apr. 22, 2025) ("For purposes of a motion to dismiss, the Court only needs to analyze whether [the plaintiff's] [promissory estoppel] factual allegations extend 'above the speculative level.'") (quoting *Twombly*, 550 U.S. at 555).

b. Poarch Officials reasonably foresaw that the Muscogee (Creek) Nation would rely on its promise to preserve the Hickory Ground Site.

Poarch Officials next complain that they "could not have reasonably foreseen that Plaintiffs would rely upon" their promises. (Doc. 270 at 84). The allegations in the TASC directly refute this flawed notion. First, in their Grant Application, the Poarch Officials strongly emphasized the unique importance of the Hickory Ground Site *to* the Muscogee (Creek) Nation, undermining the Poarch Officials' purported bewilderment that Muscogee (Creek) Nation might rely on the promises they made to protect Hickory Ground. (Doc. 261 at 22, ¶ 104) (citing Doc. 261-1, at Ex. A, 4). Second, the Poarch Officials knew that there were ceremonial burials on the Site. (Doc. 261 at 38-39, ¶¶ 167, 171); (Doc. 261-1 at Ex. A, 5). Third, the Poarch Officials knew that the Muscogee (Creek) Nation objected to development of Hickory Ground because, according to the Poarch Officials, the two groups were working together to save the Site from development. (*Id.* at Ex. A, 6-7).[30] Fourth, communications between the parties regarding Poarch's preservation plans further induced Muscogee (Creek) Nation into supporting Poarch's acquisition of the Site and

[30] The Poarch Officials make much of the fact that the plan to jointly own and operate Hickory Ground never came to fruition. (Doc. 270 at 85) (noting that "the grant application letter describes an unrealized 'plan' for PCI and MCN to jointly own and manage the Wetumpka property")). Plaintiffs, however, were not informed of the reasons underlying the Poarch Officials' decision to abandon the plan to jointly own Hickory Ground. (Doc. 200-2 at Ex. D, 24) (Plaintiff Mekko Thompson writing that: "Half interest in this property was to be vested to be Muscogee (Creek) Nation of Oklahoma, but [the Poarch Officials] never clearly clarified as to why this did not occur ….). The Poarch Officials seem to imply that Plaintiffs are the reason the plan never came to fruition, but nothing in the record supports that conclusion (*see id.*), and to the extent the Poarch Officials wish to rely on such a conclusion as a basis for dismissing Plaintiffs' claims, the factual record will need to be developed and the Poarch Officials will need be deposed concerning why *they* declined to pursue the plan to jointly own Hickory Ground with Muscogee (Creek) Nation.

federal recognition as a tribe. (Doc. 261 at 24, ¶ 107). Fifth, after the acquisition occurred, the Poarch Officials confirmed their plan to continue preserving the Site when Defendant Tullis testified before Congress to that effect, at a hearing also attended by the Chief of the Muscogee (Creek) Nation. (*Id.* ¶ 108).

Therefore, the Poarch Officials knew that, absent the assurances they made concerning the perpetual preservation of the Site, the Muscogee (Creek) Nation "would have never" supported Poarch's federal recognition (or their acquisition of Hickory Ground).[31] (*Id.* at 24-25, ¶¶ 110-14, 115); *see Mazer*, 340 So. 2d at 774 (explaining that promissory estoppel requires that "the promise . . . [must] be made with the intention, or at least the reasonable expectation, that it will be acted on by the other party."). The same is true for Defendant Tullis' 1983 Congressional testimony: had Poarch Officials revealed then that the Officials would cease protecting Hickory Ground and instead build a casino on top of it, the Muscogee (Creek) Nation would not have supported Poarch's bid for federal recognition and would have opposed Poarch's acquisition of the Site in trust the next year. (Doc. 261 at 24-25, ¶¶ 110-14, 115). Indeed, disbursement of Indian Claims Commission funds—the subject of the Congressional hearing—was contingent on achieving federal recognition by the end of 1984. *See A bill to provide for the disposition of certain undistributed judgement funds awarded the Creek Nation: Hearing on S. 1224 Before the S. Comm. On Indian Affs.*, 98th Cong. (1984) (statement of Poarch Chairman Eddie Tullis); Pub. L. 98–390, 98 Stat. 1356 (1984) (providing for funds to go to "Eastern Creek entities" who obtained federal recognition by December 30, 1984).

The Poarch Officials, therefore, should have foreseen that the Muscogee (Creek) Nation would rely on their promises in the Grant Application for federal funds, Defendant Tullis' Congressional testimony, and related communications. (Doc. 261 at 22-25, ¶¶ 102-14); *see e.g.,*

[31] As the TASC alleges, given the importance of the Site to the Muscogee (Creek) Nation, "Poarch Officials were aware that, had the Muscogee (Creek) Nation known that Poarch would not protect the Hickory Ground Site as they promised and would instead destroy Plaintiffs' sacred burial grounds and religious Site, the Muscogee (Creek) Nation would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent Poarch's federal recognition." (Doc. 261 at 78-79, ¶ 351).

Mazer, 340 So. 2d at 774 (holding that "[c]ommon sense and the evidence compel the conclusion" that the defendants intended that the plaintiffs "cease their opposition to annexation in reliance on the [defendant's] assurances . . . ."); *Dodd v. Consol. Forest Prods., LLC*, 192 So. 3d 409, 413 (Ala. Civ. App. 2015) (quoting *DGB, LLC v. Hinds*, 55 So. 3d 218, 228 (Ala. 2010)) (explaining that on a motion to dismiss, "'[a]ny question regarding the reasonableness" of a plaintiff's reliance "is not yet before us.").

It was also reasonably foreseeable that Plaintiffs would rely on the promises the Poarch Officials make every four years, when they renew the NPS Agreement. (Doc. 261 at 78, ¶ 349). As third-party beneficiaries, the Poarch Officials reasonably foresaw that Plaintiffs would rely on their promises—and duties—under the NPS Agreement, which include: (1) Poarch's Field Methodology Policy, emphasizing that "AGAIN! **THE POARCH BAND OF CREEK INDIANS TRIBAL ARCHAEOLOGICAL AND HISTORIC RESOURCES CODE EMPHASIZES AVOIDANCE AND PRESERVATION OF FEATURES RATHER THAN EXCAVATION**." (*Id.* at 31-32, ¶¶ 134-35); (Doc. 261-1 at Ex. K, 260); (2) "[n]o excavation will be under taken until such a decision [to excavate] is made by the Office of Cultural and Historic Preservation . . . ." (*Id.*); (3) "[i]f human remains are encountered on the surface of the site, they are **not** to be collected." (*Id.*); (4) "[i]f you find [remains] while digging . . . backfill without disturbing them. If you find [remains] while excavating a unit, cover them up and do not dig any further." (*Id.*); (5) [u]nder no circumstances are the burials on the Poarch Creek Indians Reservations, or lands under their control, to be excavated, nor are they to be subjected to **any** examination or testing." (*Id.*); (6) "[b]urial sites *take precedence over any project or program plan*." (*Id.*) (emphasis added). It is reasonable for Plaintiffs to interpret the NPS Agreement, in conjunction with Poarch's own policies against excavating human remains, as signifying that Poarch Officials would not exhume the bodies of relatives buried at Hickory Ground.

Finally, the Poarch Officials do not argue that Muscogee (Creek) Nation's forbearance was not "definite and substantial," nor could they. (*See* Doc. 261 at 25, ¶ 111) ("It would have been extraordinarily difficult, if not impossible, for Poarch to have acquired the federal preservation funds

necessary to purchase the Hickory Ground Site had the Muscogee (Creek) Nation objected to the acquisition . . . Muscogee (Creek) Nation's acquiescence was critical and essential to Poarch's acquisition" of the Site); (*id.* ¶ 113) ("An objection from the Muscogee (Creek) Nation to Poarch's application for federal recognition would have significantly lessened the chance that Interior and the Office of Federal Acknowledgment ('OFA') would have decided to grant Poarch the federal recognition it was seeking."); (*id.* ¶ 114) ("[The] Interior and the OFA relied on the Muscogee (Creek) Nation's letter to conclude that Poarch should be recognized as a tribe."). In sum, the Poarch Officials reasonably foresaw that Muscogee (Creek) Nation would rely on its promises to preserve the Site, and Muscogee (Creek) Nation's forbearance was definite and substantial.

c. Plaintiffs allege detrimental reliance.

Poarch Officials suggest that Plaintiffs did not have "legal or practical authority" to prevent Poarch from acquiring the Site in trust or fee and that Plaintiffs could not have prevented Poarch's federal recognition, such that Plaintiffs cannot establish the requisite detrimental reliance as a result of their forbearance. (Doc. 270 at 86). The Poarch Officials simply misunderstand the concept of forbearance under Alabama law.

In defining the doctrine of promissory estoppel, "[Alabama] has adopted § 90 of the Restatement of Contracts First which states in pertinent part: 'A promise which the promisor should reasonably expect to induce action ***or forbearance*** of definite and substantial character and which does so is binding if injustice can be avoided only by enforcement thereof.'" *Wyatt v. Bellsouth, Inc.*, 18 F. Supp. 2d 1324, 1326 (M.D. Ala. 1998) (emphasis added) (quoting *Davis v. Univ. of Montevallo*, 638 So. 2d 754, 757 (Ala. 1994)). Accordingly, to succeed on their claim of promissory estoppel under Alabama law, Plaintiffs do not have to prove that *but for* their support, the federal government would not have granted Poarch federal recognition. *See id.* It is enough that Plaintiffs' forbearance was of definite and substantial character, and further—as is the case here—injustice can be avoided only by enforcement of the Poarch Officials' promise to protect Hickory Ground. *See id*. The TASC satisfies this element of promissory estoppel.

Regardless, the TASC specifically alleged that the Federal Defendants relied on Plaintiffs' support in deciding whether Poarch should be given federal recognition, stating:

> Interior and the OFA relied on the Muscogee (Creek) Nation's letter to conclude that Poarch should be recognized as a tribe. *See* Federal Memo, Ex. B at 3 of 131 (citing as justification for granting Poarch federal recognition the fact that "[i]n August of 1983, the recognized Muscogee (Creek) Nation of Oklahoma formally established a government-to government relationship with the Poarch Band of Creeks and supported the group's petition for recognition . . . .") (citing letter from Muscogee (Creek) Nation Chief Claude Cox).

(Doc. 261 at 25, ¶ 114 (quoting Doc. 261-1 at Ex. B, 12)). The TASC further alleges that:

> [H]ad the Muscogee (Creek) Nation known that Poarch would not protect the Hickory Ground Site as they promised and would instead destroy Plaintiffs' sacred burial grounds and religious Site, [Plaintiffs] would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent Poarch's federal recognition.

(*Id.* at 78-79, ¶ 351). Accordingly, "[t]he Muscogee (Creek) Nation relied on Poarch Officials' promise *to its detriment* in not objecting to Poarch's acquisition of the property, either in fee or trust, and in supporting Poarch's federal recognition." (*Id.* at 78, ¶ 350) (emphasis added). Moreover, because Poarch was not a federally recognized tribe at the time, the Muscogee (Creek) Nation "was and is the only tribe with historic sovereign ties to the sacred site," such that its "acquiescence was *critical and essential* to Poarch's acquisition of the Hickory Ground Site." (*Id.* at 25, ¶ 111) (emphasis added) (alleging that "[i]t would have been extraordinarily difficult, if not impossible, for Poarch to have acquired the federal preservation funds necessary to purchase the Hickory Ground Site had the Muscogee (Creek) Nation objected to the acquisition."); *see also* Stmt. Disp. Facts ¶¶ 12.[32]

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[32] The Poarch Officials also contend that even if Poarch did not acquire the Site, Plaintiffs' injury could not have been avoided due to "imminent commercial development" of the Site in the 1980s. (Doc. 270 at 86) (citing Doc. 261-1 at Ex. A, 6). Again, in order to succeed under Alabama law, Plaintiffs are not required to prove that no other hypothetical intervening bad actor or speculative causal element would have taken place had the Poarch Officials not broken their promise to protect Hickory Ground. *Wyatt* , 18 F. Supp. 2d at 1326. Here, the Poarch Officials promised to protect Hickory Ground, Plaintiffs relied on that promise to their detriment, that reliance was reasonably foreseeable, and ultimately the Poarch Officials broke their promise and excavated fifty-seven of Plaintiffs' relatives, destroying a burial ground and sacred site. Under

Here, the Alabama Supreme Court's decision in *Mazer v. Jackson Insurance Agency* is instructive. 340 So. 2d 770 (Ala. 1976). In *Mazer*, developers planned to build an office park adjacent to residential houses in the city of Mountain Brook; in order to do so, however, the developers ensured the city would agree to annexation. *Id.* at 771. To prevent the homeowners of the residential houses from opposing the annexation, the developers made assurances that development would only occur if there were protections for the residential area, including a buffer between the development and homes that would be left as "natural woodland." *Id*. Like the statement the Poarch Officials made that the Hickory Ground Tribal Town "will be pleased to know their home in Alabama is being preserved" (Doc. 261-1 at Ex. A, 5), the developers in *Mazer* stated the homeowners "will be very happy indeed over the conclusion" that a buffer zone of natural woodland will be protected. *Mazer*, 340 So. 2d at 771-72. Just as the intent of the Grant Application was to assure Hickory Ground Tribal Town and the Muscogee (Creek) Nation that Poarch's purchase of Hickory Ground would provide for Hickory Ground's protection, the Alabama Supreme Court concluded that "[t]he clear implication of the language of the memorandum was that the assurances represented the future intentions of the Developers with regard to their property." *Id.* at 774.

Like the Poarch Officials, the homeowners in *Mazer* did not keep their promise. After the homeowners did *not* object to the annexation, and once annexation had been effectuated, the developers announced they would clear-cut and develop the zone they had promised to preserve. *Id.* at 772. Because the homeowners had relied on the developers' promises in making their decision *not* to object to the annexation, the Alabama Supreme Court concluded that promissory estoppel barred the development, rejecting the developers' claim that the homeowners failed to prove an enforceable promise or detrimental reliance. *Id.* at 773-75 (citations omitted) (finding the developers' testimony instructive, as he stated that the purpose of the memorandum was "'to assure the residents of the good faith of the developers that they would not develop the property in a

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Alabama law, these allegations state a claim for promissory estoppel—regardless of any hypothetical parade of speculative possibilities the Poarch Officials might conjure up.

manner inconsistent with [the] assurances.'"). Notably, the Alabama Supreme Court did not require the homeowners to prove that their opposition would have prevented annexation; instead, the Court found that the homeowners' cessation of opposition to the development "was forbearance of a definite and substantial character," sufficient to give rise to a claim for promissory estoppel. *Id.* at 774. Likewise, in this instance, Plaintiffs' forbearance was of a definite and substantial character.

The Alabama Supreme Court concluded that "if the Developers are permitted to ignore the assurances given in the memorandum, the Homeowners will lose the protection that was the sole reason for their ceasing to oppose annexation and will thereby suffer a serious injustice." *Id.* at 774-75. Likewise, here, if the Poarch Officials are permitted to ignore the promises made in their Grant Application, congressional testimony, and other communications with the Muscogee (Creek) Nation, the Muscogee (Creek) Nation will lose the protection that lulled the Nation into refraining from objecting to Poarch's acquisition of Hickory Ground, thereby causing Plaintiffs to suffer a serious injustice. *See generally Sykes*, 441 F. Supp. 2d at 1225.

3. Plaintiffs' promissory estoppel claim is timely.

The Poarch Officials suggest that a two-year statute of limitation period applies to promissory estoppel claims based upon *Alabama Space Science Exhibit Commission v. Odysseia Co., Ltd.*, 2016 WL 9781806, at *11 (N.D. Ala. Sept. 30, 2016). (Doc. 270 at 79). However, *Alabama Space* involved a dispute over a promise to enter a (contractual) licensing agreement. *Alabama Space* at *1, *11 (citing Ala. Code. § 6-2-38(l)). Contrary to *Alabama Space*, Plaintiffs' promissory estoppel claim does not arise from a promise to enter a contractual agreement. Rather, Plaintiffs' claim sounds in equity and seeks purely equitable relief—namely, an injunction and an order in the nature of mandamus requiring Poarch Officials to restore the Site to its pre-excavation and promised pre-desecration condition. (Doc. 261 at 132, ¶ (d)). These claims arise from the disturbance and removal of Plaintiffs' ancestors' remains, cultural items, and associated funerary objects at Hickory Ground, all of which give rise to legally protected interests in land that qualify

as hereditaments under Alabama law. *See McCormack v. AmSouth Bank, N.A.*, 759 So. 2d 538, 546 (Ala. 1999); *Cove Props., Inc. v. Walter Trent Marina, Inc.*, 702 So. 2d 472, 475 (Ala. Civ. App. 1997); *Smith & Gaston Funeral Dirs. v. Dean*, 262 Ala. 600, 605-07, 80 So. 2d 227 (1955). Because Plaintiffs' promissory estoppel claims are grounded in the protection of real property-based rights, the applicable statute of limitations is ten years pursuant to Alabama Code § 6-2-33(2). This conclusion is further supported by the principle that the applicable statute of limitations turns on the substance of the rights at issue rather than the formal label of the claim.

As this Court explained in *Auburn University v. IBM*, the appropriate statute of limitations depends on the nature of the claim, not merely its label. 716 F. Supp. 2d 1114, 1118 (M.D. Ala. 2010). This Court has emphasized that claims will not always fall into the same category for limitations purposes. *Id.* (explaining that "it would be improper to classify all unjust-enrichment claims as either tort claims subject to the two-year statute of limitations or implied-contract claims subject to the six-year statute of limitation."). That reasoning applies with equal force here. Promissory estoppel claims, like unjust enrichment claims, arise in varied contexts and cannot be categorically assigned a single limitations period. Instead, courts must look to the underlying rights and interests at issue. *See Branch Banking & Tr. Co. v. McDonald*, No. 2:13-CV-000831-KOB, 2013 WL 5719084, at *7 (N.D. Ala. Oct. 18, 2013) (finding it "well-reasoned" to determine the applicable statute of limitations based on the circumstances giving rise to the claim).

Under Alabama law, the interests underlying Count IV qualify as "hereditaments" within the meaning of Alabama Code § 6-2-33(2). Hereditaments are limited to rights associated with real property, including incorporeal interests tied to land. *McCormack*, 759 So. 2d at 546. Alabama courts have specifically recognized that nonpossessory, land-connected rights—such as riparian rights—are hereditaments protectable in equity. *See, e.g., Cove Props.*, 702 So. 2d at 475-76 (holding that the ten-year statute of limitations for promissory estoppel under § 6-2-33(2) applied to plaintiff's action against the defendant for interfering with plaintiff's riparian rights, rather than the two-year limitations period in § 6-2-38(l)).

The same reasoning applies to burial grounds. Alabama courts have recognized that burial sites create legally protected property interests tied to land and are enforceable by next of kin to enjoin disturbance. *See Smith & Gaston*, 80 So. 2d at 232 (citing *Johnson v. Kentucky-Virginia Stone Co*., 149 S.W. 2d 496, 498 (Ky. Civ. App. 1941) ("[A]lthough plaintiffs did not own the fee in the land occupied by their brother's grave, they nevertheless had a right which could not be unlawfully destroyed or disturbed by the owner of the fee . . ."); *Bessemer Land & Improvement Co. v. Jenkins*, 18 So. 565, 568 (1895) (explaining that one's right to protect a relative's grave "will entitle him to action against the owners of the fee or strangers, who, without his consent, negligently or wantonly disturb it."); *Bailey v. Leeds*, 304 So. 3d 719, 737-38, n.17 (Ala. Civ. App. 2020) (recognizing that plaintiffs' lack of ownership in land was not determinative of plaintiffs' trespass claim for disturbing plaintiffs' kins' burial sites); *Jakeman v. Lawrence Grp. Mgmt. Co., LLC*, 151 So. 3d 1083, 1089-90) (Ala. 2014) (citing several Alabama cases recognizing that next of kin have a right to maintain an action against one who destroys or disturbs burial grounds). Given that Plaintiffs' promissory estoppel claim seeks to protect the burials of Plaintiffs' relatives,[33] and given that Alabama courts acknowledge—in numerous contexts and under multiple legal theories—that individuals have the right to protect their relatives' burial grounds—the interests underlying Count IV qualify as "hereditaments" within the meaning of Alabama Code § 6-2-33(2). *See also Blackmon v. Brazil*, 895 So. 2d 900, 908-09 (Ala. 2004) (concluding that under section § 6-2-33(2), hereditaments can include anything that is inherited). Thus, Plaintiffs' promissory estoppel claims are governed by Alabama's ten-year statute of limitations.

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[33] Here, Plaintiffs seek relief that effectively protects and vindicates their interest in hereditaments set forth in § 6-2-33(2). (*See* Doc. 276 at 24-26) (stating that "Hickory Ground Tribal Town claims all remains and objects" at the Site, and denies that "ownership of any remains and/or object(s) or Cultural Property has been expressly relinquished . . . and denies that any right of possession has been obtained" by Poarch or by voluntary relinquishment); (*id.* at 24-25) (stating that "Hickory Ground Tribal Town claims this ownership as the lineal descendants of the persons therein buried . . . and also as the living descendants of and present members of . . . Hickory Ground Tribal Town which has an uninterrupted existence from time immemorial . . ."); (Doc. 261 at 122, ¶ 563) (alleging that the Poarch Officials unlawfully burden Plaintiffs' religious rights by "[r]eceiving and retaining possession of Plaintiffs' ancestors remains and associated funerary objects," thereby "preventing Plaintiffs from fulfilling their sacred duty to ensure proper burial of their ancestors[] . . . .").

Further, a promissory estoppel claim accrues when a plaintiff knows or should know that a defendant breached their promise. *Alabama Space*, 2016 WL 9781806, at *11. Thus, Plaintiffs' promissory estoppel claim did not accrue until Plaintiffs were able to confirm that burial sites at Hickory Ground were disturbed—which occurred no earlier than 2003 (since BIA says no damage occurred as of 2002 (Doc. 276 at 44)), when Poarch Officials likely began interfering with the property, and at the latest in 2006, when Muscogee (Creek) Nation received notice of Poarch Officials' excavation of human remains. (*See* Doc. 261 at 98-99, ¶¶ 459-62) (Doc. 261-1 at Ex. W, 30708) (issuing federal archeological permit); (*see also* Doc. 276 at 47) (stating that "[o]n May 9, 2006 . . . representatives from the Muscogee (Creek) Nation and Hickory Ground [T]ribal [T]own traveled to Wetumpka, Alabama to discuss reinterment of 57 or more sets of human remains.").

The Poarch Officials claim that Plaintiffs knew the Officials had broken their promise in 1992, since that is when the Muscogee (Creek) Nation "alleged … that PCI was taking actions that allegedly 'threatened"' Hickory Ground. (Doc. 270 at 79). The Officials further aver that Plaintiffs "knew no later than 2002 that excavations, including of human remains, had occurred at the site." (*Id.*). First, the idea that Plaintiffs could have—and should have—brought their claim for promissory estoppel in 1992 is absurd given that the BIA Archeologist and Federal Preservation Officer issued a Briefing Statement to the Assistant Secretary of Indian Affairs recounting that Poarch conducted limited exploratory testing at the Site around 1992 "to determine if some portion of the site could be developed without damaging archeological resources," and such activity "ceased after 1993" because the testing found "no area where such resources were totally absent." (Doc. 261-1 at Ex. V, 303). Nothing in this letter indicates that human remains or cultural items were excavated. A cause of action does not accrue before a plaintiff has an actionable claim.

Second, Hickory Ground Tribal Town's October 19, 2002, letter ultimately states that Hickory Ground Tribal Town heard *rumors* through third parties that Poarch may be disturbing the site, and "hope[s] this is not the case." (Doc. 276 at 26) (emphasis added) (explaining that "*if*" Poarch allowed human remains to be excavated or disturbed, Poarch is therefore profiting from

their failure to consult with Hickory Ground Tribal Town). The BIA investigated the suspicions voiced in Hickory Ground Tribal Town's 2002 letter and concluded that "[t]here is no evidence that archeological resources in the area … were or may be damaged." (*Id.* at 44). The BIA further found that "[t]here is no evidence that a violation of NAGPRA occurred on trust lands…." (*Id.*). Furthermore, the BIA was under the impression that "[e]fforts to develop the site apparently ceased after 1993." (*Id.* at 33).

At the time of the filing of this brief, the Poarch Officials have never confirmed *when* they began excavating Plaintiffs' relatives from their burials at Hickory Ground. Poarch Officials have confirmed that some of these excavations were complete by May 2006 (Doc. 270 at 79), but Plaintiffs also have information and reason to believe that excavations were not complete until 2011. (Doc. 261 at 36, ¶ 155). And of course, Plaintiffs received reports that more excavations took place during the Officials' recent 2023 construction (*see id.* at 61, ¶ 275). But as the Poarch Officials repeatedly reiterate, these are nothing more than rumors until and unless Plaintiffs can confirm rumors with concrete evidence. That evidence, however, lies exclusively within the Poarch Officials' possession. Given that the Poarch Officials still refuse to provide Plaintiffs with their Phase III inventory report detailing when, where, and how all of their excavations took place, these issues remain issues of disputed facts and are therefore not an appropriate basis to dismiss Plaintiffs' promissory estoppel claim. *See Twin City Fire Ins. Co. v. Hartman*, Simons & Wood, LLP, 609 F. App'x 972, 976 (11th Cir. 2015).

In sum, the ten-year statute of limitations set forth in Alabama Code § 6-2-33(2) governs Plaintiffs' promissory estoppel claims because they arise from and seek to recover hereditaments—human remains and cultural items incident to real property. As the claims accrued no earlier than 2003, and at the latest in 2006, Plaintiffs' Original Complaint was timely filed well within the ten-year limitations period.

4. Plaintiffs' promissory estoppel claim does not violate Alabama's Statute of Frauds.

The Poarch Officials advance the same argument regarding Alabama's Statute of Frauds in seeking dismissal of Plaintiffs' unjust enrichment claims under federal common law and Alabama common law. (Doc. 270 at 76-78, 80). For the sake of efficiency and to save the parties' and the Court's resources, Plaintiffs incorporate the Argument, Section VI.D.1, in Plaintiffs' Response to the Individual Defendants' Motion to Dismiss, filed Apr. 30, 2026. The same reasoning and authorities preclude dismissal of Count IV. As discussed in Plaintiffs' Response to the Individual Defendants' Motion to Dismiss, Plaintiffs do not seek to enforce contractual remedies for any contract or agreement they have made with the Poarch Officials. Pls.' Resp. to Individual Defendants Mot. to Dismiss, Section VI.D.1, filed Apr. 30, 2026. Alabama's Statute of Frauds, therefore, does not apply.

F. Plaintiffs have stated a viable claim for ongoing violations of IGRA (Count VI).

1. Sovereign immunity does not require dismissal of Count VI.

Plaintiffs bring Count VI pursuant to *Ex parte Young*, thus as discussed *supra* in Section VI.B.1, the first question is whether Plaintiffs sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress has displaced the availability of *Ex parte Young*'s traditional equitable cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, Count VI squarely fits the "straightforward inquiry" that asks only whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon*, 535 U.S. at 645. The TASC alleges that, under IGRA, Class II and Class III gaming are lawful only on "Indian lands" as defined by the Act. (Doc. 261 at 85, ¶¶ 384-385). The TASC further alleges that, if Count I succeeds, the trust acquisition of Hickory Ground is null and void and the Site therefore "will not qualify as 'Indian lands' under IGRA." (*Id.* at 86-87, ¶ 386). It then alleges that the Poarch Officials are responsible for managing and facilitating gaming

operations at Wind Creek Wetumpka on the Hickory Ground Site, that those ongoing gaming activities violate IGRA because they are being conducted on lands that do not qualify as "Indian lands," and that those ongoing violations continue to harm Plaintiffs by perpetuating the desecration of Hickory Ground. (*Id.* at 86, ¶¶ 387-389). Plaintiffs seek prospective relief to stop those ongoing violations, including a declaration that Hickory Ground does not qualify as "Indian lands" under IGRA and an injunction prohibiting the Poarch Officials from continuing to operate or authorize gaming activities at Wind Creek Wetumpka. (*Id.* at 86, ¶ 390); (*id.* at 132, ¶ (f)). Under *Verizon*, that is enough.

Second, because sovereign immunity does not bar this action under *Ex parte Young*, the next question is whether Congress displaced *Ex parte Young*'s ability to curtail the types of IGRA violations alleged in Count VI. This inquiry requires considering whether IGRA contains a detailed remedial scheme sufficient to show that Congress intended to foreclose Count VI's requested remedies. *See Seminole Tribe I*, 517 U.S. at 73-74. While some courts have concluded that particular portions of IGRA contain a detailed remedial scheme that displaces *Ex parte Young* claims, none of those cases consider the type of IGRA violation alleged in Count VI and thus are inapposite.

To start, *Seminole Tribe I* does not displace *Ex parte Young* here because the *Seminole Tribe I* Court's holding was tied to a different IGRA duty, for which Congress did identify and detail a specific scheme and IGRA remedy. In *Seminole Tribe I*, the Supreme Court considered only a tribe's claim that a state failed to negotiate a class III compact in good faith under 25 U.S.C. § 2710(d)(7)(A)(i). *See* 517 U.S. at 47-51, 73-76. The Supreme Court found *Ex parte Young* unavailable not because the claim simply alleged a violation of IGRA, but because Congress had supplied a "carefully crafted and intricate remedial scheme" for that precise compact-negotiation dispute. *Id.* at 74-76. Specifically, IGRA authorized a tribe to sue a state for failure to negotiate a compact in good faith under 25 U.S.C. § 2710(d)(7)(A)(i), and Congress supplied a detailed remedial sequence governing that same claim. *Id.* § 2710(d)(7)(B)(i-vii). If the tribe prevailed, the District Court could order the parties to conclude a compact within sixty days. *Id.*

§ 2710(d)(7)(B)(iii). If that failed, the parties had to submit proposed compacts to a mediator. *Id.* § 2710(d)(7)(B)(iv). If the state still refused, the Secretary could then prescribe gaming procedures. *Id.* § 2710(d)(7)(B)(vii). It was that "carefully crafted and intricate remedial scheme" that led the Supreme Court to conclude Congress intended to foreclose broader equitable relief, including under *Ex parte Young*, for a state's failure to negotiate a compact in good faith. *Seminole Tribe I*, 517 U.S. at 73-76.

Count VI is not that kind of claim. It does not seek to enforce a state's duty to negotiate a compact in good faith, and it is not governed by IGRA's compact-negotiation sequence. Instead, Count VI seeks prospective relief against officials for ongoing gaming that Plaintiffs allege is unlawful because Hickory Ground is not "Indian lands" under IGRA. Because IGRA does not provide a detailed remedial scheme for that claim, *Seminole Tribe I* does not bar *Ex parte Young* relief here.[34]

Further, *Alabama v. PCI Gaming Authority* supports Plaintiffs' position. In *Alabama v. PCI Gaming Authority*, Alabama brought an IGRA claim against tribal officials in their official capacities seeking declaratory and injunctive relief to halt allegedly unlawful gaming. 801 F.3d 1278, 1288-89 (11th Cir. 2015). The Eleventh Circuit held that the officials were not entitled to immunity on that federal claim because Alabama alleged an ongoing violation of IGRA and sought prospective relief. *Id*. at 1288. Relevant here, the Eleventh Circuit then explained that *Seminole Tribe I* addressed only the compact negotiation provision of IGRA and did not decide immunity for other IGRA based claims lacking the same detailed remedial scheme. *Id.* at 1289-90.

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[34] The Eleventh Circuit's decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999) ("*Seminole Tribe II*") likewise does not bar Count VI. There, the Eleventh Circuit held that the State had no implied right of action under IGRA because IGRA already contained specifically tailored language describing when a State could sue a Tribe for compacted Class III gaming on Indian lands. *Id.* at 1248-50. That particular displacement analysis is irrelevant here. Plaintiffs are not a state and are not seeking to enjoin Class III gaming on Indian lands for lack of a compact executed with Alabama. Moreover, Count VI is brought pursuant to the traditional equitable remedy under *Ex parte Young*, whereas *Seminole Tribe II* merely considered whether IGRA itself creates an implied remedy under the four factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975). As a result, *Seminole Tribe II* cannot be read to displace Plaintiffs' *Ex parte Young* claim in Count VI.

The Eleventh Circuit specifically held that *Seminole Tribe I* "neither addressed nor decided whether state and tribal officials are immune from other IGRA-based claims to enforce rights for which the statute does not set forth such a detailed, limited remedial scheme." *Id.* at 1289. Ultimately, the Eleventh Circuit found that the State could not bring *Ex parte Young* claims for violations of 18 U.S.C. § 1166, but that was because that provision specifically reserves criminal enforcement to the United States. *Id.* at 1295-97. Here, Count VI does not allege a violation of § 1166, and consequently, that aspect of the *PCI Gaming Authority* Court's holding is inconsequential here.

Bay Mills likewise does not bar Count VI either. (Doc. 270 at 87) (citing *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 795 (2014). The Poarch Officials emphasize that the Supreme Court stated that "[e]verything — literally everything — in IGRA affords tools . . . to regulate gaming on Indian lands, and nowhere else." (Doc. 270 at 87) (quoting 572 U.S. at 795) (quotation marks omitted). This statement, however, is unremarkable. Congress even said that in the statutory language expressing its findings and policy. *See* 25 U.S.C. §§ 2701(3), 2702(3). Read in context, the Supreme Court in *Bay Mills* merely explains why IGRA's limited abrogation of immunity in 25 U.S.C. § 2710(d)(7)(A)(ii), which is expressly limited to Class III gaming on "Indian lands," could not be construed to authorize a suit against the Tribe for gaming that was not on "Indian lands." *Bay Mills*, 572 U.S. at 794-96. Plaintiffs do not assert otherwise, and the State in *Bay Mills* did not bring claims against the tribal officials for ongoing violations of IGRA. What is important here is that the Supreme Court in *Bay Mills* went on to specifically state that a plaintiff could, however, bring an action under *Ex parte Young* against tribal officials for unlawful gaming beyond Indian lands. *Id.* at 796. That is the basis of Count VI, and the Supreme Court expressly endorsed it in *Bay Mills*.

To be sure, Plaintiffs' reliance on *Ex parte Young* for an IGRA action does not present a case of first impression. After *Seminole Tribe I*, courts across the country, including the Eleventh Circuit, have repeatedly recognized that IGRA does not categorically displace *Ex parte Young* outside the compact-negotiation context addressed in that case. *See PCI Gaming Auth*., 801 F.3d

at 1288-90 (holding *Seminole Tribe I* did not decide immunity for other IGRA-based *Ex parte Young* claims lacking the same detailed remedial scheme); *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311-14 (D. Ariz. 2015) (holding IGRA did not provide a comprehensive enforcement mechanism for the § 2710(d)(1) claim at issue and did not reveal congressional intent to foreclose equitable relief); *Friends of Amador Cnty. v. Salazar*, No. CIV. 2:10-348 WBS KJM, 2010 WL 4069473, at *3-4 (E.D. Cal. Oct. 18, 2010) (holding that the governor could be sued under *Ex parte Young* for an alleged ongoing IGRA violation and that *Seminole Tribe I* did not apply because IGRA lacked a comparably detailed remedial scheme for that claim); *Pueblo of Pojoaque v. New Mexico*, No. 1:15-cv-0625 RB/GBW, 2015 WL 10818855, at *6 (D.N.M. Oct. 7, 2015) (recognizing that *Seminole Tribe I* addressed only the good-faith compact-negotiation claim and collecting cases allowing *Ex parte Young* suits for other IGRA claims).

Those decisions reflect the same point. *Seminole Tribe I* did not announce a blanket rule for all IGRA-related claims, as the Poarch Officials argue. It held only that *Ex parte Young* was unavailable for the specific good-faith compact-negotiation claim governed by 25 U.S.C. § 2710(d)(7) because Congress included a detailed and carefully articulated remedial scheme for violations of that particular provision. Where IGRA does not provide a detailed remedial structure for the claim asserted, courts have continued to recognize *Ex parte Young* as an available equitable vehicle for prospective relief against officials committing ongoing violations of federal law. Count VI should be permitted to proceed.

Third, and finally, because Count VI is only applicable "if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch or that continuing to hold the land in trust is an ongoing violation of the IRA," (Doc. 261 at 71, ¶ 315), if this claim moves forward, this Count will not be subject to analysis under *Coeur d'Alene* because Poarch will not have any "special sovereignty interests" in fee simple land that is not in

trust—a point conceded at oral arguments.[35] Without any "special sovereignty interests" at issue, Poarch Officials are unable to meet the second and third factors espoused in the Eleventh Circuit's *Coeur d'Alene* analysis. (Doc. 234 at 20).

Sovereign immunity does not warrant dismissal of Count VI.

2. If Hickory Ground does not constitute "Indian lands" under IGRA, then the gaming alleged in Count VI is unlawful under IGRA.

The Poarch Officials also argue that Count VI defeats itself because the claim becomes operative only if Hickory Ground is not "Indian lands," and IGRA applies only on Indian lands. (Doc. 270 at 87-88). That is Poarch Officials' reading of *Bay Mills*, but *Bay Mills* addressed only whether IGRA's limited abrogation in 25 U.S.C. § 2710(d)(7)(A)(ii) authorized a suit against the Tribe itself (not tribal officials) for gaming beyond Indian lands. *Bay Mills*, 572 U.S. at 794-96. The Poarch Officials' argument thus conflates the unavailability of one particular statutory cause of action with the scope of IGRA as a whole.

The Poarch Officials currently invoke IGRA as the source of lawful authority for their gaming at Hickory Ground. They cannot rely on IGRA for that authority while also arguing that, once Plaintiffs challenge whether Hickory Ground satisfies IGRA's "Indian lands" requirement, IGRA drops out of the case entirely. That interpretation would lead to an absurd result allowing a tribe to claim the benefits of IGRA *and* be insulated from judicial review concerning whether IGRA's requirements for Indian gaming have been satisfied. The Eighth Circuit rejected that kind of gamesmanship, explaining that a tribe's "statutory grant of a right to conduct gaming is conditional," and "any tribe which elects to reap the benefits of gaming authority created by the IGRA must comply with the IGRA's requirements." *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 762 (8th Cir. 2003).

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[35] *See* September 25, 2024 Oral Arg. Tr. 34:39-35:10 (counsel for Poarch answering: "I would agree with your point, your honor, if they succeeded on the IRA claim, the special sovereignty interest would not apply. I would agree with that."); *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 891 (11th Cir. 2024), available at *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 891 (11th Cir. 2024) https://www.courtlistener.com/audio/94224/muscogee-creek-nation-v-buford/ (last visited Apr. 29, 2026).

For all of those reasons, Count VI should not be dismissed.

G. Plaintiffs have stated a viable claim for violations of Alabama gaming laws (Count VII).

1. Sovereign immunity does not require dismissal of Count VII.

The Poarch Officials argue Count VII fails because Plaintiffs supposedly have no right of action to enforce Alabama's gaming laws. (Doc. 270 at 88-89). Plaintiffs, however, are not attempting to criminally prosecute the Poarch Officials. Nor are Plaintiffs seeking to recover monetary damages or other monetary remedies as a result of the Officials' violations of Alabama criminal law. Instead, Count VII seeks only declaratory and injunctive relief against ongoing unlawful conduct. (Doc. 261 at 86-87, ¶¶ 392-99); (*id.* at 132, ¶ (g)). While Alabama law supplies the substantive rules violated, Count VII is brought pursuant to the equitable vehicle for prospective relief recognized in *Ex parte Young.*

Thus as discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress (or here, Alabama's legislature) has displaced the availability of *Ex parte Young*'s traditional equitable cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, Count VII squarely fits the "straightforward inquiry" that asks only whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon* at 645. Plaintiffs name tribal officials as defendants (Doc. 261 at 86, ¶ 392); allege a violation of state law (*id.* at 87 ¶ 394); allege that this violation of state law is ongoing (*id.* ¶¶ 396-97); and request prospective relief (*id.* ¶ 399); (*id.* at 132, ¶ (g)). Additionally, because Count VII is only applicable "if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch or that continuing to hold the land in trust is an ongoing violation of the IRA," (*id.* at 71, ¶ 315), Count VII will be challenging conduct on fee simple land, which will satisfy the requirement that the challenged conduct occur

outside of Indian lands. *PCI Gaming*, 801 F.3d at 1290. That is a traditional equitable action under *Ex parte Young*, and the Eleventh Circuit has already recognized that such suits may proceed against tribal officials for ongoing violations of state law when the challenged conduct occurs outside Indian lands. (Doc. 234 at 13) (quoting PCI Gaming, 801 F.3d at 1290).[36]

Second, the next relevant inquiry is whether Alabama has created a detailed remedial scheme that displaces *Ex parte Young*. Nothing in Alabama's gaming laws displaces the traditional equitable principle recognized in *Ex parte Young*. In fact, Alabama law confirms that criminal prohibitions do not eliminate otherwise available civil remedies. For example, Alabama law states that Title 13A does not "bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in the proceeding constitutes an offense defined in this title." Ala. Code § 13A-1-8(a)(2). Alabama law also provides courts equitable jurisdiction over "all cases founded on a gambling consideration, so far as to sustain a petition for discovery and grant relief." Ala. Code § 12-11-31(2); *see also Kuhl v. M. Gally Universal Press Co.*, 26 So. 535, 537 (Ala. 1899) (explaining that the policy of the statute is to discourage gambling so courts are "bound to exercise the jurisdiction, and to relieve, in proper cases, without imposing upon the party seeking it the usual condition of doing equity.").

Alabama courts have recognized that the criminal character of conduct does not foreclose equitable relief. *See*, e.g., *Stead v. Fortner*, 99 N.E. 680, 683 (Ill. 1912) (stating that the "court has never regarded a criminal prosecution . . . as a complete and adequate remedy for a wrong inflicted upon the public."); *State v. Ellis*, 78 So. 71, 72 (Ala. 1918); *Try-Me Bottling Co. v. State*, 178 So. 231, 233 (Ala. 1938). For example, Alabama courts have recognized civil equitable abatement of unlawful gambling as a public nuisance, notwithstanding the criminal character of the conduct. *See State v. Epic Tech, LLC*, 323 So. 3d 572, 580-88 (Ala. 2020). Plaintiffs did not allege this

[36] The Eleventh Circuit's determination that plaintiffs may bring *Ex parte Young* claims against officials for ongoing violations of state law is supported by other sister circuits as well. *Gingras v. Think Finance*, 922 F.3d 112 (2d Cir. 2019); *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021).

claim arises under the public nuisance statutes, but the point is that Alabama statutes and cases show that criminal laws do not displace civil actions, such as the traditional equitable action Plaintiffs are bringing under *Ex parte Young*.

Alabama courts have made clear that gambling in any form is illegal and has recognized the broad scope of remedies available, even if not stated expressly. For instance, in *Johnson v. State*, 3 So. 790 (Ala. 1888), the Alabama Supreme Court recognized "the policy of the constitution and laws of Alabama [prohibit] the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes… ," that "[n]o state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes of chance than Alabama," and that the "voice of the legislature has been loud and earnest in its condemnation of these immoral practices, now deemed so enervating to the public morals." *Id*. at 791. That was true in the nineteenth century, and it still rings true today. *See Epic Tech, LLC*, 323 So. 3d at 582; *Try-Me Bottling Co.*, 178 So. at 234-35 ("In this State, therefore, the public policy is emphatically declared against lotteries or any scheme in the nature of a lottery, both by Constitution and by statutes").

The cases the Poarch Officials cite do not require a different result. (*See* Doc. 270 at 88-89). *Shaw*, *Sears*, and *Bass Angler* rejected attempts by private plaintiffs to obtain criminal penalties, order criminal enforcement, or request monetary damages predicated on criminal statutes. *See Shaw v. Scerbo*, No. 2:22-cv-00105-JES-NPM, 2022 WL 888921, at *4 (M.D. Fla. Mar. 25, 2022); *Sears v. McCrory*, 43 So. 3d 1211, 1217 n.5 (Ala. 2009); *Bass Angler Sportsman Soc'y v. U.S. Steel Corp.*, 324 F. Supp. 412, 415-16 (S.D. Ala. 1971). Those cases do not control here because plaintiffs do not seek criminal penalties or a criminal prosecution. In contrast, Plaintiffs seek declaratory and injunctive relief to halt ongoing conduct that, if Count I succeeds, violates Alabama law and harms Plaintiffs.

The Poarch Officials also cite *State v. Epic Tech, LLC*, (Doc. 270 at 89), but *Epic Tech* does not support dismissal of Plaintiffs' claim. 323 So. 3d 572. In *Epic Tech*, the Alabama Supreme Court held that the alleged operation of illegal slot machines and gambling devices, though

criminal, did not deprive the circuit court of jurisdiction over claims for declaratory and injunctive relief. *Id.* at 580-88. The *Epic Tech* Court further rejected any reading of *Wilkinson v. State ex. rel. Morgan*, 396 So. 2d 86 (Ala. 1981), as establishing a categorical bar to injunctive relief whenever the challenged conduct also constitutes a crime. *Id*. at 584.

At the pleading stage, Plaintiffs' allegations support a cognizable basis for equitable relief under Alabama law if the Court determines Hickory Ground can no longer be held in trust and Alabama law therefore governs the challenged gaming. At this stage, that is sufficient under the traditional equitable action recognized in *Ex parte Young*. The Poarch Officials arguments and authorities do not support an alternative result.

Finally, the Poarch Officials have not made any argument that *Coeur d'Alene* requires dismissal of Count VII. (*See* Doc. 270 at 88-89). To be sure, Count VII will not be subject to analysis under *Coeur d'Alene* because Poarch will not have any "special sovereignty interests" in fee simple land—a point conceded at oral arguments.[37] As a result, without any "special sovereignty interests" in the Hickory Ground Site, the Poarch Officials cannot satisfy the second and third factors articulated by the Eleventh Circuit in the Court's *Coeur d'Alene* analysis. (Doc. 234 at 20).

Sovereign immunity does not warrant dismissal of Count VII.

2. Plaintiffs state a viable claim for ongoing violations of Alabama's gaming laws.

If Plaintiffs prevail on Count I, the Poarch Officials' continued gaming at Hickory Ground violates Alabama law. Alabama's gambling statutes prohibit knowingly advancing or profiting from unlawful gambling activity otherwise than as a player, Ala. Code § 13A-12-22, conspiring to do so, *id.* § 13A-12-23, and knowingly manufacturing, selling, transporting, placing, possessing, or negotiating transactions affecting the ownership, custody, or use of a slot machine or other

[37] *See* September 25, 2024 Oral Arg. Tr. 34:39-35:10 (counsel for Poarch answering: "I would agree with your point, your honor, if they succeeded on the IRA claim, the special sovereignty interest would not apply. I would agree with that."); *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 891 (11th Cir. 2024), available at *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 891 (11th Cir. 2024) https://www.courtlistener.com/audio/94224/muscogee-creek-nation-v-buford/ (last visited Apr. 29, 2026).

gambling device intended for use in unlawful gambling activity. *Id.* § 13A-12-27. These statutory prohibitions are among those that implement the constitutional prohibition embodied in Section 65, which the Alabama Supreme Court has described as the constitutional bar to lotteries, slot machines, and other forms of gambling in Alabama. *See, e.g.,Epic Tech,* 323 So. 3d at 581-82.

The Poarch Officials have provided no argument or reason that warrants dismissal of Count VII.

H. Plaintiffs have stated a viable claim for unjust enrichment under federal common law against the Poarch Officials (Count VIII).

1. Plaintiffs' unjust enrichment claim satisfies *Ex parte Young*.

The Poarch Officials do not assert that Plaintiffs are unable to sue the Officials under *Ex parte Young* for Count VIII; nor have they made any argument that *Coeur d'Alene* requires dismissal of Count VIII. (*See* Doc. 270 at 71-78, 89-90). However, given that the Poarch Officials previously told this Court, and the Eleventh Circuit, that all of Plaintiffs' claims against the Officials must be dismissed under *Coeur d'Alene* (Doc. 202 at 26-28), and because the Eleventh Circuit has instructed the parties to analyze the Poarch Officials' sovereign immunity on a claim-by-claim and defendant-by-defendant basis (Doc. 234 at 11), Plaintiffs offer the following for this Court's consideration.

First, the Eleventh Circuit stated that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (*Id.*). With respect to Count VIII, Plaintiffs: name Tribal Officials as defendants (Doc. 261 at 88, ¶402); allege a violation of federal law, namely unjust enrichment under federal common law (*id.* at 85, ¶406); allege that this violation of federal law is ongoing (*id.* ¶407) (incorporating *id.* at 71-77, ¶¶320-333) (including that the "Poarch Officials continue to be unjustly enriched … because instead of providing permanent protection to the Site as promised, the Poarch Officials are operating a casino resort that is generating hundreds of millions of dollars in gaming and resort revenues while human remains, cultural items, and associated funerary objects remain displaced from their intended resting places."); and request prospective, non-

monetary relief (*id.* at 132, ¶(h)) ("...enter an order in the nature of mandamus requiring the Poarch Officials to restore the Hickory Ground Site, to the greatest extent possible, to its pre-excavation and pre-construction condition, and further, issue an order enjoining the Poarch Officials from engaging in any activities that violate Poarch's original promise to protect the Hickory Ground Site from excavation or destruction").

Second, the Poarch Officials have not pointed to a detailed remedial scheme to indicate that Congress intends to displace the availability of an equitable remedy under *Ex parte Young* for purposes of Count VIII, and Plaintiffs are aware of none.

Third, for all the reasons, and alternative reasons, articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count VIII. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for unjust enrichment is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"infused with a public trust' like the submerged lands in *Coeur d'Alene*." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count VIII satisfies *Ex parte Young* and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs have stated a claim for unjust enrichment under federal common law.

Because the Poarch Officials and Individual Defendants advance very similar unjust enrichment arguments under Alabama law in their motions to dismiss Plaintiffs' unjust enrichment claims, (*compare* Doc. 273 at 17-26); (*with* Doc. 270 at 71-75), and because Alabama law and federal common law require nearly the same elements to plead unjust enrichment, Plaintiffs

address both Poarch Officials' and Individual Defendants' arguments in Section VI.C of their Response to Individual Defendants' Motion to Dismiss, incorporated herein by reference, for the sake of convenience and efficiency. Pls.' Resp. to Individual Defendants Mot. to Dismiss, Section VI.C, filed Apr. 30, 2026.

3. Alabama's Statute of Frauds does not apply to Count VIII.

While the basic elements for unjust enrichment do not differ dramatically between Alabama and federal common law, the affirmative defenses available under both do not perfectly align. Alabama's Statute of Frauds is a state-law doctrine, adopted through a state statute; it is not available to a party defending against a claim for unjust enrichment brought pursuant to federal common law. *See* Ala. Code. § 8-9-2. While federal courts may apply a state's statute of frauds to state-law claims, Count VIII is not a state law claim. Where a claim arises under federal law, federal law governs the available affirmative defenses. *See Kossick v. United Fruit Co*., 365 U.S. 731, 742 (1961) (holding that the validity of a shipowner's oral promise to a seaman is governed by federal maritime law rather than New York's statute of frauds); *Agent-cee v. Nelson*, No. 1:23-cv-04380-VMC, 2024 WL 4868283, at *2 (N.D. Ga. Sep. 12, 2024) (holding that "federal copyright law, not Georgia simple contract law or Georgia's Uniform Commercial Code, applies to [p]laintiff's claims for breach of contract").

Moreover, both the Northern and Southern District Courts in Alabama have been reluctant to dismiss unjust enrichment claims based on a statute of frauds defense at the pleading stage. *See ANZ Advanced Techs., LLC, v. Bush Hog, LLC*, No. 09–00228–KD–N, 2009 WL 3415650, at *4 n.4 (S.D. Ala. Oct. 20, 2009) (concluding that the defendants' statute of frauds "defense [did] not render [p]laintiff's claims implausible nor authorize [the court] to ignore the material issues of face which have yet to be addressed with any discovery by either side"); *Abernathy v. Church of God*, No. 4:11-CV-2761-VEH, 2011 WL 13135285, at *2 (N.D. Ala. Nov. 28, 2011) ("The court finds particularly problematic [the defendant's] position that the court should find in its favor on its statute of frauds defense at the pleadings stage . . .").

Even if Alabama's Statute of Frauds applied (it does not), dismissal on that basis would be premature at this stage in the proceeding.[38]

I. Plaintiffs have stated a viable claim for promissory estoppel under federal common law against the Poarch Officials (Count X).

1. Sovereign immunity does not warrant dismissal of Count X.

The Poarch Officials do not assert that Plaintiffs are unable to sue the Officials under *Ex parte Young* for Count X; nor have they made any argument that *Coeur d'Alene* requires dismissal of Count X. (*See* Doc. 270 at 78-87, 90). However, given that the Poarch Officials previously told this Court, and the Eleventh Circuit, that all of Plaintiffs' claims against the Officials must be dismissed under *Coeur d'Alene* (Doc. 202 at 26-28), and because the Eleventh Circuit has instructed the parties to analyze the Poarch Officials' sovereign immunity on a claim-by-claim and defendant-by-defendant basis (Doc. 234 at 11), Plaintiffs offer the following for this Court's consideration.

First, the Eleventh Circuit stated that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 13). With respect to Count X, Plaintiffs: name Poarch Officials as defendants (Doc. 261 at 89, ¶ 409); allege a violation of federal law related to the common law doctrine of promissory estoppel (*id.* ¶ 411);[39] allege that this violation of federal law is ongoing (*id.* ¶ 410) (incorporating *id.* at 77-80, ¶¶ 343-356) (including that the "Poarch Officials continued to breach their promises again in 2023, when they commenced new construction and expansion at

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[38] The Poarch Officials, unlike the Individual Defendants, do not argue that Plaintiffs' unjust enrichment claims under federal common law and Alabama common law must relate back under Federal Rules of Civil Procedure 15(c) or Alabama Rules of Civil Procedure 15(c). To the extent the Poarch Officials attempt to argue that Plaintiffs' unjust enrichment claims under federal common law and Alabama common law must relate back in their reply brief, Plaintiffs address that argument in Section VI.F. of their Response to Individual Defendants' Motion to Dismiss, incorporated herein by reference, for the sake of convenience and efficiency. Pls.' Resp. to Individual Defendants' Mot. to Dismiss, Section VI.F, filed Apr. 30, 2026.

[39] The mention of "unjust enrichment" in Paragraph 411 of the TASC is a typo, (*see* Doc. 261 at 89, ¶ 411), as that Paragraph reincorporates Plaintiffs' allegations from Count IV, a claim for promissory estoppel under Alabama law, and references Paragraphs 343-356. That Paragraph should say "promissory estoppel" and not "unjust enrichment."

the Hickory Ground Site without consulting Plaintiffs or obtaining their consent."); and request prospective relief (*id.* at 133, ¶ (j)) (requesting this Court to "enter an order in the nature of mandamus requiring the Poarch Officials to restore the Hickory Ground Site, to the greatest extent possible, to its pre-excavation and pre-construction condition, and further, issue an order enjoining the Poarch Officials from engaging in any activities that violate Poarch's original promise to protect the Hickory Ground Site from excavation or destruction.").

Second, the Poarch Officials point to no statutes wherein Congress has created a detailed remedial scheme that displaces *Ex parte Young* as an equitable remedy for purposes of Count X, and Plaintiffs are aware of none.

Third, for all the reasons, and alternative reasons, articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count X. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for promissory estoppel is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"infused with a public trust' like the submerged lands in *Coeur d'Alene*." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count X satisfies *Ex parte Young* and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs have stated a claim for promissory estoppel under federal common law.

The TASC includes a count of promissory estoppel under Alabama common law, Count VIII, in the event the Court rules in Plaintiffs' favor on Count I; The TASC also includes a count of promissory estoppel under federal common law, Count X, in the event the Court does not rule

in Plaintiffs' favor on Count I. (*See* Doc. 261 at 77-80, 89, ¶¶ 343-56, 408-11). As the controlling law and relevant facts are substantially the same regardless of which claim is operative, and as the Poarch Officials have treated them as a single claim for purposes of their brief, (Doc. 270 at 78-87, 90), Plaintiffs herein incorporate their arguments made in their Response to the Poarch Officials' Motion to Dismiss Count IV. *See supra* Sections VI.E.2-4.

J. Plaintiffs have stated a viable NAGPRA claim against the Poarch Officials (Count XII).

1. Sovereign immunity does not support dismissal of Count XII.

The Poarch Officials do not assert that Plaintiffs are unable to sue the Officials under *Ex parte Young* for Count XII; nor have they made any argument that *Coeur d'Alene* requires dismissal of Count XII. (*See* Doc. 270 at 104-06). However, given that the Poarch Officials previously told this Court, and the Eleventh Circuit, that all of Plaintiffs' claims against the Officials must be dismissed under *Coeur d'Alene* (Doc. 202 at 26-28), and because the Eleventh Circuit has instructed the parties to analyze the Poarch Officials' sovereign immunity on a claim-by-claim and defendant-by-defendant basis (Doc. 234 at 11), Plaintiffs offer the following for this Court's consideration.

First, the Eleventh Circuit stated that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 11). With respect to Count XII, Plaintiffs: name Poarch Officials as defendants (Doc. 261 at 94, ¶433); allege a violation of federal law in the form of violations of NAGPRA (*id.* at 95, ¶440); allege that this violation of federal law is ongoing (*id.* ¶441); and request prospective relief (*id.* at 134, ¶ (l) (e.g., "[i]ssue an order requiring the Poarch Officials to oversee the creation of a Phase III inventory report and send the report to Plaintiffs").

Second, the Poarch Officials point to no provision in NAGPRA wherein the Officials contend Congress intends to displace the availability of an equitable remedy under *Ex parte Young* for the violations of NAGPRA alleged in Count XII.

Third, for all the reasons, and alternative reasons, articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count XII. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of NAGPRA is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"in-fused with a public trust' like the submerged lands in *Coeur d'Alene*." (*Id.*) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count XII satisfies *Ex parte Young* and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs have stated a NAGPRA claim against the Poarch Officials.

The Poarch Officials' primary argument against Count XII is that Plaintiffs cannot be "lineal descendants" under NAGPRA because Plaintiffs have not identified a single "known" individual out of the fifty-seven people the Poarch Officials excavated and continue to possess. (Doc. 270 at 105). For the reasons described in greater detail below, this argument is fundamentally flawed for two reasons. First, the TASC plausibly alleges numerous facts supporting the conclusion that the relatives the Poarch Officials exhumed are "known" to Mekko Thompson and Hickory Ground Tribal Town through Muscogee traditional kinship systems. Second, even if the Poarch Officials dispute whether Plaintiffs have identified the excavated individuals with sufficient specificity, that is a factual issue not appropriately resolved on a motion to dismiss before any discovery.

NAGPRA is human rights legislation passed after "decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead

relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property back to Native owners." Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992). "In interpreting NAGPRA, it is critical to remember that it must be liberally interpreted as remedial legislation to benefit the class for whom it was enacted." *Id*. at 76. NAGPRA was intended to prevent situations like this one, where Plaintiffs' ancestors, their funerary objects, and other religious and cultural items were wrongfully disinterred without appropriate notice to or consultation with the Plaintiffs and continue to be wrongfully kept from Plaintiffs' custody. In a shocking and grimly ironic twist, one of the alleged wrongdoers in this case is a federally recognized Indian Tribe. That fact, however, does not render NAGPRA inapplicable.

Plaintiffs have provided detailed allegations showing that the Poarch Officials violated and continue to violate NAGPRA. The Poarch Officials continue to directly violate NAGPRA by refusing to consult with Plaintiffs and refusing to return or by obstructing the return of human remains and other cultural items excavated from the Hickory Ground Site to Plaintiffs. This Court has broad equitable powers to order appropriate relief with respect to Plaintiffs' NAGPRA claim and the relief that Plaintiffs seek here is within the scope of that equitable authority. The Poarch Officials' motion to dismiss Plaintiffs' NAGPRA claim in Count XII should be denied.

3. NAGPRA's basic requirements govern the manner in which the Poarch Officials excavated Plaintiffs' relatives, as well as how they continue to possess them.

Although Count XII challenges only ongoing violations of NAGPRA, a basic understanding of the entire NAGPRA's statutory and regulatory framework helps explain why the Poarch Officials' ongoing possession of, and refusal to return, Plaintiffs' relatives plausibly states an ongoing violation of NAGPRA. (Doc. 261 at 95, ¶ 440(b)). That framework also confirms that lineal descent may be established through traditional Native kinship systems (such as clan, Tribal Town affiliation within a tribal nation, ceremonial role, associated funerary objects, etc.), rather than only through mainstream forms of legal documentation.

NAGPRA affords protection to Native American "cultural items," which include human remains, associated funerary objects, unassociated funerary objects, sacred objects, and other objects of cultural patrimony.[40] 25 U.S.C. § 3001(3). NAGPRA applies to both intentional excavation and removal of cultural items and the inadvertent discovery of cultural items. For intentional excavations, Section 3002 provides:

> The intentional removal from or excavation of Native American cultural items from Federal or tribal lands…is permitted only if—
>
> (2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate [Indian tribe];
>
> (3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and
>
> (4) proof of consultation or consent under paragraph (2) is shown.

In their motion to dismiss, the Poarch Officials offer two reasons Plaintiffs' NAGPRA claim in Count XII should be dismissed. First, the Poarch Officials aver that they are not currently failing to engage in consultation because Paragraph 221 of the TASC states that the Poarch Officials engaged in "six years of negotiations" prior to the Poarch Officials' unilateral decision to "proceed[] with reinterment in April 2012." (Doc. 270 at 104). Next, the Poarch Officials argue that Plaintiffs are not "lineal descendants" because they have not identified a "known" individual excavated by Poarch Officials, and that "as the tribal owner of the tribal lands from which the remains and artifacts in question were excavated," their claim to Plaintiffs' relatives is superior to Plaintiffs. (*Id.* at 105). Neither of these arguments support dismissal of Count XII at this time.

First, as described in greater detail above, the Poarch Officials' mischaracterization of Paragraph 221 of the TASC (and other statements regarding failed attempts at communication over the years) does not support the Poarch Officials' assertion that they engaged in what NAGPRA would classify as "consultation." Stmt. Disp. Facts ¶¶ 4-5. The TASC alleges that the Poarch Officials continue to violate NAGPRA by "refusing to consult with Plaintiffs regarding their

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

NAGPRA and historic preservation duties with regard to the Hickory Ground Site, despite the fact that the NPS Agreement requires them to do so on an ongoing basis." (Doc. 261 at 95, ¶ 440). The question, therefore, is whether the Poarch Officials are meeting the consultation requirement (they are not).

NAGPRA's consultation requirements are extensive and are not limited to the act of excavation alone. Because the Poarch Officials continue to possess the remains of Native Americans that they excavated, NAGPRA requires the Poarch Officials to consult with Plaintiffs to develop a plan of action that will cover topics such as how the cultural items will be treated, the planned disposition of the cultural items and more. 43 C.F.R. § 10.5(b)-(e). The TASC plausibly alleges that the Poarch Officials are not currently engaged in the consultation that NAGPRA contemplates. (Doc. 261 at 95, ¶ 440). Although the Poarch Officials argue they engaged in consultation in the past, they offer no reason to conclude that the TASC's allegations regarding their present failure to consult are not plausible or cannot be accepted as true under Rule 12(b)(6). Stmt. Disp. Facts ¶¶ 3-4.

The NPS Agreement's mandate that the Poarch Officials consult with the Muscogee (Creek) Nation further underscores why the Officials' ongoing failure to engage in consultation constitutes an ongoing harm appropriate for prospective relief under *Ex parte Young*. By signing the NPS Agreement, the Poarch Officials agreed that their THPO would "provide for … consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," and "will periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities." (Doc. 261 at 30, ¶ 126(b)) (quoting NPS Agreement § 7, Doc. 261-1 at 251).

Regardless of whether Plaintiffs are legally entitled to "third-party beneficiary" status as it relates to the NPS Agreement, (Doc. 270 at 105), federal law requires the Poarch Officials to engage in consultation with Plaintiffs concerning their ongoing activities with regard to (1) the Native human remains the Poarch Officials intentionally excavated and continue to possess, 43 C.F.R. § 10.5(b)-(e) (2013), and (2) how their plan under the NPS Agreement affects the

cultural and religious interests Plaintiffs maintain in their traditional lands and cultural resources that are now located within the borders of Poarch's Reservation. The Poarch Officials cannot avoid that ongoing obligation by recasting it as a dispute about contract enforcement.

Second, the Poarch Officials are wrong to state that Count XII must be dismissed because the individuals the Poarch Officials excavated are not "known." (Doc. 270 at 105). The TASC contains numerous allegations demonstrating that the relatives Poarch Officials excavated are "known" to Mekko Thompson through the Muscogee traditional kinship systems. Stmt. Disp. Facts ¶ 7. Poarch Officials have even recognized that the present-day living descendants of those originally living at Hickory Ground are now the members of Hickory Ground Tribal Town in Oklahoma (Doc. 261-1 at Ex. A, 5). The Poarch Officials and Auburn have documentation that identifies the individuals they excavated as members of Hickory Ground Tribal Town, and if Poarch Officials and Auburn shared that information, Plaintiffs could more specifically identify their relation to the relatives the Officials and Auburn excavated. These ancestors were known by their burial location prior to excavation, and any suggestion that they are unknown now can only be due to deliberate noncompliance with NAGPRA and willful concealment of records.

Indeed, there are many ways, culturally and through kinship systems, that Plaintiffs will be able to say who the excavated individuals are with more specificity, once the parties have engaged in discovery and Poarch Officials are forced to produce the information they have been withholding concerning who they excavated and from where. For instance, "[i]n the Muscogee (Creek) culture and religion, there are specific burial places for those who held particular positions in Tribal Town traditional governance, and specific governance structures over Tribal Towns, including burials within those Tribal Towns." (Doc. 261 at 19, ¶ 89). By way of example, "Hickory Ground Mekkvlke are buried under the Mekkvlke arbor in the ceremonial grounds." (*Id.* ¶ 90). Once this information is shared with Mekko Thompson, he will be able to say more about how each of the exhumed relatives are "known" to Hickory Ground Tribal Town today. Finally, the Poarch Officials removed thousands of funerary objects, each of which was buried with a specific individual. (Doc. 261 at 4, ¶ 7). Knowing which funerary objects were buried with which

individual will reveal a lot about that person's gender, clan, role in their Tribal Town, and more. Of course, this is precisely the type of information a Phase III inventory report includes (which the Poarch Officials continue to refuse to provide). (*Id.* at 36, ¶¶ 154-156). The Poarch Officials vociferously dispute these allegations, but they are true, and, at a minimum, plausible under Rule 12(b)(6) standards.

Moreover, the Poarch Officials' argument is predicated on a single word that Congress did *not* include in NAGPRA: the word "known." (Doc. 270 at 105) (contending that Plaintiffs cannot be "lineal descendants … because the remains and artifacts at issue do not belong to any '*known* Native American individual."') (emphasis added). The word "known" is only found the definition of "lineal descendant" found in NAGPRA's implementing regulations. 43 C.F.R. § 10.2(b)(1) (2013). But Poarch Officials' reading ignores the full text of the regulation, which expressly recognizes ancestry traced "by means of the traditional system of the appropriate [Indian tribe]." *Id*.

In this case, "the traditional kinship system" relevant to the Muscogee individuals that Poarch Officials excavated from Hickory Ground is the same as the "traditional kinship system" that governs Hickory Ground today. The TASC contains numerous allegations plausibly stating that Mekko Thompson is the "representative of all lineal descendants of the ancestors buried at Hickory Ground under the Muscogee (Creek) *traditional kinship* structure." (Doc. 261 at 44, ¶ 205) (emphasis added). First, every living member of the historic Hickory Ground Tribal Town was forcibly removed from Hickory Ground on the Trail of Tears in the 1830s. *Id.* at 8, ¶ 31); (*id.* at 19, ¶ 86); Stmt. Disp. Facts ¶ 3. Hickory Ground Tribal Town, however, did not cease to exist. Instead, the survivors of the Trail of Tears resettled in Hickory Ground Tribal Town in *Oklahoma*. (Doc. 261 at 3, ¶ 5). Because membership in Hickory Ground is matrilineal, everyone who is a present-day member of Hickory Ground is a direct descendant of the Hickory Ground Tribal Town from before the Trail of Tears, through their mother's mother's mother's mother, etc. (*Id.* at 7, ¶ 24). According to the Plaintiffs' traditional kinship system, Plaintiffs Mekko Thompson and

Hickory Ground Tribal Town are the lineal descendants of the ancestors buried at the Hickory Ground Site.

By making "traditional kinship system" the primary standard for determining lineal descendants, the Department of the Interior intended that *tribal kinship systems*—and not American legal systems—would determine who qualifies as a lineal descendant. *See* 60 Fed. Reg. 62134, 62136 (Dec. 4, 1995) ("Reference to traditional kinship systems is designed to accommodate the different systems that individual Indian tribes use to reckon kinship.").[41] And to the extent that the Poarch Officials' argument is that an individual cannot be a "lineal descendant" for purposes of NAGPRA unless they provide documentation regarding the "known" legal identity of the person who has been excavated—regardless of the lineal descendant's evidence of traditional Native kinship systems—such an interpretation would contradict the plain language of the statute, as well as Congress' primary purpose in passing NAGPRA. *See, e.g.,* S. Rep. No. 101-473, at 1 (1990) (Congress intended for NAGPRA to effectuate "permanent disposition in accordance with *tribal customs* and *traditions*," not legal formalities defined by mainstream society) (emphasis added); *see id.* at 2 (declaring that "the process for determining the appropriate disposition and treatment of Native American human remains . . . should be governed by respect for Native human rights.").

[41] Even if Plaintiffs Mekko Thompson and Hickory Ground Tribal Town were not lineal descendants (which they are), the Muscogee (Creek) Nation would be entitled to ownership and control of the cultural items as the Tribe which has the closest cultural affiliation with the cultural items. 25 U.S.C. § 3002(a)(2)(B). Although the Poarch Officials might normally occupy a higher position of priority for ownership and control as the current tribal landowner with respect to cultural items discovered on its reservation *only*, *id*. § 3002(a)(2)(A), the Muscogee (Creek) Nation should take precedence in this case, as the Tribe "having the strongest cultural relationship with such remains or objects" (as well as, next in priority, the Indian tribe who aboriginally occupied the lands). 25 C.F.R. § 262.8(a)(2); *see also* Stmt. Disp. Facts ¶¶ 1-2. Moreover, the drafters of NAGPRA did not intend that the interests of Tribes with the closest cultural affiliation would be disregarded as they have been here. *See* S. Rep. No. 101-473, at 6 ("The Committee also recognizes that there may be circumstances where human remains or objects found on one Indian tribe's lands may be culturally affiliated with a different Indian tribe. In these situations . . . the Committee intends that a determination of the right of possession shall be based on the best available evidence given the totality of the circumstances.").

If the Court determines that Plaintiffs must produce some sort of legal documentation regarding the excavated individuals' death or birth certificates, legally listed names, etc., then Plaintiffs should be given the opportunity to engage in discovery prior to being required to do so. Such an inquiry is inherently factual, and given the Poarch Officials' refusal to produce any documentation, inventory, or other report identifying *who* they excavated and from *where* (and with *which* funerary object), it would be unfair and prejudicial to Plaintiffs' rights to require them to provide such evidence or documentation prior to the commencement of any discovery. At minimum, that issue should be resolved after the development of a factual record, not on a motion to dismiss.

For the aforementioned reasons, Count XII should not be dismissed, and Plaintiffs' NAGPRA claim should be permitted to proceed.

K. Plaintiffs have stated a viable NAGPRA claim against the Poarch Officials acting under delegated federal authority (Count XI).

1. Count XI is brought against the Poarch Officials only to the extent their actions, past or present, are deemed to have been taken pursuant to delegated federal authority, and therefore is not subject to dismissal as a result of the Poarch Officials' sovereign immunity.

Count XI proceeds against the Poarch Officials only to the extent they exercised, or continue to exercise, specifically delegated federal authority under federal law and the NPS Agreement. (See Doc. 261 at 89, 99, ¶¶ 414, 460). Plaintiffs do not contend that the Poarch Officials are federal officials for all purposes. Rather, Count XI names them alongside the Federal Defendants only to the extent they are found to have assumed and exercised federal responsibilities formally delegated by NPS under federal law and the NPS Agreement. Count XI is pleaded in this limited manner to identify clearly the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Court's instruction that Plaintiffs plead their claims on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); *see also* (Doc. 234 at 11).

That pleading choice is purposeful. Federal law recognizes that tribal entities and their employees may, in appropriate circumstances, stand in the government's shoes when carrying out

delegated federal functions. *See, e.g., United States v. Orleans*, 425 U.S. 807, 813-14 (1976) (recognizing that a party under contract with the government can become an agency of the United States within the meaning of the Federal Tort Claims Act); *Colbert v. United States*, 785 F.3d 1384, 1389-90 (11th Cir. 2015) (holding that Indian tribes and their employees may be deemed employees of the United States for purposes of the Federal Tort Claims Act when they are carrying out functions authorized in or under a tribal self-determination contract).

The Federal Defendants have argued, and continue to argue, that they cannot be held responsible for NAGPRA violations at Hickory Ground because Poarch, rather than the United States, bears responsibility for NAGPRA compliance there. *See, e.g.*, (Doc. 275 at 27) (claiming the Federal Defendants had no duty to enforce NAGPRA at Hickory Ground because Poarch has "responsibility for [NAGPRA] compliance on [Poarch's] tribal lands, rather than federal agencies"); (*id.* at 28-29) (arguing the Federal Defendants are not responsible for violations of NAGPRA because "the alleged excavation and removals are taking place by the Poarch Band on its own land."). Count XI prevents that shell game. If the Court concludes that the Federal Defendants delegated federal responsibilities bearing on consultation, preservation, treatment, repatriation, or related NAGPRA compliance at Hickory Ground, then the Poarch Officials cannot avoid the Court's review of their conduct taken pursuant to that delegated authority. Count XI reaches them only to that limited extent.

The Poarch Officials cite one authority to support their argument that they could not have been exercising delegated federal authority: the Southern District of Alabama's unpublished decision in *.1 v. Wilcox County, Alabama*. (Doc. 270 at 92) (citing No. 13–0572–WS–B, 2014 WL 1202943, at *3 & n.3 (S.D. Ala. Mar. 21, 2014)). Even if a Magistrate Judge's unpublished Report and Recommendation could be considered controlling precedent, which it cannot, *Martin* is inapplicable. In *Martin*, the Magistrate Judge was not considering anything close to voluntary assumption of federal duties and responsibilities under the NHPA pursuant to 54 U.S.C. § 302704, the provision that governs the Secretary's transfer of federal authority to the Poarch Officials pursuant to the NPS Agreement. *See Martin v. Alabama Historical Comm'n,* No. 13-CV-648-MEF,

2014 WL 28850 at *3 (M.D. Ala. Jan. 2, 2014). Nor did the Magistrate Judge consider whether 36 C.F.R. § 800.2(a)'s reference to "tribal official" includes tribal officials that sign an NPS Agreement, like the Poarch Officials did. *See id*. Plaintiffs are not taking the position that the Poarch Officials are "agency officials" for all purposes under the NHPA (or NAGPRA).

Instead, Plaintiffs' position is that under 54 U.S.C. § 302704 and 36 C.F.R. § 800.2(a), the Poarch Officials' voluntary assumption of historic-preservation and consultation duties renders them accountable to federal lawsuits if and when they abuse their assumption of federal regulatory authority and engage in violations of NAGPRA and their governing NPS Agreement. (Doc. 261 at 92, ¶ 424). The TASC plausibly alleges such delegated authority. It alleges that NPS delegated historic-preservation responsibilities on reservation lands that included a significant portion of Hickory Ground, that Poarch Officials assumed formal responsibility for specified consultation and historic-preservation functions on tribal lands, and that those functions remained subject to federal standards under the NHPA and its implementing regulations, reporting requirements, periodic NPS review, and possible termination for noncompliance. (*Id.* at 30-34, 104-05, 111, ¶¶ 124-27, 139-44, 485-87, 517). ; (Doc. 261-1 at Ex. J, 251-53, §§ 5, 7, 9, 12, 14, 15).[42] The TASC further alleges that the Poarch Officials exercised that delegated authority in ways that violated NAGPRA, including by: "[f]ailing to enforce NAGPRA's safeguards regarding the excavation, removal, and reburial of cultural items and remains" (Doc. 261 at 91, ¶ 422(g)); "[p]ermitting the continued desecration of burial grounds and sacred sites without taking appropriate action to restore or protect the Hickory Ground Site in compliance with NAGPRA" (*id.* at 92, ¶ 422(h)); and by "[f]ailing to create a Phase III inventory or report regarding the cultural items recovered or destroyed at the Hickory Ground Site." (*Id.* ¶ 422(i))).

[42] The same is true for the requested prospective relief (Doc. 261 at 133-134, ¶ (k) (e.g., "Issue an injunction requiring all the Federal Defendants and Poarch Officials to immediately engage in consultation with Plaintiffs regarding restoration of the Hickory Ground Site to its pre-construction condition"). If the Court concludes that the violations of NAGPRA have been (or continue to be) committed by the Poarch Officials acting pursuant to delegated federal authority, then the requested relief will be ordered against them pursuant to their federal, and not tribal, capacities.

2. Sovereign Immunity does not warrant dismissal of Plaintiffs NAGPRA claim against the Poarch Officials acting under delegated federal authority.

Because Count XI is brought only to the extent the Poarch Officials exercised, or continue to exercise, delegated federal authority, the relevant sovereign-immunity question is federal, not tribal. To the extent Count XI seeks prospective relief for ongoing failures to discharge delegated federal duties, sovereign immunity is waived by 5 U.S.C. § 702. To the extent Count XI challenges past acts taken under asserted delegated federal authority, Plaintiffs proceed under the APA. *See* 5 U.S.C. §§ 702, 706; *see also* (Doc. 261 at 14, ¶ 64).

These allegations are sufficient at the pleading stage to plausibly allege that the Poarch Officials acted as federal delegees with respect to the delegated NPS responsibilities concerning the treatment, repatriation, and curation of Native remains and funerary objects excavated at Hickory Ground. Whether the liability of Poarch Officials is imputed to the United States is a question for a later stage of the case. At this pleading stage, Rule 8 permits alternative pleading, regardless of consistency. Fed. R. Civ. P. 8(d)(2)-(3). Thus, the Poarch Officials' argument that Count XI is an improper shotgun pleading because it allegedly asserts claims against both the Federal Defendants and Poarch Officials acting under delegated federal authority provides no basis for dismissal. (Doc. 270 at 90-91). Sovereign immunity does not warrant dismissal of Plaintiffs' NAGPRA claim against the Poarch Officials acting under delegated federal authority.

Count XI also fits within the equitable *ultra vires* action recognized in *Larson* and *Dugan* to the extent Plaintiffs seek prospective relief against officials alleged to have acted beyond the scope of delegated federal authority. *See Larson*, 337 U.S. at 689 (recognizing the common law equitable doctrine permitting suits to go forward alleging that a government official's actions were beyond statutory authority, on the grounds that such actions "are considered individual and not sovereign actions"); *Dugan*, 372 U.S. at 621-23 (same); *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1308 n.20 (11th Cir. 2001).

The Poarch Officials do not assert that Plaintiffs are unable to proceed on Count XI under that limited theory. Nor have they made any argument that *Coeur d'Alene* requires dismissal of

Count XI. (See Doc. 270 at 90-104). In any event, *Coeur d'Alene* does not apply here because Count XI does not proceed under *Ex parte Young*. For these reasons, and for the reasons discussed in General Administrative Procedure Act and Equitable Review Principles, Section V.C, in the Plaintiffs' Response to the Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026, Count XI is not subject to dismissal on sovereign-immunity grounds.

3. Count XI alleges actionable ongoing violations of NAGPRA.

To the extent Count XI alleges present violations, it alleges that the Poarch Officials continue to exercise delegated federal responsibilities while failing to discharge duties that remain ongoing. The TASC alleges, among other things, that the Poarch Officials continue to violate NAGPRA by "[f]ailing to enforce NAGPRA's safeguards regarding the excavation, removal, and reburial of cultural items and remains," (Doc. 261 at 91, ¶ 422(g)); "[p]ermitting the continued desecration of burial grounds and sacred sites without taking appropriate action to restore or protect the Hickory Ground Site in compliance with NAGPRA," (*id.* at 92, ¶ 422(h)); and by "[f]ailing to create a Phase III inventory or report regarding the cultural items recovered or destroyed at the Hickory Ground Site," (*id.* ¶ 422(i)). Those allegations concern present failures to perform duties Plaintiffs allege remain ongoing.

The additional arguments offered against Count XI mirror the arguments the Poarch Officials offer to counter Count XII (Plaintiffs' NAGPRA claim brought against the Officials pursuant to *Ex parte Young*). Plaintiffs incorporate herein their discussion in Count XII concerning lineal descendants, ongoing failure to consult, and ongoing refusal to return or facilitate the return of remains and cultural items. *See supra* Section VI.J.4. The same allegations that make Count XII viable against the Poarch Officials directly also make Count XI viable to the extent the same conduct is attributable to their exercise of delegated federal authority. Plaintiffs also incorporate herein their discussion in their Response to the Federal Defendants' Motion to Dismiss regarding NAGPRA's private right of action, the APA's waiver of sovereign immunity, and the federal

duties NAGPRA imposes with respect to consultation, permits, and ownership and control. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.C.1-3, filed Apr. 30, 2026.

The NPS Agreement reinforces the ongoing nature of those duties. By signing the NPS Agreement, the Poarch Officials agreed that their THPO would "provide for . . . consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," and "will periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities." (Doc. 261 at 30, ¶ 126(b)) (quoting Doc. 261-1 at Ex. J, 251). Plaintiffs cite the NPS Agreement here, not as a free-standing contract claim, but because it confirms that the relevant consultation and preservation obligations did not end in 2012. The TASC plausibly alleges that those obligations continue to be disregarded now.

Count XI therefore states a viable claim for prospective relief against ongoing violations to the extent those ongoing violations are committed while the Poarch Officials continue exercising delegated federal authority.

4. Count XI also alleges actionable past violations of NAGPRA reviewable under the APA.

Count XI also reaches past acts, but only to the extent those acts were undertaken pursuant to asserted delegated federal authority and are reviewable under the APA. This is where Count XI differs from Count XII. Count XII proceeds only against ongoing violations under *Ex parte Young*. Count XI also preserves review of earlier acts if those acts were committed by the Poarch Officials while standing in the shoes of the federal government.

Plaintiffs incorporate herein the NAGPRA statutory and regulatory discussion in their opposition to the Federal Defendants' Motion to Dismiss, including the discussion of NAGPRA's private right of action, § 702's waiver of sovereign immunity, NAGPRA's permit and consultation requirements, and the Federal Defendants' duties concerning ownership and control of human remains and associated funerary objects. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.C.1-3, filed Apr. 30, 2026. Plaintiffs also incorporate their Count XII discussion

concerning lineal descendants, the identity of the appropriate tribe, and the factual insufficiency of Poarch's "known individual" argument. *See supra* Section VI.J.4.

Those incorporated authorities and allegations plausibly support review of earlier conduct including failures to enforce NAGPRA's safeguards during excavation, removal, and reburial of cultural items and remains; past failures to ensure required consultation and proof of consultation; failures to require or enforce compliance with permit requirements for intentional excavations; and failures to create the Phase III inventory or report concerning the cultural items recovered or destroyed at Hickory Ground. (Doc. 261 at 91-92, ¶ 422(g)-(i)).

That theory is especially important as to the permit issue. The permit requirement is a very important part of NAGPRA, because, as discussed above, it should ensure that the Muscogee (Creek) Nation receives prior notice of any excavation on the Hickory Ground Site, as a tribe who considers the site to have religious or cultural significance, 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). Importantly, ***anyone other than Poarch itself*** who engaged in intentional excavation, ***whether on "tribal land" or "federal lands"*** for purposes of NAGPRA, was required to obtain a permit under ARPA, as discussed above. 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470cc(g)(1). That includes archaeologists affiliated with Auburn, who Plaintiffs allege conducted excavations at the Poarch Officials' direction, (Doc. 261 at 17, 36, ¶¶ 79, 154), and any other non-tribal individuals or entities who discovery may reveal conducted excavations, even if they were contracted by Poarch or otherwise acting on Poarch's behalf. 16 U.S.C. § 470cc(g)(1); *see also* 25 C.F.R. § 262.4(c) (clarifying that consultants, advisors, and others serving by contractual agreement as agents for Indian tribes are not exempt from permit requirements under ARPA, although they may be able to expedite the permit).

It may also include individual Poarch tribal members, as it appears that there may have been an absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands (or the excavation may have been in violation of that law if it did exist). (*See* Doc. 261 at 31-32, ¶¶ 132-38). Indeed, in limited cases, it could even include Poarch tribal employees, particularly if permit requirements were not met by other means, which there is no indication that

they were. Any excavation that took place without a permit was in violation of NAGPRA that the Poarch Officials, acting under delegated federal authority, should not have allowed to occur.

The Poarch Officials insist they had no duties to consult with Plaintiffs because they own Hickory Ground and are the "appropriate tribe" for purposes of NAGPRA. (Doc. 270 at 95). They likewise insist they did not violate NAGPRA when they failed to obtain Plaintiffs' consent for the required permits. (*Id.* at 96). But Count XI challenges intentional excavations allegedly directed or allowed by the Poarch Officials while exercising delegated federal authority, including excavations performed by Auburn archaeologists and any other non-tribal actors whose work required compliance with ARPA and NAGPRA. 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470cc(g)(1); *see also* 25 C.F.R. § 262.4(c). The TASC alleges the Poarch Officials violated NAGPRA when, acting under delegated federal authority, they directed or allowed intentional excavations at the Hickory Ground Site to take place without the appropriate permits. (Doc. 261 at 91, ¶ 422(d)). To the extent those excavations occurred without the permits, consultation, and proof of consultation federal law required, Count XI states a claim for review of those past violations under the APA. The same is true of the Phase III inventory or report. The Poarch Officials aver that they could not have failed to create a Phase III inventory report because they are neither a "federal agency" or a "museum" under NAGPRA. (Doc. 270 at 100). Count XI, as discussed in greater detail above, is not brought against the Poarch Officials as a tribe or a federal agency, but rather, as Officials acting pursuant to delegated federal authority—and thus this argument simply misses the mark.

Finally, the Poarch Officials claim that Count XI fails because "it is black letter law that the APA applies only to federal agency officials." (*Id.* at 103). Count XI fits within that principle because it challenges federal action allegedly carried out by delegees acting in the government's shoes. If the Court finds that the earlier NAGPRA violations alleged in Count XI were committed while the Poarch Officials exercised delegated federal authority, then APA review is appropriate. If the Court concludes that the Poarch Officials did not act pursuant to delegated federal authority, then Count XI will be dismissed as against the Poarch Officials (but not necessarily the Federal

Defendants). Rule 8 permits Plaintiffs to plead that alternative theory now. Fed. R. Civ. P. 8(d)(2)-(3).

For the foregoing reasons, Count XI should not be dismissed. It states a viable claim for prospective relief against ongoing failures to perform delegated federal duties and, separately, a viable APA claim to review past acts taken under asserted delegated federal authority.

L. Plaintiffs have stated a viable ARPA claim against the Poarch Officials (Count XV).

1. Sovereign immunity does not support dismissal of Count XV.

The Poarch Officials argue that Plaintiffs cannot bring Count XV pursuant to *Ex parte Young* because that is "a ploy that fails for reasons explained in Part I.C.4" of their brief in support of the Poarch Officials' Motion. (Doc. 270 at 117, n.37). In this section of the Poarch Officials' brief, they make the argument that *Ex parte Young* is "[a]n exception to sovereign immunity, not an independent right of action" (*id.* at 35). However, as discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress, in passing ARPA, displaced the availability of *Ex parte Young*'s traditional equitable cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, it is clear that Count XV satisfies the basic requirements under *Ex parte Young*. On appeal, the Eleventh Circuit stated that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 13). With respect to Count XV, Plaintiffs: name Tribal Officials as defendants (Doc. 261 at 101, ¶ 468); allege a violation of federal law in the form of violations of ARPA (*id.* ¶¶ 470-73); allege that this violation of federal law is ongoing (Doc. 261 at 101-102, ¶¶ 474-75); and request prospective relief (*id.* at 135-36, ¶ (o) (e.g., "Enter an order in the nature of mandamus requiring the Poarch Officials to restore the Hickory Ground Site … to its pre-excavation and pre-construction condition…")).

The Poarch Officials do not challenge the fact that Count XV alleges ongoing violations of ARPA. (*see* Doc. 270 at 116-20). Their attacks on Count XV focus on the Poarch Officials' *past* violations. Although it is true that the Poarch Officials violated ARPA in the past, they continue to violate ARPA now. Because Mekko Thompson and all members of Hickory Ground Tribal Town are the lineal descendants of the individuals excavated from Hickory Ground, the Poarch Officials' ongoing refusal to repatriate the relatives and their associated funerary objects constitutes an ongoing violation of ARPA. (Doc. 261 at 101-02, ¶¶ 471-72, 474(d)). Their continued construction without a permit also constitutes an ongoing violation (*id.* at 101, ¶ 474(a)), as well as their ongoing failure to consult Plaintiffs regarding the manner in which they continue to curate the archaeological resources they excavated from Hickory Ground. (*Id.* ¶ 474(b)). Their continued failure to restore Hickory Ground to its original condition, as much as is practicable, also constitutes an ongoing violation. (*Id.* at 102, ¶ 474(e)). The Poarch Officials continue to act in a manner that undermines the preservation of Hickory Ground's archaeological integrity (*id.* ¶ 474(f)), and they continue to misrepresent the extent to which they have—and continue to—desecrate the human remains and cultural resources located at Hickory Ground. (*Id.* ¶ 475).

The NPS Agreement further reinforces the ongoing nature of those duties. Plaintiffs do not cite the NPS Agreement here as a free-standing contract claim, but because it confirms that the relevant preservation obligations did not end when the earlier excavations stopped. The TASC plausibly alleges that those obligations continue to be disregarded now, including during more recent construction and continued non-restoration of the Site. (*Id.* at 59-65, ¶¶ 269-82); (id. at 100, ¶ 464). All of these constitute ongoing violations for which the Plaintiffs seek non-monetary, injunctive relief. Accordingly, Plaintiffs have established that Count XV seeks prospective, injunctive relief for ongoing violations of ARPA.

Second, applying the test articulated by the Eleventh Circuit in *PCI Gaming Authority*, 801 F.3d at 1290, it is clear that Congress did not intend for ARPA to displace actions under *Ex parte Young*. In this regard, the Sixth Circuit's decision in *Michigan Corrections* is of no help to the Poarch Officials because that case held the FLSA displaced the equitable action recognized in *Ex*

parte Young. *Michigan Corr. Org.* 774 F.3d at 903 (quoting 29 U.S.C. § 211(a)). No such prescriptive language regarding "all actions" exists in ARPA.

In contrast, Plaintiffs seek to enjoin the Poarch Officials from violating ARPA under *Ex Parte Young*, which *no* court has concluded is displaced by ARPA. The Poarch Officials have not claimed there is a more limited remedial regime applicable to these circumstances, and accordingly, Plaintiffs' claim under *Ex parte Young* for ongoing violations of ARPA may proceed.

Third, and finally, the Poarch Officials do not make any argument that *Coeur d'Alene* requires dismissal of Count XV. (*See* Doc. 270 at 116-20). For all the reasons, and alternative reasons, articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count XV. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of ARPA is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use "'infused with a public trust' like the submerged lands in *Coeur d'Alene*." (Doc. 234 at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count XV satisfies all requirements of the *Ex parte Young* doctrine with respect to the Poarch Officials and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs state a claim for violations of ARPA.

Federal law provides that "[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under [16 U.S.C. § 470cc]." 16 U.S.C. § 470ee(a); *see also* 25 C.F.R. § 262.3(a). For purposes of

ARPA, "Indian lands" means, in relevant part, land held in trust by the United States for Indian tribes. 16 U.S.C. § 470bb(4). "Public lands" means certain lands owned and administered by the United States, such as national parks, national forests, etc. 16 U.S.C. § 470bb(3). Accordingly, the Hickory Ground Site constitutes "Indian lands" for purposes of ARPA, because it was held in trust by the United States for Poarch when the Poarch Officials ordered Auburn to excavate the sacred site pursuant to an ARPA permit. (Doc. 261 at 26, ¶ 118). The permit requirement of ARPA (which is incorporated into NAGPRA) is a vital component of the cultural preservation and protections in those statutes. It is intended to give tribes who "may consider the site as having religious or cultural importance" prior notice of any planned excavation that may harm a religious or cultural site. 16 U.S.C. § 470cc(c).

The Poarch Officials' primary argument against Count XV is that "ARPA exempts PCI from needing a permit for activities on its own lands." (Doc. 270 at 117).[43] And although ARPA does contain such an exemption, 16 U.S.C. § 470cc(g)(1), that exemption does *not* apply to *others* performing excavation on a tribe's behalf. 25 C.F.R. § 262.4(c). Indeed, in some circumstances, it may not even apply to tribal employees. *Id.* Even if the Poarch Officials may not need a permit to excavate, the individual people and entities performing excavation and removal of archaeological resources on the Poarch Officials' behalf do, and the Poarch Officials had, and continue to have, a duty to ensure that they obtain the proper ARPA permit for any excavations a non-Indian or non-tribal member (such as an Auburn archaeologist) performs at Hickory Ground. *See* (Doc. 200-2 at Ex. F, 30 (an ARPA violation will have occurred "if earth containing archeological resources was moved on the site by a heavy equipment operator who was not a member of the tribe and who did not have a tribal or federal permit.").

[43] To the extent that the Poarch Officials' argument relates only to past conduct, it is not relevant to Plaintiffs' *Ex parte Young* claim against the Officials, which targets ongoing and future violations. However, it is relevant to the legality of the Poarch Officials' continued excavations without a valid ARPA permit, which constitute an actionable component of Count XV (Doc. 261 at 101, ¶ 474(a)) (alleging violations of ARPA are ongoing when Poarch Officials continue to "[c]onduct[] excavation activities at the Hickory Ground Site without obtaining valid permits as required under 16 U.S.C. § 470cc.").

The Poarch Officials' reliance on *Attakai v. United States* to support their position that Poarch Band "is not required to obtain a permit to conduct archeological excavation on its lands" is inapposite. (Doc. 270 at 112) (citing *Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990)). In *Attakai*, the District Court found there were no violations of ARPA because there were no *purposeful* activities aimed at archaeological resources. *See Attakai*, 746 F. Supp. at 1410-11. Here, by contrast, the Poarch Officials *knew* prior to their excavations that Hickory Ground was a burial cemetery and that any archaeological activities would necessarily involve excavation of human remains and cultural resources. (Doc. 200-2 at Ex. F, 30) (noting that as of 2001, Auburn's "archeological reports on the site indicate that there are no areas that are completely free of archeological resources."); (*id.* at 29) ("the site was found to contain Indian burials" and there is "no area where such resources were totally absent."). Auburn and the Poarch Officials' knowledge of the remains and cultural resources renders their excavations purposeful, and within the scope of ARPA's permit requirements. *See Fein v. Peltier*, 949 F. Supp. 374, 380 (D.V.I. 1996) (where the individual undertaking the excavation knew remains were present, the excavation was "purposeful excavation and removal of archaeological resources" and not "inadvertent" and thus triggered ARPA's requirements). In this case, the excavations were far from inadvertent but instead were undertaken knowingly and purposefully.[44]

Next, the Poarch Officials aver there have been no violations of ARPA for failure to consult with Plaintiffs because, according to the Poarch Officials, they "engaged in extensive consultation with Plaintiffs regarding both the development of the property and the disposition of remains . . ." (Doc. 270 at 117). To substantiate this claim, the Poarch Officials cite to Paragraphs 191-96 and 221 of the TASC. (*See id.*). These paragraphs, however, do not support the Poarch Officials'

[44] Furthermore, the exemption discussed in Attakai, found in 43 C.F.R. § 7.5(b)(1), is also not applicable here because Hickory Ground does not constitute "public lands." ARPA's implementing regulations do provide an exception to the permit requirements for activities that are "exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources." 43 C.F.R. § 7.5(b)(1) (emphasis added). But that exception applies only to "activities on the public lands." *Id*. (emphasis added). The lands at issue here are "Indian lands," not "public lands" for purposes of ARPA, so this exception does not apply.

contention that they ever engaged in the kind of consultation that ARPA requires. *See* Stmt. Disp. Facts ¶¶ 4--5. These paragraphs in the TASC simply detail the fact that the Poarch Officials informed Plaintiffs they were excavating human remains in 2006 (Doc. 261 at 42, ¶ 191), and that as a result of learning this, "Plaintiffs engaged in a years-long effort to ***persuade*** Poarch Officials not to excavate and desecrate the remains of Plaintiffs' ancestors." (*Id.* ¶ 193) (emphasis added). The fact that Plaintiffs begged the Poarch Officials not to remove their ancestors from their graves, and that Poarch Officials ignored these requests, does not mean the Poarch Officials engaged in consultation. *See also* Stmt. Disp. Facts ¶¶ 4-5.

Furthermore, under ARPA, consultation must take place *before* the excavation of human remains—not after. *See* (Doc. 261-1 at Ex. W, 308); *see also Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1088 (9th Cir. 2016) ("ARPA requires an agency to notify Indian tribes of possible harm to or destruction of sites the tribe may consider to have religious or cultural importance."). In this instance, the ARPA permit issued for the archaeological excavations at Hickory Ground stipulated that "[e]xcavation or removal of any Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony ***must be preceded by consultation*** with or, in the case of tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization." (Doc. 261-1 at Ex. W, 308) (emphasis added). Here, the Poarch Officials ordered Auburn to conduct excavations before the Poarch Officials made any attempt to consult with Plaintiffs, and consultation in 2006—after a large number of excavations had already occurred—is not the kind of consultation ARPA requires. (*Id.*).[45]

[45] The ARPA permit governing the excavations at Hickory Ground further required that:

> Consultation should be conducted with the lineal descendants, tribal land owners, Native American representatives, and traditional religious leaders of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be culturally associated with the cultural items or, if the cultural affiliation of the objects cannot be reasonably ascertained, from whose judicially established aboriginal lands the cultural items originated.

(Doc. 261-1 at Ex. W, 308). The Poarch Officials were required to consult with Mekko Thompson, as the "traditional religious leader" of Hickory Ground Tribal Town and a lineal descendant.

In any event, Plaintiffs do not bring Count XV for the Poarch Officials' past violations of the duty to consult, but instead, Count XV hinges on the fact that the Poarch Officials maintain possession over the Muscogee remains they excavated, and they are refusing to engage in consultation with Plaintiffs concerning how they will ultimately dispose of those remains in compliance with ARPA (and NAGPRA). (Doc. 261 at 101, ¶ 474(b)); (*id.* at 102, ¶ 474(d)). While the Poarch Officials' past violations of ARPA are helpful and certainly provide relevant context for their ongoing violations of ARPA, Count XV challenges the Poarch Officials' ongoing violations alone.

Next, the Poarch Officials assert that there is "no statute or regulation that requires or defines 'appropriate safeguards' for a tribe's archeological excavation of its own tribal lands. . . ." and thus the Poarch Officials are not required to follow any safeguards in excavating Hickory Ground. (Doc. 270 at 118). This argument once again relies on the flawed premise that the Poarch Officials can hire any non-Indian they wish to excavate Native human remains from Hickory Ground without having to comply with ARPA, a premise defeated by 25 C.F.R. § 262.4(c), as discussed above. And as BIA has previously acknowledged, ARPA's "deferral to tribal law is for excavation and removal in accordance with the purposes of ARPA – i.e. furthering archeological knowledge in the public interest. Anything else constitutes site damage, and the deferral may not apply to 'damage.'" (Doc. 200-2 at Ex. F, 30). The TASC alleges that the Poarch Officials continue to "desecrate burial sites and remove archaeological resources without appropriate safeguards." (Doc. 261 at 102, ¶ 474(c)). This constitutes an ongoing violation of ARPA.

Next, the Poarch Officials contend that Plaintiffs cannot state a claim for an ARPA violation because "Plaintiffs do not satisfy the applicable definition of lineal descendants." (Doc. 270 at 118). However, as discussed in greater detail *supra* in Section VI.J.4, the TASC contains numerous plausible allegations that Mekko Thompson and all members of Hickory Ground Tribal Town are lineal descendants of the relatives the Poarch Officials exhumed from Hickory Ground. At this stage in the proceedings, the Poarch Officials cannot defeat plausible allegations made in the TASC with blanket statements that certain plausibly alleged facts must not

be true. Nor can they require this Court to adopt an agency's interpretation of NAGPRA that contradicts the plain language of the statute as well as NAGPRA's primary purpose.

The Poarch Officials expend a good deal of space and time debating whether "NAGPRA or ARPA allow[] a tribe to proceed in a *parens patriae* capacity." (Doc. 270 at 110, n. 34). The Poarch Officials contend that the Muscogee (Creek) Nation cannot proceed in a *parens patriae* capacity because none of the Plaintiffs satisfy "the limited definition of lineal descendant." (*Id.* at 110). This is beside the point. Compliance with ARPA does not hinge on the identification of lineal descendants alone. Although Mekko Thompson has plausibly alleged that he is a lineal descendant, ARPA does not afford rights to lineal descendants alone. (*See, e.g.,* Doc. 261 at 44, ¶ 205); Stmt. Disp. Facts ¶ 7. Instead, ARPA requires "an agency to notify Indian tribes of possible harm to or destruction of sites the tribe may consider to have religious or cultural importance." *Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d at 1088. Thus, not only should Mekko Thompson be notified as a lineal descendant, but ARPA requires the Muscogee (Creek) Nation to be notified because the Nation attaches cultural and religious significance to Hickory Ground. *See id.*

The Poarch Officials also aver that there is "no statute or regulation requiring that archaeological excavation sites be returned to their pre-excavation condition once the excavation is completed." (Doc. 270 at 118). The ARPA permit governing the excavations at Hickory Ground, however, requires precisely that. Specifically, the permit stated: "All excavated areas shall be restored by filling in the excavations and otherwise leaving the area in as near to original condition as is practicable." (Doc. 261-1 at Ex. W, 308). "Leaving the area in as near to original condition as is practicable" does not include substituting a cemetery with a $246 million casino. The Poarch Officials further state that "Plaintiffs cite no law imposing such an obligation" to preserve the archaeological integrity of Hickory Ground (Doc. 270 at 119), but that is the fundamental purpose of ARPA itself. 16 U.S.C. § 470aa(b) ("The purpose of this chapter is to secure, for the present

and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands…").[46]

None of the reasons offered by the Poarch Officials supports dismissal of Count XV at this stage in the proceedings.

M. Plaintiffs have stated a viable ARPA claim against the Poarch Officials pursuant to their federal NPS Agreement authority (Count XIV).

1. Count XIV is brought against the Poarch Officials only to the extent that their actions—Past or Present—are deemed to be taken pursuant to delegated federal authority.

Count XIV proceeds against the Poarch Officials only to the extent they exercised, or continue to exercise, specifically delegated federal authority under federal law and the NPS Agreement. (*See* Doc. 261 at 97, ¶ 451). Count XIV is pleaded in this limited manner to identify clearly the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Court's instruction that Plaintiffs plead their claims on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); (*see also* Doc. 234 at 11).

Federal law can treat tribal entities and their employees as standing in the government's shoes when carrying out delegated federal functions. *See, e.g.*, *United States v. Orleans*, 425 U.S. 807, 814-15 (1976) (holding that a party under contract with the government can become an agency of the United States within the meaning of the Federal Tort Claims Act); *Colbert v. United States*, 785 F.3d 1384, 1389-90 (11th Cir. 2015) (holding that Indian tribes and their employees may be deemed employees of the United States for purposes of the Federal Tort Claims Act when they are carrying out functions authorized in or under a tribal self-determination contract).

The Federal Defendants have argued, and continue to argue, that they cannot be held liable for any of the violations of their federal duties because the Poarch Officials assumed responsibility

[46] The Poarch Officials also contend that Paragraph 474(g) of the TASC cannot state a claim because transporting and receiving archeological resources excavated in violation of an ARPA permit constitutes a criminal violation and Plaintiffs have no right to enforce criminal law. (Doc. 270 at 119). Plaintiffs are not suing to enforce ARPA's criminal provisions. Instead, Plaintiffs have brought an *Ex parte Young* claim and seek injunctive relief to stop the Poarch Officials' ongoing violations of ARPA, whether or not criminal punishments are also available for violations of the same law.

for those federal duties on their Reservation. (*See, e.g.*, Doc. 275 at 31) (claiming the Federal Defendants were "not required" to issue any permits "under ARPA because Auburn University conducted activities on the Poarch Band's tribal land at the Poarch Band's request."). Count XIV prevents that shell game. If the Court concludes that the Federal Defendants delegated federal responsibilities bearing on preservation, permitting review, or compliance at Hickory Ground, then the Poarch Officials cannot avoid this Court's review of their conduct taken pursuant to that delegated authority. Count XIV reaches them only to that limited extent.

The Poarch Officials cite *Martin v. Wilcox County Alabama* to argue they could not have been exercising delegated federal authority. (Doc. 270 at 92) (citing 2014 WL 1202943, at *3 & n.3). But as discussed *supra* in Section VI.K.1, *Martin* is inapplicable. It did not address the Poarch Officials' voluntary assumption of federal historic-preservation and consultation duties under 54 U.S.C. § 302704 and the NPS Agreement, nor did it consider whether 36 C.F.R. § 800.2(a)'s reference to "tribal government official" includes tribal officials who sign an NPS Agreement.

Plaintiffs' position is that under 54 U.S.C. § 302704 and 36 C.F.R. § 800.2(a), the Poarch Officials' voluntary assumption of historic preservation and consultation duties renders them accountable to federal lawsuits if and when they abuse their assumption of federal regulatory authority and engage in violations of ARPA and their governing NPS Agreement. (Doc. 261 at 98-100, ¶¶ 457-64). The TASC plausibly alleges that the Poarch Officials were exercising authority delegated by the federal government when they engaged in conduct that violates ARPA. The TASC alleges that NPS delegated historic-preservation responsibilities on reservation lands that included a significant portion of Hickory Ground, that Poarch Officials assumed formal responsibility for specified NHPA functions on tribal lands, and that those functions remained subject to federal standards under the NHPA and its implementing regulations, reporting requirements, periodic NPS review, and possible termination for noncompliance. (Doc. 261 at 30-34, ¶¶ 124-27, 139-44); (*id.* at 104-05, ¶¶ 485-87); (*id.* at 111, ¶ 517); (Doc. 261-1 at Ex. J, 248-

53, §§ 5, 7, 9, 12, 14, 15) (NPS Agreement, June 10, 1999).[47] The TASC further alleges that the Poarch Officials exercised that delegated authority in ways that violated ARPA, including that the Poarch Officials: "falsely represented that no religious or cultural site would be harmed or destroyed by the proposed work at the Hickory Ground Site," (Doc. 261 at 98, ¶ 457); failed to notify, consult with, or obtain consent from the Muscogee (Creek) Nation, (*id.* at 99, ¶ 460); and allowed the "defacement of archaeological resources at the Hickory Ground Site without a valid permit." (*Id.* at 100, ¶ 464).

These allegations are sufficient at the pleading stage to plausibly allege that the Poarch Officials acted as federal delegees with respect to the delegated NPS responsibilities concerning historic preservation and ARPA permitting process at Hickory Ground. Whether the liability of Poarch Officials is imputed to the United States is a question for a later stage of the case. At this pleading stage, Rule 8 permits alternative pleading, regardless of consistency. Fed. R. Civ. P. 8(d)(2)-(3). Thus, the Poarch Officials' shotgun pleading argument against Count XIV likewise provides no basis for dismissal. (Doc. 270 at 116).

2. Sovereign Immunity does not warrant dismissal of Plaintiffs ARPA claim against the Poarch Officials acting under delegated federal authority.

Because Count XIV is brought only to the extent the Poarch Officials exercised, or continue to exercise, delegated federal authority, the relevant sovereign immunity question is federal, not tribal. To the extent Count XIV seeks prospective relief for ongoing failures to discharge delegated federal duties, sovereign immunity is waived by 5 U.S.C. § 702. To the extent Count XIV challenges past acts taken under asserted delegated federal authority, Plaintiffs proceed under the APA. *See* 5 U.S.C. §§ 702, 706; (*see also* Doc. 261 at 14, ¶ 64).

Count XIV also fits within the equitable *ultra vires* action recognized in *Larson* and *Dugan* to the extent Plaintiffs seek prospective relief against officials alleged to have acted beyond the

[47] The same is true for the requested prospective relief (Doc. 261 at 135, ¶ (n). If the Court concludes that the violations of ARPA have been (or continue to be) committed by the Poarch Officials acting pursuant to delegated federal authority, then the requested relief will be ordered against them pursuant to their federal, and not tribal, capacities.

scope of delegated federal authority. *See Larson* , 337 U.S. at 689 (recognizing the common law equitable doctrine permitting suits to go forward alleging that a government official's actions were beyond statutory authority, on the grounds that such actions "are considered individual and not sovereign actions"); *Dugan*, 372 U.S. at 621-23 (same); *see also Made in the USA Found.*, 242 F.3d at 1308 n.20.

The Poarch Officials do not assert that Plaintiffs are unable to proceed on Count XIV under that limited theory. Nor have they made any argument that *Coeur d'Alene* requires dismissal of Count XIV. (*See* Doc. 270 at 106-16). In any event, *Coeur d'Alene* does not apply here because Count XIV does not proceed under *Ex parte Young*. For these reasons, and for the reasons discussed in Section V in Plaintiffs' Response to the Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026, Count XIV is not subject to dismissal on sovereign-immunity grounds.[48]

3. Count XIV alleges actionable ongoing violations of ARPA.

To the extent Count XIV alleges present violations, it alleges that the Poarch Officials continue to exercise delegated federal responsibilities while failing to discharge duties that remain ongoing. The TASC alleges, among other things, that the Poarch Officials continue to permit desecration and defacement of archaeological resources at Hickory Ground, continue to fail to restore or protect the Site, and continue to maintain and administer the Site in a manner inconsistent with the preservation duties they assumed under federal law and the NPS Agreement. (Doc. 261

[48] For these reasons, the Poarch Officials' argument that Count XIV must be dismissed because ARPA contains no private right of action is also unavailing, (Doc. 270 at 106-07), as Count XIV is pursued pursuant to APA sections 702 and 706. Moreover, the single case the Poarch Officials cite for this proposition is inapplicable. The Poarch Officials rely on a decision from the District Court of Colorado, *Cheavins v. Pub. Serv. Corp. of Colo.*, 176 F. Supp. 3d 1088, 1094 (D. Colo. 2016). (Doc. 270 at 106). In *Cheavins*, the District Court concluded that the defendant was entitled to ARPA's public lands exemption in 43 C.F.R. § 7.5(b)(1), and the "Plaintiff concede[d] that [the defendant wa]s not subject to the permit requirements." 176 F. Supp. 3d at 1094. Here the lands at issue are "Indian lands," and the Poarch Officials have not tried to argue that the Hickory Ground Site constitutes "public lands" under ARPA. Since this was the basis for the District Court's decision, any consideration of whether ARPA is enforceable by private litigants was, at best, dicta—and only concerned Section 6 of ARPA, section 470ee(a). *See id.* In this case, Plaintiffs do not seek enforcement of section 470ee(a), and thus *Cheavins* is in no way applicable.

at 98-100, ¶¶ 457-64). Those allegations are sufficient at the pleading stage to support prospective relief for ongoing failures to perform delegated federal duties.

Plaintiffs incorporate herein their discussion in Count XV concerning ARPA's permit and consultation requirements, the inapplicability of the exemption discussed in *Attakai*, and the Poarch Officials' ongoing violations of ARPA. *See supra* Section VI.L.2. Plaintiffs further incorporate herein their discussion in their Response to the Federal Defendants' Motion to Dismiss regarding ARPA's permit requirement, the requirement of notice to Tribes with religious or cultural significance, and the Federal Defendants' position that no federal permitting duty remained once Poarch requested Auburn's work. (Doc 275 at 9-10, 29-31); *see also* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.D, filed Apr. 30, 2026.

As discussed in Count XV, Plaintiffs state a viable claim for prospective relief against ongoing violations of ARPA. To the extent the Court determines those ongoing violations are committed while the Poarch Officials continue exercising delegated federal authority, Count XIV should not be dismissed.

4. Count XIV also alleges actionable past violations of ARPA reviewable under the APA.

Count XIV also reaches past acts, but only to the extent those acts were undertaken pursuant to asserted delegated federal authority and are reviewable under the APA. This is where Count XIV differs from Count XV. Count XV proceeds only against ongoing violations under *Ex parte Young*. Count XIV also preserves review of earlier acts if those acts were committed by Poarch Officials while standing in the shoes of the federal government.

Plaintiffs incorporate herein the ARPA statutory and regulatory discussion in their opposition to the Federal Defendants' Motion to Dismiss, including the discussion of ARPA's permit requirement, the limited nature of the tribal land exemption, the requirement of notice to tribes with religious or cultural significance, and the allegation that excavations continued through 2011 although the only known permit expired in 2005. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.D, filed Apr. 30, 2026. Plaintiffs also incorporate herein their Count XV

discussion concerning the Poarch Officials' false representations, the permit requirement, the inapplicability of *Attakai*, and the continuing violations arising from excavations and site disturbance without valid permits. *See supra* Section VI.L.2.

Those incorporated authorities and allegations plausibly support review of earlier conduct including false representations that no religious or cultural site would be harmed, as well as failures to notify, consult with, or obtain consent from the Muscogee (Creek) Nation before permit related decisions, and allowing excavation, removal, and defacement of archaeological resources at Hickory Ground without valid permits. (Doc. 261 at 98-100, ¶¶ 457, 460, 464).

That theory is especially important as to the permit issue. The Poarch Officials insist they were not required to obtain permits to conduct archaeological excavation on their lands. (Doc. 270 at 112). Count XIV challenges excavations allegedly directed or allowed by Poarch Officials while exercising delegated authority, including excavations performed by Auburn archaeologists and any other non-tribal actors whose work required compliance with ARPA. *See* 16 U.S.C. §§ 470cc(a), (c), (g)(1); 25 C.F.R. § 262.4(c); (Doc. 261 at 17, 36, ¶¶ 78, 154-55). That is because anyone other than Poarch itself who engaged in intentional excavation is required to obtain an ARPA permit. 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470cc(g)(1). To the extent those excavations occurred without the permits and notice federal law required, Count XIV states a claim for review of those past violations under the APA.

The same is true of the false representation and notice theories. Plaintiffs allege that the Poarch Officials falsely represented that no religious or cultural site would be harmed by the proposed work and failed to notify or consult the Muscogee (Creek) Nation even though Hickory Ground plainly carried religious and cultural significance to the Nation. (Doc. 261 at 98-99, ¶¶ 457, 460). Those are discrete, reviewable acts that Plaintiffs allege occurred while the Poarch Officials were exercising federally delegated preservation authority at the Site.

Nor does the Poarch Officials' APA argument require dismissal. (Doc. 270 at 107). They contend that Plaintiffs cannot proceed against tribal officials under the APA. (*Id.*). Count XIV fits within the APA because it challenges federal action allegedly carried out by delegees acting in the

government's shoes. If the Court finds that the earlier ARPA violations alleged in Count XIV were committed while the Poarch Officials exercised delegated federal authority, then APA review is appropriate. If the Court concludes that the Poarch Officials did not act pursuant to delegated federal authority, then Count XIV will be dismissed as against the Poarch Officials (but not necessarily the Federal Defendants). Rule 8 permits Plaintiffs to plead that alternative theory now. Fed. R. Civ. P. 8(d)(2)-(3).

For the foregoing reasons, Count XIV should not be dismissed. It states a viable claim for prospective relief for ongoing failures to perform delegated federal duties and, separately, a viable APA claim to review past acts taken under asserted delegated federal authority.

N. Plaintiffs have stated a viable NHPA claim against the Poarch Officials (Count XVIII).

1. Sovereign immunity does not warrant dismissal of Count XVIII.

The Poarch Officials argue that Plaintiffs cannot bring Count XVIII against the Poarch Officials under *Ex parte Young*, stating that "Plaintiffs' effort to circumvent their lack of a private right of action by claiming to proceed 'pursuant to *Ex parte Young*' is unavailing for reasons previously explained." (Doc. 270 at 132) (citation omitted) (citing Doc. 270 at Part I.C.4). However, as discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress, in passing the NHPA, displaced the availability of *Ex parte Young*'s traditional equitable cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, the Eleventh Circuit stated in its opinion that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 13). With respect to Count XVIII, Plaintiffs: name Tribal Officials as defendants (Doc. 261 at 110, ¶ 509); allege a violation of federal law in the form of violations of NHPA (*Id.* at 110, ¶ 511); allege that this violation of federal law is ongoing (*Id.*);

and request prospective relief (*Id.* at 137, ¶ (r)) (*E.g.*, "Issue an injunction prohibiting the Poarch Officials from engaging in any further construction activities at the Hickory Ground Site").

Second, The Poarch Officials cite no authority concluding that Congress intended for the NHPA to displace *Ex parte Young*. In fact, the language in NHPA states just the opposite. The NHPA expressly contemplates enforcement actions by "any interested person":

> In any civil action brought in any United States district court by ***any interested person*** to enforce this division, if the person substantially prevails in the action, the court may award attorney's fees, expert witness fees, and other costs of participating in the civil action, as the court considers reasonable.

54 U.S.C. § 307105 (emphasis added). Courts across the country have found that section permits extra-statutory rights of action. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991); *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 194 F. Supp. 2d 977, 990 (D. S.D. 2002). *See also Narragansett Indian Tribe v. R.I. Dep't of Transp*., 903 F.3d 26, 29-30 (1st Cir. 2018) ("We have previously assumed, without deciding, that the NHPA creates some type of private right of action . . . . [and] we can continue to indulge in this assumption . . . .").

Moreover, the Poarch Officials do not cite to any decisions where a court has found that Congress intended for the NHPA to displace *Ex parte Young*. The Poarch Officials have not claimed there is a more limited remedial regime applicable to these circumstances, and accordingly, Plaintiffs' claim under *Ex parte Young* for ongoing violations of the NHPA may proceed.

Third, and finally, the Poarch Officials do not make any argument that *Coeur d'Alene* requires dismissal of Count XVIII. (*See* Doc. 270 at 132-34). For all the reasons articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count XVIII. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of the NHPA is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical

connection to or historic exercise of sovereignty over the Site. Stmt. Dispt. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"infused with a public trust' like the submerged lands in *Coeur d'Alene*." (Doc. 234 at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count XVIII satisfies all requirements of the *Ex parte Young* doctrine with respect to Poarch Officials and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs have standing to bring Count XVIII.

The Poarch Officials also argue that Count XVIII must be dismissed because "Plaintiffs continue to lack standing to enforce the NPS Agreement against the Tribal Officials." (Doc. 270 at 132).[49] The Officials' argument against standing is predicated on their assertion that Plaintiffs are not the "intended third-party beneficiaries" to the NPS Agreement, and "thus lack standing to sue." (*Id.* at 131). The TASC, however, alleges that Plaintiffs *are* the intended third-party beneficiaries to the NPS Agreement, (Doc. 261 at 31, ¶ 131), and the Poarch Officials' barebone assertion that they simply are not—with no legal authority or precedent—cannot defeat the Plaintiffs' plausible allegation in the TASC. *Newbauer v. Carnival Corp*., 26 F.4th 931, 934 (11th Cir. 2022) (The court must "accept[] the complaint's allegations as true and constru[e] them in the light most favorable to the plaintiff.").

The Poarch Officials attempt to override Plaintiffs' plausible allegation by characterizing it as an "unsupported declaration" (Doc. 270 at 131, n.43), but even a cursory read of the TASC quickly dispels the notion that Paragraph 131 is "unsupported." As the TASC alleges, the NPS Agreement is no ordinary contract. Instead, it is a contract with a federal agency delegating federal duties and obligations to the Poarch Officials, contingent on their continued compliance with the

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Poarch Officials state they are incorporating their arguments on standing with respect to Count XVII. (Doc. 270 at 132).

NHPA. (Doc. 261 at 30-31, ¶ 126-27). That compliance is required to ensure that tribal nations removed from their homelands, like the Muscogee (Creek) Nation, can continue to protect the graves of their relatives, their sacred sites, and any places to which they attach religious significance in their historic homelands. *See, e.g.*, (*See, e.g.*, Doc. 261 at 30, ¶ 126(a)) (noting that the NPS Agreement Section 5 mandates consultation with any Tribe that attaches religious significance to a historic site); (*id.* at ¶ 126(b)) (noting that the NPS Agreement Section 7 requires the Poarch Officials to "periodically solicit and take into account comments" regarding their plan to preserve cultural resources located on the Poarch Reservation from "representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation"). Given that the Muscogee (Creek) Nation is the *only* Tribal Nation whose traditional lands encompass the present-day Poarch Reservation, (Doc. 261 at 3, ¶ 4); (*id.* at 16, 71-73); Stmt. Disp. Facts ¶ 2, it is clear that this language in the NPS Agreement was intended to protect the statutory rights of the Muscogee (Creek) Nation, codified in the NHPA, the protection of which was voluntarily assumed by the Poarch Officials when they signed the NPS Agreement. Plaintiffs are the intended beneficiaries of the NPS Agreement.

Here, there is no plausible reading of the NHPA and/or its implementing regulations to support the conclusion that the Poarch Officials may assume the Secretary's legal authority under the NHPA without any accountability when they violate a federal law designed to protect the rights of removed tribal nation forcibly removed from its historic homeland. Hickory Ground is listed on the National Register, and therefore, is protected under federal law. Those protections did not dissipate simply because the Poarch Officials assumed provision of them. Under the governing federal regulations, the NPS's delegation of authority to Poarch Officials comes with a federal mandate that the "agency official"—defined as "a State, local, or tribal government official" takes "legal and financial responsibility for section 106 compliance in accordance with subpart B of this part ["the Section 106 process"]." 36 C.F.R. § 800.2. In turn, the Poarch Officials acknowledged this legal responsibility when they signed the NPS Agreement, an agreement that stipulates that "the Tribe will carry out [the agency's] responsibilities for review of Federal undertakings pursuant

to Section 106 of the Act." (Doc. 261-1 at Ex. J, 251, § 5). Assumption of "legal responsibility" involves compliance with the governing law—the NHPA—and accountability when the intended beneficiaries of the NHPA's protections bring suit to end ongoing violations.[50]

Moreover, the TASC contains sufficient allegations demonstrating that Plaintiffs have suffered an injury for purposes of Article III standing.[51] Specifically, Plaintiffs allege that the Poarch Officials' ongoing violations of the NHPA continue to desecrate Hickory Ground, causing Plaintiffs significant, irreparable harm. (Doc. 261 at 110-11, ¶ 512). The TASC further demonstrates that the ongoing harm Plaintiffs suffered is fairly traceable to the Poarch Officials' refusal to comply with the NHPA—and specifically the NPS Agreement (*Id.* at 35, ¶ 152)—and finally, the relief requested will remedy the harms alleged. (*See id.* at 137, ¶ (r)(ii), (iii)) (requesting this Court to "[i]ssue an injunction prohibiting . . . any further construction activities at the Hickory Ground Site" as well as to "[e]nter an order in the nature of mandamus requiring the Poarch Officials to restore the Hickory Ground Site, to the greatest extent possible, to its pre-excavation and pre-construction condition"). Under the Supreme Court's and Eleventh Circuit's guiding precedents, that is enough to demonstrate standing at this stage in the proceedings. *Focus on the Fam. v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003) (to establish that the injuries are fairly traceable to defendants' conduct and redressable, plaintiffs are "not required to prove causation beyond a reasonable doubt or by clear and convincing evidence").

Count XVIII should not be dismissed for lack of standing.

3. The Poarch Officials' violations of NHPA are ongoing.

Finally, the Poarch Officials argue that none of the alleged ongoing violations of the NHPA are actual violations, (Doc. 270 at 132-34), and accordingly, Count XVIII should be dismissed.

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[50] Indeed, Congress made these provisions an integral and mandatory part of any such agreement to delegate federal agency authority. *See* 54 U.S.C. § 302704 (stating that the Secretary may only enter into such an agreement with a Tribe if the agreement provides for appropriate participation by "representatives of other Indian tribes whose traditional land is under the jurisdiction of the Indian tribe assuming responsibilities . . . .").

[51] Plaintiffs incorporate herein their arguments regarding standing from Plaintiffs' Response to the Federal Defendants' Motion to Dismiss, Section VI.B.1, filed Apr. 30, 20206.

All of the Poarch Officials' attacks, however, rely on mischaracterizations of the statute, governing regulations, the TASC—or all three. The TASC, however, plausibly alleges that the Poarch Officials' violated NHPA, and those violations are ongoing.

Of course, the ongoing violations must be considered within the context of the NHPA's primary purpose. The purpose of NHPA is the preservation of historic resources. *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir. 1981). The Hickory Ground Site has been listed on the National Register of Historic Places since 1980. (Doc. 261 at 104, ¶ 483). Accordingly, it is a "historic property" subject to the NHPA. 54 U.S.C. § 300308 (defining "historic property" as including sites included on the National Register). Section 106 of NHPA (codified at 54 U.S.C. § 306108) requires federal agencies to take into account the effects of their undertakings on historic properties. 36 C.F.R. § 800.1(a). This is commonly referred to as the "Section 106 process."

The Section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. 36 C.F.R. § 800.1(a). The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. *Id.* Federal agencies must complete the Section 106 process ***before*** approving the expenditure of any federal funds or issuing any license. 54 U.S.C. § 306108; 36 C.F.R. § 800.1(c).

While NHPA requirements primarily apply to Federal agencies, Tribes can assume certain legal obligations under the NHPA. 54 U.S.C. § 302702. Here, the Poarch Officials willingly entered into the NPS Agreement with Federal Defendants, the NPS, and the Interior for the express purpose of assuming NHPA responsibilities, including with respect to the Hickory Ground Site. (Doc. 261-1 at Ex. J, 249-53).

However, within this regulatory framework, the Poarch Officials aver that they are not capable of violating 36 C.F.R. § 800.5(a) because "Tribal Officials are not agency officials, so

Plaintiffs' claim fails as a matter of law." (Doc. 270 at 133). The Poarch Officials, however, cite no authority for their limited reading of who qualifies as an "official," and the relevant regulation clearly includes tribal officials in its definition. Under the governing federal regulations, the NPS's delegation of authority to Poarch comes with a federal mandate that the "agency official"—defined as "a State, local, or *tribal government official*" takes "*legal and financial responsibility* for section 106 compliance in accordance with subpart B of this part ["the Section 106 process"]." 36 C.F.R. § 800.2 (emphasis added). The Poarch Officials' attempt to shirk responsibility under Section 800.5(a) fails.[52]

The Poarch Officials rely on the same convoluted argument to assert that the Poarch Officials are not required to create a preservation plan, as contemplated by the NPS Agreement, because it is "settled law that a [State Historic Preservation Officer ("SHPO")]/THPO is not a federal agency and is not subject to suit under the NHPA." (Doc. 270 at 133). For this proposition, the Poarch Officials cite a footnote in an unpublished Report and Recommendation issued by a Magistrate Judge. (*See* Doc. 270 at 133) (citing *Martin*, 2014 WL 1202943, at *3). *Martin* is neither controlling nor applicable here for the reasons explained *supra* in Section VI.K.1, The Magistrate Judge did not consider whether 36 C.F.R. § 800.2(a)'s reference to "tribal official" includes tribal officials that sign an NPS Agreement, like the Poarch Officials. *See Martin*, 2014 WL 1202943 at *3. Plaintiffs are not taking the position that the Poarch Officials are "agency officials" for all purposes under the NHPA.

However, Plaintiffs do take the position—to which the Poarch Officials have offered no direct response—that under 54 U.S.C. § 302704 and 36 C.F.R. § 800.2(a), the Poarch Officials' voluntary assumption of NHPA Section 106 duties renders them accountable to *Ex parte Young* lawsuits if and when they abuse their assumption of federal regulatory authority and engage in

[52] The Poarch Officials rely on the same baseless assertion that "official" excludes tribal officials to argue that the TASC does not allege a violation of 36 C.F.R. § 800.6. (Doc. 270 at 133). Because 36 C.F.R. § 800.2 expressly includes tribal officials in the definition of "agency official," this argument fails.

ongoing violations of the NHPA and their governing NPS Agreement. (Doc. 261 at 109-11, ¶¶ 508-12).

The Poarch Officials' reliance on *Martin* to assert that they are not obligated to "periodically solicit and take into account comments" from the Muscogee (Creek) Nation concerning the protection and preservation of Hickory Ground is likewise baseless. (Doc. 270 at 134). The NPS Agreement plainly states that the Poarch THPO is required to "in accordance with Section 101(d)(4)(C) [of the NHPA], provide for … consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," and "periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities." (Doc. 261 at 30, ¶ 126(b)) (alterations in original) (quoting Doc. 261-1 at Ex. J, 251, § 7). This language plainly imposes an ongoing duty, pursuant to the NPS Agreement and the NHPA, on the Poarch Officials to consult with the Muscogee (Creek) Nation concerning how their program impacts the preservation of Hickory Ground.

Finally, the TASC makes clear that the Poarch Officials have *not* received "comments regarding the excavation and development of PCI's Wetumpka property for decades," (Doc. 270 at 134), nor have the Poarch Officials engaged in the consultation that the NHPA and NPS Agreement require. (Doc. 261-1 at Ex. N, 276) (There was "no consultation with any other Indian tribe, particularly the Muscogee Creek Nation."); *see also* Stmt. Disp. Facts ¶¶ 4-5. The TASC further alleges that this failure to consult is ongoing. (Doc. 261 at 33, 110, ¶¶ 142, 511). To the extent that the Poarch Officials contend that Plaintiffs' public protest over the Poarch Officials' ongoing violations constitutes "receiving comments" under the NPS Agreement, that is an issue not appropriate for adjudication on a motion to dismiss.

4. Count XVIII is not moot.

Finally, the Poarch Officials aver that Plaintiffs' NHPA claims must be dismissed "because they are moot." (Doc. 270 at 130). In making their argument, the Poarch Officials rely almost

exclusively on the D.C. District Court's decision in *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50 (D.D.C. 2018), a case they claim is "directly on point." (Doc. 270 at 130). *Standing Rock*, however, is not "on point," and furthermore, under binding Eleventh Circuit precent, Plaintiffs' NHPA claims are not moot because Plaintiffs continue to "need[] protection from future injury." *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997). Plaintiffs' claims are also *not* moot because the Poarch Officials' violations of the NHPA are ongoing, rendering them "capable of repetition, yet evading review." *Id.* (citation omitted). Because the Poarch Officials' violations of the NHPA are ongoing and have not ceased, and because this Court is capable of providing Plaintiffs with effectual relief, Plaintiffs' NHPA claims are not moot. *See Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021).

The doctrine of mootness derives from Article III of the U.S. Constitution which "limits the jurisdiction of the federal courts to the consideration of 'Cases' and 'Controversies.'" *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000) (quoting U.S. Const. Art. III, § 2). Typically, "if in the course of litigation a court finds that it can no longer provide a plaintiff with *any* effectual relief, the case generally is moot." *Uzuegbunam*, 592 U.S. at 282 (emphasis added). In cases seeking equitable relief, the mootness doctrine applies "[w]hen the plaintiff no longer needs protection from future injury." *Adler*, 112 F.3d at 1477.

With respect to Count XVIII, Plaintiffs allege ongoing harms, including that Poarch Officials "continue to violate the NHPA by . . . [c]ontinuing to permit activities that physically destroy and desecrate portions of the Hickory Ground Site, in violation of 36 C.F.R. § 800.5(a)." (Doc. 261 at 110, ¶ 511(a)). The TASC alleges that the Poarch Officials *continue*: "to avoid, minimize, or mitigate harm to the Hickory Ground Site," (*id.* at 110, ¶ 511(b)); fail to develop a plan to preserve the Hickory Ground Site, as required by the NPS Agreement, (*id.* at 110, ¶ 511(c)); fail to cooperate with the ACHP, as required by the NHPA, (*id.* at 11, ¶ 511(d)); fail to consider comments on the Poarch Officials' preservation plan, as required by the NPS Agreement, (*id.* at 110, ¶ 511(e)); and fail to take the Nation's views into consideration with regards to preserving

the Hickory Ground Site, as required by the NPS Agreement, (*id.* at 110, ¶ 511(f)). Each of these ongoing violations continue to cause Plaintiffs harm, (*id.* at 110-11, ¶ 512), and thus Plaintiffs' claims are not moot because plaintiffs still "need[] protection from future injury." *Adler*, 112 F.3d at 1477.

Furthermore, Plaintiffs have put forth equitable remedies that, if granted, would result in "meaningful relief." *Ethrege v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993) (citing *United States v. Certain Real & Personal Prop.*, 943 F.2d 1292, 1296 (11th Cir. 1991)). Specifically, Plaintiffs request this Court to "[i]ssue an injunction prohibiting any further construction activities at the Hickory Ground Site" as well as to "[e]nter an order in the nature of mandamus requiring . . . the Poarch Officials to restore the Hickory Ground Site, to the greatest extent possible, to its pre-excavation and pre-construction conditions." (*See* Doc. 261 at 137, ¶ (r)(ii)-(iii)).

The D.C. District Court's decision in *Standing Rock* has little bearing on Plaintiffs' NHPA claims in this case. Although it is true that the Dakota Access company in *Standing Rock*—like the Poarch Officials—purposefully destroyed and bulldozed Native burials, the similarities stop there. *See Standing Rock*, 301 F. Supp. 3d 50. In *Standing Rock*, the D.C. District Court concluded that the Tribe's claim against the Army Corps of Engineers was rendered moot by the completion of the pipeline. *Id.* at 62. But as that District Court noted, had the plaintiffs brought claims for the continuing impacts of the pipeline on the environment, the claims could have "remained viable." *Id.* at 63. Indeed, to hold otherwise would allow parties to "build [their] structures before a case gets to court, and then hide behind the mootness doctrine." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015) (alteration in original) (citation omitted). "[S]uch a result is not acceptable." *Id.* (citation omitted).

The *Standing Rock* Court also emphasized that contrary to the instant action "such an emphasis on ongoing harms is nowhere to be found in Plaintiffs' Complaint, nor are such prospective injuries [risk of future pipeline spills] supported by the record." *Standing Rock*, 301 F. Supp. 3d at 63. Furthermore, in that case, the Plaintiffs had conceded that if the construction of the pipeline was completed, the case would be moot. *Id.* at 62-63. Here, Plaintiffs do not concede

mootness and Plaintiffs' NHPA claims are not limited to a past failure to consult. Instead, as discussed above, Count XVIII alleges numerous *ongoing* violations of the NHPA (and the NPS Agreement) that exist separate and apart from the Poarch Officials' failure to engage in consultation in the past.[53] (*See* Doc. 261 at 110-11, ¶¶ 510-12). It is possible that if Plaintiffs' NHPA claim was limited to the failure to consult prior to 2012, then that claim could be considered moot. But even a cursory reading of Count XVIII reveals that not to be the case.[54] (*See* Doc. 261 at 110-11, ¶¶ 510-12). It is possible that if Plaintiffs' NHPA claim was limited to the failure to consult prior to 2012, then that claim could be considered moot. But even a cursory reading of Count XVIII reveals that not to be the case.

Count XVIII alleges ongoing violations of the NHPA for which Plaintiffs continue to be harmed. Accordingly, Plaintiffs' NHPA claim is not moot and should not be dismissed.

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[53] Also, in *Standing Rock*, the entity that destroyed the Native burials (Dakota Access) had not signed any agreement close to the nature of the NPS Agreement that the Poarch Officials signed with the NPS. Plaintiffs' NHPA claim in Count XVIII is not predicated on the destruction of Native burials in the past. Instead, Plaintiffs' NHPA claim is predicated on ongoing violations of the NHPA, and the NPS Agreement, that continue now and threaten—absent immediate injunctive relief—to continue into the future. (Doc. 261 at 110-11, ¶¶ 510-12).

[54] The Poarch Officials also cite *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 62 F. Supp. 3d 1 (D.D.C. 2014). (Doc. 270 at 130). *Finca Santa Elena* is yet another non-binding D.C. District Court case that did—as the Poarch Officials assert—find "NEPA and NHPA claims moot" in a case where the Government had "completed virtually all construction on" the portion of a flood control project that was the subject of the suit. *Id.* at 3, 5. The Poarch Officials neglect to mention, however, that the holding was predicated not only on the fact that construction had been completed, but, at least as importantly, on the fact that the Government "has represented that it will conduct further administrative and environmental reviews before any work on future phases of the project takes place." *Id.* at 3. In reaching its conclusion that the Plaintiffs' claims were moot, the District Court noted that "Plaintiffs . . . have not disputed sworn statements by the [Government] that it will conduct additional administrative and environmental reviews before beginning any additional phases of the project" and the "counsel for the [Government] represented to the Court at the most recent hearing that 'nothing further will happen without' additional assessments of environmental law and historic preservation compliance.'" *Id*. at 4 (citation omitted). These facts were key because they demonstrated that not only had "[t]he precise conduct that prompted th[e] suit . . . has come to an end" *but also* that the "plaintiff will have 'ample opportunity . . . to renew their complaint.'" *Id.* at 4 (alterations in original) (quoting *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 292 (D.C. Cir. 1980)). *Finca Santa Elena* has no application here.

O. Plaintiffs have stated a viable NHPA claim against the Poarch Officials acting under delegated federal authority (Count XVII).

1. Count XVII is brought against the Poarch Officials only to the extent that their actions—past or present—are deemed to be taken pursuant to delegated federal authority.

Count XVII proceeds against the Poarch Officials only to the extent they exercised, or continue to exercise, specifically delegated federal authority under federal law and the NPS Agreement. (*See* Doc. 261 at 105, ¶ 491). Count XVII is pleaded in this limited manner to identify clearly the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Court's instruction that Plaintiffs plead their action on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); (*see also* Doc. 234 at 11).

Federal law can treat tribal entities and their employees as standing in the government's shoes when carrying out delegated federal functions. *See, e.g.*, *United States v. Orleans*, 425 U.S. 807, 815 (1976) (holding that a party under contract with the government can become an agency of the United States within the meaning of the Federal Tort Claims Act); *Colbert v. United States*, 785 F.3d 1384, 1389-90 (11th Cir. 2015) (holding that Indian tribes and their employees may be deemed employees of the United States for purposes of the Federal Tort Claims Act when they are carrying out functions authorized in or under a tribal self-determination contract).

The TASC plausibly alleges that the Poarch Officials were exercising authority delegated by the federal government when they engaged in conduct that violates the NHPA. The TASC alleges that NPS delegated historic-preservation responsibilities on reservation lands that included a significant portion of Hickory Ground, that Poarch Officials assumed formal responsibility for specified NHPA functions on tribal lands, and that those functions remained subject to federal standards under the NHPA and its implementing regulations, reporting requirements, periodic NPS review, and possible termination for noncompliance. (Doc. 261 at 30-34, 104-05, 111 ¶¶ 124-127, 139-144, 485-87, 517); (Doc. 261-1 at Ex. J, 248-53, §§ 5, 7, 9, 12, 14, 15). The TASC further alleges that the Poarch Officials exercised that delegated authority in ways that violated the NHPA, including that the Poarch Officials: failed to meaningfully consult with Plaintiffs, (Doc. 261 at

105, ¶ 493(a)); failed to comply with the NHPA while conducting phase III excavations, (*id.* at ¶ 493(b)); approved or allowed excavation, construction, and gaming activity without consideration of the effects those undertakings would have on a historic property, (*id.* at ¶ 493(c)); failed to invite ACHP to participate in the § 106 process, (*id. at* ¶ 493(d)); failed to minimize or mitigate the adverse effects their construction and operation of a gaming facility would have on Hickory Ground, (*id.* at ¶ 493(e)); and continue now to allow the ongoing desecration and destruction of Hickory Ground, a historic site listed on the National Register, (*id.* at ¶ 493(f)).

The Poarch Officials *Martin v. Wilcox County Alabama* to argue they could not have been exercising delegated federal authority. (Doc. 270 at 92) (citing 2014 WL 1202943, at *3 & n.3). *Martin* is neither controlling nor applicable here for the reasons explained *supra* in Section VI.K.1, *supra*.

These allegations are sufficient at the pleading stage to plausibly allege that the Poarch Officials acted as federal delegees with respect to the delegated NPS responsibilities concerning historic preservation and the Section 106 process at Hickory Ground. Whether the liability of Poarch Officials is imputed to the United States is a question for a later stage of the case. At this pleading stage, Rule 8 permits alternative pleading, regardless of consistency. Fed. R. Civ. P. 8(d)(2)-(3). Thus, the Poarch Officials' shotgun pleading argument against Count XVII likewise provides no basis for dismissal.

2. Sovereign immunity does not require dismissal of Plaintiffs' NHPA claim against the Poarch Officials acting under delegated federal authority.

Because Count XVII is brought only to the extent the Poarch Officials exercised, or continue to exercise, delegated federal authority, the relevant sovereign immunity question is federal, not tribal. To the extent Count XVII seeks prospective relief for ongoing failures to discharge delegated federal duties, sovereign immunity is waived by 5 U.S.C. § 702. To the extent Count XVII challenges past acts taken under asserted delegated federal authority, Plaintiffs proceed under the APA. *See* 5 U.S.C. §§ 702, 706; (*see also* Doc. 261 at 14, ¶ 64).

Count XVII also fits within the equitable *ultra vires* action recognized in *Larson* and *Dugan* to the extent Plaintiffs seek prospective relief against officials alleged to have acted beyond the scope of delegated federal authority. *See Larson*, 337 U.S. at 689 (recognizing the common law equitable doctrine permitting suits to go forward alleging that a government official's actions were beyond statutory authority, on the grounds that such actions "are considered individual and not sovereign actions"); *Dugan*, 372 U.S. at 621-23 (same); *see also Made in the USA Found.*, 242 F.3d at 1308 n.20.

The Poarch Officials' argument that Count XVII must be dismissed because the NHPA contains no private right of action is also unavailing. (Doc. 270 at 121). Count XVII is pursued pursuant to 5 U.S.C. §§ 702 and 706, and to the extent it seeks prospective relief for ongoing violations committed under delegated federal authority, it also fits within the equitable *ultra vires* action recognized in *Larson* and *Dugan*. *See supra* Section VI.C.1. In addition, as Plaintiffs state in their Response to the Federal Defendants' Motion to Dismiss, the NHPA expressly contemplates civil actions brought by "any interested person." Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.E.1, filed Apr. 30, 2026.

The Poarch Officials have not argued that *Coeur d'Alene* requires dismissal of Count XVII. (*See* Doc. 270 at 90-104). In any event, *Coeur d'Alene* does not apply here because Count XVII does not proceed under *Ex parte Young*. For these reasons, and for the reasons discussed in Plaintiffs' Response to the Federal Defendants' Motion to Dismiss, Section V.A, filed Apr. 30, 2026, Count XVII is not subject to dismissal on sovereign-immunity grounds. Count XVII alleges actionable ongoing violations of the NHPA.

3. Count XVII states an actionable claim for violations of the NHPA.

To the extent Count XVII alleges present violations, it alleges that the Poarch Officials continue to exercise delegated federal responsibilities while failing to discharge duties that remain ongoing. The TASC alleges, among other things, that the Poarch Officials continue to fail to meaningfully consult with Plaintiffs, continue to fail to avoid, minimize, or mitigate adverse

effects on Hickory Ground, continue to fail to solicit and take into account comments as required by the NPS Agreement, and continue to allow the desecration and destruction of Hickory Ground, a historic site listed on the National Register. (Doc. 261 at 105-07, ¶¶ 493-97).

The NPS Agreement reinforces the ongoing nature of those duties. The Poarch Officials agreed that their THPO would "provide for . . . consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation," and would "periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities." (Doc. 261 at 30, ¶ 126(b)) (alteration in original) (quoting Doc. 261-1 at Ex. J, 251, § 7). And as the TASC plausibly alleges, the lands comprising the Poarch Reservation constitute the Muscogee (Creek) Nation's "traditional lands." (Doc. 261 at 3, ¶ 4). The Poarch Officials assertion that the NPS Agreement does "not include an obligation to consult with Plaintiffs," (Doc. 270 at 124), is therefore wrong.[55]

The additional arguments offered against Count XVII mirror the arguments the Poarch Officials offer to counter Count XVIII. Plaintiffs incorporate herein their discussion in Count XVIII concerning the Section 106 process, ongoing failure to consult, ongoing failure to avoid, minimize, or mitigate adverse effects on Hickory Ground, and ongoing failure to solicit and take into account Plaintiffs' comments. *See supra* Section VI.N.3. The same allegations that make Count XVIII viable against the Poarch Officials directly also make Count XVII viable to the extent the same conduct is attributable to the exercise of delegated federal authority. For example, the Poarch Officials contend both that they had no duty to consult with Plaintiffs and that they nevertheless "engaged in extensive consultation regarding excavation and development of the site and the proper disposition of excavated remains and artifacts." (Doc. 270 at 125). Plaintiffs' arguments and authorities in defense of Count XVIII explain why neither point supports dismissal. The TASC alleges that the consultation required by the NHPA and the NPS Agreement did not

[55] Plaintiffs do not cite the NPS Agreement here as a free-standing contract claim, but because it confirms that the relevant consultation and preservation obligations did not end in 2012. The TASC plausibly alleges that those obligations continue to be disregarded now.

occur, that any contrary assertion is contradicted by the TASC and the record, and that, in any event, the Poarch Officials continue to fail to engage in the required consultation now. (Doc. 261 at 105-07, ¶¶ 493-97); Stmt. Disp. Facts ¶¶ 4-5. Those allegations are sufficient at this stage, and the issue cannot be resolved on a motion to dismiss.

Plaintiffs also incorporate herein their discussion in their Response to the Federal Defendants' Motion to Dismiss regarding undertakings under the NHPA, the APA's waiver of sovereign immunity, and the federal duties and agency actions surrounding Hickory Ground and the NPS Agreement. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.E.2-4, filed Apr. 30, 2026. Count XVII therefore states a viable claim for prospective relief against ongoing violations to the extent those ongoing violations are committed while the Poarch Officials continue exercising delegated federal authority.

4. Count XVII also alleges actionable past violations of the NHPA reviewable under the APA.

Count XVII also reaches past acts, but only to the extent those acts were undertaken pursuant to asserted delegated federal authority and are reviewable under the APA. This is where Count XVII differs from Count XVIII. Count XVIII proceeds only against ongoing violations under *Ex parte Young*. Count XVII also preserves review of earlier acts if those acts were committed by Poarch Officials while standing in the shoes of the federal government.

The additional arguments offered against Count XVII mirror the arguments the Poarch Officials offer to counter Count XVIII. Plaintiffs incorporate herein their discussion in Count XVIII concerning the Poarch Officials' substantive NHPA duties, including the Section 106 process, failure to meaningfully consult, failure to avoid, minimize, or mitigate adverse effects on Hickory Ground, failure to invite ACHP to participate in the Section 106 process, and failure to solicit and take into account Plaintiffs' comments as required by the NPS Agreement. *See supra* Section VI.N.3. The same allegations that make Count XVIII viable against the Poarch Officials directly also make Count XVII viable to the extent the same conduct is attributable to the exercise of delegated federal authority. Plaintiffs also incorporate herein their discussion in their Response

to the Federal Defendants' Motion to Dismiss regarding undertakings under the NHPA, final agency action, and the federal duties and agency actions surrounding Hickory Ground and the NPS Agreement. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.E.3, filed Apr. 30, 2026. The Poarch Officials also argue that Count XVII must be dismissed because any claim Plaintiffs have that the Poarch Officials failed to consult is time-barred under the APA. (Doc. 270 at 125). In response to this, Plaintiffs incorporate their response to the same argument raised by the Federal Defendants in response to Count XVII. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.E.3.b, filed Apr. 30, 2026.

Those incorporated authorities and allegations plausibly support review of earlier conduct including failure to meaningfully consult during phase III excavations, approval or allowance of excavation, construction, and gaming activity without taking into account effects on Hickory Ground, failure to invite ACHP to participate in the Section 106 process, failure to avoid, minimize, or mitigate adverse effects, and failure to comply with the preservation and comment obligations the Poarch Officials assumed in the NPS Agreement. (Doc. 261 at 105-09, ¶¶ 493(a)-(f), 495-506).

The Poarch Officials claim that Paragraph 493(c) fails to state a claim because the Poarch Officials do "not approve excavations, permits, or gaming operation[s]" on their own tribal lands. (Doc. 270 at 126). That is precisely why Count XVII is pleaded in the alternative. On one hand, the Poarch Officials argue they have no authority to approve any excavations, permits, or gaming operations on their own tribal lands. (Doc. 270 at 126). And then on the other hand, the Poarch Officials assert that the federal laws protecting Native burials and sacred sites have no application because only the Poarch Officials have the requisite authority to approve or disapprove of excavations on their own tribal lands. (Doc. 270 at 96) (Poarch Officials "conduct[ed] intentional archeological excavations on its own tribal lands"); (*id.* at 95-97) (claiming that Poarch Officials are "not required to obtain a [federal] permit to excavate archeological resources from the site" because the Poarch Officials "obviously consented to excavations that [they] carried out and/or directed"). The Poarch Officials cannot have it both ways. Either the Federal Defendants were

required to issue permits for the excavations that the Poarch Officials, in their own words "directed" (Doc. 270 at 95), or, the Poarch Officials were required to grant their own permits/authorization for the excavations they "directed" pursuant to delegated federal authority. Plaintiffs are not required at this stage to guess which version of the Poarch Officials' position will ultimately prove true. Count XVII preserves APA review to the extent the Poarch Officials did approve, direct, or allow those undertakings while exercising delegated federal authority.[56]

The Poarch Officials also argue that Paragraph 493(d)'s allegation that the Officials have failed to "invite the ACHP to participate in the § 106 process" fails "because it is counterfactual." (Doc. 270 at 127). According to the Poarch Officials, Exhibit N to the TASC demonstrates that the Poarch Officials fully complied with their obligation to invite the ACHP to participate in the § 106 process. (Doc. 270 at 127) (citing Doc. 261-1 at Ex. N, 275). Exhibit N, however, clearly documents the ways in which the Poarch Officials *failed* to comply with Section 106; a plain reading of Exhibit N in no way supports the Officials' bald assertion that they complied with Section 106. (Doc. 261-1 at Ex. N, 275) ("[T]he archaeological surveys and data recovery *were not* carried out in compliance with Section 106 of the NHPA.") (emphasis added). In fact, Exhibit N questions whether the "Poarch Band's actions were undertaken with the *intent* to avoid the requirements of Section 106." (*Id.* at Ex. N, 276)) (emphasis added). And to the extent that the Poarch Officials claim Paragraph 493(d) falls outside of the statute of limitations under the APA, Plaintiffs hereby incorporate their response to that same argument from their brief in opposition to the Federal Defendants' Motion to dismiss. *See* Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.E.3.b, filed Apr. 30, 2026.

The Poarch Officials next contend that Paragraph 493(e) fails to state a claim under 36 C.F.R. § 800.6 because Section 800.6 only requires "agency officials" to undertake certain

[56] Similarly, the Poarch Officials' aspersion that Paragraph 493(b) does not identify any regulation or provision with which the Poarch Officials failed to comply is easily dismissed. (Doc. 270 at 126). Paragraph 493(b) specifically refers to Section 106 of the NHPA, a provision that includes clear guardrails and instructions for Officials acting pursuant to federal delegated authority. (Doc. 261 at 105, ¶ 493(b)). The Poarch Officials' purported confusion is a stretch.

actions, and—without citing any authority, statute, or regulatory language, the Poarch Officials claim that this regulation merely requires "requires federal agency officials to consult with PCI." (Doc. 270 at 128). The problem with the Poarch Officials' argument is that the governing regulations define "agency official" to include *tribal officials* that sign agreements like the NPS Agreement—thus nullifying the argument that the Poarch Officials, after signing the NPS Agreement, have no duties or obligations under 36 C.F.R. § 800.6. Under the governing federal regulations, the NPS's delegation of authority to the Poarch Officials comes with a federal mandate that the "agency official"—defined as "a State, local, or *tribal government official*" takes "*legal and financial responsibility* for section 106 compliance in accordance with subpart B of this part ["the Section 106 process"]." 36 C.F.R. § 800.2 (emphasis added). The Poarch Officials' argument that they have no statutory or regulatory duties fails as a matter of law.[57]

The Poarch Officials rely on this same myopic characterization of the governing regulations to conclude that the Officials had no Section 106 duties to engage in consultation with the Plaintiffs prior to undertaking their 2023 construction at the Hickory Ground Site. (Doc. 270 at 129). For all the reasons discussed *supra* in Section VI.N.3, it is clear that the NPS Agreement requires the Poarch Officials to carry out Section 106 consultation with any tribe whose historical homelands encompass the Hickory Ground Site, and that necessarily includes consultation with the Muscogee (Creek) Nation. Stmt. Disp. Facts ¶ 2. A plain reading of the NPS Agreement and corresponding NHPA provisions and implementing regulations do not support the view that the Poarch Officials were only required to consult with federal agencies. (*See, e.g*, ., (Doc. 261-1 at Ex. J, 251, § 7) (The Poarch Officials must engage in "consultation with representatives of any other *tribes* whose traditional lands may have been within the Poarch Band of Creek Indians Reservation, and for consultation with the interested public.") (emphasis added).[58]

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[57] The Poarch Officials' attacks on Paragraph 493(f) fail for the same reasons. (Doc. 270 at 128-29).

[58] The Poarch Officials claim that Paragraph 501 of the TASC is "this is the only instance in the entire TASC where Plaintiff links an alleged violation by the Tribal Officials to a specific provision of the NPS

None of the Poarch Officials' various attacks on Count XVII support dismissal at this time. Thus, for the foregoing reasons, Count XVII should not be dismissed. It states a viable claim for prospective relief against ongoing failures to perform delegated federal duties and, separately, a viable APA claim to review past acts taken under asserted delegated federal authority.

P. Plaintiffs have stated a viable claim that the Poarch Officials, as persons acting under color of federal law through the NPS Agreement, have violated Plaintiffs' religious rights (Count XIX).

1. Count XIX is brought against the Poarch Officials only to the extent their conduct is alleged to have been taken pursuant to delegated federal authority.

Count XIX is not brought against the Poarch Officials merely in their capacity as tribal officials, but rather, Count XIX is brought against them only to the extent they acted, or continued to act, pursuant to their delegated NPS Agreement authority. (*See* Doc. 261 at 112, ¶ 520). Count XIX is pleaded in this limited manner to identify clearly the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Court's instruction that Plaintiffs plead their claims on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); (*see also* Doc. 234 at 11).

That pleading choice is deliberate. The TASC alleges that the Poarch Officials assumed federally defined historic-preservation and consultation responsibilities, remained subject to federal standards and oversight, and exercised that authority in connection with Hickory Ground. (Doc. 261 at 30-34, 111-13 ¶¶ 124-27, 139-48, 517, 520-21); (Doc. 261-1 at Ex. J, 248-53, §§ 5, 7, 9, 12, 14, 15). Count XIX reaches the Poarch Officials only to that limited extent.

2. Sovereign immunity does not warrant dismissal of Count XIX.

Because Count XIX is brought only to the extent the Poarch Officials exercised, or continue to exercise, delegated federal authority, the relevant sovereign immunity question is federal, not tribal. To the extent Count XIX seeks prospective relief against an ongoing burden on Plaintiffs'

Agreement" (Doc. 270 at 129, n. 42), but the TASC includes numerous allegations that cite directly to an obligation in the NPS Agreement the Officials signed with the NPS. *See, e.g.,* (Doc. 261 at 30, ¶ 126); (*id.* at 110, ¶ 511).

religious exercise arising from the application of ARPA and NAGPRA at Hickory Ground, sovereign immunity is waived by 5 U.S.C. § 702. (Doc. 261 at 14, ¶ 64). The APA waiver applies because Count XIX seeks prospective relief to stop the ongoing and future application of the governing federal framework in a manner that continues to burden Plaintiffs' religious exercise. (Doc. 261 at 111-14, ¶¶ 515-25); (*id.* at 136-37, ¶ (s)).

Count XIX also fits within the equitable *ultra vires* action recognized in *Larson* and *Dugan* to the extent Plaintiffs seek prospective relief against officials alleged to have acted beyond the scope of delegated federal authority. *See Larson*, 337 U.S. at 689 (recognizing the common law equitable doctrine permitting suits to go forward alleging that a government official's actions were beyond statutory authority, on the grounds that such actions "are considered individual and not sovereign actions"); *Dugan*, 372 U.S. at 621-23 (1963) (same); *see also Made in the USA Found.*, 242 F.3d at 1308 n.20.

The RFRA component of Count XIX arises under an express cause of action. RFRA authorizes "appropriate relief against a government," and "government" includes an "official" or "other person acting under color of law" of the United States. 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1). Thus, to the extent the Poarch Officials acted under delegated federal authority through the NPS Agreement and the federal statutory framework it implements, RFRA itself supplies the cause of action for that portion of Count XIX. RFRA provides an express cause of action, but nothing in RFRA suggests Congress meant to foreclose the traditional equitable action for ongoing constitutional violations. *See Seminole Tribe*, 517 U.S. at 73-76.

The First Amendment component of Count XIX rests on a different legal footing. Plaintiffs do not contend that RFRA creates the First Amendment claim, nor do they rely on an implied right of action under ARPA or NAGPRA. That portion of Count XIX proceeds through the traditional non-statutory equitable action recognized in *Larson* and *Dugan*, which permits prospective relief against officials whose conduct exceeds lawful statutory authority or violates the Constitution. Nor does Count XIX implicate any statute containing the kind of detailed remedial scheme that would

displace that traditional equitable action as to the ongoing constitutional violation alleged here. *See supra* Section VI.B.1.

The Poarch Officials do not argue that Count XIX must be dismissed under *Coeur d'Alene*. (See Doc. 270 at 134-37). In any event, Count XIX, as pleaded against Poarch Officials acting under delegated federal authority, does not present the kind of *Ex parte Young* claim to which *Coeur d'Alene* would apply. Therefore, Count XIX is not subject to dismissal on tribal sovereign immunity grounds.

3. Count XIX is brought against the Poarch Officials only to the extent that their actions—past or present—are deemed to be taken pursuant to delegated federal authority under the NPS Agreement.

Count XIX challenges the application of ARPA and NAGPRA at Hickory Ground under RFRA. Plaintiffs allege those statutes violate RFRA as applied if they are construed or enforced to allow any tribe other than the Muscogee (Creek) Nation to consent to the excavation or removal of cultural items at Hickory Ground, or to give higher priority in the excavated remains and cultural items to any entity or person other than Mekko Thompson or the Muscogee (Creek) Nation. (Doc. 261 at 111-14, ¶¶ 514-27). As with Count XX, Count XIX proceeds against the Poarch Officials only to the extent they have acted (or continue to act) under delegated federal authority in the application of that federal statutory regime. (Doc. 261 at 111-12, ¶¶ 514, 517, 520). The TASC alleges the Poarch Officials, acting under delegated federal authority, participated in the excavation, treatment, reinterment, retention, and continued handling of Plaintiffs' ancestors' remains and funerary objects, while failing to provide the notice, consultation, and protection required under federal law and the NPS Agreement. (Doc. 261 at 30-34, 38, 112-13, ¶¶ 125-27, 132, 141-48, 161-66, 520-21).

Count XIX is narrower than Count XX. Plaintiffs allege Hickory Ground is a sacred Muscogee ceremonial ground and burial site, that members of Hickory Ground Tribal Town are lineal descendants through the Town's matrilineal kinship system, and that Mekko Thompson brings this action as the traditional representative of those lineal descendants. (Doc. 261 at 7, 21

¶¶ 22-26, 93-98). Against that backdrop, Count XIX alleges that ARPA and NAGPRA violate RFRA as applied if they are construed or applied to allow any tribe other than the Muscogee (Creek) Nation to consent to the excavation or removal of cultural items at Hickory Ground, or to give higher priority in the excavated remains and cultural items to any entity or person other than Mekko Thompson or the Muscogee (Creek) Nation. (Doc. 261 at 113-14, ¶¶ 522-25). The TASC further alleges that Plaintiffs have suffered resulting burdens including the inability to properly bury their ancestors, the ongoing desecration of sacred burial grounds, and the denial of access needed to perform required religious practices. (Doc. 261 at 114, ¶ 526).

That narrow claim fits the statutory and regulatory scheme. For human remains and associated funerary objects, lineal descendants have first priority. 25 U.S.C. § 3002(a)(1). NAGPRA's regulations also recognize that lineal descent may be shown through the traditional kinship system of the "appropriate Indian tribe." 43 C.F.R. §§ 10.2(b)(1); *id.* § 10.14 (2023). That is important here because Plaintiffs allege their traditional kinship structure determines both lineal descent and the religious responsibility to care for the ancestors buried at Hickory Ground. (Doc. 261 at 21, ¶¶ 94-98); Stmt. Disp. Facts ¶ 7.

For intentional excavations on tribal lands, NAGPRA requires the consent of the "appropriate Indian tribe." 25 U.S.C. § 3002(c)(2). That structure reflects Congress's decision to prioritize lineal descendants and culturally affiliated tribes in the disposition of Native American human remains and funerary objects, rather than making the present trust beneficiary status alone dispositive. *See* 25 U.S.C. § 3002(a)(1)-(2); S. Rep. No. 101-473, at 8, 10 (1990). BIA's regulations likewise reflect that determinations concerning custody and control of human remains and funerary objects turn first on lineal descendants, and that other cultural items may depend on aboriginal occupation or the strongest demonstrated cultural relationship rather than present land status alone. 25 C.F.R. §§ 262.5(d), 262.8(a). Accepting the TASC's allegations as true, those provisions do not compel the Poarch Officials' apparent position that Poarch's status as beneficiary owner of trust land overrides Plaintiffs' alleged lineal, cultural, and religious connection to the ancestors and sacred items at Hickory Ground.

4. RFRA permits Plaintiffs' as applied challenge.

RFRA provides that the government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that applying the burden to that person furthers a compelling governmental interest through the least restrictive means. 42 U.S.C. § 2000bb-1(a), (b). The Supreme Court has repeatedly applied RFRA in that manner, requiring the federal government to justify the application of generally applicable federal law to the particular religious claimant before the court. *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006) (concluding that RFRA requires the government to show that the compelling-interest test is satisfied through application of the challenged law "to the person," not by relying on broad categorical interests); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95, 726-28 (2014) (applying RFRA to a generally applicable federal mandate and requiring the government to prove that enforcing that mandate against the particular claimants was the least restrictive means of furthering a compelling interest). Plaintiffs do not allege that ARPA and NAGPRA are facially invalid, but allege those statutes violate RFRA as applied if they are construed in a way that lets another tribe consent to the excavation of Plaintiffs' ancestors (instead of requiring Plaintiffs' consent) or deprives Plaintiffs of priority to their remains and funerary objects. (Doc. 261 at 113-14, ¶¶ 522-27). Accordingly, Plaintiffs state a cognizable RFRA claim.

The Poarch Officials argue that Count XIX rests on a "flawed premise," asserting that Poarch would own the human remains and artifacts even if ARPA and NAGPRA did not exist. (Doc. 270 at 135-36). That argument is beside the point: NAGPRA and ARPA *do* exist, and Plaintiffs' Count XIX challenges the Poarch Officials' application of those statutes to Hickory Ground as violating RFRA. When federal actors invoke that statutory framework in a way that imposes a substantial burden on Plaintiffs' religion, RFRA limits how the statutory framework may be applied. The Poarch Officials therefore cannot reframe Count XIX as a simple

property-rights dispute, nor can they defeat Count XIX based on conjecture about a hypothetical statutory framework that does not exist and is not in place.

Plaintiffs further allege that the federal government allowed Poarch to exercise significant federal preservation responsibilities through Poarch's own tribal preservation code, internal review bodies, and Tribal Council, rather than through a neutral federal agency, state official, or independent decisionmaker. The NPS Agreement expressly incorporated Poarch's own preservation structure, while the TASC alleges Poarch's own policies once prohibited excavation and emphasized preservation, but were later violated when it came to Hickory Ground. (Doc. 261 at 31-32, ¶¶ 134-36); (Doc. 261-1 at Ex. J, 250-52, § 9). In that way, Plaintiffs plausibly allege that the Poarch Officials' delegated role enabled them to construe and apply the governing framework in a manner that favored Poarch's own interests at Hickory Ground rather than the protective purposes of the federal statutory scheme and Plaintiffs' lineal, cultural, and religious interests in the Site.

5. Poarch Officials are proper RFRA defendants because they acted under delegated federal authority.

RFRA defines "government" to include not only an official of the United States, but also "instrumentalities" and any "other person acting under color of law" of the United States. 42 U.S.C. § 2000bb-2(1). That phrase carries its familiar civil-rights meaning. *Tanzin v. Tanvir*, 592 U.S. 43, 50-52 (2020); *West v. Atkins*, 487 U.S. 42, 54-57 (1988). Here, the TASC alleges the Poarch Officials assumed federally defined SHPO functions, exercised authority governed by federal law and Section 106, remained subject to continuing federal oversight, and undertook federally imposed consultation duties toward tribes whose traditional or aboriginal lands could be affected. (Doc. 261 at 30-31, 33-35, ¶¶ 125-27, 132, 141-48). The TASC further alleges that, while exercising that authority, the Poarch Officials failed to notify and consult with Plaintiffs, failed to take into account Plaintiffs' views regarding Hickory Ground, failed to seek ways to avoid, minimize, or mitigate harm to the Site, and continued to permit destruction and desecration of Hickory Ground without corrective action. (*Id.* at 104-10, 112-13 ¶¶ 486-505, 511(a)-(f), 520-21).

At the pleading stage, those allegations are sufficient to bring Count XIX within RFRA's definition of government.

Once Plaintiffs plausibly allege a prima facie RFRA claim, the burden shifts to the government. 42 U.S.C. § 2000bb-1(b); *United States v. Grady*, 18 F.4th 1275, 1285, 1287 (11th Cir. 2021); *Davila v. Gladden*, 777 F.3d 1198, 1204-05 (11th Cir. 2015). Count XIX alleges the challenged applications do not further a compelling governmental interest and do not use the least restrictive means, which the Poarch Officials do not contest. (Doc. 261 at 113-14, ¶¶ 522-24, 527). The TASC alleges less restrictive means, including notice to the Muscogee (Creek) Nation, consultation with traditional religious leaders, recognition of Plaintiffs' traditional kinship structure, proper treatment and reburial of the ancestors, lawful repatriation, and restoration of the Site. (*Id.*at 12-13, 37-38, 97-98, 117 ¶¶ 53-58, 161-66, 453-57, 537).

6. None of the reasons offered by the Poarch Officials support dismissal.

The Poarch Officials' other arguments for dismissal of Count XIX rely upon the theory that RFRA does not apply to them and that they did not substantially burden Plaintiffs' religion. (Doc. 270 at 134-38). For the same reasons set out more fully in Plaintiffs' arguments on Count XX in Section VI.Q, and Count XXII in Section VI.R, *infra*, the TASC adequately alleges religious exercise, substantial burden, and government action. Plaintiffs allege that Hickory Ground is a sacred burial and ceremonial ground, that their religion imposes concrete duties to care for their ancestors and ensure they remain undisturbed, and that the challenged applications of ARPA and NAGPRA has prevented proper burial, authorized improper reburial, continued the desecration of sacred grounds, and denied Plaintiffs access needed for required religious practices. (Doc. 261 at 21, 66-68, 112-14 ¶¶ 93-98, 285-93, 521-27). Under Eleventh Circuit law, those allegations plausibly state a RFRA claim. *See Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-32 (11th Cir. 2020); *Davila*, 777 F.3d at 1204-05.

7. In the alternative, Plaintiffs state a claim under the Free Exercise Clause because the Poarch Officials applied the governing framework in a unneutral and unequal manner.

In the alternative, Count XIX asserts that the Poarch Officials, acting under delegated federal authority, have applied ARPA and NAGPRA in a manner that violates the First Amendment. For efficiency, Plaintiffs incorporate the argument and reasons provided in Section VI.Q, *infra*, regarding the Free Exercise Clause.

Q. Plaintiffs have stated a viable RFRA claim, and in the alternative a Free Exercise claim, against the Poarch Officials acting under delegated federal authority (Count XX).

1. Count XX is brought against the Poarch Officials only to the extent their conduct is alleged to have been taken pursuant to delegated federal authority.

Count XX proceeds against the Poarch Officials only to the extent they exercised, or continue to exercise, delegated federal authority under federal law and the NPS Agreement. (Doc. 261 at 115, ¶¶ 529, 532). Count XX names them alongside the Federal Defendants only to the extent they are alleged to have assumed and exercised federal responsibilities formally delegated through the NPS Agreement and to have acted under color of federal law in ways that substantially burden Plaintiffs' religious exercise. Count XX is pleaded in this limited manner to identify clearly the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Court's instruction that Plaintiffs plead their claims on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); (*see also* Doc. 234 at 11).

This pleading choice distinguishes Count XX from Counts XXII and XXIII. Counts XXII and XXIII are direct claims against the Poarch Officials in their official capacities for ongoing violations of RFRA and the First Amendment. Count XX reaches the Poarch Officials only to the extent they acted under delegated federal authority, including with respect to past conduct reviewable under the APA.

The TASC plausibly alleges such delegated authority. It alleges that NPS delegated historic preservation responsibilities on reservation lands that included a significant portion of Hickory

Ground, that Poarch Officials assumed formal responsibility for specified NHPA functions on tribal lands, and that those functions remained subject to federal standards under the NHPA and its implementing regulations, reporting requirements, periodic NPS review, and possible termination for noncompliance. (Doc. 261 at 30-34, ¶¶ 124-27, 139-44); (Doc. 261-1 at Ex. J, 248-53, §§ 5, 7, 9, 12, 14, 15). The TASC further alleges that the Poarch Officials exercised that delegated authority in ways that burdened Plaintiffs' religion, including by failing to notify and consult with Plaintiffs, failing to take into account Plaintiffs' views regarding Hickory Ground, authorizing excavation and construction activities, authorizing reburial without adherence to Plaintiffs' religious practices, and allowing the continued desecration of the Site without restoration. (Doc. 261 at 115-17, ¶¶ 535-39). At the pleading stage, those allegations are sufficient to place Count XX within the delegated-authority framework.

2. Sovereign immunity does not warrant dismissal of Plaintiffs' RFRA claim against the Poarch Officials acting under delegated federal authority.

Because Count XX is brought only to the extent the Poarch Officials exercised, or continue to exercise, delegated federal authority, the relevant sovereign immunity question is federal, not tribal. To the extent Count XX seeks prospective relief against ongoing burdens on Plaintiff's religious exercise arising from conduct taken under delegated federal authority, sovereign immunity is waived by 5 U.S.C. § 702. To the extent Count XX also preserves review of discrete past acts taken under delegated federal authority, Plaintiffs proceed under the APA's review provisions, including 5 U.S.C. § 706.

To the extent Count XX also seeks prospective relief against ongoing burdens arising from conduct taken under delegated federal authority, Count XX also satisfies the requirements for the equitable *ultra vires* action as recognized in *Larson* and *Dugan*. *See Larson*, 337 U.S. at 689 (recognizing the common law equitable doctrine permitting suits to go forward alleging that a government official's actions were beyond statutory authority, on the grounds that such actions "are considered individual and not sovereign actions."); *Dugan*, 372 U.S. at 621-23 (same); *see also Made in the USA Foundation*, 242 F.3d at 1308 n.20. That is because Count XX names

officials acting under federal delegated authority as defendants (Doc. 261 at 115, ¶ 529); allege a violation of federal law in the form of violations of the First Amendment and RFRA (*id.* at 115-17, ¶ 530-39); allege that this violation of federal law is ongoing (*id.* at 115-17, ¶530-39); and request prospective relief (*id.* at 137-38, ¶ (t)) (*E.g.*, "Issue an order prohibiting any further burdening of Plaintiffs' religious exercise, including . . . [p]rohibitions against any additional construction at the Hickory Ground Site . . . .").

Finally, RFRA also provides its own express cause of action. RFRA authorizes "appropriate relief against a government," and "government" includes an "official" or "other person acting under color of law" of the United States. 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1). Thus, to the extent the Poarch Officials acted under delegated federal authority through the NPS Agreement and the federal statutory framework it implements, RFRA itself supplies the cause of action for that portion of Count XX. The First Amendment component proceeds through the traditional nonstatutory equitable action recognized in *Larson* and *Dugan*, which permits prospective relief against officials whose conduct exceeds lawful authority or violates the Constitution. *See Larson*, 337 U.S. at 689; *Dugan*, 372 U.S. at 621-23.

The Poarch Officials do not argue that Count XX must be dismissed under *Coeur d'Alene*. (*See* Doc. 270 at 134-37). In any event, Count XX, as pleaded against the Poarch Officials acting under delegated federal authority, does not present the kind of *Ex parte Young* claim to which *Coeur d'Alene* would apply. Therefore, Count XX is not subject to dismissal on tribal sovereign immunity grounds.

3. Plaintiffs adequately allege a substantial burden on religious exercise.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government demonstrates that application of the burden to that person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). RFRA defines "government" to include not only an "official . . . of the United States," but also any "*other person*

acting under color of law" of the United States. 42 U.S.C. § 2000bb-2(1) (emphasis added). Thus, to establish a prima facie RFRA claim, a party "must first show (1) that he or she was exercising (or was seeking to exercise) his or her sincerely held religious belief, and (2) that the government substantially burdened the [plaintiff's] religious exercise." *Grady*, 18 F.4th at 1285; *Davila*, 777 F.3d at 1204. The burden then shifts to the government to demonstrate that it has a compelling interest, and that the challenged action in question is the least-restrictive means of furthering that interest. *Grady*, 18 F.4th at 1285, 1287.

Plaintiffs incorporate by reference Section VI.F.1 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.1, filed Apr. 30, 2026. As explained there, the TASC plausibly alleges religious exercise within RFRA's meaning because Hickory Ground is a sacred and irreplaceable religious site and Plaintiffs allege concrete religious duties concerning their ancestors' remains, burial grounds, ceremonial grounds, and access to the Site. Those same allegations apply equally to Count XX against the Poarch Officials.

Plaintiffs likewise incorporate by reference Section VI.F.2 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss, which demonstrates that the TASC plausibly alleges a substantial burden on Plaintiffs' religious exercise. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.2, filed Apr. 30, 2026. As alleged in the TASC, the challenged conduct includes excavation and removal of ancestors' remains and funerary objects, desecration of sacred burial and ceremonial grounds, improper reburial, denial of access needed for required religious practices, and continuing conditions that prevent Plaintiffs from carrying out mandatory religious duties at Hickory Ground. (Doc. 261 at 115-17, ¶¶ 532-38). Under Eleventh Circuit precedent, those allegations are more than sufficient at the pleading stage to plausibly allege a burden properly attributable to government action rather than a self-imposed harm. *See Thai Meditation Ass'n of Ala., Inc.*, 980 F.3d at 832.

4. The Poarch Officials acted under color of law pursuant to delegated federal authority in substantially burdening Plaintiffs' religious exercise.

Plaintiffs incorporate by reference their substantial-burden arguments above and address here the Poarch Officials' argument that Count XX does not state a claim against them because they are not federal officials. (Doc. 270 at 137) (claiming they cannot be held liable for violations of RFRA or the First Amendment because they are not "a federal agency at all"). The question is not whether the Poarch Officials are a "federal agency," but rather, the question is whether they were, and continue, to act under "color of law" of the United States.

First, RFRA reaches not only federal officials, but also any "other person acting under color of law" of the United States. 42 U.S.C. § 2000bb-2(1). The Supreme Court has recognized that this language carries the familiar civil-rights meaning of conduct taken under color of law. *See Tanzin*, 592 U.S. at 50-52. In the analogous Section 1983 context, private actors act under color of law when they exercise delegated governmental authority. *See West*, 487 U.S. at 54-57.

Second, Count XX is not a direct RFRA claim against the Poarch Band as a tribe, but instead a RFRA claim against the Poarch Officials only to the extent they are alleged to have exercised federal responsibilities formally delegated to them by NPS under federal law and the NPS Agreement. The Poarch Officials are named as defendants to Count XX along with the Federal Defendants because federal law can treat tribal entities and their employees as standing in the government's shoes when carrying out delegated federal functions. *See, e.g.*, *Orleans*, 425 U.S. at 815 (holding that a party under contract with the government can become an agency of the United States within the meaning of the Federal Tort Claims Act); *Colbert*, 785 F.3d at 1389-90 (holding that Indian tribes and their employees may be deemed employees of the United States for purposes of the Federal Tort Claims Act when they are carrying out functions authorized in or under a tribal self-determination contract). Count XX is pleaded in this limited manner to clearly identify the basis on which the Poarch Officials are named alongside the Federal Defendants and to comply with the Circuit Court's instruction that Plaintiffs plead their action on a claim-by-claim and defendant-by-defendant basis. (Doc. 259 at 1-2); (*see also* Doc. 234 at 11).

Third, the TASC plausibly alleges that the Poarch Officials exercised authority delegated by the federal government when they engaged in conduct that burdened Plaintiffs' religion. The TASC alleges that: (1) NPS delegated historic-preservation responsibilities on reservation lands that included a significant portion of Hickory Ground; (2) that Poarch Officials assumed formal responsibility for specified NHPA functions on tribal lands; and (3) that those functions remained subject to federal standards under the NHPA and its implementing regulations, reporting requirements, periodic NPS review, and possible termination for noncompliance. (Doc. 261 at 30-34, 104-05, 111 ¶¶ 124-27, 139-44, 485-87, 517); (Doc. 261-1 at Ex. J, 248-53, §§ 5, 7, 9, 12, 14, 15). The TASC further alleges that the Poarch Officials exercised that delegated authority in ways that substantially burdened Plaintiffs' religious exercise, including: (1) failing to consult with Plaintiffs before excavation and reburial; (2) mistreating and sacrilegiously reinterring Plaintiffs' ancestors' remains and funerary objects; (3) continuing to maintain conditions at Hickory Ground that desecrate sacred burial and ceremonial grounds; and (4) preventing Plaintiffs from carrying out required religious duties. (Doc. 261 at 66-68, 112-13, 115-17 ¶¶ 283-93, 521, 532-39).

Poarch argues that Count XX fails because the RFRA violations alleged in Paragraph 535 of the TASC do not implicate duties assumed under the NPS Agreement. (Doc. 270 at 137-38). But Count XX directly ties the challenged conduct to those delegated functions. The TASC alleges that the Poarch Officials, acting under delegated federal authority, are required to: (1) consult with Tribes that attach religious and cultural significance to Hickory Ground; (2) take into account the effects of undertakings on that historic property; (3) seek ways to avoid, minimize, or mitigate adverse effects; and (4) comply with Section 106 procedures through the NPS Agreement. (Doc. 261 at 104-07, ¶¶ 486-99). It then alleges that the Poarch Officials violated and continue to violate those assumed responsibilities by: (1) failing to notify and consult with Plaintiffs; (2) failing to take into account Plaintiffs' views on actions affecting their traditional lands; (3) failing to comply with Section 106; (4) failing to solicit and consider Plaintiffs' comments; and (4) continuing to permit destruction and desecration of Hickory Ground without corrective action. (Doc. 261 at 107-11, ¶¶ 496-505, 511(a)-(f)).

Those allegations are sufficient at the pleading stage to plausibly allege that the Poarch Officials acted as federal delegees with respect to the delegated NPS responsibilities concerning historic preservation and Section 106 consultation at Hickory Ground. Whether the liability of Poarch Officials is imputed to the United States is a question for a later stage of the case. At this pleading stage, Rule 8 permits alternative pleading, regardless of consistency. Fed. R. Civ. P. 8(d)(2)-(3). Thus, the Poarch Officials' argument that Counts XX and XXII are improper because they contain undifferentiated allegations provides no basis for dismissal. (Doc. 270 at 137).

5. The Poarch Officials cannot establish RFRA's strict-scrutiny defense at the pleading stage.

Finally, Plaintiffs incorporate by reference Section VI.F.3 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.3, filed Apr. 30, 2026. For the same reasons stated there, Poarch Officials do not show that the challenged burden on Plaintiffs' religious exercise furthers a compelling governmental interest through the least restrictive means. Count XX therefore should not be dismissed.

6. In the alternative, Plaintiffs state a claim under the Free Exercise Clause because the Poarch Officials applied the governing framework in a unneutral and unequal manner.

Even if the Court concludes Plaintiffs have not plausibly alleged a substantial burden sufficient to state a claim under RFRA, the First Amendment claims still survive. RFRA and the Free Exercise Clause are not coextensive. RFRA requires a substantial burden. The Free Exercise Clause also forbids government from discriminating among religious believers, departing from neutrality, or applying a legal framework in a manner that prefers one religious framework over another. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458-61 (2017); *Fulton v. City of Philadelphia*, 593 U.S. 522, 532-34 (2021). Facial neutrality alone is not enough, because the Free Exercise Clause forbids "subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (citations omitted). A law is not generally

applicable when it invites discretionary, individualized exemptions or when it burdens religious conduct while permitting comparable secular conduct that undermines the government's asserted interests in a similar way. *See Fulton*, 593 U.S. at 535; *Lukumi*, 508 U.S. at 542-43. And where the government singles out religious observers for unequal treatment because of their religious character or status, strict scrutiny applies. *See Lukumi*, 508 U.S. at 546. Those cases make clear that religious observers are protected not only from outright coercion, but also from unequal treatment.

Here, the TASC alleges that Plaintiffs are the lineal descendants of those buried at Hickory Ground under the Muscogee traditional matrilineal kinship system, that Mekko Thompson sues as the traditional representative of those lineal descendants, and that Poarch's modern-day members have no ancestral lineage or cultural connection to Hickory Ground. (Doc. 261 at 7, 16, 18 ¶¶ 24-26, 71-72, 82-83); *see also* Stmt. Disp. Facts ¶¶ 2, 7. The TASC further alleges that, under NAGPRA, Poarch never had ownership or the right of control over the excavated human remains and associated funerary objects, while Mekko Thompson, as representative of the lineal descendants under the Muscogee (Creek) traditional kinship structure, does have that ownership and right of control. (Doc. 261 at 44, ¶ 205).

Significantly, Plaintiffs allege that Poarch Officials do not share Plaintiffs' lineal, cultural, and religious relationship to Hickory Ground, yet Poarch Officials nevertheless exercised authority over excavation, reinterment, custody, and repatriation in a manner that disregarded Plaintiffs' traditional kinship structure and religious obligations, chose outcomes that suited Poarch's own commercial needs and desires rather than the religious requirements of the individuals exhumed and their descendants, deprived Mekko Thompson of authority over the reinterment of his relatives, and falsely created the impression that the reburial occurred with Plaintiffs' participation and in accordance with proper religious protocol. (*Id.* at 47-48, 113-14, 124-26, 129-31, ¶¶ 222-26, 522-25, 572-80, 595-602). Accepted as true, those allegations plausibly describe a non-neutral application of federal law and a form of unequal religious treatment.

Pleading both theories does not make the claims indistinguishable or shotgun. The RFRA claim asks whether the Poarch Officials substantially burdened Plaintiffs' religious exercise and, if so, whether the Officials can satisfy strict scrutiny. The First Amendment claim asks whether the Poarch Officials applied or administered the governing framework in a manner that was not neutral or generally applicable, or that preferred competing religious or cultural claims over Plaintiffs' own religious obligations. And Plaintiffs have alleged precisely the kind of departure from neutrality and unequal treatment that the Free Exercise Clause forbids. That is sufficient for fair notice under Rule 8, and Plaintiffs may plead those theories in the alternative. Fed. R. Civ. P. 8(d)(2)-(3).

For those reasons, Count XX states a plausible claim under the Free Exercise Clause and should not be dismissed.

R. Plaintiffs have stated a viable RFRA claim against the Poarch Officials (Count XXII).

1. Plaintiffs' RFRA claim against the Poarch Officials satisfies *Ex parte Young*.

As discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress, in passing RFRA, displaced the availability of *Ex parte Young*'s traditional equitable cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, the Eleventh Circuit stated in its opinion that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 13). With respect to Count XXII, Plaintiffs: name Poarch Officials as defendants (Doc. 261 at 120, ¶ 555); allege a violation of federal law in the form of violations of RFRA (*id.* at 121-23, ¶¶ 557-66); allege that this violation of federal law is ongoing (*id.* at 122-23, ¶¶ 563-65); and request prospective relief (*id.* at 138-39, ¶ (v)) (*E.g.*, "Plaintiffs request that the Court issue declaratory and injunctive relief against Poarch Officials,

including . . . [a]n order enjoining Poarch Officials from engaging in any activities that substantially burden Plaintiffs' religious exercise, including permitting gambling, alcohol consumption, or unauthorized access to sacred ceremonial grounds at Hickory Ground . . . .")).

Second, RFRA provides the cause of action. RFRA authorizes a person whose religious exercise has been burdened to "assert that violation as a claim," and authorizes "appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). As alleged in Count XXII, Poarch Officials fall within RFRA's definition of "government" to the extent they acted under color of federal law. See 42 U.S.C. § 2000bb-2(1). Moreover, *Ex parte Young* permits prospective relief against tribal officials for ongoing violations of RFRA.

Third, nothing in RFRA demonstrates congressional intent to displace that traditional equitable vehicle. The Poarch Officials do not identify any detailed remedial scheme in RFRA comparable to the compact-negotiation scheme at issue in *Seminole Tribe*. *Seminole Tribe*, 517 U.S. at 73-76. Nor does RFRA channel claims of this sort into some exclusive alternative remedial process. Instead, RFRA expressly authorizes claims for relief against a government. 42 U.S.C. § 2000bb-1(c). Thus, Count XXII does not present the sort of statutory scheme that forecloses equitable relief.

Finally, for all the reasons articulated *supra* in Section VI.B.2., the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count XXII. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of RFRA is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"in-fused with a public trust' like the submerged lands in *Coeur d'Alene*." (Doc. 234 at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count XXII is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs adequately allege a substantial burden on religious exercise.

Plaintiffs incorporate by reference Section VI.F.1 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.1, filed Apr. 30, 2026. As explained there, the TASC plausibly alleges religious exercise within RFRA's meaning because Hickory Ground is a sacred site of unique and irreplaceable religious significance to Plaintiffs, and Plaintiffs allege specific religious duties concerning their ancestors' remains, burial grounds, ceremonial grounds, and access to the Site. Those same allegations apply equally to Count XXII against the Poarch Officials.

Plaintiffs likewise incorporate by reference Section VI.F.2 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss, which demonstrates the TASC plausibly alleges a substantial burden on Plaintiffs' religious exercise. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.2, filed Apr. 30, 2026. The TASC alleges excavation and removal of ancestors' remains and funerary objects, desecration of sacred burial and ceremonial grounds, improper reburial, denial of access needed for required religious practices, and continuing conditions that prevent Plaintiffs from carrying out mandatory religious duties at Hickory Ground. For the same reasons, Count XXII adequately alleges a substantial burden on religious exercise.

The Poarch Officials nevertheless rely heavily on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (*see* Doc. 270 at 143-45), but that reliance is misplaced for the reasons already set out in Section VI.F.2 of Plaintiffs Response to the Federal Defendants' Motion to Dismiss. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.2, filed Apr. 30, 2026. *Lyng* pre-dated RFRA by five years, and Congress enacted RFRA because it concluded that courts were not providing sufficient protection for religious exercise. 42 U.S.C. §§ 2000bb(a)(4), (b)(1); *see also Emp. Div. v. Smith*, 494 U.S. 872, 883-85 & n.2 (1990) (identifying *Lyng* as one of the cases in which the Supreme Court declined to apply the compelling-interest test to a neutral governmental decision or rule of general applicability), *superseded in part*

by Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4). Specifically, under RFRA, any federal rule that substantially burdens the free exercise of religion must pass strict scrutiny, even if generally applicable. 42 U.S.C. §§ 2000bb(a)(4), (b)(1); 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . . . "). RFRA therefore provides "greater protection for religious exercise than is available under the First Amendment." *Ramirez v. Collier*, 595 U.S. 411, 424 (2022) (quoting *Holt v. Hobbs*, 574 U.S. 352, 357 (2015)). To the extent the Poarch Officials argue that *Lyng* stands for the proposition that they can permit the destruction of a religious site without triggering strict scrutiny due to the lack of a substantial burden, that argument is incorrect and is inapplicable post-RFRA.

The Poarch Officials also cite the Ninth Circuit's decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069 (9th Cir. 2008), to argue for a narrower definition of substantial burden. (Doc. 270 at 141). But the Ninth Circuit has overruled *Navajo Nation* on that point. *See Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) ("A majority of the *en banc* court therefore overrules *Navajo Nation v. U.S. Forest Service* to the extent that it defined a 'substantial burden' under RFRA as imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.") (citation modified).

The Poarch Officials also cite several unreported district court decisions from the Ninth Circuit to argue that "substantial burden" requires a more restrictive test. (Doc. 270 at 144-45) (first citing *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. 2:11-cv-00395-ODW, 2012 WL 2884992 (C.D. Cal. July 13, 2012) ("*La Cuna I*"); then *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. CV 11-00400 DMG, 2013 WL 4500572 (C.D. Cal. Aug. 16, 2013) ("*La Cuna II*"); and then *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-cv-01169-YY, 2018 WL 4523135 (D. Or. Mar. 2, 2018). But those nonbinding district court decisions apply the same narrow Ninth Circuit substantial-burden approach overturned by the Ninth Circuit and are inconsistent with Eleventh

Circuit precedent. *See La Cuna I*, 2012 WL 2884992, at *8; *La Cuna II*, 2013 WL 4500572, at *10; *Slockish*, 2018 WL 4523135, at *3. The Poarch Officials effectively acknowledge as much. (*See* Doc. 270 at 145) (stating *Slockish* relied on *Navajo Nation*). Therefore, the Poarch Officials' use of Ninth Circuit precedent is no longer good law.

In any event, the Ninth Circuit cases are of no value when there is controlling Eleventh Circuit precedent on point. The Eleventh Circuit has cautioned against importing heightened formulations from other circuits rather than applying its own precedent. *See Vision Warriors Church, Inc. v. Cherokee Cnty. Bd. of Comm'rs*, No. 22-10773, 2024 WL 125969, at *7 (11th Cir. Jan. 11, 2024) ("[T]he district court erred in applying a more demanding substantial burden standard from the Fourth Circuit."). Indeed, the Eleventh Circuit has already established that a plaintiff need not show a "complete, total, or insuperable burden" to satisfy that requirement. *Thai Meditation Ass'n of Ala., Inc.*, 980 F.3d at 830. Nor must Plaintiffs show that the Poarch Officials imposed pressure so severe that Plaintiffs were required to "completely surrender" their religious beliefs. *Id.* at 830–31. Rather, "modified behavior, if the result of government coercion or pressure, can be enough." *Id.* at 831. A burden is also substantial when it "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief," *Davila*, 777 F.3d at 1205, or when it forces adherents to "forego religious precepts." *Thai Meditation*, 980 F.3d at 830. Plaintiffs' allegations in the TASC easily meet this standard.

While there is absolutely no reason to look to cases in the Ninth Circuit for guidance, especially when most of those cases are no longer controlling law, the Poarch Officials are also wrong that *Apache Stronghold*, *La Cuna*, and *Slockish* are indistinguishable. In *Apache Stronghold*, the challenged governmental action was the congressionally mandated transfer of federally owned land to a private mining company, and while the Court held that the mere disposition of governmental real property is not a substantial burden, it recognized that "preventing access to religious exercise is an example of substantial burden." *Apache Stronghold*, 101 F.4th at 1043-44. In contrast to *Apache Stronghold*, Plaintiffs do not contend that the federal government's transferring of Hickory Ground to the Poarch Band constitutes a substantial burden; instead,

Plaintiffs allege that the substantial burden has been imposed by the Poarch Officials acting under color of federal law as they continue to refuse to repatriate and rebury Plaintiffs' relatives in accordance with Muscogee culture and religion, they restrict Plaintiffs' access to the sacred Site, they continue to serve alcohol at their gravesite, and operate a casino on a sacred site that is supposed to host ceremonies, not gambling. (Doc. 261 at 121-23, ¶¶ 561-63). This case is not *Apache Stronghold*.

Likewise, the two cited district court opinions are inapposite. In *La Cuna I*, plaintiffs did not "demonstrate that they have in fact been barred from the Project site or received actual threats of arrest," and alleged a burden on their religion that was in the nature of decreased "spiritual fulfillment." 2012 WL 2884992, at *7-8. In *Slockish*, the plaintiffs failed to show that they were forced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Slockish*, 2018 WL 4523135, at *6. Here, by contrast, Plaintiffs allege that Hickory Ground has been covered with the casino, buildings, parking lots, and other facilities, and that Defendants' ongoing actions prevent Plaintiffs from returning their ancestors to their original resting places and protecting the ceremonial grounds as their religion requires. (Doc. 261 at 67-68, 116-17, 121-23, ¶¶ 292-93, 535-38, 561-65). Plaintiffs further allege that the Poarch Officials authorized or facilitated excavation of graves and funerary objects, failed to provide required notice and consultation, participated in the mistreatment and reinterment of ancestral remains, continue to permit ongoing desecration of burial and ceremonial grounds, and continue to maintain conditions that prevent Plaintiffs from carrying out required religious duties at Hickory Ground. (*Id.* at 105-07, 110, 115-17, 121-26, ¶¶ 493-99, 511, 532-38, 561-79). Those allegations are materially different from the allegations in *Apache Stronghold*, *La Cuna*, and *Slockish*.

Even under the Ninth Circuit line of cases on which the Poarch Officials rely, dismissal would be premature. In *Slockish*, the District Court denied an earlier motion to dismiss the RFRA claim, explaining that "[s]uch a determination will best be made in any remedial phase of this litigation after the facts have been established and the legal issues have been decided." *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1185 (D. Or. 2010). Here too, all the Court

needs to decide at this stage of the case is whether Plaintiffs have alleged a plausible claim for relief under RFRA. The ultimate question is whether RFRA was violated, by whom, and what relief may be appropriate should be resolved on a full record.

3. The Poarch Officials acted under color of law in substantially burdening Plaintiffs' religious exercise.

Count XXII is pleaded independently of Count XX and is not limited to the narrower delegated-authority theory. Rather, Count XXII alleges that the substantial burden on Plaintiffs' religious exercise is properly attributable to the Poarch Officials because they acted under color of federal law and thus fall within RFRA's definition of "government." (Doc. 261 at 121-23, ¶¶ 558-67); 42 U.S.C. § 2000bb-2(1). The Supreme Court has recognized that this language carries the familiar civil-rights meaning of conduct taken under color of law. *See Tanzin*, 592 U.S. at 50-52.

The Poarch Officials assert they cannot be sued under RFRA because the word "tribe" does not appear in RFRA's definition of "government." (Doc. 270 at 140) (citing 42 U.S.C. §§ 2000bb2(1)-(2)). This argument, however, erroneously overlooks RFRA's acknowledgement that any person can be a "government" under RFRA if they are a "person acting under color of law" of the United States. 42 U.S.C. § 2000bb-2(1). A challenged act, therefore, may be treated as governmental where a private party exercises delegated governmental authority, acts jointly with the government, where the government provides significant encouragement, or where government remains entwined in the policies, management, or control of the challenged conduct. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). In the Eleventh Circuit, those principles are generally analyzed through the public-function, state-compulsion, and nexus-or-joint-action tests. *See Focus on the Fam.*, 344 F.3d at 1277; *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1026-27 (11th Cir. 1988). The TASC plausibly alleges action under color of federal law under each framework, and most clearly under the nexus-or-joint-action test.

Under the public-function test, a private entity acts under color of law when it exercises powers that are "traditionally the exclusive prerogative of the state." *Focus on the Fam.*, 344 F.3d at 1277 (quoting *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993)). The TASC alleges that the Poarch Officials assumed traditional functions that are exclusively governmental on tribal lands pursuant to the NPS Agreement and thereby undertook preservation responsibilities assigned and governed by federal law. (Doc. 261 at 30-31, ¶¶ 125-27, 132). Under that Agreement, the Poarch Officials undertook SHPO functions on tribal lands and assumed responsibilities assigned and governed by federal law, including advising and assisting federal and state agencies, cooperating with the Secretary, the ACHP, and other governmental entities, and consulting with the appropriate federal agencies in accordance with Section 106. (Doc. 261-1 at Ex. J, 251-53, §§ 5, 7, 9, 12, 14, 15). Those responsibilities included advising and assisting federal and state agencies, cooperating with the Secretary and the ACHP, consulting with tribal nations that attach cultural and religious significance to Hickory Ground in accordance with Section 106, and carrying out consultation and review obligations concerning historic properties. *Id.* Count XXII is based on conduct allegedly undertaken in the course of exercising those functions, including failures to provide required consultation and participation in excavation, treatment, reinterment, retention, and continued mishandling of remains and funerary objects at Hickory Ground. (Doc. 261 at 105-07, 110, 121-23 ¶¶ 488-99, 511, 561-65). At the pleading stage, those allegations are sufficient to place the Poarch Officials within a federally assigned preservation role rather than purely private conduct.

Under the state-compulsion test, state action exists where the government "has coerced or at least significantly encouraged the [challenged] action." *Focus on the Fam.*, 344 F.3d at 1277 (quoting *Willis*, 993 F.2d at 840). The TASC alleges that federal law and the NPS Agreement prescribed the framework within which the Poarch Officials were required to act. (Doc. 261 at 30-31, 104-05 ¶¶ 125-27, 132, 485-92). Before the Poarch Officials could assume SHPO functions to uphold the NHPA, the Secretary could approve the delegation *only after* consulting with other tribes "whose tribal or aboriginal lands may be affected by the conduct of the tribal preservation

program." 54 U.S.C. § 302702(4). Since the Poarch Officials assumed these functions, Section 106 and the NPS Agreement require the Poarch Officials to consult with other affected tribes, take into account effects on historic properties, and seek ways to "avoid, minimize, or mitigate" adverse effects. 36 C.F.R. § 800.6(a)-(b); (Doc. 261-1 at Ex. J, 251, § 7). The TASC alleges that the Poarch Officials continue to exercise that authority without providing the required notice and consultation while permitting continued desecration of Hickory Ground. (Doc. 261 at 33-35, 38, 91-93, 95, 121-23 ¶¶ 144-48, 163-65, 422(a)-(d), 426-28, 439-40, 561-65). Those allegations plausibly place the challenged conduct within a federally prescribed and federally encouraged course of action.

Under the nexus-or-joint-action test, courts consider whether "the State has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Focus on the Fam.*, 344 F.3d at 1277 (alteration in original) (quoting *Willis*, 993 F.2d at 840). This case fits cleanest in the nexus-or-joint-action test. In *Focus on the Family*, the Eleventh Circuit held that a private contractor could be treated as a state actor where the government established the governing standards, retained authority over the challenged decision, and used the contractor to carry out those standards. *Id*. at 1278-79. Through the NPS Agreement, Poarch Officials assumed federal preservation functions, remained subject to annual reporting, notice requirements, NPS review, and termination for failure to comply with the Agreement, the NHPA, or other applicable federal law. (Doc. 261-1 at Ex. J, 251-53, §§ 5, 7, 9, 12, 14, 15). The TASC further alleges that the Poarch Officials failed to notify and consult with Plaintiffs before excavation and reburial, failed to account for Plaintiffs' views concerning actions affecting their traditional lands, and participated directly in the treatment, reinterment, retention, and continued handling of ancestors' remains and funerary objects. (Doc. 261 at 33-35, 38, 91-93, 95, 121-23 ¶¶ 144-48, 163-65, 422(a)-(d), 426-28, 439-40, 561-65). Those allegations tie the challenged burden to the very preservation and consultation responsibilities the Poarch Officials allegedly assumed and exercised within a federally supervised program.

Thus, the TASC plausibly alleges that the burden challenged in Count XXII is attributable to the Poarch Officials acting under color of federal law. The TASC alleges that the Poarch

Officials assumed federally defined SHPO functions, exercised authority governed by federal law and Section 106, remained subject to continuing federal oversight, and undertook federally imposed consultation duties toward other tribes whose traditional or aboriginal lands could be affected. (Doc. 261 at 30-31 33-34, ¶¶ 125-27, 132, 141-48). It further alleges that the Poarch Officials, while exercising that authority, failed to provide required notice and consultation and participated directly in the excavation, treatment, reinterment, retention, and continued handling of remains and funerary objects in ways that burdened and continue to burden Plaintiffs' religious exercise. (Doc. 261 at 33-34, 38, 91-93, 95, 121-23 ¶¶ 144-48, 163-65, 422(a)-(d), 426-28, 439-40, 561-65). At this stage, those allegations are sufficient to state a claim under Count XXII.

4. Poarch Officials cannot establish RFRA's strict-scrutiny defense at the pleading stage.

Finally, Plaintiffs incorporate by reference Section VI.F.3 of their RFRA argument in their Response to the Federal Defendants' Motion to Dismiss. Pls.' Resp. to Federal Defendants' Mot. to Dismiss, Section VI.F.3, filed Apr. 30, 2026. For the same reasons stated there, the Poarch Officials do not show that the challenged burden on Plaintiffs' religious exercise furthers a compelling governmental interest through the least restrictive means.

Count XXII therefore should not be dismissed. The TASC plausibly alleges that the Poarch Officials acted under color of law within RFRA's meaning and that, through their ongoing conduct, they substantially burdened Plaintiffs' religious exercise. That is enough at this stage.

S. Plaintiffs have plausibly alleged an ongoing violation of ICRA (Count XXI).

1. Sovereign immunity does not warrant dismissal of Count XXI.

In Count XXI, Plaintiffs invoke the traditional equitable action recognized in *Ex parte Young* to obtain prospective relief against tribal officials committing ongoing violations of federal law. As discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress, in passing ICRA, displaced the availability of *Ex parte Young*'s traditional equitable

cause of action with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, Count XXI squarely fits the "straightforward inquiry" standard. *See Verizon*, 535 U.S. at 645. The TASC alleges that the Poarch Officials, acting in their official capacities, violate ICRA by enforcing tribal laws or authorizations that permit construction, excavation, development, gambling, alcohol, unauthorized access, and other activities inconsistent with Plaintiffs' religious rights at Hickory Ground. (Doc. 261 at 118-19, ¶¶ 549). The TASC further alleges that Poarch Officials continue to excavate and develop Hickory Ground, continue to obstruct repatriation, continue to mishandle remains and funerary objects, and continue to allow activities at the Site that desecrate burial grounds and ceremonial grounds. (*Id.* at 118-20, ¶¶ 546-53). Plaintiffs ask this Court to prohibit further construction, excavation, and development, require restoration of the Site to the extent possible, prohibit activities that desecrate burial or ceremonial grounds, and require the Poarch Officials to cease enforcing tribal laws or authorizations that permit conduct inconsistent with Plaintiffs' religious rights. (*Id.* at 138, ¶ (u)). Under *Verizon*, that is enough to satisfy the immunity inquiry.

Second, in passing ICRA, Congress did not create a detailed remedial scheme that displaces the type of *Ex parte Young* claim brought by Plaintiffs in Count XXI. ICRA's only express remedy is Section 1303, which extends *habeas corpus* to test the legality of detention by tribal order. 25 U.S.C. § 1303. It leaves unaddressed the remedies available for violations of other provisions, such as the operative one here, that no Tribe shall "make or enforce any law prohibiting the free exercise of religion." 25 U.S.C. § 1302(a)(1). That is not remotely the kind of comprehensive remedial design that drove the Supreme Court's decision in *Seminole Tribe I*. ICRA does not identify an express cause of action for noncustodial religious-burden claims, does not prescribe who may sue which tribal official for ongoing violations, does not limit relief through a set of mandatory procedures, and does not provide any alternative federal or administrative mechanism to address the ongoing official conduct alleged here. Because Section 1303 merely addresses detention, it

cannot be read to demonstrate congressional intent to displace traditional equitable relief for the ongoing, noncustodial burdens on Plaintiffs' religious exercise at Hickory Ground.

The Poarch Officials' reliance on *Santa Clara*, is misplaced for at least three reasons. (*Cf.* Doc. 270 at 138-39). First, *Santa Clara* did not decide whether *Ex parte Young* supplies the traditional equitable cause of action Plaintiffs invoke here. Instead, *Santa Clara* addressed a different question: whether 25 U.S.C. § 1302 itself implied a federal cause of action for declaratory and injunctive relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61-72 (1978). In contrast here, Count XXI proceeds under the traditional equitable action recognized in *Ex parte Young* against tribal officials alleged to be committing ongoing violations of federal law. *Santa Clara* addressed a different cause-of-action theory than the one Plaintiffs invoke here.[59]

Second, *Santa Clara* did not impose a categorical bar on every federal ICRA action outside *habeas*. Properly read, *Santa Clara* held that Section 1303 is the exclusive federal review mechanism Congress provided in ICRA, and further, that Section 1302 itself does not impliedly create a *separate* federal cause of action for declaratory and injunctive relief. *Santa Clara*, 436 U.S. at 61-72. Indeed, *Santa Clara* did not hold that all other ICRA rights are unenforceable in every forum, as the Court's reasoning depended in substantial part on the continued availability of Tribal Courts to hear ICRA disputes. *Id.* at 65-66. Although the *Santa Clara* Court warned against the exercise of federal court jurisdiction over purely internal tribal disputes, *see id.* at 60, that warning has not been construed as a categorical prohibition on federal court jurisdiction, and as explained in greater detail below, has no application here. *See Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 684-85 (10th Cir. 1980) ("*Dry Creek II*").[60]

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[59] *See also Seminole Tribe II*, 181 F.3d at 1245-49. There, the Eleventh Circuit applied *Cort v. Ash*, 422 U.S. 66 (1975), only to the distinct question of whether IGRA itself implied a statutory cause of action against the tribal chairman. 181 F.3d at 1245-49. Count XXI proceeds on a different theory, under the traditional equitable action recognized in *Ex parte Young*, which is settled in well-established law to be an independent equitable cause of action. Consequently, the *Cort* factors are inapplicable.

[60] Plaintiffs do not rely on *Dry Creek* as an exception to sovereign immunity for Count XXI, but cite *Dry Creek* only insofar as it confirms that *Santa Clara* is not a categorical bar to every non-*habeas* federal action implicating ICRA.

Third, the reasoning that drove *Santa Clara* does not fit this case. In *Santa Clara*, female tribal members challenged a tribal membership ordinance in what the Supreme Court treated as a fundamentally internal tribal dispute. *Santa Clara*, 436 U.S. at 52-54. After reviewing ICRA's structure and legislative history, the Supreme Court concluded that Congress deliberately chose a limited federal role to refrain from intruding on internal tribal disputes that may turn on tribal tradition, custom, and self-governance. *Id.* at 62-72. But that analysis, which was tied to internal tribal disputes and the Congressional balance reflected in ICRA's history, does not control here. Plaintiffs are not Poarch members, this is not a tribal membership dispute, and Count XXI does not seek federal-court review of Poarch's domestic governance. Instead, Count XXI seeks prospective relief against tribal officials who continue to enforce tribal laws or official authorizations in a manner that burdens the religious exercise of citizens of another Tribe at a sacred burial and ceremonial site located exclusively within their Tribe's historic homelands. (Doc. 261 at 118-20, ¶¶ 549-53); (*id.* at 138, ¶ (u)). Under these circumstances, *Santa Clara* does not answer whether Congress intended to displace Plaintiffs' ability to bring an *Ex parte Young* claim for the Poarch Officials' ongoing violations of the religious rights ICRA protects.

The other cases cited by the Poarch Officials do not change the analysis. *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987), involved a tribal member's challenge to tribal election results and candidate qualifications, and *Cross v. Fox*, 23 F.4th 797 (8th Cir. 2022), likewise involved tribal members challenging tribal election and office-holding rules after first suing tribal officials in Tribal Court. Those two cases squarely fit *Santa Clara*'s mold of an internal tribal dispute brought by tribal members.

Contour Spa addresses a different issue altogether. There, the Eleventh Circuit addressed a commercial lease dispute against the Tribe itself and held only that ICRA did not waive tribal sovereign immunity to permit a suit concerning the lease against the Tribe. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla*., 692 F.3d 1200, 1209-10 (11th Cir. 2012). The Eleventh Circuit did not decide whether an action could proceed against tribal officials under *Ex parte*

Young; indeed, it expressly noted that it had no occasion to revisit the District Court's separate *Ex parte Young* ruling because that issue was not on appeal. *Id.* at 1209 n.4.

The *Dry Creek Lodge* litigation itself illustrates why *Santa Clara* does not control here. In *Dry Creek I*, the Tenth Circuit reversed dismissal of claims brought by non-Indian plaintiffs after tribal and federal actors barricaded the only access road to the plaintiffs' lodge on fee land within the reservation. *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) ("*Dry Creek I*"). The first appeal thus already involved the same basic factual posture that matters here: nonmember plaintiffs, alleging tribal conduct affecting access to property, and a dispute that was not an internal controversy over tribal membership, tribal elections, or domestic tribal governance. *See id.* And in *Dry Creek II*, the Tenth Circuit reversed the District Court's reliance on *Santa Clara*, explaining that *Santa Clara* involved a purely internal dispute between tribal members, whereas *Dry Creek Lodge* involved non-members who were refused access to their property. *Dry Creek II*, 623 F.2d at 684-85. This case more closely resembles *Dry Creek Lodge* than *Santa Clara*, *Wheeler*, or *Cross*. Like *Dry Creek Lodge*, this case involves non-member plaintiffs asserting an ICRA claim outside the context of an internal tribal dispute. And like *Dry Creek Lodge*, the point is not that every ICRA claim belongs in federal court, but that *Santa Clara* cannot fairly be read as a categorical answer to every non-*habeas* ICRA claim without regard to the particular factual circumstances.

The Poarch Officials do not make any argument that *Coeur d'Alene* requires dismissal of Count XXI. (*See* Doc. 270 at 138-40). Additionally, for all the reasons articulated *supra* in Section VI.B.2, *supra*, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply with respect to Count XXI. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of ICRA is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory

Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use "'in-fused with a public trust' like the submerged lands in *Coeur d'Alene*." (*Id.* at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283).

The Poarch Officials' argument therefore fails at the first step because sovereign immunity does not protect the Poarch Officials from suit under Plaintiffs' *Ex parte Young* theory.

2. The TASC plausibly alleges that Poarch Officials are making or enforcing tribal laws or official actions that violate ICRA's protection for the free exercise of religion.

The Indian Civil Rights Act ("ICRA") provides that "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion." 25 U.S.C. § 1302(a)(1). Plaintiffs allege in Count XXI that Poarch Officials, acting in their official capacities, are "making or enforcing" tribal laws or official actions that prohibit or burden the free exercise of religion in violation of Section 1302(a)(1). (Doc. 261 at 118-20, ¶¶ 549-52). The TASC alleges that those officials continue to authorize conduct at Hickory Ground that desecrates sacred burial and ceremonial grounds, prevents Plaintiffs from carrying out mandatory religious duties, and places Plaintiffs' ancestors in a state of ongoing unrest under Plaintiffs' religious beliefs. (*Id.* at 118-20, ¶¶ 547-50). Accepting those allegations as true, Count XXI plausibly alleges that Poarch Officials are presently enforcing or maintaining official policies and authorizations in a manner that violates ICRA's free exercise protection. That is enough at the pleading stage.

In their motion, the Poarch Officials do not argue that Count XXI fails to sufficiently allege the Poarch Officials are currently violating ICRA. (Doc. 270 at 138-40). Instead, the Poarch Officials argue Plaintiffs cannot state a claim because, as a result of the Supreme Court's decision in *Santa Clara*, ICRA does not create a private right of action except for *habeas corpus*. (Doc. 270 at 138-39). This argument is addressed in the preceding section.

In sum, Plaintiffs have alleged an ongoing violation of federal law by Poarch Officials, seek only prospective declaratory and injunctive relief, and invoke a traditional equitable officer suit that ICRA does not displace. That is sufficient to allow Count XXI to proceed at this stage.

T. Plaintiffs have stated a viable First Amendment claim against the Poarch Officials (Count XXIII).

1. Plaintiffs' First Amendment claim against the Poarch Officials satisfies *Ex parte Young.*

In Count XXIII, Plaintiffs invoke the traditional equitable action recognized in *Ex parte Young* to obtain prospective relief against tribal officials committing ongoing violations of federal law. As discussed *supra* in Section VI.B.1, the first question is whether plaintiff sufficiently pleads an action against tribal officials for prospective relief against ongoing violations of applicable law. *See Seminole Tribe I*, 517 U.S. at 53; *Verizon*, 535 U.S. at 645. If so, the inquiry becomes whether Congress has passed a statute that displaces the availability of *Ex parte Young*'s traditional equitable cause of action for violations of the First Amendment with a more detailed remedial scheme. *Seminole Tribe I*, 517 U.S. at 73-76. Plaintiffs will discuss both in turn below.

First, the Eleventh Circuit stated in its opinion that "under *Ex parte Young*, tribal officials are not immune from suits that seek prospective declaratory or injunctive relief against ongoing violations of federal law." (Doc. 234 at 13). With respect to Count XXIII, Plaintiffs: name Tribal Officials as defendants (Doc. 261 at 123, ¶ 569); allege a violation of federal law in the form of violations of the First Amendment of the U.S. Constitution (*id.* at 124-26, ¶¶ 571-79); allege that this violation of federal law is ongoing (*id.* at 125-26, ¶577-79); and request prospective relief (*id.* at 139-40, ¶ (w)) (*E.g.*, "Plaintiffs request that the Court issue declaratory and injunctive relief against Poarch Officials, including . . . [a]n order enjoining Poarch Officials from engaging in any activities that violate Plaintiffs' free exercise rights under the First Amendment, including permitting activities that desecrate burial sites and ceremonial grounds . . . ").

Second, the Poarch Officials point to no statutes passed by Congress wherein Congress intended for a detailed remedial scheme to displace *Ex parte Young* suits like the one Plaintiffs have brought in Count XXIII.

Third, and finally, for all the reasons articulated *supra* in Section VI.B.2, the Poarch Officials are unable to satisfy the requirements necessary for the *Coeur d'Alene* exception to apply

with respect to Count XXIII. Under the first factor set forth by the Eleventh Circuit, the *Coeur d'Alene* exception is not available because a claim for violations of the First Amendment is not the equivalent of a quiet title action. Second, the Poarch Officials cannot claim to have any "special sovereignty interests" in Hickory Ground since they have no historical connection to or historic exercise of sovereignty over the Site. Stmt. Disp. Facts ¶¶ 1-2; (Doc. 234 at 22) ("Unlike state jurisdiction over submerged lands, the Poarch Band's regulatory jurisdiction over Hickory Ground does not result exclusively from its sovereignty."). And, as the Eleventh Circuit noted, their use of Hickory Ground to operate a casino is not a use '"in-fused with a public trust' like the submerged lands in *Coeur d'Alene*." (*Id.* at 22) (quoting *Coeur d'Alene*, 521 U.S. at 283).

Therefore, Count XXIII satisfies all requirements of the *Ex parte Young* doctrine with respect to Poarch Officials and is not subject to dismissal on tribal sovereign immunity grounds.

2. Plaintiffs state a claim for First Amendment violations.

For efficiency, Plaintiffs incorporate the argument and reasons provided *supra* in Section VI.Q.6, which demonstrate Plaintiffs have stated a claim that their religious exercise has been burdened in violation of the Free Exercise Clause.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Poarch Officials' Motion to Dismiss the Third Amended and Supplemental Complaint.

Respectfully submitted this 30th day of April, 2026.

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Certificate of Service

I hereby certify that on the 30th day of April, 2026, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Stewart Davidson McKnight, III

Counsel