PRERAK SHAH
Deputy Assistant Attorney General
Environment and Natural Resources Division

PETER KRYN DYKEMA
SALLY J. SULLIVAN
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Email: peter.dykema@usdoj.gov
Ph: (202) 305-0436
Fx: (202) 305-0506

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN BAND OF CHEROKEE INDIANS 88 Council House Loop, Cherokee, NC 28719	)	
Plaintiff,	)	Civil Action No. 1:20-cv-757-JEB
vs.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR 1849 C Street, N.W., Washington, D.C. 20240, et al.	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

Plaintiff's request for extraordinary injunctive relief merits summary denial. Four courts, including this Court and the Supreme Court, have held that the injury of which Plaintiff complains is not at all irreparable. The likelihood that Plaintiff's claims will succeed on the merits is virtually nil, for a host of reasons. And the balance of equities tips dramatically away from the relief sought.

The 16.57 acres at issue "is a highly disturbed area previously prospected for tin and used as a soil borrow site for [road] construction." Exh. 1 (Final Environmental Assessment (EA)) at 23. While Plaintiff's main complaint is that it was not adequately consulted about the possibility of historic remains being on the site, it cannot say that there are any such remains and the State authorities who are expert in the subject say that there are not. By all appearances Plaintiff's *asserted* interest in the property is unsupported.

Intervenor Catawba Indian Nation ("Catawba") urgently needs jobs, income, housing, and health care.[1] The host community enthusiastically supports the development for which Federal Defendants have decided to take the land into trust. Plaintiff's motion should be denied.

Federal Defendants, in the materials that follow, have attempted to minimize arguments that may be duplicative of those to be made by Catawba.

---

[1] Exh. 1 (Final EA) at 7 ("Among the [Catawba] Nation's general membership of approximately 2,800 individuals, there is presently a high unemployment rate and reliance upon the federal and state governments for social services. The Nation lacks economic development opportunities and has no sustainable revenue stream that could be used to fund programs and provide assistance to the Nation's members.")

Please note that page references in this brief will give the pdf page of the cited pleadings and documents, not the documents' internal pagination.

II. BACKGROUND

A. Statement of Facts

1. The land, and the casinos, at issue

The Department of the Interior (DOI) Bureau of Indian Affairs (BIA) has approved an application submitted by the Catawba to accept into trust a 16.57-acre parcel of industrial land in North Carolina. Regarding the tract at issue, the DOI's Final EA reports:

> Historic research of the parcel indicates that it was heavily disturbed when North Carolina Department of Transportation (NCDOT) used the entire site as a soil borrow pit during the construction of Dixon School Road in 2005. The site was later graded by NCDOT in 2006, after road construction was completed. Based on the previous NCDOT work that has occurred on the site, BIA concludes that no historic resources would be affected by the Proposed Project.
>
> A request for records review and comments was submitted to the NC State Historic Preservation Office (SHPO). The following comments were received on February 22, 2019 (Consultation letter can be found in Appendix F): "We have conducted a review of the project and are aware of no historic resources which would be affected by the project. Therefore, we have no comment on the project as proposed." These comments were made pursuant to Section 106 of the National Historic Preservation Act and the Advisory Council on Historic Preservation's Regulations for Compliance with Section 106 codified at 36 CFR Part 800.

Exh. 1 (Final EA) at 735.

The acquisition will allow Catawba's development of a casino. The DOI's purpose in approving the application is to facilitate tribal self-sufficiency, self-determination and economic development, thus satisfying its land acquisition policy as articulated in DOI's trust land regulations at 25 C.F.R Part 151. Exh. 1 (Final EA) at 7. The action also furthers the principal goal of the Indian Gaming Regulatory Act (IGRA) as articulated in 25 U.S.C. § 2701. *Id.* The need for the DOI to act on Catawba's application is established by the regulation at 25 C.F.R. §§ 151.10(h) and 151.12. *Id*. Development and operation of the proposed facility would, in the DOI's view, strengthen Catawba's socioeconomic status by providing a sustained revenue source

for funding a strong tribal government; improving tribal housing; funding a variety of social, governmental, administrative, educational, health and welfare services to improve the quality of life of Catawba members; and providing capital for other economic development and investment opportunities. *Id*.

Plaintiff Eastern Band of Cherokee Indians (Eastern Cherokee, or EBCI) operates two casinos with which the Catawba casino would compete. *Id*. at 44. Both of the Eastern Cherokee casinos are located in North Carolina, one 133 miles from the proposed Catawba site, the other 198 miles away. *Id*.

2. BIA's environmental/historic review process, and involvement of the Eastern Cherokee

On January 31, 2019 TGS Engineering (the contractor who assisted in the preparation of compliance documents under the National Environmental Policy Act (NEPA)) wrote to the North Carolina State Historic Preservation Office to consult regarding the possibility that historic resources of any kind might be present at the project site. *See* Exh. 1 (Final EA) at 713. On February 22, 2019, Ramona M. Bartos, on behalf of the North Carolina Historic Preservation Office, reported that they "have conducted a review of the project and are aware of no historic resources which would be affected by the project." *Id*.

The proposed project was presented at the Cleveland County Commissioners Meeting on March 19, 2019. *Id*. at 689. The public meeting was held at the Commissioners' Chambers, County Administrative Building, 311 East Marion Street, Shelby, N.C. The project was listed in the published agenda for the Country Commissioners meeting. Forty local citizens attended. *Id*.

Chairman Allen recognized Leonard Fletcher with TGS Engineering to present the Catawba Scoping Presentation. Mr. Fletcher presented a project overview that described the project location, the purpose and need for the project, and the proposed development. *Id*. Chief Harris of the Catawba Nation was introduced; he commented on the project and made himself

available to anyone that wanted to discuss it with him after the meeting. *Id*.

The Draft EA was published on December 22, 2019. Exh. 1 (Final EA) at 728. The BIA made the EA available for state and local governments, resource agencies, and public review for a comment period ending on January 22, 2020. Exh. 2 (April1, 2020 Declaration of Chester McGhee, with attachments) ¶ 6. The State of North Carolina received an extension until February 10, 2020, to provide comments. Exh. 3 (March 12, 2020 Finding of No Significant Impact (FONSI)) at 1; Exh. 2 (McGhee Decl.) ¶ 6. The BIA published Notices of Availability for the EA in the Charlotte Observer on December 22, 2019, Gaston Gazette on December 28, 2019, and Shelby Star on January 3, 2020. Exh. 3 (FONSI) at 1; Exh. XX (McGhee Decl.) ¶ 6. The BIA also made the Draft EA available online at catawbanationclevelandcountyea.com. Exh. 3 (FONSI) at 1; Exh. 2 (McGhee Decl.) ¶ 6.

Also in December, 2019, Chester McGhee, the BIA's Regional Environmental Scientist, made sure that the Eastern Cherokee were notified of the publication of the Draft EA. On December 23, 2019, Mr. McGhee emailed notice of the publication to Mr. Joey Owle, Eastern Cherokee Secretary of Agriculture and Natural Resources, and to Mr. Michael Lavoie, Eastern Cherokee Natural Resource Manager. Exh. 2 (McGhee Decl.) at 1 ¶ 7, 6. Mssrs. Lavoie and Owle responded on January 6 and 7, 2020. Also on December 23, 2019, Mr. McGhee emailed Mr. William McKee, BIA Cherokee Agency Superintendent, Mr. David Lambert, BIA Cherokee Agency Forester, and Ms. Lisa Parker, BIA Cherokee Agency Realty Services, requesting that they reach out to their contacts with the Eastern Cherokees to make sure they were aware the EA was ready for review. Exh. 2 (McGhee Decl.) at 2 ¶ 8, 3-4. Mr. Lambert sent Mr. McGhee a response on December 27, 2019, forwarding a response he had received from Eastern Cherokee Chief Richard Sneed which stated "We will review and respond." Exh. 2 (McGhee Decl.) at 2 ¶ 8, 3.

Comments on the Draft EA were received from State, Local and Federal agencies and concerned citizens. Exh. 1 (Final EA) at 742--819 (Appendix M – Comments and Responses). On January 22, 2020, the BIA received a letter from Wilson Pipestem, attorney for Plaintiff, commenting on the Draft EA on behalf of the Eastern Cherokee. Exh. 1 (Final EA) at 814--19. The letter criticized the Draft EA on various grounds. As relevant here, the letter asserted that "the 16.57 acres proposed for federal trust acquisition is located within the Cherokee aboriginal and historic territory," and that the Draft EA was defective because it did not reflect "any attempt to consult with the EBCI, as required by § 106 of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) …". *Id*. at 814. The letter asserted that "the BIA has failed to fulfill its duty to make 'a reasonable and good faith effort' to consult with the EBCI since, to date, no effort has been made, and no invitation has been sent, inviting the EBIC [sic] to consult over this proposed federal action." *Id*. at 815, (quoting 36 C.F.R. § 800.3(f)(2)).

Mr. Pipestem's letter did not state or suggest that the property actually contained anything of historical significance to the Eastern Cherokee or any other tribe. *Id*. at 814-19.

On January 30, 2020, R. Glen Melville, BIA Acting Director, Eastern Region, wrote to Mr. Russell Townsend, Tribal Historic Preservation Officer (THPO) for the Eastern Band of Cherokee Indians:

> BIA … would like to verify with your office that the proposed project will not impact any specific sites having potential religious or cultural significance to Eastern Band of Cherokee Indians. The North Carolina Department of Natural and Cultural Resources -State Historic Preservation Office reviewed the project and was not aware of any historic resources in the area of the project. Please see attached letter. Historic research of the parcel indicates that it was heavily disturbed when North Carolina Department of Transportation (NCDOT) used the entire site as a soil burrow pit during the construction of Dixon School Road in 2005. The site was later graded by NCDOT in 2006, after road construction was completed. An aerial photograph showing the site in 2005 can be found as Figure 11 in the enclosed maps.
>
> BIA is very interested in hearing from your office regarding this project. For further information or for concerns over potential impacts, please contact our

> Environmental Scientist Chet McGhee, at (615) 564-6830.

Id. at 712; Exh. 2 (McGhee Decl.) at 2 ¶ 10, 9-26.[2]

No response to Acting Director Melville's letter was received when, six weeks later, on March 12, 2020, Tara Sweeney, Assistant Secretary for Indian Affairs, signed the Finding of No Significant Impact for the Catawba project. Exh. 3 (FONSI). Regarding "Cultural Resources," the FONSI (*id*. at 3) found:

> Impacts to cultural resources will be less than significant. The Proposed Project will not affect historic resources, based on the previous NCDOT work on the site. The BIA submitted a request for records review and comments to the North Carolina State Historic Preservation Office. The BIA received the following comments on February 22, 2019, "We have conducted a review of the project and are aware of no historic resources which would be affected by the project. Therefore, we have no comment on the project as proposed."

Assistant Secretary Sweeney concluded: "Based on the findings in the EA, I determine that transferring the Kings Mountain Parcel into trust for the benefit of the Catawba Indian Nation and the subsequent development of the parcel will have no significant impact on the quality of the human environment." *Id*. at 6. The next day, March 13, Stephen J. Yerka, Historic Preservation Specialist for the Eastern Band of Cherokee Indians and Tribal Historic Preservation Officer (THPO), re-sent Mr. Pipestem's January 22 letter to Chester McGhee. Exh. 2 (McGhee Decl.) at 2 ¶ 13, 28.

As recounted in the Final EA:

> Notice of the Draft EA was provided to the Eastern Band of Cherokee Indians December 20, 2019. A subsequent letter was sent to Mr. Russell Townsend, Tribal Historic Preservation Officer (THPO), Eastern Band of Cherokee Indians on January 30, 2020, requesting information or concerns over potential impacts to sites having potential religious or cultural significance to the Eastern Band of Cherokee Indians. BIA has received no response from the THPO regarding the Proposed Project prior to making a final decision on the Catawba Indian Nation's application.

---

[2] The letter was emailed by BIA Regional Environmental Scientist Chester McGhee to Russell Townsend and Brian Burgess of EBCI on January 31. *See* Exh. 2 (McGee Decl.) at 2 ¶ 10, 9-26.

Exh. 1 (Final EA) at 735.

On March 15, 2020, Chester McGhee received (by email) an unsigned, undated letter from Mr. Russell Townsend, THPO for the Eastern Cherokee. Exh. 2 (McGhee Decl.) ¶ 13.[3] As was true of Mr. Pipestem's January 22 letter, the focus of Mr. Townsend's letter is alleged lack of consultation: "Our concern is that nowhere in the public NEPA documentation is there mention of consultation [with potentially affected Tribes]." ECF No. 1-5 at 1. The letter vaguely alludes to an archaeological site ("according to our records there actually is an archaeological site recorded within the project location listed in the NC State Archaeological Site Inventory,") *id*., but provides no identifying information for an assertion at odds with the report of the North Carolina Historic Preservation Office. In the end, however, the letter admits that the author does not know of any Eastern Cherokee historical interest in the site: "Until we receive the data about the site, we cannot determine whether Cherokee religious or cultural sites exist at the site." *Id*. at 2.

B. Legal Background

The key statutes implicated by Plaintiff's motion are those adopting South Carolina's settlement of long-standing disputes with Catawba, the National Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act.

1. The South Carolina Settlement and Federal Settlement Act

In 1993, after more than a century of asserting aboriginal land claims against the State of South Carolina,[4] Catawba and the State negotiated a Settlement Agreement resolving all claims.

---

[3] Mr. Townsend's cover email stated: "Please find attached a letter that outlines the serious concerns the EBCI THPO has with the Kings Mountain Land-Into-Trust Project. A hard copy of the letter will be forwarded to your office as well. Please let me know if you have questions or comments." *Id*. at 29.

[4] *See, e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986); *Catawba Indian*

Agreement in Principle, Agreement between the Catawba Indian Tribe of South Carolina and the State of South Carolina (provided as an attachment to the state settlement act, S.C. CODE ANN. § 27-1 6-10 et seq.). On October 27, 1993, Congress enacted the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 (Settlement Act), incorporating the terms of the Settlement Agreement. Pub. L. No. 103- 116, 107 Stat. 1118 (formerly codified at 25 U.S.C. § 94 1 (omitted from the editorial reclassification of Title 25)). Among other things, the Settlement Act restored the federal trust relationship between Catawba and the United States. As noted by the DOI in its decision document, "[t]he Settlement Agreement and Settlement Act contain various provisions pertaining to the trust acquisition of land by [DOI], use of such land for gaming, and the applicability of the Indian Gaming Regulatory Act (IGRA)." ECF No. 2-1 at 2-3.

2. National Historic Preservation Act

The National Historic Preservation Act (NHPA) is a procedural statute that requires federal agencies to "stop, look, and listen;" it "requires federal agencies to take into account the effect of their actions on structures eligible for inclusion in the National Register of Historic Places." *Ill. Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1260–61 (D.C. Cir. 1988); *see generally United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 733–34 (D.C. Cir. 2019). A federal agency is not required "to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult the [State Historic Preservation Officer] and the [Advisory Council on Historic Preservation] and consider the impacts of its undertaking." *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000). And where the undertaking involves "'historic properties of significance to Indian Tribes,' the agency

---

Tribe of S.C. v. State of South Carolina, 865 F.2d 1444 (4th Cir. 1989); *Catawba Indian Tribe of S.C. v. State of South Carolina*, 978 F.2d 1334 (4th Cir. 1992); *Catawba Indian Tribe of S.C. v. United States*, 24 Cl. Ct. 24 (1991).

must also consult and consider the views of the affected tribes." *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 119 (D.D.C. 2014) (quoting 36 C.F.R. § 800.2(c)(2)(ii)).

NHPA's Section 106 requires federal agencies to "take into account the effect of" their "undertaking[s] on any historic property." 54 U.S.C. § 306108. Both "historic property" and "undertaking" have specific meanings under the statute. Historic properties include monuments, buildings, and sites of historic importance, including "[p]roperty of traditional religious and cultural importance to an Indian tribe." *Id*. §§ 302706, 300308. Insofar as Tribal heritage is concerned, the Section 106 process requires federal agencies to "consult with any Indian tribe ... that attaches religious and cultural significance to" a historic property potentially affected by a federal undertaking. *Id*. §§ 302706, 306102. A federal "undertaking," as relevant here, is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including ... those requiring a Federal permit, license, or approval." *Id*. § 300320. For an action to be a federal undertaking, "only a 'Federal permit, license or approval' is required," not necessarily federal funding. *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112 (D.C. Cir. 2006).

The Section 106 process requires that an agency "consider the impacts of its undertaking" and consult various parties, not that it necessarily "engage in any particular preservation activities." *Id*. at 107 (*quoting Davis*, 202 F.3d at 370). The NHPA established an independent agency, the Advisory Council on Historic Preservation (Advisory Council), 54 U.S.C. § 304101, which is responsible for promulgating regulations "to govern the implementation of" Section 106, *id*. § 304108(a). Agencies must consult with the Advisory Council, State Historic Preservation Officers, and Tribal Historic Preservation Officers, the last of which adopt the responsibilities of State Historic Preservation Officers on Tribal lands. *Id*. §§ 302303, 302702;

36 C.F.R. §§ 800.3(c), 800.16(v)--(w) (2019) (defining State and Tribal Historic Preservation Officers).

3. The National Environmental Policy Act

NEPA is a procedural statute that requires federal agencies to consider the impacts of, and alternatives to, federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331. Its purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate substantive results. *Id*. at 350. The Council of Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what level of NEPA review is required. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757–58 (2004) (citing 40 C.F.R. § 1500.3). Not all actions require an agency to prepare an environmental impact statement (EIS). *Id*. Under certain circumstances, an agency may prepare "a more limited document, an Environmental Assessment (EA)." *Id*. (citing 40 C.F.R. § 1501.4(a), (b)). An EA is a "'concise public document' that '[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].'" *Id*. (alterations in original) (quoting 40 C.F.R. § 1508.9(a)). If, after conducting an EA, the agency determines that an EIS is not required under the applicable regulations, "it must issue a 'finding of no significant impact' (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Id*. at 757–58 (citing 40 C.F.R. §§ 1501.4(e), 1508.13).

4. Administrative Procedure Act

Agency orders are set aside under the Administrative Procedure Act (APA) only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5

U.S.C. § 706(2)(A). Agencies' obligation to engage in "reasoned decisionmaking" means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (*quoting Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Although "a court is not to substitute its judgment for that of the agency," the arbitrary and capricious standard demands that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

An agency is entitled to deference to its reasonable interpretations of ambiguous provisions in statutes the agency is entrusted to enforce. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984). *Chevron* deference applies to DOI's application of the IGRA. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007); *Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 282 (D.D.C. 2018), appeal dismissed, No. 18-5327, 2019 WL 2563220 (D.C. Cir. June 19, 2019). *Chevron* deference under IGRA might, in theory, yield to the Indian canons of construction, but does not do so where the DOI's interpretation favors Tribal interests. *Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 49–50 (D.D.C. 2019), appeal dismissed *sub nom. Koi Nation of N. Cal v. U.S. Dep't of the Interior*, No. 19-5069, 2019 WL 5394631 (D.C. Cir. Oct. 3, 2019) ("[T]he Indian canon of construction is not substituted for *Chevron* deference when "the

Secretary's proposed interpretation does not run against any Indian tribe ... [and] actually advances the trust relationship between the United States and the Native American people") (*quoting Cal.Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n. 7(D.C. Cir. 2008)).[5]

III. ARGUMENT

A. Legal Standards Governing Expedited Motions

To prevail on its motion Plaintiff "must 'demonstrate 1) a substantial likelihood of success on the merits, 2) that [it] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.'" *Katz v. Georgetown Univ*., 246 F.3d 685, 687–88 (D.C. Cir. 2001) (*quoting CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). According to the Supreme Court's formulation, Plaintiff must satisfy the following four elements: (1) likelihood of success on the merits; (2) likelihood that it will suffer irreparable harm in the absence of the preliminary injunction; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

Preliminary injunctive relief is an extraordinary form of judicial relief and is "never awarded as of right," but only "upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 22, 24; *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Often the critical element is irreparable injury: Plaintiff must "demonstrate that irreparable injury is likely in the absence of

---

[5] In *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, — F. Supp. 3d —, 2020 WL 1065406, at *21 (D.D.C. Mar. 5, 2020) the court held that, where Tribal interests conflict, the Indian canon of construction still applies for the Tribe for whose primary benefit a statute was passed. We believe that decision is incorrectly decided and that the correct view is expressed in *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016) ("[T]he Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe."). In all events, the DOI did not rely upon the Indian canon in making its decision.

an injunction." *Winter*, 555 U.S. at 22. The D.C. Court of Appeals "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury "must be both certain and great; it must be actual and not theoretical." *Id*. (*citing Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985) (per curiam)). Plaintiffs must demonstrate that the injury is "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. (internal quotations omitted). Moreover, the injury "must be beyond remediation" and "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id*. (internal quotations omitted).

Even where the irreparable injury requirement has been satisfied, "a preliminary injunction will not issue unless the moving party also shows, on the same facts, a substantial likelihood of success on the merits, that the injunction would not substantially injure other interested parties, and that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 304.[6]

B. Plaintiff's Claims Will Fail on the Merits

1. Interior fulfilled its consultation duties

The DOI's obligation is to make "reasonable or good faith efforts to determine if its undertaking would affect cultural properties." *Narragansett Indian Tribe v. Warwick Sewer*

[6]Prior to the Supreme Court's ruling in *Winter*, a number of circuits, including the D.C. Circuit, evaluated the four factors using a "sliding scale" approach—allowing a strong showing on one of the factors to make up for a weaker showing on another factor. *Sherley*, 644 F.3d at 392. The D.C. Circuit has yet to clarify whether *Winter* explicitly precludes the use of a "sliding scale" approach. *Id*. at 393; *Mills v. D.C.*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 324 (D.D.C. 2018). What is perfectly clear, however, is that *Winter* rejected the argument that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." 555 U.S. at 21.

Auth., 334 F.3d 161, 169 (1st Cir. 2003). Here, the DOI satisfied that obligation. The State Historic Preservation Officer (SHPO) specifically reported, under NHPA Section 106, that "[w]e have conducted a review of the project and are aware of no historic resources which would be affected by the project. Therefore, we have no comment on the project as proposed." Exh. 1 (Final EA) at 713. Where the agency official and SHPO agree that an identified property should not be considered eligible for listing on the National Register of Historic Places, "the property shall be considered not eligible." 36 C.F.R. § 800.4(c)(2). *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 9-10 (D.D.C. 2016).

The point made in *Standing Rock Sioux* is important. As noted in *S. Utah Wilderness All. v. Norton*, 326 F. Supp. 2d 102 (D.D.C. 2004), "Section 800.4(d) details two procedures: Section 800.4(d)(1) sets forth the procedure to be followed if the agency finds that no historical properties are affected, and Section 800.4(d)(2) sets forth the procedures to be followed if the agency finds that there are historic properties which may be affected." 326 F. Supp. 2d at 115. "[I]f the agency finds no adverse effect, and the SHPO and Council agree with this determination," the court continued, "Section 800.4(d)(1) makes clear that 'that the agency official's responsibilities under section 106 are fulfilled.'" *Id*. (citing 36 C.F.R. § 800.4(d)(1)).

Similarly, the DOI's consultation duties only require that an interested Tribe be given a reasonable opportunity to identify historic properties. NHPA implementing regulations require agencies to provide a tribe with "a *reasonable opportunity* to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added); *see United Keetoowah Band of Cherokee Indians*, 933 F.3d at 745.

Again, the DOI fulfilled this obligation. The Catawba fee-into-trust application, and the EA to which it led, were the subject of repeated public notices and opportunities for comment. The proposed project was presented at the Cleveland County Commissioners Meeting on March 19, 2019. Exh. 1 (Final EA) at 689 (public meeting with county commissioners). The Draft EA was published on December 22, 2019. It was made available for state and local governments, resource agencies, and public review for a one-month comment period. Exh. 2 (McGhee Decl.) ¶ 6; Exh. 3 (FONSI) at 1. The BIA published Notices of Availability for the EA in the Charlotte Observer on December 22, 2019, Gaston Gazette on December 28, 2019, and Shelby Star on January 3, 2020. *Id*. The BIA also made the EA available online. *Id*. Dozens of comments were received. Exh. 1 (Final EA) at 742-819 (Appendix M – Comments and Responses). The BIA took special pains to ensure that the Eastern Cherokee knew about, and could comment on, the Draft EA. Exh. 2 (McGhee Decl.) ¶¶ 7-8.

And yet the Eastern Cherokee did not say a word until the last day of the comment period on the Draft EA. Even then, in its attorney's January 22, 2020 letter (Exh. 1 (Final EA) at 814-19), the Tribe did not state or suggest that the property actually contained anything of historical significance to the Eastern Cherokee or any other tribe. The DOI nonetheless immediately wrote to the Tribe's SHPO "to verify with your office that the proposed project will not impact any specific sites having potential religious or cultural significance to Eastern Band of Cherokee Indians." *Id*. at 712. Six weeks later, when the DOI made its decision, it had received no response. Only then (and immediately, albeit after-the-fact) did the Eastern Cherokee SHPO email a response. But again the Tribe could identify nothing of historical interest at the site, and admitted as much. ECF No. 1-5 at 2 ("Until we receive the data about the site, we cannot determine whether Cherokee religious or cultural sites exist at the site.").

On these facts, Plaintiff has little if any likelihood of prevailing on the merits of its

failure-to-consult claim. *See Caddo Nation of Okl. v. Wichita & Affiliated Tribes*, No. CIV-16-0559-HE, 2016 WL 3080971, at *8, *9 (W.D. Okla. May 31, 2016) ("Here, despite the Caddo Nation's arguments to the contrary, the Wichita Tribe did consult with it, or make an effort to consult with it … Plaintiff has not demonstrated that the Wichita Tribe failed to consult or acted arbitrarily in performing its responsibilities under NHPA. … While the Wichita Tribe may not have executed its Section 106 duties perfectly, the Caddo Nation was offered the opportunity to participate but did not take it") (citation omitted); *Narragansett Indian Tribe*, 334 F.3d at 167 ("The Authority dutifully initiated consultation. In January 2001, the Tribe was provided with [the contractor's] determination that the project would not affect any significant artifacts or properties and was invited to comment on that conclusion. Under the regulations, the Tribe's failure to respond within thirty days permitted the Authority to proceed. *See* [36 C.F.R.] § 800.4(d)(1)"); *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 939–40 (D. Ariz. 2017) ("[T]he law directs agencies only to ensure that tribes are afforded 'a reasonable opportunity to identify its concerns about historic properties …' The NHPA does not guarantee actual meaningful consultation, only that the tribe will have a reasonable opportunity for such consultation. The Tribe had such an opportunity here") (*quoting* 36 C.F.R. § 800.2(c)(2)(ii)(A)).

2. No additional consultation can be necessary where there is no evidence of the presence of historic properties

The fact that Plaintiff could identify no historic values associated with the site will be independently dispositive of Plaintiff's NHPA claim. NHPA's purpose, after all, is to protect historic properties, not to mandate pointless procedures. *See* 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist Indian tribes in preserving their particular historic properties"); *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation

of historic resources."). The purpose of consultation, accordingly, is "to ensure that all types of historic properties and all public interests in such properties are given consideration...." 16 U.S.C. § 470a(d)(1)(A).

Consequently, a tribe's claim of a failure to consult under Section 106 will fail where the tribe has not identified historical properties worth consulting about. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010) ("Here, Plaintiffs do not identify any new information that the Tribe would have brought to the attention of the BLM had it been consulted earlier"). "Where no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [government]." *Narragansett Indian Tribe*, 334 F.3d at 168; *see also Concerned Citizens & Retired Miners*, 279 F. Supp. 3d at 942 (Tribe failed to "identify any cultural sites that were not properly considered in the EA"); *Coyote Valley Band of Pomo Indians of Cal. v. United States Dep't of Transp.*, No. 15-cv-04987-JSW, 2018 WL 1569714, at *11 (N.D. Cal. Mar. 30, 2018) (Tribe had adequate opportunity for consultation and "do[es] not identify any new information they would have provided to the Federal Defendants if they had been consulted earlier in the construction process"); *Okinawa dugong (Dugong Dugon v. Mattis*, 330 F. Supp. 3d 1167, 1188 (N.D. Cal. 2018) ("Plaintiffs have not identified any additional information that they would have provided to supplement or broaden Defendants' analysis. Courts have considered the absence of prejudice in rejecting challenges to the sufficiency of consultation under the NHPA") (citations omitted).

The DOI consulted with the SHPO and with the Eastern Cherokee. Plaintiff's complaint that that consultation was inadequate is unlikely to find any traction because Plaintiff did not identify anything to consult about. These facts alone require denial of Plaintiff's request for extraordinary injunctive relief.

3. Interior fulfilled its NEPA obligations

Plaintiff likewise will not succeed on its NEPA claim because DOI fulfilled its obligations under that statute. Here, Interior prepared a draft EA, sought and received public comment on that draft, determined that an EIS was not required, and then issued a FONSI (Exh. 3) and Final EA (Exh. 1).

The Eastern Cherokee's chief complaint is that Interior violated NEPA because it did not *publish* a final EA or FONSI. Memo. at 6-7. As a threshold matter, the CEQ regulations that Plaintiff cites do not require publication of either document. Memo. at 12 (citing 40 C.F.R. §§1501.3-1501.4, 1508.9). And the single case Plaintiff cites in support of its argument, *Dine Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1261 (D. Colo. 2010), expressly recognizes as much: "Although the CEQ Regulations require agencies to 'involve ... the public, to the extent practicable, in preparing [EAs],' they only require an agency to circulate a FONSI before making the final determination of whether to prepare an EIS in certain limited circumstances. 40 C.F.R. § 1501.4(b)." The "circumstances" alluded to do not obtain here. 40 C.F.R. § 1501.4(b). Nevertheless, Interior has made both documents available to the public, *see* www.catawbanationclevelandcountyea.com, and announced the land-into-trust decision on its website the day after Secretary Sweeney signed the March 12 decision letter. *See* U.S. Department of Interior, Press Release: Indian Affairs Announces Two Historic Decisions Taking Into Trust Tribal Lands Under New Guidance (Mar. 13, 2020), https://www.bia.gov/as-ia/opa/online-press-release/indian-affairs-announces-two-historic-decisions-taking-trust-tribal. The Eastern Cherokee's complaint with respect to publication thus fails on both the law and the facts.

The Eastern Cherokee's additional complaint—that Interior failed to consider any alternatives (Memo. at 13)—likewise fails. Both the Draft and Final EA demonstrate that

Interior studied and evaluated alternatives as part of its decision-making process. The EA outlines three alternatives to the proposed project, Exh. 1 (Final EA) at §§ 2.4-2.6, and analyzes each of those alternatives' impact across twelve different environmental categories, including land and water resources, air quality, noise, and cultural resources, *id*. § 4.0. Plaintiff's complaint that Interior failed to consider alternatives is belied by the plain evidence.

4. Plaintiff's challenge to the lawfulness of DOI's acquisition of the subject property for gaming by Catawba will fail

On the legality of the DOI's taking the subject tract into trust for the benefit of Catawba and to facilitate Catawba's development of a casino, many of the salient arguments have been made by the decision makers at DOI (*see* ECF No. 1-2 (Decision Document) at 21-28) and by Intervenor (*see* ECF No. 12, *The Catawba Indian Nation's Opposition to The Eastern Band Of Cherokee Indians' Motion For A Preliminary Injunction*, Section II (C)). At this preliminary and expedited stage of the case, we will not belabor or comment on those arguments here, but we will stress the following key points.

The argument that the 1993 Settlement Act[7] somehow bars the United States from acquiring land for Catawba *outside South Carolina* is, on its face, implausible. The purpose of the federal legislation was to "to approve, ratify, and confirm the Settlement Agreement" between Catawba and the State of South Carolina. 25 U.S.C. § 941a(b)(1). As the DOI noted, "[i]n 1993, after more than a century of asserting aboriginal land claims against the State of South Carolina … the Nation and State negotiated a Settlement Agreement resolving existing claims. On October 27, 1993, Congress enacted the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 (Settlement Act), incorporating the terms of the Settlement

[7] Pub. L. No. 103- 116.

Agreement." ECF No. 1-2 (Decision Document) at 2. The notion that the South Carolina settlement agreement sought to regulate Catawba's (and the federal government's) activities in North Carolina is alien to our federal system being contrary, for example, to the basic notion that the Constitution does not "permit one state to project its regulatory regime into the jurisdiction of another state." *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 930 (9th Cir. 2019) (citations and internal quotation marks omitted). The point applies to Plaintiff's argument that the DOI cannot acquire land for Catawba in North Carolina, and, with equal force, to Plaintiff's argument that the Settlement Act (and the South Carolina Settlement Agreement that it adopts) somehow precludes gaming *in North Carolina*.[8]

Plaintiff's argument is also bluntly refuted by *Connecticut ex. rel. Blumenthal v. U.S. Dep't. of the Interior*, 228 F.3d 82 (2nd Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). That case is on all fours with this case: the Connecticut Indian Land Claims Settlement Act expressly authorized the DOI to accept into trust (for the Mashantucket Pequot Tribe) land located within a designated area, but was silent regarding the DOI's authority to take land into trust outside that area. The Second Circuit viewed this statutory silence as leaving fully intact the DOI's authority under the Indian Reorganization Act (IRA) to take such lands into trust. 228 F.3d at 88. Here, as the DOI noted, "nothing in the Settlement Act expressly limits the Secretary's power under the IRA to take land that is located outside South Carolina into trust for the Nation." ECF No. 1-2 (Decision Document) at 26.

And, as the DOI noted (*id*. at 26-27), Plaintiff's argument is also refuted by the Maine Indian Claims Settlement Act in which Congress, in settling claims by the Passamaquoddy and

---

[8] *TOMAC v. Norton*, 193 F. Supp. 2d 182, 194 n.8 (D.D.C. 2002), *aff'd sub nom. TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), cited by Plaintiff (ECF No. 2 at 18), is not to the contrary. There the court simply noted that the Settlement Act's language about the IGRA was explicit – the decision says nothing about the scope of the Act's prohibition.

Penobscot Tribes in 1980, adopted the very proscription that is absent in the Catawba Settlement Act.

Finally, the DOI's determination that it is fully authorized to take the subject property into trust for Catawba, and to permit gaming there, rests on the agency's interpretation of the Settlement Act, the IRA, and the IGRA --- all statutes in which DOI is expert and as to which the agency's interpretations are entitled to deference. *City of Arlington v. FCC*, 569 U.S. 290, 302 (2013) (*Chevron* deference applies to "statute[s an agency] is entrusted to administer" and to the agency's interpretation of its own jurisdiction and "regulatory authority.").

Plaintiff's success on the merits of its challenge to the DOI's acquiring the land at issue is unlikely.

5. Plaintiff lacks standing

In the section that follows we show that Plaintiff has failed to demonstrate that it is likely to suffer irreparable harm. But even more fundamentally, it is doubtful that Eastern Cherokee even has standing to assert its claims, and this too demonstrates that Plaintiff's prevailing on the merits is unlikely.

The governing law was summarized in *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912--13 (D.C. Cir. 2015):

> It is well-established that "each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " *Bennett v. Spear*, 520 U.S. 154, 167–68 … (1997) (*quoting Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 … (1992)). In order to obtain a preliminary injunction, a party must show, among other things, "a substantial likelihood of success on the merits." *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir.2009) (internal quotation marks omitted). "In this context, the 'merits' on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction." *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir.2015) (Williams, J.). In order to establish jurisdiction, a plaintiff must establish standing. *See, e.g., Susan B. Anthony List v. Driehaus*, ––U.S. ––––, 134 S. Ct. 2334, 2342, 189 L.Ed.2d 246 (2014) ("The party invoking federal jurisdiction bears the burden of establishing

> standing." (citation and internal quotation marks omitted)). Accordingly, a party who seeks a preliminary injunction "must show a 'substantial likelihood' of standing." *Klayman*, 800 F.3d at 568 (Williams, J.). A party who fails to show a "substantial likelihood" of standing is not entitled to a preliminary injunction. *Id*.

Eastern Cherokee alleges primarily procedural harms, which on their own do not confer constitutional standing. *Elec. Privacy Info. Ctr. v. United States Dep't of Commerce*, 928 F.3d 95, 102 (D.C. Cir. 2019) ("a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III.") (*quoting Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549(2016), as revised (May 24, 2016))); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) ("the plaintiffs have standing only if, inter alia, (1) the government violated their procedural rights designed to protect their threatened concrete interest, and (2) the violation resulted in injury to their concrete, particularized interest."). Eastern Cherokee, therefore, must establish an injury to its "concrete, particularized interests" in order to establish Article III standing—which it fails to do.

Eastern Cherokee has asserted that the land at issue was once Cherokee territory, and might argue that that "fact" somehow confers standing. But as Catawba shows, that "fact" is dubious at best. ECF No. 12, *The Catawba Indian Nation's Opposition To The Eastern Band Of Cherokee Indians' Motion For A Preliminary Injunction*, Section II (B)(2).

It is possible, of course, that the interest Eastern Cherokee is actually trying to promote relate to its ownership and operation of two casinos with which the Catawba facility would compete. *See* Exh. 1 (Final EA) at 44 (analyzing likely impact of Catawba casino on existing Cherokee casinos). But purely economic interests are not protected by NEPA, and do not establish standing. *Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*, 823 F.3d 184, 194 (3d Cir. 2016) ("The vast majority of NEPA authority makes clear that economic injury alone does not satisfy the statute's zone of interests test" (collecting cases)). The same is true of NHPA. *Role Models Am., Inc. v. Harvey*, 459 F. Supp. 2d 28, 38 (D.D.C. 2006), *aff'd on other grounds*

sub nom. Role Models Am., Inc. v. Geren, 514 F.3d 1308 (D.C. Cir. 2008) (citing cases).

C. Eastern Cherokee Has Not Shown and Cannot Show Irreparable Harm

There is no need to act on Plaintiff's request for injunctive relief now because no irreparable harm is imminent. This Court cannot issue a preliminary injunction unless Plaintiff demonstrates that its threatened injury is irreparable. The D.C. Circuit "has set a high standard for irreparable injury." *Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). "The moving party must show 'the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Id*. (quoting *Wis. Gas Co.*, 758 F.2d at 674). As the term "irreparable injury" implies, "the injury must be beyond remediation." *Id*. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Wis. Gas Co.*, 758 F.2d at 674 (*quoting Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (internal quotation marks omitted)). "[P]laintiff bears the burden of showing that [it] will suffer irreparable injury," *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 152 (D.D.C. 2011) (citing *Winter*, 555 U.S. at 22), and must present the Court with enough evidence to "substantiat[e]" its claim of irreparable injury, *Wisc. Gas Co.*, 758 F.2d at 674.

1. Taking land into trust is not an irreparable harm

Here, Plaintiff has not met its burden. Because the act of taking the land into trust, as directed by the Assistant Secretary's March 12 letter, can be undone upon resolution of the merits, if the Court concludes it was in error, it is in no way irreparable. The Supreme Court has recognized that any "injury" from taking land into trust is *not* irreparable. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the plaintiff originally

sought an injunction against the Secretary preventing the Secretary from taking land into trust for the benefit of a Tribe. 567 U.S. at 213 (Plaintiff "requested only a declaration that the decision to acquire the land violated the [Indian Reorganization Act] and an injunction to stop the Secretary from accepting title."). But before the District Court acted on plaintiff's request, the Secretary took the land into trust, and, as a result, "all parties agree[d] that the suit [then] effectively [sought] to divest the Federal Government of title to the land." *Id*. at 213-14. One of the issues on appeal was whether the Quiet Title Act, 86 Stat. 1176, barred the suit on grounds of sovereign immunity—a point on which the Courts of Appeals were then in conflict. *Id*. The Supreme Court held that plaintiff's suit could go forward. The only remedy plaintiff sought in *Patchak* was to have the land taken out of trust. The suit that the Supreme Court allowed to proceed was a suit—as all parties agreed—"to divest the Federal Government of title to" land taken into trust for a tribe. As the dissent emphasized, "[a]fter today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes . . .". *Id*. at 2212 (Sotomayor, J., dissenting).

Following *Patchak*, at least three district courts—including this Court—considering factual circumstances nearly identical to those presented here, have concluded that the act of transferring land into trust for a Tribe does not constitute irreparable harm, and that, under such circumstances—where a plaintiff does not itself assert legal title to the land—emergency injunctive relief is inappropriate. *Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 83 (D.D.C. 2013) (denying plaintiff's request for a preliminary injunction after concluding plaintiff failed to demonstrate likelihood of irreparable harm as the court would have jurisdiction to issue "a future order vacating the trust transfer … after the transfer has already been made" if found to be in error); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar*, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, at *4 (E.D. Cal. Jan. 30, 2013) (denying

plaintiff's request for a TRO after concluding that the "mere act of transferring the Proposed Site into trust" did not constitute irreparable harm and that a TRO was "therefore inappropriate"); *Town of Verona v. Jewell*, No. 608CV0647LEKDEP, 2014 WL 12894093, at *3 (N.D.N.Y. Aug. 12, 2014) (denying plaintiffs' request for a preliminary injunction, explaining "Plaintiffs are not asserting an interest in the land to be taken into trust [for the tribe]; they are challenging the administrative decision to take land into trust under, inter alia, the APA … Accordingly, transfer of the land into trust will not prevent the Court from ordering an appropriate remedy should it ultimately decide in favor of Plaintiffs in this case."). As these cases demonstrate, taking land into trust does not constitute irreparable harm.

2. Eastern Cherokee's alleged harms are speculative, not actual or imminent

Moreover, the harms that Plaintiff alleges may flow from this transfer are speculative. As the Supreme Court has made clear: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Here, Plaintiff admits that it does not "exert jurisdiction" over the site. Memo. at 11. Nor does it allege any legal ownership interest in the site. *See generally* Memo.; Compl., ECF No. 1. The potential harms of which Plaintiff complains, including its alleged rights to participate in the NEPA and NHPA consultation process, are procedural. Memo. at 11, 20-22. But Plaintiff recognizes that whether it has any procedural rights that attach to the land at issue turns on whether the site is in fact Cherokee historic treaty territory. *Id*. at 20; Compl. at 2. This is a factual question which is, at best, unsettled.[9]

[9] The Indian Claims Commission findings (and associated map) show that the Cherokee aboriginal lands do not include Cleveland County, North Carolina, where the land at issue is located. *See* Geological Survey, U. S. & United States Indian Claims Commission. (1978) Indian Land Areas Judicially Established. Reston, Va.: The Survey. [Map] Retrieved from the

The NHPA requires agencies to "make a reasonable and good faith effort to identify any Indian tribes … that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2). As discussed above, in compliance with this requirement, the BIA reached out directly to Eastern Cherokee's THPO, Mr. Townsend, to verify that the project would not impact any "specific sites having potential religious or cultural significance to the [Eastern Cherokee]." ECF No. 1-4; McGhee Decl. ¶ 8. Mr. Townsend did not respond, and the BIA received no further comment from EBCI or its THPO prior to issuing the March 12 decision. McGhee Decl. ¶ 11. The North Carolina SHPO, which conducted a review of the proposed transfer site and responded to the BIA's request for comment, expressly told the BIA that it was "aware of no historic resources which would be affected by the project." Exh. 3 (FONSI) at 3.[10] This is unsurprising given the nature and extent of the prior disturbance on the property, which occurred nearly fifteen years ago, related to the North Carolina Department of Transportation's road construction activities. Exh. 3 (FONSI) at 2. Even now, Mr. Townsend admits that the Tribe has not conclusively determined "whether Cherokee religious or cultural sites exist at the site." Memo. at 21 (quoting Townsend Decl.); *see also* Compl. ¶ 68 ("the EBCI THPO is unable to determine whether this final agency action will destroy or harm Cherokee religious or cultural sites."). Eastern Cherokee has thus failed to show that any historic remains or cultural patrimony are at risk. While allegations of a potential historic connection to the site may meet the notice pleading

---

Library of Congress, https://www.loc.gov/item/80695449/.

[10] *See also* Exh. 1 (Final EA) at 40: "No historic properties, known archaeological sites or cultural materials are currently located within the Area of Potential Effects (APE) for the site. No known historic, cultural, religious or archaeological resources or paleontological resources would be affected by the Proposed Project Alternative, and the degree of disturbance to the site suggests a low probability for buried cultural resources. There is always a possibility, however, that previously unknown archaeological or paleontological resources could be encountered during construction. Any inadvertent discovery of archaeological resources would be subject to Section

standard, they do not meet the high bar set for emergency injunctive relief, which requires a clear showing of imminent, irreparable harm. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 ("The moving party must show '[t]he injury complained of is of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"). The mere possibility of harm does not suffice, and Plaintiff's failure to allege injuries that rise above the speculative level is dispositive.

Moreover, since the transfer can be undone, there is no immediate risk that the tribe will lose "its sovereign right" to engage in NHPA consultations concerning the Kings Mountain Site, as it alleges. Memo. at 15. If the Court concludes on the merits that the transfer was wrongful and directs the Secretary to undo it, the land will revert to its pre-litigation status and all rights that Eastern Cherokee would have had prior to the transfer would remain intact. *See Stand Up for Cal!*, 919 F. Supp. 2d at 83 ("the Court sees no cognizable limit to its jurisdiction that would preclude a future order vacating the trust transfer in this case after the transfer has already been made"). This would include any rights Eastern Cherokee would have had under NEPA and the NHPA.

3. Procedural injury, without more, is not irreparable harm

Finally, contrary to Plaintiff's assertion (Memo. at 21--22) procedural injury alone does not constitute irreparable harm. Federal courts in the District of Columbia have made clear that "procedural harm arising from a NEPA violation is insufficient, *standing alone*, to constitute irreparable harm justifying issuance of a preliminary injunction." *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (emphasis added); *Friends of Animals v. U.S. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 67 (D.D.C. 2017) (same); *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-CV-01582 (APM), 2016 WL 420470, at *11 (D.D.C. Jan. 22, 2016)

---

106 of the NHPA as amended (36 CFR § 800), NAGPRA."

(same). "To establish irreparable harm under a NEPA claim, Plaintiffs must allege some concrete injury beyond the procedural injury caused by [the agency's] alleged failure to comply with NEPA …" *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017); s*ee also Knowles v. U.S. Coast Guard*, 924 F. Supp. 593, 603 (S.D.N.Y. 1996) ("Plaintiffs who assert rights under NEPA are therefore required to demonstrate that if a preliminary injunction does not issue, they will suffer the imminent irreparable harm NEPA is designed to protect against: a significant adverse effect on the human environment."). Here, the Tribe has failed to allege any concrete injury and its allegations of procedural injury, standing alone, do not establish irreparable harm. Moreover, to the extent Plaintiff argues that the irreparable harm in this case is BIA's failure to consult, Memo. at 16, as shown above, BIA made a good faith effort to consult with EBCI and, thus, EBCI has suffered no procedural injury whatsoever.

In sum, because this Court can undo the transfer of the land at issue, if found to be wrongful, there is no urgency to Plaintiff's request. The harm Plaintiff seeks to prevent is thus fully reparable. And not only that, it is speculative and purely procedural. For these reasons, the Court should deny Plaintiff's request for a preliminary injunction.

D. The Balance of Equities Argues Against an Extraordinary Injunction

In considering the extraordinary remedy of a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). And, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences" that would issue from an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Where, as here, an injunction is sought against the government, these inquiries largely merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiff has not met its burden to show that the balance of harms favors an injunction or

that emergency relief is in the public interest. As discussed *supra*, Plaintiff's alleged harms are fully reparable. If, on the merits, the Court determines that the transfer of land into trust for Catawba was in error, it can undo the transfer and Eastern Cherokee will be returned to the pre-transfer status quo, retaining any procedural rights that it may have had with respect to the site. Plaintiff's harms are also highly speculative and uncertain: it has provided no evidence that Eastern Cherokee cultural or religious patrimony are at the site nor has it proven that the site encompasses historic Cherokee treaty territory. *See generally* Memo.; Compl.

In contrast, the potential harms to Catawba are real and certain. This project, once brought to fruition, will provide substantial economic and social benefits to Catawba by generating the revenues needed to fund a strong tribal government, improve and build tribal housing, and fund a variety of social, governmental, administrative, educational, health, and welfare services to improve the quality of life for its members. Exh. 3 (FONSI) at 4. If the transfer is enjoined and Catawba is not permitted to move forward with the project at this time, those benefits may never be fully realized, and at minimum, will be delayed. As detailed in Catawba's filings, ECF No. 12, the harm to Catawba from delaying the project would be considerable.

Enjoining the transfer will also harm state and local interests in North Carolina. In the near term, the projected economic effect on the local area is estimated to be $311 million, and the annual economic impact on Cleveland County is expected to be $428 million. Exh. 3 (FONSI) at 3-4; Exh. 1 (Final EA) at 42. The project is expected to generate thousands of jobs both in construction as well as the service and hospitality sector, and to improve the overall health of the local economy. *Id*. The secondary economic effects will also generate tax revenue for state and local governments. *Id*. If the Court enjoins the project, these substantial economic benefits will be delayed.

Finally, enjoining the transfer is contrary to the public interest as it would frustrate the federal interest in "furthering Indian self-government," *Morton v. Mancari*, 417 U.S. 22 535, 551 (1974), and Congress's purposes in enacting the IGRA. There is a "strong federal policy favoring tribal self-government [and] tribal self-sufficiency," *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995), and the Court should consider this policy in evaluating whether to issue an injunction. *See, e.g., Cal. Valley Miwok Tribe v. Jewel*, No. CV21601345WBSCKD, 2016 WL 6217057, at *3 (E.D. Cal. Oct. 24, 2016) ("Issuing an injunction preventing the BIA from determining the Tribe's proper government undermines the public policy favoring the promotion of tribal self-governance."). Moreover, in enacting IGRA, Congress directed that "Indian tribes must, in appropriate circumstances, be given the opportunity to pursue economic self-sufficiency and strong tribal government through gaming." *Stand Up for Cal!*, 919 F. Supp. 2d at 85 (concluding that the public interest would not be served by a grant of preliminary injunctive relief where the agency's actions furthered development of a gaming establishment as contemplated by IGRA). Enjoining the transfer in this case would hinder Catawba's ability to promote its economic self-sufficiency through gaming, as provided for under IGRA. It would also undermine DOI's efforts to assist tribes, like Catawba, in securing independent sources of income to support their self-government and self-sufficiency.

Contrary to Plaintiff's argument that an injunction will "impose very little—if any—harm," (Memo. at 16), on the agencies and the public, there are substantial federal, tribal, state, and local interests implicated. All counsel strongly against an injunction, and, for that reason, the Court should deny Plaintiff's motion.

IV. CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court deny Plaintiff's motion for preliminary injunction.

Dated this 3rd day of April, 2020.

Respectfully submitted,

PRERAK SHAH
Deputy Assistant Attorney General

/s/Peter Kryn Dykema
Peter Kryn Dykema
Sally J. Sullivan
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington DC 20044-7611
peter.dykema@usdoj.gov
Phone: (202) 305 0436
Fax: (202) 305 0274

Attorney of Record for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on April 3, 2020, upon all counsel of record.

/s/ Peter Kryn Dykema
Peter Kryn Dykema