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 FEDERAL DEFENDANTS' 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 United States Department of the Interior's ("Interior"), the National Park Service's ("NPS"), the Bureau of Indian Affairs' ("BIA"), Deb Haaland's, in her official capacity as Secretary of the United States Department of the Interior ("Secretary"), Bryan Newland's, in his official capacity as Assistant Secretary – Indian Affairs, and Charles F. Sams III's, in his official capacity as Director of the National Park Service (collectively referred to as the "Federal Defendants") Motion to Dismiss the Third Amended and Supplemental Complaint ("TASC") (Doc. 261).

In the Federal Defendants' motion to dismiss, they do not challenge the designation of the Hickory Ground Site ("Hickory Ground" or "Site") as a sacred site. Nor do they challenge the fact that the Secretary placed Hickory Ground in trust for the Poarch Band of Creek Indians ("Poarch" or the "Band") in 1985, or that they subsequently relied on the trust status of Hickory Ground to decline their duty and obligation to enforce the federal laws that require them to protect Hickory Ground as a sacred and historic site placed on the National Register of Historic Places.

Instead, the Federal Defendants' motion to dismiss is predicated on a smattering of procedural arguments that, if accepted, would have required Plaintiffs to sue before the excavations of their relatives began and before any cause of action accrued. The Federal Defendants also insist that the statute of limitations began to run in 2003—when they first issued a permit for the excavations that Auburn University ("Auburn") performed at Hickory Ground—despite the Federal Defendants admitting that Plaintiffs did not learn of the excavations until 2006 (Doc. 275 at 33). The Federal Defendants make no attempt to explain why they issued a permit for 2003 to 2005, but did not issue any permit for the excavations that took place from 2006 to 2011.

The Federal Defendants' conflicting and disparate discussion of the facts relevant to any statute of limitations analysis reveals that dismissal at this stage is not warranted, when the Court

must accept the facts stated in the complaint as true. Moreover, because the Federal Defendants have never provided the Phase III inventory report detailing who, where, and when specific excavations occurred, the Federal Defendants do not provide any evidence of an alternate starting point (beyond that alleged in the TASC) for the harm caused by their violations of federal law—the trigger for the statute of limitations under *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799, 825 (2024).

The Federal Defendants also attempt to shift their responsibilities to the Poarch Officials, claiming they cannot be responsible for the unlawful actions the Poarch Officials ordered and effectuated.[1] The reality is, however, none of the Poarch Officials' unlawful actions would be possible had the Federal Defendants not violated federal law and placed Hickory Ground in trust for Poarch in the first place, delegated authority to Poarch to perform federal functions, or allowed Poarch Officials to violate federal law with no repercussions. The desecration of Hickory Ground would not have happened had the Federal Defendants upheld the law.

The Federal Defendants cannot meet their high burden justifying dismissal of the TASC. The Court should deny the Federal Defendants' Motion to Dismiss.

II. PROCEDURAL BACKGROUND

Plaintiffs incorporate herein Section II, Procedural Background, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.

[1] The Poarch Officials include 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"**); (collectively referred to as the **"Poarch Officials"**).

III. FACTUAL BACKGROUND

Plaintiffs incorporate herein Section III, Factual Background, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026. Plaintiffs offer the following additional background that is in response to the Federal Defendants' Motion to Dismiss regarding how the National Park Service ("NPS") continues to fail to review and rescind the National Park Service Agreement ("NPS Agreement") Poarch signed with the NPS in 1999.

On October 5, 2023, Principal Chief David Hill of the Muscogee (Creek) Nation ("Nation") sent a letter to NPS Director Charles F. Sams III, and a separate letter to Secretary Deb Haaland. (Pls.' Third Am. Compl. and Suppl. Compl., Doc. 261 at 32, ¶ 139).[2] Both letters demanded that the Department of the Interior ("Interior") and NPS terminate the NPS Agreement with Poarch based on Poarch's failure to comply with the Agreement's terms. (*See* Doc. 261-1 at Ex. K, 261-72) (Poarch Field Methodology Policy).

On October 19, 2023—two weeks after Chief Hill sent his letters—Jennifer Talken-Spaulding, the Bureau Cultural Anthropologist from the Office of Tribal Relations & American Cultures and Tribal Historic Preservation Program, wrote an email to Chief Hill acknowledging that the Federal Defendants had received the two letters from Chief Hill. (Doc. 261 at 35, ¶ 150). Since this 2023 email from Ms. Talken-Spaulding, there has been no communication from any of the Federal Defendants regarding the Nation's demand that Interior and NPS terminate the NPS Agreement with Poarch. (*Id.* at 35, ¶ 151).

Each time Interior and NPS fail to review the Poarch Officials' compliance (or rather, the Poarch Officials' ongoing lack of compliance) with the NPS Agreement, Plaintiffs are injured and suffer further harm as a result of the failure of these federal agencies and officials to uphold the

[2] All pin cites to previously filed documents are to the ECF generated page number.

National Historic Preservation Act ("NHPA"), a law passed for the purpose of protecting historic, sacred sites like the Hickory Ground Site. (*Id*. at 35, ¶ 152).

IV. STANDARD OF REVIEW

Plaintiffs incorporate herein the Standard of Review, Section V.A, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.[3]

To the extent Federal Defendants invoke sovereign immunity, they present a Rule 12(b)(1) challenge. To the extent they argue Plaintiffs lack standing, that too is jurisdictional. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005). A Rule 12(b)(1) motion may present either a facial attack or a factual attack on subject matter jurisdiction. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). Here, Federal Defendants do not clearly identify their Rule 12(b)(1) motion as a factual attack. (See Doc. 275 at 12-13). Plaintiffs therefore address the motion as a facial challenge, and the Court should do the same. *See Lawrence*, 919 F.2d at 1529.

A facial attack tests the sufficiency of the complaint's jurisdictional allegations, and the Court must accept those allegations as true for purposes of the motion. *Id.* at 1529. Plaintiffs therefore receive the same procedural safeguards under Rule 12(b)(1) as they receive under Rule 12(b)(6). *See id.* Although Plaintiffs bear the burden of establishing subject matter jurisdiction, that burden is satisfied at the pleading stage by alleging facts that, taken as true, establish

[3] Although the Federal Defendants also attach extrinsic evidence in the form of an attorney affidavit and additional exhibits, Plaintiffs do not take the position that all of the Federal Defendants' evidence is truly extrinsic, as Plaintiffs acknowledge that many of the Federal Defendants' documents could be considered central to Plaintiffs' claims. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (a court may consider a document attached to a motion to dismiss only if it is (1) central to the plaintiff's claim and (2) undisputed). Moreover, the Federal Defendants do not rely on an overly curated factual narrative in an attempt to contradict the plausible factual allegations in the TASC. However, if the Court were to elect to convert the Federal Defendants' Motion to Dismiss into a motion for summary judgment pursuant to Rule 12(d), Plaintiffs request a reasonable opportunity to pursue discovery and submit additional facts. *See* Fed. R. Civ. P. 56 and Fed. R. Civ. P. 12(d).

jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A factual attack, by contrast, challenges the existence of subject matter jurisdiction in fact and permits the Court to consider matters outside the pleadings. *See Lawrence,* 919 F.2d at 1529. In that circumstance, no presumption of truthfulness attaches to the complaint's allegations, and the Court may weigh evidence relevant to jurisdiction. *See Scarfo v. Ginsberg*, 175 F.3d 957, 960-61 (11th Cir. 1999). However, the Eleventh Circuit has recognized both that district courts have the power to order discovery necessary to determine jurisdiction and that plaintiffs have a qualified right to conduct jurisdictional discovery when the relevant jurisdictional facts are genuinely in dispute. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729-31 (11th Cir. 1982). The Eleventh Circuit has also concluded that the Federal Rules of Civil Procedure entitle a plaintiff to obtain material through discovery before a claim is dismissed for lack of jurisdiction. *Id.* at 731. That is especially true where, as here, the jurisdictional issue overlaps with the very conduct giving rise to the federal claims. *Id.* at 733-34. More recently, the Eleventh Circuit reiterated that plaintiffs generally should have an opportunity to conduct jurisdictional discovery before dismissal where the jurisdictional facts are disputed. *See Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 775-76 (11th Cir. 2020).

To the extent any of Federal Defendants' Rule 12(b)(1) arguments depend on disputed facts that are intertwined with the merits of Plaintiffs' claims, those disputes cannot be resolved under Rule 12(b)(1); the proper course is to assume jurisdiction exists and treat the objection as a direct attack on the merits under Rule 12(b)(6) or Rule 56. *Lawrence*, 919 F.2d at 1529; *Morrison v. Amway Corp.*, 323 F.3d 920, 924-25 (11th Cir. 2003). If the Court is instead inclined to treat any

part of the motion as a factual attack and weigh disputed jurisdictional facts at this stage, Plaintiffs request jurisdictional discovery before the Court considers such a challenge.

V. GENERAL ADMINISTRATIVE PROCEDURE ACT AND EQUITABLE REVIEW PRINCIPLES

The Administrative Procedure Act ("APA") governs judicial review of federal agency action and prescribes the standards courts apply when reviewing agency action, inaction, or action unlawfully withheld. *See* 5 U.S.C. §§ 701-706. In 1976, Congress amended the APA to waive sovereign immunity for suits seeking nonmonetary relief against federal agencies and officers acting in an official capacity or under color of federal authority. *See* 5 U.S.C. § 702. Congress added that waiver in 1976 to remove the sovereign-immunity barrier that had complicated traditional *ultra vires* officer suits. The APA's judicial-review provisions and waiver of immunity often work together, but they address distinct issues. Section 702 waives sovereign immunity for all APA claims, but it is not limited to APA claims. *See* 5 U.S.C. § 702. Sections 704 and 706 address the availability and standards of APA review. *See* 5 U.S.C. §§ 704, 706. As discussed below, Federal Defendants' arguments concerning final agency action, discrete agency action, and the scope of § 706 may properly challenge APA claims, but they do not define the scope of § 702's waiver.

A. Section 702 of the APA waives sovereign immunity independent of the APA's cause of action and finality requirements.

Section 702 of the APA waives sovereign immunity for actions in federal court seeking relief "other than money damages." 5 U.S.C. § 702. Section 702's waiver applies broadly to claims seeking equitable relief against federal agencies and officials acting under color of federal authority. The APA states, in pertinent part:

> [1] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. [2] An action in a court of the United States seeking relief

> other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The second sentence of Section 702 provides the waiver of sovereign immunity for ongoing violations of federal law does not depend on the cause of action in the first sentence. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017). By placing the waiver of sovereign immunity in the second sentence of Section 702, Congress did not mean to limit that waiver to actions arising under the APA. *See, e.g.*, *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011) (rejecting an argument that "the placement of the waiver of sovereign immunity in section 702 of the APA suggests that the waiver was meant to be limited to actions arising under the APA itself or under a statute directed at the review of 'agency action' as that term is defined in the APA."); *Navajo Nation*, 876 F.3d at 1168 (acknowledging the first sentence provides an "omnibus judicial-review provision, which permits suit for violations of numerous statutes…*that do not themselves include causes of action for judicial review*," while the second sentence provides the "broad waiver of sovereign immunity" discussed above) (emphasis added) (internal quotation marks omitted); *see also Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (rejecting an argument that the waiver of sovereign immunity in the second sentence applies only if there is an agency action under the first sentence, finding that the second sentence contains no limitation regarding "agency action," and concluding that the waiver "was clearly intended to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of 'agency action'"); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 399-400 (3d Cir. 2012) (agreeing with *Delano*, *Presbyterian Church*, and others on this point). Thus, the waiver of sovereign immunity in the second sentence of Section 702 applies without regard to the "agency action" language in the first sentence of Section 702.

The waiver of sovereign immunity also applies regardless of the APA's other procedural requirements. *Cf.* 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Jurisdiction* § 3659 (4th ed.) ("[N]umerous circuits have held that the APA's waiver of sovereign immunity under § 702 extends to all challenges to Government actions, ***regardless of whether other requirements of the APA cause of action***—particularly that agency action be final—***are met***.") (emphasis added). Federal appellate courts are now in "near-unanimity" that the second sentence of Section 702 waives sovereign immunity broadly for all causes of action that seek non-monetary relief against agencies, and does not incorporate the requirements of Section 704. *Navajo Nation*, 876 F.3d at 1172.[4]

Similarly, Section 706 does not limit Section 702's waiver of sovereign immunity. Neither the text, nor the legislative history, of Section 702 supports any limitation of its waiver. As the *Presbyterian Church* Court stated:

[4] The D.C. Circuit, Federal Circuit, and First, Third, Sixth, Seventh, Eighth, and Ninth Circuits are all in accord. *E.g.*, *Navajo Nation,* 876 F.3d at 1172; *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017) (stating that the finality requirement and adequate remedy bar of Section 704 does not determine whether there is subject matter jurisdiction); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) ("[W]e now join all of our sister circuits who have done so in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of 'agency action' or 'final agency action' as set forth in § 704."); *Treasurer of N.J.*, 684 F.3d at 400 ("Accordingly, section 704 in limiting review to 'final agency action' concerns whether a plaintiff has a cause of action under the APA that can survive a motion to dismiss under Rule 12(b)(6) but does not provide a basis for dismissal on grounds of sovereign immunity."); *Delano*, 655 F.3d at 1344 ("We hold that section 702 of the APA waives sovereign immunity for non-monetary claims against federal agencies….[i]t is not limited to 'agency action' or 'final agency action,' as those terms are defined in the APA."); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011) (explaining that "the conditions of § 704 affect the right of action contained in the first sentence of § 702, but they do not limit the waiver of immunity in § 702's second sentence"); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007) ("We have previously held that the APA's finality requirement is not jurisdictional in nature."); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ("[T]he waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief."). The Fifth Circuit appears to be alone in holding otherwise. *Navajo Nation*, 876 F.3d at 1172 n.36; *see Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (treating "agency action" as a requirement for establishing a waiver of sovereign immunity under Section 702).

> On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable. Nothing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of "agency action."

870 F.2d at 525 (internal footnote omitted). Attempting to restrict the waiver of sovereign immunity, such as to only actions challenging agency action, "offends the plain meaning of the amendment." *Id*. Subsequent courts have similarly noted the absence of various terms from the text of Section 702 in concluding that the absent terms did not limit Section 702's waiver. *E.g.*, *Delano*, 655 F.3d at 1344 (noting that nothing in the text of Section 702's waiver limits its scope to "agency action" or "final agency action"); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) (noting that Section 702's waiver sentence "does not use either the term 'final agency action' or the term 'agency action.'").

Moreover, nothing in the legislative history of the 1976 amendment suggests that Congress intended to limit the waiver. *Presbyterian Church*, 870 F.2d at 525. "On the contrary, Congress stated that 'the time [has] now come to eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Id*. (emphasis and alteration in original); *see also, e.g.*, *Trudeau*, 456 F.3d at 187 ("Nor does the legislative history refer to either limitation. To the contrary, the House and Senate Reports' repeated declarations that Congress intended to waive immunity for 'any' and 'all' actions for equitable relief against an agency make clear that no such limitations were intended." (internal citations omitted)).[5]

[5] Section 706 simply sets forth procedures regarding how a reviewing court should conduct its review. *See Delano*, 655 F.3d at 1344 (characterizing Sections 704 and 706 as providing merely "rules governing" judicial review under the APA). Other courts are in agreement that Section 702's waiver of sovereign immunity is not limited by the APA's procedures and review provisions, which would logically include those in Section 706. *E.g.*, *Barlow*, 846 F.2d at 476 ("[T]he waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is

The primary case upon which the Federal Defendants rely for their asserted "inaction" requirement, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*") (*see* Doc. 275 at 28-29), is not to the contrary. Nowhere in *SUWA* does the Court discuss, much less decide, the issue of whether Section 706 limits Section 702's waiver of sovereign immunity. And even if the *SUWA* Court's silence on those issues could somehow be construed to mean something, only Section 706(1) was at issue in that case, *id*. at 57, and the Plaintiffs here have primarily, although not exclusively, invoked Section 706(2), which *SUWA* does not address. *See generally Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1031 n.6 (9th Cir. 2020) (characterizing *SUWA* as "inapposite" in a case involving Section 706(2), because SUWA pertains to Section 706(1)); *All. to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (noting that *SUWA* "does not reach claims encompassed within § 706(2)," which are "unaffected by *SUWA*").

At bottom, Section 702's waiver applies broadly to claims seeking equitable relief against federal agencies and officials acting under color of federal authority. That waiver is not limited to claims invoking the APA's cause of action. Rather, section 702 applies to any action seeking non-monetary relief from unlawful federal conduct unless another statute expressly or impliedly forbids the relief sought. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012); *Trudeau*, 456 F.3d at 186 ("We have previously, and repeatedly, rejected [the argument that the waiver applies only to actions arising under the APA],

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dependent on the suit against the government being one for non-monetary relief."); *Michigan*, 667 F.3d at 775 ("Moreover, the waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself."). Like the rest of the APA, Section 706 is procedural in nature, not jurisdictional, and it does not limit the waiver of sovereign immunity provided in Section 702.

expressly holding that the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'").

B. The APA provides a cause of action for review of agency action.

The APA establishes a "basic presumption of judicial review" for persons suffering legal wrong because of agency action. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020). Separate from Section 702's waiver of sovereign immunity, the APA also provides a cause of action for judicial review. Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Section 704 then identifies the agency action subject to APA review. It provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The first category is "agency action" made reviewable by another statute, while the second category is "final agency action" for which there is no other adequate remedy. Thus, when another statute makes agency action reviewable, Section 704 does not impose a separate final-agency-action requirement. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) ("[W]e decline to conjure up a finality requirement for '[a]gency actions made reviewable by statute' where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements."). The APA uses a broad definition of "agency action" which includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 701(b)(2) (incorporating by reference certain definitions from 5 U.S.C. § 551, including the definition of "agency action"); 5 U.S.C. § 551(13) (defining "agency action").

Once review is available, Section 706 supplies the standards and remedies. A reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and shall "hold unlawful and set aside agency action" that is arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, without observance of procedure required by law, or otherwise contrary to the APA's standards. 5 U.S.C. § 706(2). Under Section 706(1), a plaintiff may seek to compel agency action that has been unlawfully withheld or unreasonably delayed. The Supreme Court has held that relief under Section 706(1) is limited to discrete agency action that the agency is legally required to take. *SUWA,* 542 U.S. at 63-65. Under Section 706(2), a plaintiff may seek review of agency action already taken and ask the court to set it aside if it violates the APA's standards. *Id.* at 62; *see also* 5 U.S.C. § 706(2).

C. Traditional equitable review is available for ongoing *ultra vires* or unconstitutional conduct

The Federal Defendants claim that the APA does not create an independent basis of jurisdiction (Doc. 275 at 11) and later contend that Plaintiffs cannot avoid the APA by recasting their challenge as *ultra vires*. (*See* Doc. 275 at 20). But Plaintiffs' action fits comfortably within Section 702 and governing precedent.

A statutory cause of action is not required for every claim seeking prospective relief from unlawful federal conduct. Before the APA, federal courts reviewed unlawful executive action through traditional equitable suits against federal officers. *See Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Under *Larson* and *Dugan*, a suit for specific relief may proceed against a federal officer when the officer acts beyond statutory authority or under unconstitutional authority. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963). The Eleventh Circuit has recognized this same principle. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1308 n.20 (11th Cir.

2001); *Jordan v. Def. Fin. & Accounting Servs.*, 744 Fed. App'x. 692, 695 (11th Cir. 2018) ("a plaintiff may be able to obtain injunctive relief against an individual officer or agent of the United States in his official capacity for acts beyond his statutory or constitutional authority"); *Upside Foods Inc v. Comm'r, Florida Dep't of Agric. & Consumer Servs.*, 171 F.4th 1239, 1250 (11th Cir. 2026).

The doctrine is comparable to *Ex parte Young*, but applies to federal officers rather than state officers. *Ex parte Young* allows prospective relief against state officers who violate federal law. 209 U.S. 123, 159-60 (1908). *Larson* and *Dugan* perform the same basic function for federal officers by allowing prospective relief when the officer's conduct exceeds statutory authority or violates the Constitution. *See Larson*, 337 U.S. at 689; *Dugan*, 372 U.S. at 621-23; *Made in the USA Found.*, 242 F.3d at 1308 n.20.

The 1976 amendment to section 702 addressed the sovereign immunity problem that had complicated those traditional officer suits. Congress removed that barrier for actions seeking relief "other than money damages" and alleging that an agency, officer, or employee "acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. The amendment, however, did not eliminate equitable *ultra vires* review. *See Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). Rather, section 702 permits non-monetary claims seeking prospective relief from unlawful federal conduct to proceed without dismissal on the ground that the suit is against the United States, unless another statute expressly or impliedly forbids the relief sought. *See Patchak*, 567 U.S. at 215.

Similar to *Ex parte Young*, the Supreme Court has described this type of relief as a product of traditional equity, rather than an implied action arising from a statute. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-28 (2015); *see also Axon Enter., Inc. v. FTC*, 598

U.S. 175, 195 (2023) (concluding district court has jurisdiction where plaintiff challenges a "here-and-now harm" outside of the APA); *see also* Pls.' Resp. to Poarch Officials' Mot. to Dismiss, Section VI.B.1, filed Apr. 30, 2026. Accordingly, where Plaintiffs seek prospective relief from ongoing federal conduct that exceeds statutory authority or violates the Constitution, traditional equitable review supplies a separate cause of action, and Section 702 removes the sovereign immunity barrier. The Federal Defendants' argument that Plaintiffs cannot avoid the confines of an APA cause of action by recasting a challenge as *ultra vires* is without merit.

VI. ARGUMENT

A. The TASC does not violate Rule 8.

The Federal Defendants include one paragraph arguing that "the Third Amended Complaint violates Rule 8 of the Federal Rules of Civil Procedure." (Doc. 275 at 41). But they do not contend they cannot identify the claims asserted against them. Instead, they argue the TASC is too long. (*Id.*). That is not a basis for dismissal.

Rule 8 requires a short and plain statement showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). It does not impose a page limit. The question is whether the pleading gives the defendant fair notice of the claims and the grounds on which they rest. *See Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1325 (11th Cir. 2015).

Plaintiffs do not dispute that the TASC is longer than the Second Amended Complaint, but that is hardly surprising given Plaintiffs' good faith efforts to heed the instructions from the Eleventh Circuit, which were designed to "give defendants 'adequate notice' of the 'grounds upon which each claim rests'" and to allow the "courts to perform the claim-by-claim analysis that is necessary here." (Doc. 234 at 16). Dividing many of the individual counts into two or three separate counts required additional length. As the Eleventh Circuit has noted, even if a pleading is "not a model of efficiency or specificity" the important factor is that "it does adequately put

[defendants] on notice of the specific claims against them and the factual allegations that support those claims." *Weiland*, 792 F.3d at 1325.

The TASC easily satisfies the Rule 8 standard. It identifies Federal Defendants, specifies the six counts asserted against them, identifies the statute or constitutional provision underlying each count, and pleads the factual basis for each claim. Federal Defendants' own motion confirms that they understand exactly what has been alleged, as they have fully responded to all claims filed against them. Thus, the TASC provides Federal Defendants adequate notice and does not violate Rule 8.

B. Plaintiffs have stated a claim under the Indian Reorganization Act ("IRA") against the Secretary (Count I).

1. Plaintiffs have Article III standing to bring their IRA claim.

Plaintiffs have Article III standing to pursue their claim that the Federal Defendants unlawfully took the Hickory Ground Site into trust in violation of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101 *et seq*. ("IRA"), and further, that Federal Defendants' continued maintenance of Hickory Ground in trust constitutes an ongoing violation of the law. The Federal Defendants assert that Plaintiffs do not have standing because their injuries are not "fairly traceable" to the Secretary's trust acquisition and would not be redressed by setting that decision aside. Plaintiffs, however, have alleged facts sufficient to demonstrate that their injuries are fairly traceable to the Secretary's unlawful decision to put (and continue to hold) Hickory Ground in trust, and further, that removing Hickory Ground from trust will redress many of the past and ongoing injuries Plaintiffs suffer.

To establish standing, a plaintiff must show (1) an injury in fact that is (2) fairly traceable to the defendant's conduct and (3) likely to be redressed by a favorable decision. *See Lujan*, 504

U.S. at 560-61. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct are sufficient. *Id.* Plaintiffs easily satisfy this standard.

The Federal Defendants do not assert that Plaintiffs cannot meet *Lujan*'s first standard to establish Article III standing, nor could they. (*See* Doc. 275 at 15-18). The TASC alleges concrete and ongoing injuries arising from the excavation, desecration, and continued disturbance of Hickory Ground, a sacred ceremonial and burial site of profound religious and historical significance to the Muscogee (Creek) Nation, Hickory Ground Tribal Town, and the matrilineal descendants buried there, causing significant injury to Plaintiffs' core religious, cultural, and historical interests. (Doc. 261 at 3-6, 19-21, 66-68, 102, ¶¶ 4, 7, 12-17, 20, 87-98, 283-290, 293, 476).

Second, those injuries are fairly traceable to the Federal Defendants for purposes of Count I because Plaintiffs challenge the Secretary's decision to take Hickory Ground into trust for Poarch and the continued federal maintenance of that trust status. Instead, the Federal Defendants argue that Plaintiffs' IRA claim is not "fairly traceable" because the land was placed "in trust decades ago" and thus the Secretary's action "is not the source of Plaintiffs' injury." (Doc. 275 at 16). This misconstrues the legal standard.

Article III does not require Plaintiffs to show that the Secretary's trust decision was the last link in the causal chain or the direct cause of every downstream harm. It requires only that the injuries be fairly traceable to the challenged action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 134 n.6 (2014). "[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Fam. v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003). A plaintiff

therefore need not allege that "the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

While the Secretary's *ultra vires* action in placing Hickory Ground in trust for Poarch may not be the direct cause of Plaintiffs' injuries, it is undoubtedly the "but for" cause. Because Alabama's Constitution outlaws gaming, Poarch would not have been able to build and continue to operate a casino at Hickory Ground if the Secretary had not put the sacred Site in trust for Poarch. Placing the land into trust allowed Poarch to build and operate the casino—including the ongoing gambling and serving of alcohol on top of a sacred religious site and burial ground (*see* Doc. 261 at 68, ¶ 293)—because casinos owned and operated by tribes on trust lands are not regulated by states, but instead, fall within the regulatory jurisdiction of the National Indian Gaming Commission ("NIGC") and the Indian Gaming Regulatory Act ("IGRA"). Poarch's actions would not have been possible if the Secretary had not improperly placed Hickory Ground in trust and Plaintiffs' harms flow from that decision. *TOMAC v. Norton,* 193 F. Supp. 2d 182, 188 (D.D.C. 2002), *aff'd sub nom. TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (concluding that "injuries due to operation of the casino are traceable to the Bureau's actions, because the taking of the site in trust is a necessary prerequisite to both Class II and III gaming.").

Moreover, the Federal Defendants relied on the unlawful trust determination when they failed to fulfill their obligations under federal cultural protection statutes, including the Native American Graves Protection and Repatriation Act ("NAGPRA") and the Archaeological Resources Protection Act ("ARPA"). (Doc. 261 at 26-30, 43-44, 97-98, ¶¶ 118-123, 197-205, 453-457). Most notably, the TASC alleges that in 2009, Interior rejected Mekko Thompson's request for relief under NAGPRA based on its determination that Poarch retained legal interest in

the excavated items because Hickory Ground was tribal trust land. (*Id.* at 43-44, ¶¶ 197-205). Similarly, Federal Officials treated Hickory Ground as Indian trust land for purposes of ARPA, but failed to notify or consult the Muscogee (Creek) Nation before permits were issued, and allowed excavation activity to proceed on the basis that the land was held in trust for Poarch. (*Id.* at 37-38, 97-98, ¶¶ 161-166, 453-457). Taking these allegations as true, Plaintiffs' injuries are fairly traceable to the trust determination because, absent that determination, the federal government would not have been able to treat Hickory Ground as Poarch's Indian land under those statutes or rely on that designation to justify its failure to respond to the excavation and resulting disturbance of the Site.

Finally, the third prong of standing—redressability—is "in this case established in exactly the same manner as the causation requirement is satisfied." *Focus on the Fam.*, 344 F.3d at 1274. Plaintiffs seek a declaration that Interior lacked authority to take Hickory Ground into trust for Poarch and an order requiring relinquishment of that trust title. (Doc. 261 at 131, ¶ (a)). If the Court grants that relief, it would remove the basis for Poarch's continued operation of the casino, which is unlawful under Alabama law. Moreover, that declaration would set aside the legal foundation on which federal officials treated Hickory Ground as Poarch's trust land. That would remove the basis for continued federal reliance on the trust determination in administering statutes such as NAGPRA and ARPA, and would further eliminate the main obstacle preventing the Federal Defendants from fully and faithfully executing these laws. At the pleading stage, that is enough. *See TOMAC*, 193 F. Supp. 2d at 188 (concluding that plaintiffs' claims "satisfy the redressability requirement—since a decision not to take the land in trust would prevent the [tribe] from building a casino on that site and from satisfying the requirements of IGRA for casino gambling.").

Without citation or support, the Federal Defendants posit that Plaintiffs' injuries do not arise "from gaming on the site." (Doc. 275 at 17). The TASC plainly contradicts this claim. It alleges: "Alcohol consumption near ceremonial grounds is considered sacrilegious and is strictly prohibited in the Muscogee (Creek) religion. The casino's continuous sale and consumption of alcohol on top of these sacred grounds desecrate the Site and violate Plaintiffs' religious beliefs." (Doc. 261 at 67, ¶ 291). The TASC further alleges that Plaintiffs are harmed by the ongoing "casino activities [that are] unsuitable for sacred sites and religious practices." (*Id.* at 68, ¶ 293).

Furthermore, the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, confirms that plaintiffs may challenge land-into-trust decisions based on injuries arising from downstream development of the land, even where the tribe already owned the land in fee before the trust acquisition. 567 U.S. at 213, 224-28. In that case, the plaintiff alleged that he lived near land taken into trust for a tribe and that the construction of a casino would harm his enjoyment of the surrounding area by increasing traffic and altering the rural character of the community. *Id*. at 213. The Supreme Court held that those economic, environmental, and aesthetic injuries were sufficient to establish standing to challenge the Secretary's land-into-trust decision. *Id.* at 224-28.

Likewise, in *Upstate Citizens for Equality, Inc. v. United States*, the Second Circuit concluded that plaintiffs had standing where two towns, a civic organization, and several residents of the area near the questioned trust land alleged "loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site," "loss of tax revenue currently generated by the agricultural land that comprises the casino site," and "the loss of business and recreational opportunities, such as retail stores and restaurants, that will be forced out by the casino." 841 F.3d 556, 565-66 (2d Cir. 2016).

Similarly, in *Stand Up for California! v. U.S. Dep't of the Interior*, the District Court concluded that the Picayune Tribe had standing to contest a land-into-trust decision for another tribe because the planned gaming on that land would "have a devastating economic impact" on the Picayune Tribe. 919 F. Supp. 2d 51, 56 n.7 (D.D.C. 2013). There, the D.C. District Court concluded that injury to the Picayune Tribe "will be fairly traceable to the defendants' conduct since it will . . . permit gaming thereon." *Id.* The court further explained, "the Picayune Tribe's injury in fact is likely to be redressed by a favorable decision because, if the plaintiffs are successful on the merits, the Secretary's determinations will likely be vacated, and the economic injury to the Picayune Tribe will not occur." *Id.*[6]

Plaintiffs' alleged harms are far more severe than the harms alleged in *Patchak* and the other cases discussed above. Plaintiffs do not merely allege increased traffic or aesthetic impacts from a nearby development project. Nor do they allege mere economic impact. Instead, Plaintiffs allege that the excavation and development authorized by the federal government disturbed ancestral graves and sacred cultural resources at a site that holds profound religious and historical importance to Plaintiffs—importance that secured its place on the National Register of Historic Places. (Doc. 261 at 19-21, 66-67, 102, ¶¶ 87-98, 283-290, 476). Plaintiffs allege that the ongoing operation of a gaming casino and the serving of alcohol at a sacred ceremonial and burial ground causes continued harm and injury. (*Id.* at 68, ¶ 293). All of these harms stem from the Federal Defendants' unlawful decision to take the land into trust for Poarch and can be redressed by a revocation of that trust status. Plaintiffs satisfy Article III's standing requirements.

[6] S*ee also TOMAC*, 193 F. Supp. 2d at 188 (concluding that plaintiffs' claims "satisfy the redressability requirement—since a decision not to take the land in trust would prevent the [Tribe] from building a casino on that site and from satisfying the requirements of IGRA for casino gambling.").

Further, the Federal Defendants' argument that Poarch would develop its property if it only owned Hickory Ground in fee is a red herring and should be disregarded for two reasons. (*See* Doc. 275 at 16). First, the Tribes in all of the above cases *already* held their lands in fee prior to the land-into-trust decision. *See Patchak*, 632 F.3d at 703 (noting "[t]he Band owned the land" before it was placed in trust); *Geyser v. United States*, No. CV 17-7315-DMG (ASx), 2018 WL 6990808, at *2 (C.D. Cal. Aug. 30, 2018) (noting the property was "fee land owned by the Tribe"); *Upstate Citizens*, 841 F.3d at 563 ("All of the land was already owned by the Tribe."); *Stand Up for California!*, 919 F. Supp. 2d at 55 (noting the transaction was "fee-to-trust"). Absent the disputed fee-to-trust decisions, each Tribe could still develop its fee land in accordance with applicable law—development that might cause similar injuries to the plaintiffs. What the defendants *might* do with fee land, however, was not the issue. The question in those cases—and before this Court—is what use and resulting harm arose from the Secretary's trust decision in each particular case. *See Stand Up for California!*, 919 F. Supp. 2d at 56 n.7; *TOMAC*, 193 F. Supp. 2d at 188; *Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *20 (W.D.N.Y. July 8, 2008).

Second, applicable precedent does not require Plaintiffs to put forward evidence proving that Poarch would have still ordered Auburn to excavate scores of Plaintiffs' relatives had Poarch not been able to build a $246 million casino on top of the sacred Site. *See Focus on the Fam.*, 344 F.3d at 1273 (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."). Speculation regarding what Poarch might have done in a hypothetical scenario does not defeat Plaintiffs' Article III standing at this stage in the proceedings.

2. The TASC alleges a plausible IRA violation.

The IRA authorizes the Secretary to take land into trust only for tribes that were "under federal jurisdiction" in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (holding that Interior could only acquire land into trust for "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934"); 25 U.S.C. § 5108. To determine whether Tribes were "under federal jurisdiction," the federal government evaluates whether (1) the United States took actions reflecting federal obligations, duties, responsibility for, or authority over a tribe in or before 1934, *and* (2) that relationship continued through 1934. *See* U.S. Dep't of Interior, M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, 19 (Mar. 12, 2014).[7]

Applying that standard, Plaintiffs allege that Poarch was not "under federal jurisdiction" within the meaning of the IRA and that Interior therefore lacked—and continues to lack—authority to take or hold the Hickory Ground Site in trust for Poarch. (Doc. 261 at 26-30, 68-69, ¶¶ 119-123, 297-304). At a minimum, these allegations plausibly state that the 1985 trust acquisition exceeded the Secretary's authority under the IRA.

Poarch itself has repeatedly admitted it had no government-to-government relationship with the United States for approximately 140 years before recognition in 1984, including in 1934. (*Id.* at 27-29, ¶ 121). In 2005, Poarch represented that "the federal government clearly ended its relationship with Poarch Creek following removal [in 1832]" and that the historical record showed the federal government had "terminated the government-to-government relationship with the Creek in Alabama through a broad course of dealings that included express statements by top

[7] Sol. Op. M-37029 was withdrawn by Sol. Op. M-37055 (Mar. 9, 2020) but subsequently reinstated by Sol. Op. M-37070 (Apr. 27, 2021).

federal officials disclaiming any federal relationship with the Tribe" until federal recognition in 1984. (*Id.* at 27, ¶ 121(a)). In the 1950s, Poarch likewise described itself as "but a newly formed band of descendants of the original Creek nation" that was "not under the guardianship of the Federal Government" and had "possessed no territory and were not dealt with by the United States as a group" since the 1830s. (*Id.* at 28-29, ¶ 121(d), (f), (g)).

The United States reached the same conclusion. The Department of the Interior Solicitor's Office stated in 2008 that it "does not believe that the Poarch Creek Band ever had a government-to-government relationship with the United States until it was [recognized in 1984]." (*Id.* at 27-28, ¶ 121(b)). The NIGC likewise concluded that "the United States specifically and repeatedly disclaimed any relationship with the Poarch Band" from the 1830s until 1984. (*Id.* at 28, ¶ 121(c)). In 1952, the United States wrote in an appellate brief to the Court of Claims that those Creeks who remained in the East after removal "abandoned their tribal relationships," had "never continued a tribal government recognized by the United States," and "entered into no treaties or other political arrangements with the United States," having only recently organized themselves. (*Id*. at 29, ¶ 121(h)). The Court of Claims likewise found that the United States had "no occasion for further dealings with [those Creeks who remained east of the Mississippi] since 1832." (*Id*. at ¶ 121(j)).

Those allegations demonstrate concrete historical admissions by Poarch and federal actors that fit Interior's own test for whether a tribe was "under federal jurisdiction" in 1934. Taking the allegations as true, the TASC plausibly alleges that Poarch does not satisfy that requirement.

Notably, the Federal Defendants do not argue that Poarch was under federal jurisdiction in 1934. (*See* Doc. 275 at 19-24). The Federal Defendants do not defend the lawfulness of the Secretary's trust acquisition under the IRA. *See id.* The Federal Defendants do not dispute that

continuing to hold the land in trust could constitute an *ultra vires* act if the acquisition was unlawful. *See id.* And they do not contend that the TASC fails to plausibly allege a statutory violation. *See id.* Their silence on this point speaks volumes.

Taking Plaintiffs' allegations as true, the TASC plausibly alleges that Poarch was not under federal jurisdiction in 1934 within the meaning of *Carcieri*. If so, Interior lacked authority under the IRA to take Hickory Ground into trust for Poarch. The Court does not need to go further at this stage to deny dismissal under Rule 12(b)(6).

3. The TASC states a valid claim for equitable relief for ongoing unlawful conduct.

The Federal Defendants challenge Count I on the ground that Plaintiffs cannot avoid the APA by recasting their challenge as *ultra vires*. (*See* Doc. 275 at 20). But Plaintiffs' equitable action fits comfortably within Section 702's waiver of immunity and governing precedent. As discussed in greater detail above, section 702 of the APA waives sovereign immunity for actions in federal court seeking relief "other than money damages." 5 U.S.C. § 702. Section 702's waiver applies broadly to claims seeking equitable relief against federal agencies and officials acting under color of federal authority. *See supra* Section V.A. That waiver is not limited to claims invoking the APA's cause of action. The Supreme Court has confirmed this is the correct interpretation of section 702. *See Patchak*, 567 U.S. at 215.

In *Patchak*, a neighboring landowner challenged the Secretary of the Interior's decision to take land into trust for the Match-E-Be-Nash-She-Wish Band. *Id.* at 213. The plaintiff alleged that the Secretary exceeded his statutory authority to acquire land under the IRA. *Id*. The Supreme Court held that section 702's waiver of sovereign immunity permitted the suit to proceed and rejected the argument that the Quiet Title Act barred review. *Id*. at 224. In doing so, the *Patchak* Court confirmed that suits challenging unlawful trust acquisitions under the IRA may proceed

through section 702 when plaintiffs seek prospective equitable relief rather than damages or a quiet-title remedy. *Id*. at 224; (*see also* Doc. 234 at 17) ("Congress waived sovereign immunity for this kind of claim against the Secretary under the Administrative Procedure Act.").

Patchak therefore confirms that Section 702 waives the government's sovereign immunity here because Plaintiffs' cause of action is equitable; Plaintiffs seek prospective equitable relief from the Secretary's allegedly unauthorized trust acquisition and continued assertion of trust status. *Carcieri*, 555 U.S. at 395; (Doc. 261 at 68-69, ¶¶ 297-99). Because the United States continues to hold Hickory Ground in trust despite the IRA allegedly not authorizing that status, section 702 waives the sovereign immunity of the United States for equitable actions seeking prospective relief, as confirmed in *Patchak*.[8]

Count I is also consistent with the traditional *ultra vires* officer suit principle recognized in *Larson* and *Dugan*. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908); *see Larson*, 337 U.S. at 689; and *Dugan*, 372 U.S. at 621-23. That doctrine permits 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." *Larson*, 337 U.S. at 689; *see also Made in the USA Found.*, 242 F.3d at 1308 n. 20. It is well settled that a cause of action can arise out of common law, even in the absence of an express statutory cause of action. *See Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). As discussed further *supra* in

[8] And where the government's present conduct rests on an allegedly unauthorized statutory predicate, courts do not treat that predicate as immune from scrutiny merely because the original decision occurred long ago. *See Legal Envt'l. Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997) (explaining that if an agency rule is inconsistent with its statute, it is "a mere nullity" and "void *ab initio*," and as a result, the court could review EPA's denial order and consider the *ultra vires* challenge even though it was outside the limitations period for a direct challenge to the regulations) (*quoting Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). Sovereign immunity therefore does not bar Count I under Section 702.

Section V.C, incorporated herein by reference, the ability to sue officers for prospective relief for ongoing violations of law is a product of traditional equity and is not dependent on an express statutory cause of action. *See Armstrong*, 575 U.S. at 326-28. Because the TASC alleges that the Federal Defendants' continued holding of the trust title is an *ultra vires* act in violation of the IRA and seeks injunctive relief, Count I fits comfortably within that principle. (*See* Doc. 261 at 69, 71 ¶¶ 299, 314).

In sum, the TASC asks this Court to declare that the trust acquisition violated the IRA, that the United States' continued holding of Hickory Ground in trust is unlawful because Interior lacked authority to acquire it under the IRA, and to enjoin Federal Defendants from continuing to unlawfully maintain and assert that trust status. (*Id.* at 69-70, ¶¶ 299-305); (*id.* at 131, ¶ (a)). Those claims fall within Section 702's waiver of sovereign immunity and are consistent with the longstanding *ultra vires* officer-suit doctrine recognized in *Larson* and *Dugan*. Accordingly, sovereign immunity does not require dismissal of Count I at this stage.

4. Alternatively, if Count I is treated as a challenge to past final agency action, it is timely under *Corner Post* because the statute of limitations did not begin to run until Plaintiffs were first concretely injured.

Plaintiffs also properly bring this action under the APA's cause of action because the Secretary's trust determination was (1) "in excess of statutory jurisdiction, authority, or limitations," and (2) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C); (Doc. 261 at 68-69, ¶¶ 296, 299, 303-304). The Federal Defendants, however, argue that any APA claim for violation of the IRA is barred by the six-year statute of limitations in 28 U.S.C. § 2401(a) because the trust acquisition occurred in 1985. (Doc. 275 at 19-24). That argument incorrectly assumes that the limitations period begins when the government acts. Under *Corner Post*, that is not necessarily so.

The Supreme Court recently clarified that the statute of limitations for an APA claim begins when the plaintiff is first injured by the challenged agency action. *See Corner Post*, 603 U.S. at 825. A claim accrues when the plaintiff has a "complete and present cause of action"—that is, when the plaintiff suffers injury resulting from the agency's action. *Id*. at 813. In *Corner Post*, the Supreme Court explained that the APA focuses on when the "right of action first accrues," which ties the limitations period to the particular plaintiff's ability to sue—not to the date of the agency's conduct. *Id.* at 811-13. That is because a basic requirement of an APA claim is that the plaintiff be "adversely affected or aggrieved" by a federal agency's decision. *Id.* at 807 (quoting 5 U.S.C. § 702). In other words, in an as-applied challenge, the date of the final agency action is irrelevant. An APA claim accrues when the plaintiff has a complete and present cause of action, *i.e.*, when the plaintiff suffers injury resulting from the agency's action. Here, Plaintiffs' cause of action accrued in April of 2009, when Interior refused to enforce Plaintiffs' rights under NAGPRA on the basis that Hickory Ground was placed in trust for Poarch. (*See* Doc. 261 at 70-71, ¶ 310). This application of the Secretary's land-into-trust decision caused, and continues to cause, Plaintiffs significant injury.

The question, then, is when Plaintiffs first suffered a concrete injury from the trust determination. As one District Court in the Eleventh Circuit has noted, under *Corner Post*, the APA's statute of limitations does not begin to accrue when the agency gives its "approval" or plaintiffs lodge their "early objections" to the agency action if the injury plaintiffs sustain comes from the project's "construction and future operation[,]" and not just its approval. *Soka Gakkai Int'l-USA v. United States Army Corps of Eng'rs,* No. 24-CV-62452-WPD, 2025 WL 2269858, at *4 (S.D. Fla. July 29, 2025); *see also Inclusive La. v. St. James Parish*, 134 F.4th 297, 308 (5th Cir. 2025) (applying *Corner Post* to determine that claims accrued recently as the result of

subsequent discriminatory acts taken pursuant to a plan, as opposed to when the overarching plan was formally adopted and approved in 2014). Indeed, under this test, Plaintiffs were not injured until construction at Hickory Ground started in 2012.

Here, Plaintiffs do not allege they were concretely injured merely by the existence of the trust acquisition itself. At the time of the trust acquisition, Poarch represented to the Nation, federal authorities, and the Alabama Historic Commission that acquisition would "prevent development on the property," that the site would be preserved "without excavation," and that the Hickory Ground Tribal Town in Oklahoma would be pleased to know that its ancestral home was being preserved. (Doc. 261 at 22-23, ¶¶ 102-106). Poarch repeatedly represented that it would preserve Hickory Ground and protect it "without excavation." (*Id*. at 5, ¶ 12). At the time of acquisition, the trust status provided oversight and regulation for the preservation of Hickory Ground. Plaintiffs were not yet injured.

That continued for two decades. In 1992, the Advisory Council on Historic Preservation ("ACHP") stated that "[t]he proposed development at Hickory Ground requires approval by BIA before the Poarch Band can commence construction." (Doc. 276 at Ex. A, 7) (ACHP Letter). NPS also stated that NAGPRA applies to the Hickory Ground Site, despite its trust status. (*See, e.g.,* Doc. 261-1 at Ex. O, 281) (ACHP Executive Director's Report). And in 2001, the Bureau of Indian Affairs ("BIA") maintained the position that Hickory Ground remains subject to ARPA "because of its trust status." (*Id.* at Ex. V, 303) (2001 BIA Briefing Statement). Then in 2003, the permit Auburn obtained from Interior reinforced that NAGPRA and ARPA apply *because* Hickory Ground was "Indian lands" and that it was Interior's responsibility to ensure compliance with the permit and the governing law. (Doc. 261 at 37-38, ¶¶ 161, 165-166); (Doc. 261-1 at Ex. W, 307) (Auburn's Federal Archeological Permit). Plaintiffs were not yet injured from the trust acquisition,

because based on actions and representations of the Federal Defendants, the trust status meant that Federal Defendants would continue ensuring preservation of the Site to its near-original condition, providing oversight for any archaeological work, requiring consultation prior to excavation, and otherwise enforcing applicable federal laws. (Doc. 261-1 at Ex. W, 308).

Plaintiffs did not have a complete and present cause of action until the Federal Defendants shifted course and used the trust status as the predicate for refusing to require compliance with the laws that protect Hickory Ground. (Doc. 261 at 66-68, ¶¶ 283-293). Specifically, the TASC alleges that Mekko George Thompson sent a letter on March 12, 2008, to the Director of NPS, highlighting NAGPRA violations arising from the disturbance and removal of human remains and funerary objects from Hickory Ground. (*Id*. at 43, ¶ 197). The TASC further alleges that, on April 21, 2009, Interior sent a letter conveying its determination that Mekko Thompson's NAGPRA allegations "have not been substantiated," based on Interior's factual findings and legal conclusions. (*Id*. ¶ 199). Most importantly, the TASC alleges that Interior's refusal to address the NAGPRA violations was based largely on its "incorrect determination that Poarch retained legal interest in the 'NAGPRA items from the Hickory Ground site' based on the fact that Interior had previously placed the land in trust for Poarch." (*Id*. ¶ 200).

The 2009 letter reflected a new application by the Federal Defendants of the Secretary's trust acquisition. It reflected a shift from the trust status providing federal oversight and protection for more than two decades, to excusing the Federal Defendants from ensuring Hickory Ground is preserved or requiring Poarch Officials and Auburn to comply with NAGPRA. That shift may have occurred as early as December 16, 2006, when Federal Defendants allowed excavation to continue after Auburn's ARPA permit lapsed. But at minimum, the TASC alleges that by 2009, Federal Defendants had applied that position directly to Plaintiffs by denying Mekko Thompson's

request for protection of Hickory Ground. Either way, the TASC plausibly alleges that Federal Defendants had first relied on the trust status in a way that caused concrete injury to Plaintiffs within the statute of limitations.

This fits comfortably under the accrual principle of *Corner Post*. The Federal Defendants argue that the 2009 injury could not have started the clock on the statute of limitations because "Plaintiffs do not allege . . . they were unaware of the land being taken into trust for Poarch before December 2006." (Doc. 275 at 23). For this point, the Federal Defendants rely on *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015) and *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 944 (11th Cir. 2016). (Doc. 275 at 19-21). Both cases are inapposite. The plaintiffs in *PCI Gaming* and *Hildreth* were immediately injured by the land-into-trust decision itself. In *PCI Gaming*, the Eleventh Circuit held that Alabama's proposed APA challenge was futile because the trust decision immediately altered the State's regulatory authority over the land, causing immediate injury. 801 F.3d at 1292. Likewise, in *Hildreth*, the Escambia County Tax Assessor sought to challenge a trust acquisition that immediately removed the land from the County's taxing jurisdiction, and the plaintiff had been aware of that effect since at least 1986. 656 F. App'x at 937, 943-44. Those cases do not hold that every plaintiff challenging a trust acquisition is injured at the moment of the agency's decision, regardless of when that plaintiff first experiences a concrete injury. *Corner Post* forecloses that reading.

Federal Defendants also identify various historical events that, in their view, could have injured Plaintiffs before December 12, 2006. (Doc. 275 at 21-24). But, at the pleading stage, Plaintiffs need not disprove every alternative accrual date the Government can imagine.[9] Factual

[9] Equitable tolling may apply where, despite diligent efforts, a plaintiff could not reasonably have filed earlier because material facts were concealed. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95-96 (1990); *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255-57 (2016); *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 701-02 (11th Cir. 2005) (emphasizing that tolling may apply where the fraud

development is needed to identify the specific date of the first injury under *Corner Post*. However, at this stage, Plaintiffs plausibly allege that they were first "adversely affected or aggrieved" when the Federal Defendants first invoked Hickory Ground's trust status to allow the desecration of Hickory Ground without ensuring compliance with ARPA or NAGPRA, an invocation that first occurred within the APA's six-year statute of limitations. *Corner Post*, 603 U.S. at 807. Count I therefore should not be dismissed as untimely.

C. Plaintiffs have stated a claim under NAGPRA (Count XI).

Likewise, the Federal Defendants' arguments against Count XI do not warrant dismissal at this stage. NAGPRA provides both subject matter jurisdiction and a private right of action in this case. The APA provides a waiver of sovereign immunity, which, as discussed above in Section V.B, does not depend on agency action or inaction in this case. The Hickory Ground Site includes both tribal lands and federal lands, as those terms are defined under NAGPRA, and with Auburn, the Poarch Officials, and the Federal Defendants all refusing to disclose *where* each individual was excavated from Hickory Ground, dismissal based on this distinction is not, at this time, appropriate. Accordingly, the Federal Defendants had, and continue to have, relevant duties under NAGPRA, and Count XI should not be dismissed.

1. NAGPRA provides subject matter jurisdiction and a private right of action.

The Federal Defendants' primary argument against Count XI is that "Plaintiffs do not identify a final agency action made under, nor allege a failure to act on a nondiscretionary duty

"goes undiscovered despite the exercise of due diligence" because of affirmative acts of concealment). Here, the TASC alleges that Poarch repeatedly represented Hickory Ground would be preserved without excavation, that Plaintiffs were not notified of the Phase III excavation until 2006, that the degree of desecration was misrepresented and concealed, and that Federal Defendants failed to provide the consultation and notice required by law, thereby concealing their own role in authorizing and facilitating the excavation. (Doc. 261 at 22-26, 42, 70-71, ¶¶ 102-116, 191-96, 306-10). At a minimum, those allegations preclude dismissal on limitations grounds at this stage before factual development.

required by, NAGPRA." (Doc. 275 at 24). The interplay between NAGPRA and the relevant provision of the APA, Section 702, however, only requires Plaintiffs to identify the requisite "agency action," and the TASC clearly does.

First, NAGPRA contains a private right of action. Specifically, NAGPRA states: "The United States district courts shall have jurisdiction over *any action brought by any person* alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013 (emphasis added). NAGPRA's implementing regulations also recognize that "the United States District Courts have jurisdiction over any action by any person alleging a violation of the Act or this part." 43 C.F.R. § 10.1(h).

Not surprisingly, given that plain language, courts are in agreement that NAGPRA's enforcement provision vests the federal courts with jurisdiction over claims alleging a violation of NAGPRA.[10] Courts are also in agreement (and the Federal Defendants concede (Doc. 275 at 24)) that NAGPRA's enforcement provision creates a private right of action.[11] Indeed, as the *Bonnichsen* Court stated, "[i]t is difficult to see how Congress could be more express than that." 969 F. Supp. at 627. Accordingly, NAGPRA provides both jurisdiction and a private right of

[10] *E.g.*, *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 259 (3d Cir. 2014), *cert. denied*, 136 S. Ct. 84 (2015) ("NAGPRA's jurisdictional provision vests federal courts with jurisdiction over 'any action brought by any person alleging a violation of' NAGPRA."); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir. 1996) (stating that Section 3013 "explicitly vests jurisdiction in federal courts,"); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 209 F. Supp. 2d 1008, 1016 (D.S.D. 2002) ("The Court has jurisdiction in this case pursuant to 25 U.S.C. § 3013….").

[11] *E.g.*, *Geronimo v. Obama*, 725 F. Supp. 2d 182, 185 (D.D.C. 2010) (stating that Section 3013 "expressly provides for a private right of action."); *White v. Univ. of Cal.*, No. 12-01978, 2012 WL 12335354, at *2 (N.D. Cal. Oct. 9, 2012) (unpublished) ("Significantly, NAGPRA includes an enforcement provision that creates a private right of action."), *aff'd*, 765 F.3d 1010 (9th Cir. 2014); *Rosales v. United States*, No. 07-0624, 2007 WL 4233060, at *3 (S.D. Cal. Nov. 28, 2007) (unpublished) ("NAGPRA creates a private right of action…"); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003) ("There is a private right of action under NAGPRA…."), *aff'd* 417 F.3d 1091 (9th Cir. 2005); *Bonnichsen v. U.S. Dep't of Army*, 969 F. Supp. 614, 627 (D. Or. 1997) (stating that NAGPRA appears to establish a private right of action); (Doc. 200 at 25) ("NAGPRA contains a private right of action....").

action. Consequently, Plaintiffs do not have to allege a "final agency action," since APA Section 704 is not the source of Plaintiffs' cause of action.

2. Section 702 of the APA provides a waiver of sovereign immunity for NAGPRA claims that are not dependent on agency action or inaction.

The APA, however, is still relevant. Even though the APA is not the predicate for the cause of action in Count XI, the APA does provide a waiver of sovereign immunity for NAGPRA claims against the federal government.[12] Indeed, as discussed above in Section V.A, the waiver of sovereign immunity in the second sentence of Section 702 is not just for APA claims, but is for all claims seeking non-monetary relief. *E.g.*, *Trudeau*, 456 F.3d at 186 ("We have previously, and repeatedly, rejected [the argument that the waiver applies only to actions arising under the APA], expressly holding that the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'").

This specifically includes NAGPRA claims. *White v. Univ. of California*, 765 F.3d 1010, 1024 (9th Cir. 2014) (stating that suits concerning the United States under NAGPRA are authorized under the APA, "which contains an express limited sovereign immunity waiver for suits seeking non-monetary relief against the United States"); *Geronimo*, 725 F. Supp. 2d at 185 ("The waiver of sovereign immunity applicable to a claim under NAGPRA is the waiver found within the [APA]."); *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886 ("The APA waives the sovereign immunity of the Government for NAGPRA claims.").

[12] At least one court, in one of the most prominent NAGPRA cases to date, has suggested that an argument can be made that NAGPRA itself provides a waiver of sovereign immunity. *Bonnichsen*, 969 F. Supp. at 627 n.17 ("An argument can be made in favor of an implied waiver of sovereign immunity in § 3013, since a primary purpose of NAGPRA is the repatriation of remains and other items that are in the possession of federal agencies or that may be discovered on federal lands."). Although the Plaintiffs do not waive this argument, they do not assert it for purposes of Plaintiffs' Response to the Federal Defendants' Motion to Dismiss.

Importantly, because Count XI is made reviewable by NAGPRA itself, Plaintiffs need not rely on the APA's cause of action or show "final agency action" under Section 704. This is because "[c]laims not grounded in the APA," like the NAGPRA claim here, "'do[] not depend on the cause of action found in the first sentence of [Section] 702.'" *Navajo Nation*, 876 F.3d at 1170 (second alteration in original) (citation omitted).

This Court should decline the Federal Defendants' invitation to issue a proscribed "drive-by jurisdictional ruling[]" that conflates the APA's procedural requirements with its waiver of sovereign immunity. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). Dismissal of Plaintiffs' NAGPRA claim on the basis of sovereign immunity would be erroneous. *Cf. Trudeau*, 456 F.3d at 187 (holding that the APA's waiver of sovereign immunity applied regardless of whether there was a final agency action).

3. Plaintiffs have plausibly alleged a claim under NAGPRA.

a. "Federal lands" are at issue in this case for purposes of NAGPRA.

According to the Federal Defendants, if all of Hickory Ground constitutes "tribal lands" under NAGPRA, then "no federal agency duty under NAGPRA has been triggered." (Doc. 275 at 27). This argument is wrong for two reasons. First, Hickory Ground consists of tribal lands and Federal lands—as those terms are defined by NAGPRA. *See* 25 U.S.C. §§ 3002(a), 3001(5), (15). Second, even *if* all of Hickory Ground could be correctly (and wholly) characterized as "tribal lands" under NAGPRA (it cannot), the Federal Defendants would still have duties under NAGPRA since NAGPRA applies to *both* "Federal lands" and "tribal lands." *See* 25 U.S.C. § 3002(a) ("The ownership or control of Native American cultural items which are excavated or discovered on *Federal or tribal lands* after November 16, 1990, shall be . . . .") (emphasis added).

First, NAGPRA defines "Federal lands," in relevant part, as "any land other than tribal lands which are controlled or owned by the United States." 25 U.S.C. § 3001(5). Land held in trust

by the United States is plainly "controlled or owned by the United States," so as long as the trust land in question here does not fall within the definition of "tribal land," and thus constitutes "Federal lands" for NAGPRA purposes. NAGPRA defines "tribal lands," in relevant part, as "(A) all lands within the exterior boundaries of any Indian reservation; [and] (B) all dependent Indian communities." 25 U.S.C. § 3001(15). NAGPRA's definition noticeably does not include *land held in trust* that is *not* located on a Tribe's reservation. Of course, excavations and possession of Native remains on both categories of land are subject to NAGPRA's requirements. And, as discussed in greater detail below, the fact that some excavations may have occurred on "tribal lands" does not displace the Federal Defendants' duties and obligations to comply with NAGPRA. Just the same, the Federal Defendants are wrong to argue that "[b]ecause the Hickory Ground is tribal land for purposes of NAGPRA, no federal agency duty under NAGPRA has been triggered." (Doc. 275 at 27).[13]

The cases the Federal Defendants cite do not involve NAGPRA's definition of "tribal lands." Rather, they involve the question of whether certain land constitutes "Indian country" more broadly. (*See* Doc. 275 at 26-27). Those cases also involve completely different legal issues. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 507 (1991) (addressing state regulatory authority in "Indian country")[14]; *Okla. Tax Comm'n v. Sac & Fox*

[13] Congress contemplated situations like these and intended for NAGPRA to apply in circumstances "where human remains or objects found on one Indian tribe's lands may be culturally affiliated with a *different* Indian tribe" than the Tribe owning the land where the remains were found. S. Rep. No. 101-473, at 6 (1990) (emphasis added). It simply is not the case that NAGPRA does not apply to excavations that took place on "tribal lands."

[14] The issue in *Citizen Band Potawatomi Indian Tribe* was whether a state had the authority to tax a tribe's cigarette sales on trust land. 498 U.S. at 507. The State argued that the Tribe's sovereign immunity should not apply because the land was not a "reservation." *Id*. at 511. The Court did not specifically cite 18 U.S.C. § 1151, and (unlike the instant case) no specific definition in another federal statute was at issue. The Supreme Court's holding was narrow: it held that the trust land "qualifies as a reservation ***for tribal immunity purposes***." *Id*. at 511 (emphasis added).

Nation, 508 U.S. 114, 116 (1993) (addressing state taxing authority on tribal members in "Indian country").[15] Accordingly, they do not support the proposition that NAGPRA's definition of "tribal lands" should be read to include informal reservations in cases interpreting a definition of an entirely different term ("Indian country") in an entirely different federal statute (18 U.S.C. § 1151(a)).

The circuit court cases to which the Federal Defendants cite are likewise inapposite. (*See* Doc. 275 at 27) (citing *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), and *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986)). *Roberts* and *Azure* are both criminal cases involving questions of federal criminal jurisdiction under 18 U.S.C. § 1151 directly. The *Roberts* Court, admitting that "the relationship between informal reservations and dependent Indian communities is not entirely clear under current case law," did not actually determine whether the tribal government complex in question was a reservation under 18 U.S.C. § 1151(a) or a dependent Indian community under 18 U.S.C. § 1151(b), although it did determine that the land was "Indian country" regardless. 185 F.3d at 1133. And while the *Azure* Court was more decisive, its holding was narrow, like that of the *Potawatomi* Court—it held that the tribal housing area in question "can be classified as a *de facto* reservation, ***at least for purposes of federal criminal jurisdiction***." 801 F.2d at 339 (emphasis added). Neither Court considered the definition of "reservation" or "dependent Indian communities" as they are used in NAGPRA's "tribal lands" definition.

[15] The issue in *Sac & Fox Nation* was whether a state had the authority to impose its income and motor vehicle taxes on tribal members in a tribe's territory. 508 U.S. at 116. The State argued that the Tribe's reservation had been disestablished. *Id*. at 121. The Court cited 18 U.S.C. § 1151's definition of "Indian country," *id*. at 115, 123, but no specific definition in another federal statute was involved. While the Supreme Court alluded to the possibility that an "informal reservation" might constitute "Indian country" for taxation purposes, *id*. at 123, 125, the Court did not so hold. Instead, the Supreme Court remanded the case for a determination of whether the land in question was "Indian country" for taxation purposes. *Id*. at 126, 128.

Accordingly, the cases upon which the Federal Defendants rely illustrate, at best, that ***in some areas of federal Indian law***, and under appropriate factual circumstances, it may be appropriate to apply a more flexible interpretation of the term "reservation" as used in 18 U.S.C. 1151(a). But that statute is not at issue here, and the statute that is at issue—NAGPRA's definition of "tribal lands"—should be read to mean what it says: that "tribal lands" includes only reservation land (according to a plain meaning of the term "reservation," which would not include informal reservations) and dependent Indian communities (which could, under appropriate circumstances not met here, include informal reservations). If Congress had wanted to include more, it would have said so (as it did in 18 U.S.C. § 1151).

The Federal Defendants have not denied that there is some reservation land in question and some off-reservation trust land at Hickory Ground. Under NAGPRA's definition of "tribal lands," therefore, the reservation land constitutes land "within the exterior boundaries of any Indian reservation," 25 U.S.C. § 3001(15)(A), but the off-reservation trust land does not.

b. The Federal Defendants had duties to act under NAGPRA.

NAGPRA is a remedial human rights statute 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 R. Trope & 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 specifically 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. 25 U.S.C. § 3001(3). Among other things, Section 3002

of NAGPRA prohibits such items from being disturbed unless several carefully prescribed requirements are met, stating in pertinent part:

> The intentional removal from or excavation of Native American cultural items from Federal or tribal lands . . . is permitted only if—
>
> > (1) such items are excavated or removed *pursuant to a permit* issued under [16 U.S.C. 470cc] which shall be consistent with this chapter;
> >
> > (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.

25 U.S.C. § 3002(c) (emphasis added).

The permit required by Section 3002(c)(1) is a federal permit issued under ARPA to excavate or remove any archaeological resource located on "public lands" or "Indian lands" (as those terms are defined in ARPA). 16 U.S.C. § 470cc(a). If harm to, or destruction of, any religious or cultural site may result from land disturbing activity, notice to "any Indian tribe which may consider the site as having religious or cultural importance" is required before the permit may be issued. 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). While there is an exception under ARPA for tribes performing archaeological excavations on their own lands, 16 U.S.C. § 470cc(g)(1), that does not apply to non-tribal individuals or entities, even if they are acting on behalf of a tribe on that tribe's land. *Id.*; *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). Nor does it apply to individual tribal members in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands. 16 U.S.C. § 470cc(g)(1). Indeed, in some limited circumstances, the exception may not even apply to tribal employees, particularly if the tribe does

not ensure that permit requirements have been met by other documented means. 25 C.F.R. § 262.4(c)(2).

The consultation requirements of Section 3002(c)(2) are further detailed in 43 C.F.R. §§ 10.3 and 10.5. Notably, these requirements do not depend solely on the Federal Defendants receiving notice of an excavation or inadvertent discovery—the requirements are also triggered if the Federal Defendants otherwise become aware of it. 43 C.F.R. § 10.5(b). Under Section 10.5, consultation must be conducted with lineal descendants, tribes on whose aboriginal lands the excavation will occur, tribes that are culturally affiliated with the cultural items, and tribes that have a demonstrated cultural relationship with the cultural items. 43 C.F.R. § 10.5(a). The consultation requirements are extensive and include development of 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). Moreover, federal agencies are instructed to enter into comprehensive agreements with tribes that are affiliated with the cultural items "whenever possible." 43 C.F.R. § 10.5(f). If a planned activity is also subject to review under Section 106 of the NHPA, then the federal agency should coordinate its NAGPRA and NHPA consultation and agreement processes. 43 C.F.R. § 10.3(c)(3).

NAGPRA does not relieve the federal government of responsibility for actions occurring on tribal lands. NAGPRA similarly does not *limit* the federal government's responsibility to "Federal lands" under NAGPRA. 25 U.S.C. § 3009. And NAGPRA expressly recognizes the "unique relationship between the Federal Government and Indian tribes," 25 U.S.C. § 3010, which includes its trust responsibility to tribes. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating that the federal government, in its dealings with Indians, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts

of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards"); *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The federal government has substantial trust responsibilities toward Native Americans. This is undeniable.").

c. Plaintiffs allege plausible NAGPRA claims under the APA.

As discussed above in Section V.A, and because NAGPRA contains a private right of action and APA Section 702 provides the waiver of the Federal Defendants' sovereign immunity, Plaintiffs are not required to allege the occurrence of a "final agency action" under APA Section 704 in order to pursue their claims under NAGPRA. Accordingly, the TASC alleges numerous "agency actions" giving rise to their claims under NAGPRA.

Various "agency actions" occurred here. A permit issued under NAGPRA and the ARPA, such as the one(s) in question here, constitutes a "license" under the APA. 5 U.S.C. § 551(8) (defining "license" to include "an agency permit"). The requirement of a license also constitutes a "sanction" under the APA, with the failure to require the license accordingly constituting a "failure to act" thereunder. *Id*. at §§ 551(10)(F) (defining "sanction" to include a "requirement, revocation, or suspension of a license") and (13) (including "failure to act" in the definition of "agency action"). Likewise, giving a required notice, or conducting a required consultation, constitutes a "sanction" under the APA, with the failure to take the required action constituting a "failure to act." *Id*. at §§ 551(10)(F) and (13). Various decisions under NAGPRA constitute "order[s]" under the APA, such as a decision that NAGPRA does not apply, or a decision that directly or indirectly recognizes a right to ownership or control in a party. *Id*. at § 551(6) (defining "order"); *see also* 43 C.F.R. § 10.1(b)(3) ("Any final determination making the Act or this part inapplicable is subject to review under [25 U.S.C. § 3013]."); *Navajo Nation*, 819 F.3d at 1086 (Park Service's decision to inventory remains and objects was a determination of "possession and control" and constituted

a final agency action). All of these constitute "agency action" reviewable under the APA. 5 U.S.C. § 701(a)(2) (incorporating by reference certain definitions from 5 U.S.C. § 551, including the definition of "agency action"); 5 U.S.C. § 551(13) (defining "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

The TASC contains allegations substantiating many of the agency actions identified in the paragraph above. Plaintiffs have alleged, among other things,[16] that the Federal Defendants, in violation of NAGPRA, knowingly allowed the excavation of the Plaintiffs' ancestors, their funerary objects, and other cultural items from the Hickory Ground Site without appropriate notice, consultation, permits, or proper disposition of the items excavated. (Doc. 261 at 91-92, ¶ 422). The Federal Defendants also failed to perform independent obligations they had, including giving notice to the Plaintiffs at various points, and engaging in consultation with the Plaintiffs. (*Id.* at 91, ¶ 422(a)). The Federal Defendants were also obliged to ensure that NAGPRA's consultations requirements were fulfilled by others, and to ensure that the Plaintiffs were given ownership and control of the excavated remains and cultural items. (*Id.* at 92, ¶ 423).

More specifically, Plaintiffs have alleged that at least 57 sets of human remains and associated funerary objects were excavated from the Hickory Ground Site, and numerous other cultural items were removed from the Site. (*Id.* at 40, ¶ 172). Plaintiffs have further alleged that the Federal Defendants knew about this excavation, as well as Plaintiffs' concerns about it. The TASC states that concerns about violations of NAGPRA at the Hickory Ground Site were brought to the Federal Defendants' attention. (*Id.* at 43, ¶ 197). The TASC also alleges that the Federal

[16] The Plaintiffs streamline their arguments for purposes of the instant motion only; they do not waive any other allegations set forth in the TASC, or any arguments pertaining thereto.

Defendants issued one or more permits, and knew or should have known of the removals based on conditions of the permits, such as submitting reports of work performed under the permit(s). (*Id.* at 37-38, ¶¶ 161-66). This is not a case in which the Federal Defendants were legitimately unaware of what was happening—the Federal Defendants were well aware of the ongoing desecration and still failed to meet their NAGPRA obligations. (*See, e.g.,* Doc. 276 at Ex. A, 7) (acknowledging "the need for DOI to resolve under the Native American Graves Protection and Repatriation Act of 1990 which tribe within the Creek Nation has closest cultural affiliation with Hickory Ground. BIA must consider these recommendations before making further decisions on the project at hand.").

Anyone other than Poarch itself who engaged in intentional excavation, ***whether on "tribal lands" or "Federal lands"*** for purposes of NAGPRA, was required to obtain a permit under ARPA (and Poarch itself was required to obtain a permit for any intentional excavations on Federal lands). 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 (Doc. 261 at 36, ¶ 154), and any other non-tribal individuals or entities who, following discovery, may be determined to have 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 tribes are not exempt from permit requirements under ARPA).[17] Any excavation that took place without a permit was in

[17] Individual Poarch tribal members would also have been required to obtain permits if, as it appears may be the case, there was 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* 16 U.S.C. § 470cc(g)(1); (Doc. 261 at 31-32, ¶¶ 134-36) (Poarch had a policy in place at one time prohibiting excavation, but upon information and belief, later reversed it). 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.

violation of NAGPRA and the Federal Defendants could and should have stopped it. (Doc. 261-1 at Ex. O, 281) ("In response to the Council's question of whether the provisions of NAGPRA apply, NPS states that they do.").

Moreover, the Federal Defendants were required to provide notice to the Muscogee (Creek) Nation ***before*** granting any permit(s) they did issue. 16 U.S.C. § 470cc(c); *see also* 43 C.F.R. § 10.3(c). Plaintiffs allege that the Federal Defendants issued one or more permit(s) (Doc. 261 at 37, ¶ 161), and the Federal Defendants concede that they issued at least one permit, but they do not cite any materials properly before this Court showing they provided the required notice or consultation to the Plaintiffs before doing so. (*Id.* at 91, ¶ 422(d)) (alleging that the Federal Defendants issued an ARPA permit to Auburn without engaging in required consultation with Muscogee (Creek) Nation); (Doc. 275 at 28) ("Interior issued a permit for the Hickory Ground property").

When the Federal Defendants received notice ***or otherwise became aware of*** an excavation or inadvertent discovery on any "Federal lands" for purposes of NAGPRA, as discussed above, they were required to initiate consultation with Plaintiffs. 43 C.F.R. § 10.5(b). Plaintiffs fall within ***all*** of the categories for which consultation is required under 43 C.F.R. § 10.5(a). Plaintiffs Mekko Thompson and Hickory Ground Tribal Town are lineal descendants of the excavated ancestors. (Doc. 261 at 7, 10, 18, 21, ¶¶ 23, 26, 41, 82, 95). And the Hickory Ground Site is within the aboriginal lands of the Nation, which is also culturally affiliated with the cultural items, and which also has a demonstrated cultural relationship with the cultural items. (*Id.* at 3, 19, 90-91, ¶¶ 4, 87, 420). All of this was known to the Federal Defendants and Plaintiffs have alleged that the Federal Defendants did not consult with them before granting the permit(s). (*Id.* at 33-34, ¶ 144). And the

Federal Defendants do not contest that allegation or suggest that they fulfilled their obligation to consult with the Muscogee (Creek) Nation at any time.

As noted above, as part of the consultation process, the Federal Defendants also should have made efforts to enter into a comprehensive agreement with the Nation. 43 C.F.R. § 10.5(f). Because the Hickory Ground Site is listed on the National Register of Historic Places (Doc. 261 at 104, ¶ 483), the Federal Defendants also should have coordinated their NAGPRA and NHPA consultation and agreement processes. 43 C.F.R. § 10.3(c)(3).

The Federal Defendants also had a duty to ensure that ownership and control of the excavated cultural items were given to the appropriate parties. This required ownership and control of the human remains and associated funerary objects to go to Plaintiffs Mekko Thompson and Hickory Ground Tribal Town, as lineal descendants. 25 U.S.C. § 3002(a)(1). The Federal Defendants argue that they have no duty with respect to the disposition of the cultural items under 25 U.S.C. § 3002(c)(3) because they do not possess or control the cultural items. While they may not have physical possession of these items, they do have a legal interest in the cultural items as the owner of all the land in question. This gives them "control," under NAGPRA's implementing regulations. 43 C.F.R. § 10.2(a)(3)(ii) (defining "control" to include a legal interest in cultural items, with or without physical custody); *see also Native American Graves Protection and Repatriation Act Regulations*, 60 Fed. Reg. 62,134, 62,134–35 (Dec. 4, 1995) (explaining that the term "control" extends not just to cultural items in federal agency collections or museums, but also to cultural items intentionally excavated or inadvertently discovered on Federal or tribal lands, and the federal agencies are responsible for their appropriate treatment and care, even when held by non-governmental repositories). Allowing other parties to exert ownership or control over the cultural items without an appropriate determination of who was entitled to ownership and control

under NAGPRA constitutes a NAGPRA violation and is reviewable under the APA. (Doc. 261-1 at Ex. O, 281) ("the Department of Interior should determine which tribal group has the closest cultural affiliation with the remains at Hickory Ground if the existing disagreements among tribal members are to be resolved.").

Indeed, the Federal Defendants' decision that they had no obligations under NAGPRA with respect to the Hickory Ground Site, *e.g.*, (Doc. 261 at 43, ¶ 202), is subject to review under NAGPRA and constitutes an "agency action" under the APA. *See* 43 C.F.R. § 10.1(b)(3) ("Any final determination making the Act or this part inapplicable is subject to review under [25 U.S.C. § 3013]."); *see Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1086 (9th Cir. 2016) (concluding that NPS's decision to inventory remains and objects was a determination of "possession and control" and constituted a final agency action).[18]

This Court must "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This Court must also "hold unlawful and set aside [certain] agency action, findings, and conclusions," including those "found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [and] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Accordingly, this Court may hold unlawful and set aside any of the foregoing agency actions that it finds to be arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by

[18] Both the NAGPRA violations committed by the Federal Defendants and those they permitted to occur in violation of NAGPRA are continuing. Plaintiffs have yet to receive the required notices for the ARPA permits issued by the Federal Defendants. They have yet to be invited to consult with the Federal Defendants. Some of the cultural items, including human remains, to which the Plaintiffs are entitled to ownership and control are still in storage, outside of their ownership and control. (Doc. 261 at 40, 49-50, 96, ¶¶ 176, 235, 448). The rest also remain outside of their ownership and control, having been reburied by Poarch Officials *away from* their final resting places in 2012, without the input of Hickory Ground's religious leaders (specifically Mekko Thompson) and knowingly pursuant to a ceremony that violates Muscogee religion, substantially burdening Plaintiffs' religious exercise. (*Id.* at 45, 47, ¶¶ 210–12, 222).

law. (Doc. 261 at 90, ¶ 416). This would logically include the failure to require a necessary permit, failure to provide a required notice before issuing a necessary permit, failure to engage in a required consultation, making a *de facto* determination of ownership and control without appropriate consultation and procedures, determining that NAGPRA or certain NAGPRA requirements do not apply without appropriate consideration, and more.

Finally, even if the land in question were all "tribal lands" for purposes of NAGPRA (which it is not), it cannot be the case that the Federal Defendants, who hold the land in trust and have asserted control (at least by statute and regulation, if not in practice, as they should) over the excavation and disposition of cultural items taken from the Site, can simply turn a blind eye and allow the desecration of Hickory Ground. The federal government's failure to uphold its responsibilities under NAGPRA violates its trust responsibility to the Plaintiffs under the "unique relationship" recognized in NAGPRA. This failure is arbitrary and capricious for purposes of the APA. *See generally Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257–58 (D. D.C. 1972) (finding an agency action that failed to demonstrate an adequate recognition of the government's fiduciary duty to a tribe to be "arbitrary, capricious, an abuse of discretion, and not in accordance with law").

The Federal Defendants' motion to dismiss should be denied with respect to Plaintiffs' NAGPRA claim.

4. The TASC alleges present and ongoing NAGPRA violations supporting prospective relief.

Plaintiffs' allegations that the Federal Defendants are committing ongoing violations of NAGPRA also proceed under Section 702 of the APA and the traditional equitable *ultra vires* officer suit recognized in *Larson* and *Dugan*. *see Larson*, 337 U.S. at 689; and *Dugan*, 372 U.S. at 621-23. The TASC alleges present federal inaction in violation of ongoing statutory duties,

including the current duty to enforce NAGPRA's ownership, control, consultation, and repatriation requirements. (Doc. 261 at 6, 90, 92, ¶¶ 18, 417, 423). Plaintiffs seek prospective relief requiring consultation, production of the Phase III inventory report, repatriation, and restrictions on further action concerning remains and cultural items without Plaintiffs' consent. (*Id*. at 133-34, ¶ (k)). As explained in Section V.C, those allegations support traditional equitable review, and Section 702 removes the sovereign immunity barrier. *See Armstrong*, 575 U.S. at 326-28. Count XI therefore is not barred by sovereign immunity, the APA's statute of limitations, or the absence of a cause of action.

D. Plaintiffs have stated a claim under ARPA (Count XIV).

The Federal Defendants argue Plaintiffs failed to state a claim under ARPA for two reasons: (1) "Federal Defendants were not required to issue any permits under ARPA," and (2) even though they did issue a permit to Auburn, that permit was issued in 2003, and thus any claim of a violation "falls outside the statute of limitations." (Doc. 275 at 29). Both arguments fail. First, under the applicable regulations—and by the Federal Defendants' own admission (Doc. 261-1 at Ex. W); (*id.* at Ex. V, 303-04)—an ARPA permit was required because Auburn archeologists did the excavating. *See* 25 C.F.R. § 262.4(c). Second, because Auburn continued to engage in excavations through 2011, any excavations that took place after the ARPA permit expired—and without consultation with the Nation—constituted new violations that took place within the six years preceding the filing of the Original Complaint in 2012. The Federal Defendants offer nothing that warrants dismissal of Plaintiffs' ARPA claim in Count XIV.

The purpose of ARPA is to secure "the protection of archaeological resources and sites . . . on public lands and Indian lands." 16 U.S.C. § 470aa(b). Under ARPA, "[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) (emphasis added); *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). The Hickory Ground Site constitutes "Indian lands" for purposes of ARPA because it is held in trust by the United States for Poarch. (Doc. 261 at 26, ¶ 118).

The permit requirement is a crucial part of the process under ARPA (and NAGPRA, which incorporates it) for preserving ancestral and cultural resources, because it requires the Federal land manager to "notify any Indian tribe which may consider the site as having religious or cultural importance" before issuing a permit that may result in harm to a religious or cultural site. 16 U.S.C. § 470cc(c). This notice requirement is intended to give tribes an opportunity to intervene in development activity to safeguard cultural items. *See* S. Rep. No. 101-473, at 10 (1990). Here, Plaintiffs allege that the Federal Defendants failed to consult with the Nation prior to issuing the permit the Federal Defendants granted to Auburn in 2003. (Doc. 261 at 97, ¶ 454). Failing to give notice to the appropriate tribes before issuing a permit and allowing excavation to be conducted on Indian lands without a required permit are both clear violations of ARPA. *See Navajo Nation*, 819 F.3d at 1088 ("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.").

The Federal Defendants, however, contend there have been no violations because "the Poarch Band's construction of a gaming facility on its land . . . [is] specifically exempted by the statute and applicable regulations." (Doc. 275 at 30) (citing *Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990)). The exemption applied in *Attakai*, however, has no application here.

In *Attakai*, the District Court found there were no violations of ARPA because there were no *purposeful* activities aimed at archeological resources. *See Attakai*, 746 F. Supp. at 1410-11 (citing 43 C.F.R. § 7.5(b)(1)). Moreover, unlike the defendants in *Attakai*, here, Auburn and the Poarch Officials *knew* prior to their excavations that Hickory Ground was a burial cemetery and that any archeological activities would necessarily involve excavation of human remains and cultural resources. (Doc. 261-1 at Ex. V, 304) (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's 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," thus triggering ARPA permit requirements). In this case, the excavations were far from inadvertent—they were undertaken knowingly and purposefully.[19]

Still, the Federal Defendants maintain that a "permit was not required under ARPA because Auburn University conducted activities on the Poarch Band's tribal land at the Poarch Band's request." (Doc. 275 at 31). While under certain circumstances *tribal members and employees* conducting excavations on the Tribe's tribal land do not require a permit, that exception does *not*

[19] 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). 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.

extend to non-members and non-Indian individuals undertaking the excavations. *See* 25 C.F.R. § 262.4(c). Notably, the Federal Defendants' own documents (that they previously filed in this case) acknowledge that under 25 C.F.R. § 262.4(c), the Auburn non-Indian archeologists were required to obtain permits for excavations at Hickory Ground. (*See, e.g.,* Doc. 261-1 at Ex. V, 304) ("individuals who do the excavating or removing must have federal permits, *unless they are members of the tribe*.") (emphasis added); (*id.*) ("Such a violation might 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") (emphasis added). Thus, even if the excavations were permissibly undertaken pursuant to Poarch law and at Poarch's request, ARPA still required a permit because *Auburn*—the party that undertook the excavations—is not a Poarch member nor tribal employee. The only permit that Plaintiffs are aware of was issued for 2003 to 2005, but the excavations did not conclude until 2011—six years after the permit expired. The TASC alleges that the Federal Defendants violated ARPA when they permitted Auburn to undertake excavations at Hickory Ground *without* a permit until 2011. (Doc. 261 at 36, ¶ 155).

Finally, the Federal Defendants aver that Plaintiffs' ARPA claim against them should be dismissed because "any challenge to the 2003 permit should be time-barred" under the APA's six-year statute of limitations. (Doc. 275 at 31). Plaintiffs, however, allege that the Phase III excavation ended in 2011, (Doc. 261 at 36, ¶ 155), the year before the Original Complaint in this matter was filed in 2012. This places Plaintiffs' ARPA claim well within the statute of limitations (since no permit was issued for excavations from 2006 to 2011). Second, any excavation, removal, damage, alteration, or defacement to archaeological resources by or at the direction of the Poarch Officials without a required permit violated ARPA, regardless of whether it occurred during the

Phase III excavation or during the subsequent construction of the casino (which commenced in 2012 and continued until the casino opened in 2014).

Moreover, Plaintiffs' allegations that the Federal Defendants continue to violate ARPA are not time-barred. The TASC alleges that the Federal Defendants are responsible for enforcing ARPA provisions at Hickory Ground. (*Id.* at 98, ¶ 455). The TASC further alleges that the Federal Defendants have obligations to protect Plaintiffs' rights, including duties to provide notice and consultation and obtain consent before allowing damage to burials and sacred sites. (*Id.* at 6, ¶ 18). Those duties remain present because the TASC alleges that the Poarch Officials and Auburn continue to violate ARPA, that archaeological resources remain under the casino and related infrastructure, and that the Federal Defendants' actions continue to cause irreparable harm. (*Id.* at 5, 101-03, ¶¶ 13-17, 474, 479). Plaintiffs seek prospective relief requiring compliance with ARPA's permit, consultation, and protection requirements, including relief preventing further excavation, removal, damage, alteration, or defacement of archaeological resources and requiring restoration to the greatest extent possible. (*Id.* at 135, ¶ (n)).

Plaintiffs' allegations of ongoing violations of ARPA proceed under Section 702 of the APA and the traditional equitable *ultra vires* officer suit recognized in *Larson* and *Dugan*. *See Larson*, 337 U.S. at 689; *Dugan*, 372 U.S. at 621-23. As explained in Section V.C, those allegations support traditional equitable review, and Section 702 removes the sovereign immunity barrier. *See Armstrong*, 575 U.S. at 326-28.

For all of the foregoing reasons, the Plaintiffs have stated a timely and plausible claim under ARPA, and the Federal Defendants' motion to dismiss the ARPA claim should be denied.

E. Plaintiffs state a claim under the NHPA (Count XVII).

1. The NHPA creates a private cause of action.

The Federal Defendants assert that "[t]he NHPA does not provide a private cause of action and may only be enforced through the APA." (Doc. 275 at 32) (citing *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094 (9th Cir. 2005)). While the Ninth Circuit may have held that the NHPA is without a private right of action, numerous other jurisdictions have reached the opposite conclusion. *See, e.g., 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. United States Army Corps of Engineers*, 194 F.Supp.2d 977, 990 (D.S.D. 2002); *see also Narragansett Indian Tribe v. Rhode Island Dept. 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 . . . we can continue to indulge in this assumption . . . .").

As the Supreme Court articulated in *Alexander v. Sandoval,* in considering whether a given statute contains a private right of action, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." 532 U.S. 275, 286 (2001). The NHPA satisfies the two-part test set forth in *Sandoval.*

First, the NHPA contains rights-creating language that focuses on the class Congress intended to protect. While the government is tasked with stewardship, 54 U.S.C. § 300101(3) ("It is the policy of the Federal Government . . . to . . . administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations"), the NHPA specifically identifies "interested person[s]" as the class of individuals entitled to participate in and enforce its protections. 54 U.S.C. § 307105. Second, the NHPA displays a clear statutory intent to create a private remedy. The NHPA explicitly authorizes

a "civil action brought . . . by any interested person to enforce this division." The NHPA states in pertinent part:

> 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). The plain language of the NHPA creates both a private right and a private remedy.

To hold that the NHPA lacks a private right of action would violate the "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (internal quotation marks omitted). Such a holding would render 54 U.S.C. § 307105—which authorizes attorneys' fees in a "civil action brought . . . by any interested person"—entirely "'inoperative or superfluous.'" *Corley v. United States*, 556 U.S. 303, 314 (2009). Congress would not have authorized fees for a category of lawsuit it did not intend to exist.

2. The APA provides a waiver of sovereign immunity for NHPA claims that is not dependent on final agency action.

The Federal Defendants assert that "[j]udicial review under the APA is expressly conditioned on the existence of a final agency action . . . ." (Doc. 275 at 32). In response, Plaintiffs reincorporate their arguments from Section V.A and assert that the same legal reasoning applies to Count XVII. Because the NHPA contains a private right of action, and because APA Section 702 waives the immunity of the Federal Defendants, the APA does not require Plaintiffs to demonstrate the existence of a "final agency action" under Section 704 in order to obtain judicial review of the Federal Defendants' various "undertakings" that violate the NHPA.

3. Plaintiffs have plausibly alleged the Federal Defendants have violated the NHPA.

The purpose of NHPA is the preservation of historic resources. *See Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 266 (10th Cir. 1981). The Hickory Ground Site has been listed on the National Register of Historic Places since 1980. (Doc. 261 at 4, 19, 104, ¶¶ 8, 88, 483). Accordingly, it is a "historic property" subject to the NHPA's protections. 54 U.S.C. § 300308 (defining "historic property" as including sites included on the National Register).

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties. 54 U.S.C. § 306108; 36 C.F.R. § 800.1. This is commonly referred to as the "Section 106 process." The NHPA defines "undertaking" as:

> [A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320. Courts have construed the statute to mean that only a Federal permit, license, or approval is required for an action to be a federal undertaking—federal funding is not necessarily required. *See United Keetoowah Band of Cherokee Indians v. Fed. Comm. Comm'n,* 933 F.3d 728, 734 (D.C. Cir. 2019); *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (finding that the definition of "undertaking" included projects requiring a federal permit or merely federal approval, because a narrower reading would "deprive the references to licensing in § 106 of any practical effect"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016) ("An undertaking is defined broadly to include any 'project, activity, or program' that requires a federal permit."); *Fein v. Peltier*, 949 F.Supp. 374, 379 (D.V.I. 1996) (reading the phrase "'funded in whole or in part' as modifying only the word 'program,'" and finding that "an undertaking for purposes of [S]ection 106 includes a project or activity under the

direct or indirect jurisdiction of the NPS which requires its prior approval, regardless of whether the project or activity is funded in whole or in part by the federal government.").

The federal decision need not be particularly formal, and it need not result in affirmative action in order to constitute an undertaking. For example, the construction of wireless communication towers has been held to constitute an undertaking subject to NHPA review based on an online registration process for the towers that takes mere minutes to complete. *CTIA-Wireless Ass'n v. Fed. Comm. Comm'n*, 466 F.3d 105, 113-14 (D.C. Cir. 2006). A decision to take *no action* has also been held to constitute an undertaking. *Nat'l Trust for Hist. Pres. v. Blanck*, 938 F. Supp. 908, 920 (D.D.C. 1996). In that case, Walter Reed Army Medical Center made a decision to *not* sell historic buildings even though it was not using the buildings, did not have the resources to maintain the buildings, and had allowed the condition of the historic buildings to significantly deteriorate. *Id.* at 910, 919-20. As the District Court explained, "[t]hat decision had the sort of serious and long-term consequences" for the historic buildings that the NHPA required be undertaken in accordance with the Section 106 process. *Id.* at 920.

As in *Blanck*, the Federal Defendants' decision to allow the excavation (whether with or without required ARPA permits) "had the sort of serious and long-term consequences" for the National Register-listed Hickory Ground Site that should have triggered the Section 106 process. It would be nonsensical if a short, online registration process for something that *might* have an impact on a historic site qualified as an "undertaking" (as in *CTIA-Wireless*), but a decision to allow excavation of a known historical site on the National Register was not.

By these standards, several "undertakings" occurred in connection with the desecration of the Hickory Ground site. Both the issuance of ARPA permits and the decision to allow excavation of the Hickory Ground Site to occur without required ARPA permits constitute undertakings.

(Doc. 261 at 104-05, ¶ 487(b)). Although issuance of an ARPA permit alone is generally not an undertaking requiring compliance with Section 106 of NHPA, *see* 43 C.F.R. § 7.12, the BIA's decision to allow the Poarch Officials and Auburn to conduct excavations of Hickory Ground—a site listed on the National Register of Historic Places—*was* an undertaking, and thus the NHPA required the Section 106 process to be completed before any federal funds could be approved in connection with the project and before any permits allowing activity at the site were issued. *See Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995) (it is the project that constitutes the undertaking, not the decision to fund or license).

The excavations took place on land owned by the federal government in trust for Poarch, for which the federal government had delegated Poarch historic preservation responsibilities subject to NPS oversight. *See Fein*, 949 F. Supp. at 379-80 (concluding that the NHPA applied, citing federal ownership of the land and a contractual obligation not to disturb historic ruins on the land and to allow NPS representatives to enter upon the property at reasonable times). Moreover, Plaintiffs have alleged facts sufficient to support a reasonable belief that the excavation was federally funded, in whole or in part. (*See* Doc. 261 at 104, ¶ 487(a)) (indicating that Poarch appears to generally receive federal historic preservation funds on an annual basis); 54 U.S.C. §§ 302906, 302907 (authorizing grants to tribes for the preservation of their cultural heritage, as well as for the purposes of carrying out a historic preservation program). Such funding would make the project an undertaking for purposes of NHPA review.[20]

[20] The Federal Defendants cite a District Court case from the Northern District of Georgia for the proposition that "the mere provision of funding is not an undertaking." (Doc. 275 at 33) (citing *Woodham v. Fed. Transit Admin.,* 125 F. Supp. 2d 1106, 1110 (N.D. Ga. 2000)). The holding in *Woodham*, however, has no bearing here. In *Woodham*, the Secretary's "[r]eview of [the overall] proposal was extremely limited, and the [agency's] concurrence was 'merely a ministerial act in which the agency exercised no discretion.'" *Woodham,* 125 F. Supp. 2d at 1110. In contrast, here, Plaintiffs allege the Federal Defendants' involvement far surpasses the payment of a few grants. As the TASC notes, the Federal Defendants affirmatively had a *non-discretionary* duty to review the NPS Agreement every four years. 54 U.S.C. § 302108; *see also* (Doc.

Construction and operation of the casino and hotel on the Hickory Ground Site also constituted an undertaking, because an Indian gaming facility is by its very nature a project conducted with the approval and extensive involvement of the federal government, specifically Interior. (Doc. 261 at 104-05, ¶ 487(b)). From the very earliest days of the Indian gaming industry, the federal government has been extensively involved in all aspects of Indian gaming. The federal government actively promoted gaming as a way of meeting federal goals for tribes, such as economic development and self-determination. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 & n.21 (1987). Multiple departments of the federal government, including the Department of the Interior, provided financial assistance to tribes to develop the nascent industry. *Id.* at 218. And the Secretary of the Interior originally approved tribal gaming ordinances, regulated the gaming activities, and reviewed management contracts for tribal gaming facilities. *Id.* Indeed, the very reason the Indian gaming industry exists as it does is because of the important tribal and federal interests involved, which preempt state regulation. *See id*. at 216–22 (balancing interests of the federal government first, tribal governments second, and state government third, in order to determine whether state regulation was preempted, and determining that it was.)

After *Cabazon*, the federal government further formalized its regulation of the Indian gaming industry by enacting IGRA, codified at 25 U.S.C. §§ 2701-2721. IGRA established the NIGC within Interior, 25 U.S.C. § 2704(a), and granted the NIGC extensive authority over Indian gaming operations. *See, e.g.*, 25 U.S.C. § 2706. Pursuant to NIGC regulations, a tribe must notify

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261 at 106-07, ¶ 495). The Secretary was required to ensure the Poarch Officials' administration of their federally delegated NHPA duties complied with the NHPA, and if and when they did not, the Secretary was required to terminate the NPS Agreement—which the Secretary has continuously failed to do. (Doc. 261 at 35, ¶¶ 151-52). Indeed, the TASC alleges an intricate web of undertakings, including allowing for the excavation of Plaintiffs' relatives at Hickory Ground, allowing violations of NAGPRA, and Interior's approval of the gaming ordinances governing the Poarch Officials' ongoing operation of a casino at Hickory Ground. (*Id.* at 104-05, ¶ 487). This case does not involve the "mere provision" of federal funds as a ministerial act as was the case in *Woodham*.

the NIGC at least 120 days before opening any new gaming facility. 25 C.F.R. § 559.2(a). Assuming Poarch complied with this requirement, as it should have, the federal government, and specifically the Interior, had at least four months' notice before the casino opened in 2014. Finally, the NIGC prescribes extremely detailed standards for all aspects of tribal gaming operations. *See, e.g.*, 25 C.F.R. Part 543 (Minimum Internal Control Standards for Class II Gaming).

The federal government's ownership of the Hickory Ground Site; its extensive involvement in the gaming operation from construction through today; and its receipt of revenues from the gaming operation make the planning, construction, and operation of the gaming facility an undertaking for NHPA purposes. *See Fein*, 949 F. Supp. at 379 (finding that "an undertaking for purposes of section 106 includes a project or activity under the direct or indirect jurisdiction of the NPS which requires its prior approval, regardless of whether the project or activity is funded in whole or in part by the federal government"); *see also CTIA-Wireless*, 466 F.3d at 114–15 (retention of approval authority constituted an undertaking). This is not a situation in which non-federal land and resources were used for a construction project. Here, Poarch clearly used federal historic preservation funds to transform a site on the National Register into a federally regulated gaming facility—something that renders the entire project an "undertaking" for purposes of the NHPA. (Doc. 261 at 104-05, ¶ 487).

Finally, each extension of the NPS Agreement without appropriate review and without termination for demonstrable noncompliance constitutes an undertaking. (*See id.* at 106-07, ¶ 495) (noting the latest review and failure to terminate occurred in 2024); *see also Blanck*, 938 F. Supp. at 920 (concluding that a decision to not take action constitutes an "undertaking"). The NPS was statutorily mandated to evaluate Poarch's historic preservation program at least every four years, and was required to disapprove the program if, at any time, the Secretary determined that a major

aspect of the program was not consistent with historic preservation program regulations. 54 U.S.C. § 302302(a)-(b). The NPS was also contractually obligated by the NPS Agreement to carry out this review. (Doc. 261 at 106-07, ¶ 495). And it reserved the right to terminate the NPS Agreement if the Poarch Officials were not carrying out their assumed responsibilities in accordance with the NPS Agreement, the NHPA, or "any other applicable Federal statute or regulation." (*Id.* at 31, ¶ 133). Yet NPS did not conduct these required reviews. (*Id.* at 106-07, ¶ 495). Its failure to do so constitutes an undertaking requiring NHPA review. *See, e.g., Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006) (holding that extension of leases was a federal undertaking requiring NHPA review).

a. Alternatively, Plaintiffs have alleged "final agency actions" under the APA.

If the Court concludes Plaintiffs must allege the existence of a plausible "final agency action" under APA Section 704 to sustain its NHPA claim (it should not), Plaintiffs have done so. A "final agency action," is one that marks the consummation of the agency's decision-making process—"it must not be of a merely tentative or interlocutory nature." *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In addition, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequence will flow.'" *Id*. at 178. Thus, "'courts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled.'" *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018) (quoting *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014)). Courts therefore "focus on both the 'practical and legal effects of the agency action,' and define the finality requirement 'in a pragmatic and flexible manner.'" *Id*. (quoting *Or. Nat. Desert Ass'n v. U.S. Forest Serv*., 465 F.3d 977, 982 (9th Cir. 2006)).

The final agency actions alleged here meet these standards. A decision to issue an ARPA permit (or not to require one when one should be required) is a final decision, not interlocutory in nature, from which legal consequences will flow (and tragically did in this case). Further discovery would be required to determine exactly when the Federal Defendants' approval of the casino on the Hickory Ground Site became final, but it necessarily must have occurred at some point between the preparation for construction and the present day, otherwise the casino would not be in operation, given the federal government's ability and authority to shut it down. (Doc. 261 at 104-05, ¶ 487(b)) ("the gaming at the Hickory Ground Site required the approval of gaming ordinances by Interior.").

Likewise, each decision to extend the NPS Agreement (*id.* at 106-07, ¶ 495) and each award of historic preservation program funds to Poarch constitute final agency actions (*id.* at 109, ¶ 507)—as consequences flowed from each of the foregoing decisions, each and every time they were made. The reviews of the NPS Agreement are required to take place once every four years, most recently in 2024. (*Id.* at 106-07, ¶ 495). The Federal Defendants' failure to undertake the required review constitutes a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and thus a violation of NHPA and the APA. *See* 5 U.S.C. § 706(2)(A).

Finally, the Court has broad equitable powers to order appropriate relief in an NHPA case, and the contours of that remedy need not be decided on a motion to dismiss. *See, e.g., Vieux Carre Property Owners, Residents & Assoc., Inc.*, 948 F.2d at 1447 ("There is, in other words a broad range of remedies that could conceivably emerge from NHPA review. We find it inappropriate to pre-judge those results as being limited to the extremes of either maintaining the status quo or totally demolishing the park.").

At this stage, the Court must accept all factual allegations in the TASC as true and decide only whether, based on those allegations and all reasonable inferences therefrom, Plaintiffs have alleged a plausible claim for relief under the NHPA. They have. Any further determination on the Federal Defendants' liability and the appropriate remedy must wait for the parties to develop the complete record after discovery.

b. Plaintiffs' NHPA claim against Federal Defendants is not barred by the statute of limitations.

Finally, Plaintiffs' NHPA claims against the Federal Defendants fit well-within the APA's six-year statute of limitations. First, because each failure of the Secretary to review Poarch's compliance with the NPS Agreement constitutes a final agency action for purposes of the APA, and because the last time the Secretary failed to undertake this non-discretionary duty was in 2024, the statute of limitations did not start to run on that particular NHPA claim until 2024. (Doc. 261 at 106-07, ¶ 495). The Federal Defendants do not address the TASC's numerous allegations regarding the Secretary's 2024 failure to undertake the review required by 54 U.S.C. § 302108, and instead focus their statute of limitations argument on a variety of truncated characterizations of allegations in the TASC and a noticeable silence regarding the Supreme Court's recent decision in *Corner Post*. *See* 603 U.S. at 809. Nothing in the Federal Defendants' brief supports dismissal at this stage based on the APA's statute of limitations.

For instance, the Federal Defendants aver that the statute of limitations has passed because the "Federal Defendants issued Auburn University an ARPA Permit in 2003, more than six years before Plaintiffs filed their original complaint." (Doc. 275 at 33). The issuance of the 2003 permit, however, is not the only final agency action the Federal Defendants took with regard to the permit that constitutes a violation of the NHPA. The Federal Defendants issued an ARPA permit in 2003 that, on information and belief, expired in 2005. (Doc. 261 at 37-38, ¶ 161). Excavations, however,

continued until 2011. (*Id.* at 36, ¶ 155). Accordingly, the decision *not* to issue any ARPA permits for the excavations that took place from 2006 to 2011 constitutes a "final agency action" under the APA that violates the NHPA. And using the Federal Defendants' math, the failure to issue ARPA permits for the excavations from 2006 to 2011 fits well within the six-year window.[21]

The Federal Defendants do not mention the Supreme Court's decision in *Corner Post*, which as discussed in Section VI.B.4 above, makes clear that a plaintiff's APA claim does not begin to run when the agency undertakes final agency action, but rather, begins to run when the plaintiff is injured. None of the Federal Defendants' arguments address when Plaintiffs suffered the requisite injury that triggers the running of the statute of limitations (Doc. 275 at 33-34), and the TASC contains allegations that Plaintiffs suffered injuries resulting from the Federal Defendants' final agency actions *after* 2006. (*See, e.g.,* Doc. 261 at 107, ¶ 499) (stating Plaintiffs suffered injuries from the excavation and alleged reburial that violated Muscogee religion); (*see also id.* at 36, ¶ 155) (noting that excavations continued through 2011); (*id.* at 47, ¶¶ 220-22) (noting that the sacrilegious reburial took place in 2012).

Nothing in the Federal Defendants' Motion supports dismissal of Plaintiffs' NHPA claim at this time.

[21] The Federal Defendants argue that the provision of federal grant funding cannot be the final agency action that starts the clock on the statute of limitations because "with the exception of a 2011 Preservation Grant from NPS, Plaintiffs do not identify the date or the source of such funding." (Doc. 275 at 33). Plaintiffs, however, allege that "Poarch continues to receive these grants." (Doc. 261 at 104, ¶ 487(a)). At this stage, that is enough. Plaintiffs' NHPA claim should not be dismissed because Plaintiffs do not yet, at this stage, have access to information exclusively within the Federal Defendants' and Poarch Officials' possession. The Federal Defendants do not contend that the allegation that Poarch continues to receive these grants is plainly untrue or not plausible, rendering this argument an insufficient basis for dismissal at this time.

4. The TASC alleges present and ongoing NHPA violations supporting prospective relief.

Plaintiffs' allegations that the Federal Defendants are committing ongoing violations of the NHPA also proceed under Section 702 of the APA and the traditional equitable *ultra vires* officer suit recognized in *Larson* and *Dugan*. *See Larson*, 337 U.S. at 689; *Dugan*, 372 U.S. at 621-23. The TASC alleges present federal inaction in violation of ongoing statutory duties, including the duty to take corrective action to protect Hickory Ground's historic and cultural significance. (Doc. 261 at 106, ¶ 493(f)). Those allegations are reinforced by the TASC's allegations concerning the NPS Agreement.

The TASC alleges that NPS "must terminate" the NPS Agreement if the Poarch Officials do not carry out their assumed responsibilities in accordance with the Agreement, the NHPA, or any other applicable federal statute or regulation. (*Id.* at 31, ¶ 133). The TASC further alleges that NPS is failing to review the Poarch Officials' compliance with the NPS Agreement, permitting violations of the Agreement and laws to continue. (*Id.* at 32, ¶¶ 137-38). Plaintiffs seek prospective relief prohibiting further construction at Hickory Ground, requiring restoration "to the greatest extent possible," and requiring the Secretary to terminate the NPS Agreement. (*Id.* at 136-37, ¶ (q)). As explained in Section V.C, those allegations support traditional equitable review, and Section 702 removes the sovereign immunity barrier. *See Armstrong*, 575 U.S. at 326-28. Count XVII therefore is not barred by sovereign immunity, the statute of limitations, or lack of cause of action.

F. Plaintiffs have stated a claim under the Religious Freedom Restoration Act (RFRA) (Count XX).

The Religious Freedom Restoration Act ("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. *Id.* § 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 [party's] religious exercise." *United States v. Grady*, 18 F.4th 1275, 1285 (11th Cir. 2021) (quoting *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015)). As detailed below, Plaintiffs alleged a *prima facie* case of RFRA violation against the Federal Defendants in Count XX of the TASC. The TASC alleges that Hickory Ground is a sacred and irreplaceable religious site, that Plaintiffs' religion imposes concrete duties toward the Site and the remains of their ancestors, and that the Federal Defendants have substantially burdened those duties through allowing excavation, continued desecration, denial of access, and ongoing obstruction of repatriation. (Doc. 261 at 115-17, ¶¶ 529-539).

The Federal Defendants did not carry their burden. They have offered no "compelling governmental interest" for their actions in authorizing and facilitating the excavations at Hickory Ground. (*See* Doc. 275 at 34-40). Because Plaintiffs have established a *prima facie* case, and because the Federal Defendants can point to no compelling governmental interest for their imposition of a substantial burden on Plaintiffs' exercise of religion, the Federal Defendants' motion to dismiss Count XX should be denied.

1. Plaintiffs plausibly allege religious exercise within RFRA's meaning.

RFRA adopts the broad definition of religious exercise in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA") that includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §

2000bb-2; 42 U.S.C. § 2000cc-5(7)(A); *see also Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 695 n.5 (2014) (holding that "exercise of religion" under RFRA must be given the same broad meaning that applies under RLUIPA). Thus, a court's role is not to decide whether a particular religious practice is important enough, orthodox enough, or plausible enough to qualify for protection. *See Davila*, 777 F.3d at 1204; *Hobby Lobby*, 573 U.S. at 724-25; *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981). Rather, the inquiry is whether Plaintiffs plausibly allege that the practices and obligations at issue reflect sincerely held religious convictions, as opposed to essentially "seeking to perpetrate a fraud on the court." *Davila*, 777 F.3d at 1204. RFRA protects religious exercise even where a practice is difficult for outsiders to understand, incapable of empirical proof, or not reducible to conventional categories of worship. *See id*.; *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

Plaintiffs' allegations easily satisfy that standard. The TASC alleges that Hickory Ground is "a sacred site of unique and irreplaceable religious significance" to Plaintiffs, encompassing ceremonial grounds, burial sites, and the remains of Plaintiffs' ancestors, all of which are integral to Plaintiffs' religious practices. (Doc. 261 at 115, ¶ 533). Plaintiffs allege that they have practiced their religion at Hickory Ground (prior to the Federal Defendants' authorizing its desecration) for millennia. (*Id.* at 18, ¶¶ 80-81). The TASC further alleges that Plaintiffs' religious beliefs require them to care for their ancestors' remains in accordance with traditional protocols, preserve the sanctity of burial and ceremonial grounds, prevent unauthorized activities or substances, including alcohol, from desecrating sacred spaces, and access and maintain Hickory Ground for religious ceremonies and practices. (*Id.* at 115, ¶ 534). Plaintiffs' religion requires them to ensure their ancestors remain in their final resting place with their funerary objects, and if disinterment

tragically occurs, for the Mekko to make decisions about treatment of the deceased, such as how and where reinterment should take place. (*Id.* at 21, 45, ¶¶ 94, 97, 211).

The TASC also alleges the specific beliefs that make those obligations religious, not merely cultural or historical. Plaintiffs allege that their ancestors cannot be at peace unless their remains are properly buried and cared for according to religious protocol. (*Id.* at 66, ¶¶ 283-84). They allege that archaeological examination violates the sanctity of ancestors and causes perpetual unrest until the remains are put back at peace using proper religious protocol. (*Id.* at 66-67, ¶¶ 285-89). Plaintiffs further allege that alcohol consumption near ceremonial grounds is sacrilegious and strictly prohibited in the Muscogee religion. (*Id.* at 67, ¶ 291). And they allege that, as living descendants, they owe a spiritual and religious duty to care for the graves and bodies of their ancestors and to ensure that their ancestors are buried and remain undisturbed in accordance with traditional religious protocol. (*Id.* at 121-26, ¶¶ 561-65, 575-79). Those allegations plausibly allege religious exercise within RFRA's broad meaning.

2. Plaintiffs plausibly allege that the Federal Defendants substantially burdened Plaintiffs' religious exercise.

A substantial burden on religious exercise exists where governmental action places substantial pressure on an adherent to modify his behavior and violate his beliefs, or where it prevents conduct his religion requires. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *Hobby Lobby*, 573 U.S. at 720, 726. As the Eleventh Circuit has clarified, a plaintiff need not show a "complete, total, or insuperable burden" to satisfy that requirement. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830 (11th Cir. 2020). Nor must Plaintiffs show that the Federal Defendants 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 (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)), or when it forces adherents to "forego religious precepts." *Thai Meditation*, 980 F.3d at 830.

Here, Plaintiffs easily satisfy that standard. Count XX alleges that the Federal Defendants substantially burdened Plaintiffs' religious exercise in several concrete ways. Plaintiffs allege that the Federal Defendants permitted the excavation and removal of Plaintiffs' ancestors' remains and funerary objects, allowed the desecration of sacred burial grounds and ceremonial sites without consulting Plaintiffs, and prevented Plaintiffs from performing the religious protocols required to care for their ancestors and sacred sites. (Doc. 261 at 116, ¶ 535); (*id.* at 70-71, ¶ 310) (alleging that in 2009, the Federal Defendants refused to address the ongoing NAGPRA and ARPA violations at Hickory Ground and specifically refused to exercise their regulatory authority to stop the violations). Plaintiffs allege that those burdens were compounded by the trust designation of Hickory Ground and the delegation of authority to the same actors violating Plaintiffs' religious freedoms. (*Id.* at 114, 117, ¶¶ 525, 537). Count XX further alleges that these actions caused concrete religious injuries, including the ongoing desecration of sacred ceremonial and burial grounds, and the continued denial of access to Hickory Ground for required religious practices. (*Id.* at 116-17, ¶¶ 536-538).

None of the arguments or authorities offered by the Federal Defendants support dismissal. First, the Federal Defendants mischaracterize the Eleventh Circuit's holding in *Midrash Sephardi*, 366 F.3d 1214 (11th Cir. 2004). (Doc. 275 at 36) (stating *Midrash* held a plaintiff can only establish a substantial burden if the challenged governmental action "completely prevents" the practice of religion)). *Midrash* did not hold that a plaintiff must show that the challenged action "completely

prevents" religious exercise in every case to plead a substantial burden. 366 F.3d at 1227. That is precisely the reading the Eleventh Circuit rejected sixteen years later in *Thai Meditation*.

In *Thai Meditation*, the Eleventh Circuit explained that *Midrash*'s references to conduct that "completely prevents" religious exercise or "force[s] . . . adherents to forego religious precepts" was not an articulation of the exclusive standard itself, but rather, was an articulation of examples that plainly satisfy the standard. *Thai Meditation*, 980 F.3d at 830. The Eleventh Circuit was explicit: "We didn't say there that to count as a 'substantial burden' government conduct must 'completely prevent[ ]' religious exercise. Nor did we say . . . that government conduct must 'impose[ ] pressure so significant as to require Plaintiffs to forego their religious beliefs.'" *Id*. In fact just two years ago, the Eleventh Circuit again reversed a district court that misapplied *Midrash* by treating it as a heightened standard, as the Federal Defendants ask this Court to do here. *See Vision Warriors Church, Inc. v. Cherokee Cnty. Bd. of Comm'rs*, No. 22-10773, 2024 WL 125969, at *7-8 (11th Cir. Jan. 11, 2024).

The Federal Defendants also improperly rely on the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*. Doc. 275 at 37 (citing 485 U.S. 439 (1988)). The Federal Defendants state that "in *Lyng*, the Supreme Court found no cognizable RFRA claim . . . " (Doc. 275 at 37 (quoting 485 U.S. at 451-52)). But the Court did not address RFRA, nor could it. RFRA was enacted in 1993, five years *after Lyng* was decided, in part to address the harms caused by the *Lyng* Court's decision. Congress enacted RFRA precisely because it concluded that decisions such as *Employment Division v. Smith,* 494 U.S. 872 (1990) and *Lyng* did not provide adequate protection for religious liberty, and Congress wanted to ensure judicial review when religious exercise is burdened. 42 U.S.C. § 2000bb(a)(4), (b)(1). To be clear, a RFRA claim is not the same as a Free Exercise claim, as RFRA 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)). The Federal Defendants therefore cannot simply import *Lyng*'s Free Exercise analysis into RFRA as though Congress had done nothing in the interim. *Lyng* has no application here.[22]

Even if, for argument's sake, the Free Exercise analysis in *Lyng* was relevant to the Court's RFRA analysis of Count XX (it is not), it is clear that the present case is materially different from *Lyng* on its facts. *Lyng* did not involve the excavation of ancestors' remains, the mishandling of funerary objects, the authorization of improper reburial, or the ongoing exclusion of plaintiffs from carrying out mandatory religious duties concerning a sacred burial and ceremonial ground. Nor did *Lyng* involve the destruction of the very site at which those duties must be performed. To the contrary, the Supreme Court emphasized in *Lyng* that the government had been notably solicitous of Native religious concerns. *Lyng*, 485 U.S. at 454. The proposed route was placed as far as possible from the spiritual sites, one-half mile protective zones were established, and "[n]o sites where specific rituals take place [would] be disturbed." *Id.* at 454. The Court then rejected the claim that road construction and logging activities would impair the privacy, silence, and undisturbed natural setting that facilitated the plaintiffs' spiritual experience. *Id*. at 442-44, 451, 454. Significantly, the Court recognized, however, that "prohibiting the Indian respondents from visiting the sites would raise a different set of constitutional questions." *Id.* at 453. Here, the

[22] The Federal Defendants also cite the Ninth Circuit's decision in *Apache Stronghold*, where the Ninth Circuit drew similarities between the Free Exercise Clause and RFRA. (Doc. 275 at 38 n.4). To the extent that the Ninth Circuit concluded that *Lyng*'s Free Exercise analysis is synonymous with RFRA's "substantial burden" standard, the Ninth Circuit is wrong. Regardless, the Ninth Circuit cannot overrule the standard in the Eleventh Circuit, which states that "[a] 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

excavations that the Federal Defendants authorized—and failed to regulate—destroyed Plaintiffs' sacred site and prohibit Plaintiffs from visiting the graves of their relatives.

The Federal Defendants' reliance on the Ninth Circuit's decision in *Snoqualmie Indian Tribe* is likewise unhelpful. (Doc. 275 at 38 (quoting *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008)). There, the Ninth Circuit found the Tribe had not established a substantial burden "[a]fter reviewing the voluminous record in this case," and not finding "any evidence demonstrating that Snoqualmie Tribe members will lose a government benefit or face criminal or civil sanctions for practicing their religion." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008). That, however, is not the standard in the Eleventh Circuit. Here, the "substantial burden" standard is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash*, 366 F.3d at 1227.

The TASC contains numerous allegations that Plaintiffs have had to conform their behavior in accordance with the Federal Defendants' refusal to uphold NAGPRA and ARPA. Specifically, Plaintiffs have had to forego participation in ceremonies, religious practices, and prayers that cannot be replicated elsewhere. (Doc. 261 at 66, ¶ 283). They have had to forego their "religious duty to care for the graves and bodies of their ancestors." (*Id.* at 67, ¶ 285). Under *Thai Meditation*, a substantial burden does not require a "complete, total, or insuperable burden," and modified behavior resulting from government coercion or pressure is enough. 980 F.3d at 830-31. Accepting Plaintiffs' allegations as true, Count XX plainly pleads a substantial burden under RFRA.

Finally, the Federal Defendants aver that they "are not the source of the alleged substantial burden on Plaintiffs' free exercise of religion." (Doc. 275 at 34). The TASC, however, specifically alleges that Federal Defendants substantially burdened Plaintiffs' religious exercise by permitting excavation and removal of ancestors' remains and funerary objects, allowing desecration of sacred

burial grounds and ceremonial sites without consulting Plaintiffs, preventing Plaintiffs from performing required religious protocols, and misapplying federal law in ways that deny Plaintiffs' religious interests at Hickory Ground. (Doc. 261 at 116, ¶ 535). Indeed, had the Federal Defendants upheld the federal law they were required to enforce, Plaintiffs' religious exercise would *not* be burdened. The permit the Federal Defendants issued for the excavations of Plaintiffs' relatives explicitly stated that after the archeological work at Hickory Ground concluded, "[a]ll excavated areas shall be restored by filling in the excavations and otherwise *leaving the area in as or near to original condition as is practicable*." (Doc. 261-1 at 308) (emphasis added). The ARPA permit never contemplated permanent removal of human remains or the building of a casino. (*See id.*). The Federal Defendants' decision to not enforce the ARPA permit, and specifically the Federal Defendants' failure to ensure the site was restored to its original state, is the source of the ongoing burden on Plaintiffs' exercise of religion.

The Federal Defendants, however, cite *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006), arguing that Plaintiffs cannot demonstrate a "sufficiently close nexus" between the alleged substantial burden and the actions of the Federal Defendants. (Doc. 275 at 35). But *Bensenville* does not supply the governing standard here.[23] The Eleventh Circuit has cautioned against importing heightened formulations from other circuits rather than applying its own precedent. *See Vision Warriors Church, Inc.*, 2024 WL 125969, at *7. And the Supreme Court cases the Federal Defendants cite, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), *Blum*

[23] *Bensenville* is also distinguishable in that the FAA's primary regulatory purpose has little to do with the preservation of cemeteries. Here, by contrast, the Federal Defendants are the primary agencies tasked with enforcing the cultural preservation laws encapsulated in ARPA, the NHPA, and NAGPRA. In contrast to *Bensenville*, the desecration of Hickory Ground is not an unrelated consequence of otherwise lawful agency action. *See Bensenville*, 457 F.3d at 64-65. Instead, the desecration of Hickory Ground is the direct consequence of the Federal Defendants' failure to enforce the plain language of the permit they issued pursuant to ARPA, as well as uphold the law under NAGPRA and the NHPA. *Bensenville* is wholly inapposite.

v. Yaretsky, 457 U.S. 991 (1982), and *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974), are not RFRA cases—two predate RFRA altogether.

Rather than importing a heightened nexus requirement from out-of-circuit or non-RFRA authorities, this Court should apply the framework the Eleventh Circuit has already provided for determining whether an alleged burden is properly attributable to the government. In *Thai Meditation*, the Eleventh Circuit recognized that courts should consider, among other things, whether there is a "meaningful 'nexus' between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise" and "whether the alleged burden is properly attributable to the government" rather than self-imposed. 980 F.3d at 832. Here, the TASC expressly alleges that the Federal Defendants implemented, authorized, facilitated, and continue to perpetuate the conditions that burden Plaintiffs' religion, including by authorizing excavation of funerary and religious objects at Hickory Ground, disinterment of Plaintiffs' ancestors, and desecration of sacred burial grounds and ceremonial sites in ways that violate NAGPRA and ARPA. (Doc. 261 at 116, ¶ 535). Count XX further alleges that the desecration and disruption caused by the Federal Defendants have placed Plaintiffs' ancestors in a state of unrest and have caused ongoing spiritual harm, forcing Plaintiffs to choose between abandoning their religious beliefs and enduring the continued desecration of their sacred Hickory Ground Site. (*Id.* at 116-17, ¶¶ 536, 538).

The broader factual allegations reinforce the Federal Defendants' critical role. The TASC alleges that BIA is responsible for administering and overseeing archaeological activities on Indian lands, that excavation and construction at Hickory Ground required prior BIA approval under ARPA and permit conditions, and that the Federal Defendants were required to notify tribes that considered the Site religiously or culturally important before allowing excavation to proceed, but never notified the Nation. (*Id.* at 12-13, 33-35, 38, 43-44, ¶¶ 53-57, 143-52, 165-66, 202-03). These

are allegations properly attributable to the government, not merely a burden self-imposed by Plaintiffs. *See Thai Meditation*, 980 F.3d at 832.

The Federal Defendants' actions constitute a meaningful nexus to the ongoing substantial burden on Plaintiffs' exercise of religion.

3. The Federal Defendants do not argue that their conduct is justified by a compelling governmental interest using the least restrictive means.

Once Plaintiffs plausibly allege a *prima facie* RFRA claim, the burden shifts to the Federal Defendants to demonstrate that the challenged burden on Plaintiffs' religious exercise furthers a compelling governmental interest *and* that they used the least restrictive means in furthering that interest. 42 U.S.C. § 2000bb-1(b); s*ee also Grady*, 18 F.4th at 1285; *Davila*, 777 F.3d at 1204. The Supreme Court has made clear that, once a substantial burden is shown, "the burden is placed squarely on the Government" to satisfy that test. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). Notably, the Federal Defendants do not argue that the burden alleged in Count XX serves a compelling governmental interest or that the actions challenged here are the least restrictive means of furthering such an interest. Nor could they. The least restrictive means standard is "exceptionally demanding," and the government must show that it lacks other means of achieving its interests without imposing the challenged burden. *Hobby Lobby*, 573 U.S. at 728; *see also O Centro*, 546 U.S. at 429-30. That inquiry is individualized and fact intensive and cannot be made on a motion to dismiss. *O Centro*, 546 U.S. at 430-31.

The TASC alleges facts supporting the obvious existence of less restrictive alternatives, including notice, consultation, compliance with proper religious protocols, protection of the Site, lawful handling and repatriation of remains and funerary objects, and termination or correction of delegated authority. (Doc. 261 at 12-13, 37-38, 97-98, 117, ¶¶ 53-58, 161-66, 453-57, 537).

Accepting the TASC's allegations as true and drawing reasonable inferences in Plaintiffs' favor, Count XX states a viable RFRA claim and should not be dismissed.

4. In the alternative, Plaintiffs state a claim under the Free Exercise Clause because the Federal Defendants applied the governing framework in an 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 at the outset. The Free Exercise Clause more broadly forbids the 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, 532-34 (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. 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 534-36; *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 persons 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 (Creek) traditional matrilineal kinship system, that Mekko Thompson brings suit 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). 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. (*Id.* at 44, ¶ 205).

Significantly, Plaintiffs allege that Poarch did not share Plaintiffs' lineal, cultural, and religious relationship to Hickory Ground, yet the Federal Defendants nevertheless refused to exercise their non-discretionary authority pursuant to NAGPRA and allowed Auburn and the Poarch Officials to oversee the excavation, reinterment, custody, and repatriation of Plaintiffs' relatives in a manner that disregarded Plaintiffs' traditional kinship structure and religious obligations (*id.* at 43, ¶ 199), thereby depriving Mekko Thompson of authority over the reinterment of his relatives. (*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 Federal Defendants substantially burdened Plaintiffs' religious exercise and, if so, whether the Federal Defendants can satisfy strict scrutiny. The First Amendment claim asks whether the Federal Defendants 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.

G. Plaintiffs state a claim that ARPA and NAGPRA violate RFRA as applied at Hickory Ground (Count XIX).

1. Plaintiffs state a claim under RFRA.

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 Nation to consent to the excavation or removal of cultural items at Hickory Ground, or to give higher priority to any entity or person other than Mekko Thompson or the Nation in the excavated remains and cultural items. (Doc. 261 at 111-14, ¶¶ 514-27). The Federal Defendants misunderstand this claim as a challenge to some future ruling this Court may make. (Doc. 275 at 39-41). It is not.

Count XIX challenges the Federal Defendants' own construction and application of ARPA and NAGPRA at Hickory Ground, which, if upheld, would violate RFRA. The TASC alleges the Federal Defendants are responsible for implementing and enforcing those statutes, that they applied them in ways that permitted excavation and removal of Plaintiffs' ancestors and funerary objects, and that they failed to notify, consult with, or obtain consent from the Muscogee (Creek) Nation before issuing permits from 2003 to 2011. (Doc. 261 at 97-99, 112-13, ¶¶ 453-61, 519-21). The TASC also points to a concrete application of that same theory in Interior's 2009 response to Mekko Thompson's NAGPRA complaint. When Interior concluded that Poarch retained legal interest in the "NAGPRA items from the Hickory Ground site" because the Site had been placed in trust for Poarch, Interior relied on that trust status as a basis for declining to stop ongoing

NAGPRA violations. (*Id.* at 43, 70-71, ¶¶ 197-200, 310). Plaintiffs allege that application—treating Poarch as the legal interest-holder and a priority NAGPRA claimant—violates RFRA because it overrides Plaintiffs' lineal, cultural, and religious interests in the ancestors and cultural items from Hickory Ground. (*Id.* at 113-14, ¶¶ 522-25).

Count XIX is narrower than Count XX. Plaintiffs allege Hickory Ground is a sacred Muscogee (Creek) 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. (*Id.* 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 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 Nation. (*Id.* 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. (*Id.* 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 tribe. 43 C.F.R. §§ 10.2(b)(1). 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). 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 6, 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 Federal Defendants' 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.

Next, RFRA permits this as applied challenge. RFRA provides that the government may not substantially burden a person's exercise of religion, even through a rule of general applicability, unless it demonstrates that application of 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 O Centro*, 546 U.S. at 430-31 (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); *Hobby Lobby*, 573 U.S. at 694-95, 726-28 (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 ARPA and NAGPRA are facially

invalid, but instead 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 or deprives Plaintiffs of priority to their ancestors' remains and funerary objects. (Doc. 261 at 113-14, ¶¶ 522-27). That is a cognizable RFRA claim.

The Federal Defendants' response that Poarch would own the land in fee even absent trust status is irrelevant to Count XIX. (Doc. 275 at 39-40). Count XIX arises precisely because Hickory Ground is not ordinary fee land outside a federal statutory regime. ARPA applies to "Indian lands," which include lands "held in trust by the United States," and it requires a federal permit for excavation or removal of archaeological resources from those lands, with the consent of the Indian or tribe owning or having jurisdiction over them. 16 U.S.C. §§ 470bb(4), 470cc(a), (g)(2); 43 C.F.R. § 7.35(a)-(c). NAGPRA likewise governs Native American human remains and cultural items on "Federal or tribal lands," gives priority to lineal descendants for human remains and associated funerary objects, and permits intentional excavation only if the excavation proceeds under ARPA, after consultation with or, in the case of tribal lands, consent of the appropriate tribe, with disposition governed by NAGPRA's priority rules. 25 U.S.C. §§ 3001(5), (15), 3002(a), (c)(1)-(4); 43 C.F.R. § 10.14(b)-(c). Plaintiffs challenge the Federal Defendants' construction and application of those statutes at Hickory Ground—not some hypothetical parcel of land that is not in trust.

The TASC alleges that trust status aggravates the burden because it increases the federal government's role in excavation, consent, custody, and priority and places federal decision making and enforcement authority in the hands of the same actors burdening Plaintiffs' religion. (Doc. 261 at 114, ¶ 525). Those allegations are sufficient to distinguish this case from the hypothetical fee land scenario.

Once Plaintiffs plausibly allege a *prima facie* RFRA claim, the burden shifts to the government. 42 U.S.C. § 2000bb-1(b); *Grady*, 18 F.4th at 1285, 1287; *Davila*, 777 F.3d at 1204-05. The Federal Defendants do not argue that the specific constructions challenged in Count XIX satisfy strict scrutiny. Count XIX alleges that the challenged applications do not further a compelling governmental interest and do not use the least restrictive means. (Doc. 261 at 113-14, ¶¶ 522-24, 527). The TASC also alleges less restrictive means, including notice to the 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, 97-99, 117, ¶¶ 53-58, 161-66, 453-57, 537).

The Federal Defendants' remaining arguments are that Plaintiffs cannot show a substantial burden and that neutral laws of general applicability do not violate the First Amendment. (Doc. 275 at 39-41). For the same reasons set out more fully in Plaintiffs' argument on Count XX, Section VI.F., the TASC also 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. (Doc. 261 at 19, 21, 66-68, ¶¶ 87, 93-98, 283-93). It further alleges that the Federal Defendants' applications of ARPA and NAGPRA have prevented proper burial, authorized improper reburial, continued the desecration of sacred grounds, and denied Plaintiffs access needed for required religious practices. (*Id.* at 112-14, ¶¶ 521-27). Under Eleventh Circuit law, those allegations plausibly state a RFRA claim. *See Thai Meditation*, 980 F.3d at 830-32; *Davila*, 777 F.3d at 1204-05. Count XIX therefore should not be dismissed.

2. In the alternative, Plaintiffs state a claim under the Free Exercise Clause because the Federal Defendants applied the governing framework in a nonneutral and unequal manner.

Plaintiffs incorporate the argument and reasons provided in Section VI.F.4.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Federal Defendants' Motion to Dismiss the TASC.

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