IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN BAND OF CHEROKEE INDIANS Plaintiff, vs. UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS; DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Assistant Secretary for Indian Affairs; and R. GLEN MELVILLE, in his official capacity as Acting Regional Director for the Bureau of Indian Affairs Eastern Regional Office, Defendants.	)	Civil Action No. 1:20-cv-757

PLAINTIFF'S CONSOLIDATED REPLY IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff, the Eastern Band of Cherokee Indians ("EBCI" or "Plaintiff") files this Consolidated Reply Brief in Further Support of the EBCI's Motion for Temporary Restraining Order and Preliminary Injunction ("Motion") in response to the Memorandum in Opposition submitted by Defendant United States Department of the Interior ("DOI") ("Defs.' Br.", ECF No. 13), Defendant United States Bureau of Indian Affairs ("BIA"), Defendant DOI Secretary David Bernhardt, Defendant Assistant Secretary for Indian Affairs Tara Sweeney, and Defendant Acting BIA Eastern Regional Office Director R. Glen Melville (collectively "Defendants"), as well as the Memorandum in Opposition submitted by Intervenor-Defendant, the Catawba Indian Nation ("Catawba" or "Intervenor-Defendant") ("Catawba Br.", ECF No. 12).

I. INTRODUCTION

Five days after the EBCI filed its Complaint and Motion, Defendants, on March 23, 2020, finally published the Final Environmental Assessment ("Final EA") and Finding of No Significant Impact ("FONSI") that they claim justifies Defendants' March 12 Decision to take the Kings Mountain Site into trust on behalf of Catawba within traditional Cherokee treaty territory. Having finally had the opportunity to review the Final EA and the FONSI, it is clear that they are as flawed as the Draft EA that preceded them. It is clear that Defendants "violated NEPA by determining that an EIS was unnecessary even though one of the EIS-triggering factors was met," and furthermore, Defendants have "not 'succeeded' in 'resolv[ing] the controversy' created by 'consistent and strenuous opposition, often in the form of concrete objections to the [DOI's] analytical process and findings,' by 'organizations with subject-matter expertise,'" including the EBCI. *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers, et al*., No. 16-1534, 2020 WL 1441923, *16 (D.D.C. Mar. 25, 2020) (quoting *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F. 3d 1075 (D.C. Cir.), *amended on reh'g in part*, 925 F.3d 500 (D.C. Cir. 2019)). None of the arguments presented by Defendants, or Intervenor-Defendant, warrant the

denial of Plaintiff's Motion. Defendants seem determined to, for the first time ever, attack the EBCI's—and Cherokee Nation's—legitimate connections to its traditional treaty territory as a primary basis for undermining the EBCI's ability to establish the four requisite elements for preliminary injunctive relief. These efforts, however, fail. For the reasons described below, the EBCI has more than sufficiently demonstrated that Defendants' arbitrary and capricious March 12 Decision warrants the provision of immediate injunctive relief.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. The Kings Mountain Site is Located In Cherokee Treaty Territory

Defendants' new attempt to call into question Cherokee treaty, historical, and cultural ties to the Kings Mountain Site further reveals the arbitrary and baseless nature of their agency decision-making. Defendants, for the first time during the entire environmental review and decision-making process, now allege that the EBCI's assertion of Cherokee historical ties to the land "is a factual question which is, at best, unsettled." *See* Defs.' Br. 25.

Defendants do not and cannot deny that the Cherokees agreed to cede lands that include present-day Cleveland County, North Carolina, through the Cherokee Treaty of July 20, 1777. Compl. ¶ 18. Further, the federal Indian Claims Commission (ICC) specifically relied upon the 1884 Royce Map of Cherokee Land Sessions, ECF No. 1-8, in adjudicating the EBCI's claims against the United States, which also demonstrates that present-day Cleveland County is located within the Cherokee historical and treaty territory. Compl. ¶ 19 (citing *Eastern Band of Cherokee Indians v. United States*, 28 Ind. Cl. Comm. 386 (1972)).

Catawba cites to Defendants' March 12 Decision, wherein Defendants relied on the Treaty of Pine Hill, to assert Catawba, and not the EBCI, can claim that the King Mountains Site is located within the Tribe's treaty territory. *See* Catawba Br. 5 (citing ECF No. 1-2, at 12). Defendants, however, did not characterize their own reliance on this treaty in the same manner.

See March 12 Decision 9 n.46, ECF No. 1-2 (the Kings Mountain Site "*may* be located within the boundaries of the [Catawba] Nation's last reservation in North Carolina under the 1760 Treaty of Pine Hill"). Defendants' March 12 Decision not only hedges on its reliance on this treaty, Defendants also state the treaty is "lost to history," and do not provide any other documentation to support Catawba's assertion of historical ties to Cherokee ancestral homeland. *See id.*; Compl. ¶ 103.

The EBCI is not alone among Tribal Nations that recognize Cleveland County as Cherokee treaty and historic territory. The Cherokee Nation based in Tahlequah, Oklahoma, the largest federally recognized Indian Tribe in the United States, affirms that "the Cherokee aboriginal and historical territory [] includes part of North Carolina—including Cleveland County where the land the Department of the Interior plans to take land into trust for the Catawba Indian Nation is located." April 10, 2020 Declaration of Cherokee Nation's Tribal Historic Preservation Officer Elizabeth Toombs ("Toombs Decl.") ¶¶ 2, 4.The Cherokee Nation and the United Keetoowah Band of Cherokee Indians descend from the same historic Cherokee Nation, and therefore maintain the same cultural sovereign rights to protect and preserve cultural resources and historical sites within traditional Cherokee treaty territory. Compl. ¶ 20.

Defendants casually refer to the Indian Commission Claims map in a footnote to "show that the Cherokee aboriginal lands do not include Cleveland County, North Carolina. . . ." Defs.' Br. 25, n.9. Of course, Defendants did not rely on this map, or even cite to it, in their March 12 Decision. *See* ECF No. 1-2. Having not relied on this map to inform their final agency action, Defendants cannot now rely on this map to justify their failure to engage in good faith consultation, early in the process with the EBCI before issuing the decision on March 12.

B. Federal Agencies Routinely Consult with the EBCI Concerning Major Federal Actions in Cleveland County

The absurdity in Defendants' questioning the EBCI's historical connections to the land at issue is further belied by the history of federal agency engagement with the EBCI and Cherokee Nation concerning federal actions taken in Cleveland County, North Carolina.

Federal agencies *routinely* consult with the EBCI related to cultural resource issues within the Cherokee aboriginal and historic territory, which includes Cleveland County. March 16, 2020 Declaration of the Eastern Band of Cherokee Indians Tribal Historic Preservation Officer Russell Townsend ("Townsend Decl.") ¶ 4. Federal agencies have consulted with the EBCI on Cherokee historic preservation matters in Cleveland County at least seven times in the last seven years, including one in Kings Mountain. April 10, 2020 Declaration of the Eastern Band of Cherokee Indians Tribal Historic Preservation Officer Russell Townsend ("Townsend April 10 Decl.") ¶ 4.

In fact, the Advisory Council on Historic Preservation highlights the Tribal Assistance Directory Tool ("TADT"), developed and administered by the Department of Housing and Urban Development ("HUD"), as "a free, easy-to-use system to find Indian tribes that should be invited to coordinate or consult on projects. . . . [and an] important tool to foster *early and respectful consultation* with Tribes about projects that may affect their cultural resources . . . ." ACHP, Newly Updated Online Tool Assists with Involving Indian Tribes Early in Section 106 Historic Preservation Process (June 25, 2018), https://www.achp.gov/news/newly-updated-online-tool-assists-involving-indian-tribes-early-section-106-historic (emphasis added). When searching Cleveland County on HUD's TADT database, the results provide "Contact Information for Tribes with Interests in Cleveland County, North Carolina" and include the EBCI. *See* HUD's TADT database is located at https://egis.hud.gov/tdat/.

Cherokee cultural resources undoubtedly exist in Cleveland County near the site at issue. The EBCI THPO conducted a review of available archaeological data in Cleveland County located about ten miles from Kings Mountain—a short distance in the world of pre-historic Cherokee archaeology—and identified sites that included pre-historic Cherokee ceramics that are found throughout the Cherokee historical territory. Townsend Apr. 10 Decl. ¶ 5.

C. **Defendants Consulted Early in the Process with the State, but not with the EBCI**

In their Statement of Facts, Defendants acknowledge that Defendants contacted the North Carolina State Historic Preservation Officer ("SHPO") on January 31, 2019, "regarding the possibility that historic resources of any kind might be present at the project site." Defs.' Br. 3. Defendants also acknowledge that they waited almost an entire *year* to reach out to the EBCI's THPO, noting that they did not reach out to the EBCI until eleven months later, in December 2019, after the Draft EA had been prepared and disseminated. *See* Defs.' Br. 4. This reflects that Defendants were aware that the EBCI had an interest in the Kings Mountain Site but waited nearly a year from the date the SHPO was contacted to even notify the EBCI that it could comment on—but not consult in the creation of—the Draft EA. Compl. ¶ 58; Townsend Decl., ¶ 10.

Defendants further aver that any consultation requirement owed to the EBCI was fulfilled when Acting Director Melville sent a letter to the EBCI THPO Russell Townsend "[o]n January 30, 2020, . . . [and n]o 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." Defs.' Br. 5-6. Of course, Defendants' rendition of the facts completely omits key facts that occurred after the January 30 letter and before Defendant Assistant Secretary Sweeney signed the FONSI.

On January 31, 2020, after submitting their formal comments on the Draft EA on January 22, and after having received the January 30 letter from Acting Director Melville—that made no mention of and gave no response to the EBCI's January 22 Comments—the EBCI Principal Chief Richard Sneed requested a meeting with Assistant Secretary Sweeney to discuss concerns about the proposed Catawba action. April 10, 2020 Declaration of the Eastern Band of Cherokee Indians Principal Chief Richard Sneed ("Chief Sneed Decl.") ¶ 8. Assistant Secretary Sweeney's assistant requested "briefing" papers on the Catawba issue. *Id*. at ¶ 9. On February 7, 2020, EBCI legal counsel responded to the request, stating: "A briefing paper on Catawba's efforts to acquire land into trust in North Carolina is attached. Eastern Band would appreciate the opportunity to discuss this matter further with Assistant Secretary Sweeney. Please let us know if we can provide any additional information that may be helpful." *Id*. at ¶ 10. The February 7, 2020 briefing paper reiterated the concerns the Eastern Band previously expressed about Catawba's land-into-trust application, including concerns about the Department permitting the Catawba to encroach on Cherokee aboriginal lands and harm Cherokee religious and cultural resources in the area. Specifically, the February 7 Briefing Paper states:

> [T]he EA reflects that there was no attempt to invite EBCI to consult on the project, despite the parcel at issue being within Cherokee aboriginal boundaries—demonstrating a total absence of any reasonable or good faith effort to comply with the [NHPA]'s implementing regulations that require an agency '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.'

February 7, 2020 Briefing Paper, 3, Ex. A. Chief Sneed Decl. ¶ 11.

On February 10, 2020, Principal Chief Sneed and a majority of the EBCI Tribal Council members met with Deputy Solicitor for Indian Affairs Kyle Scherer, Counselor to the Assistant Secretary for Indian Affairs Matthew Kelly, and Policy Advisor Phil Bristol about the Catawba

proposal. Chief Sneed Decl. ¶ 13. Assistant Secretary Sweeney did not attend the meeting. *Id.* at ¶ 12. During the meeting, EBCI leaders walked through the concerns raised in the EBCI's January 22 Comments to the Draft EA and stated that the Department must conduct a full EIS on the project. *Id.* at ¶¶ 13-14. Principal Chief Sneed informed the Department that the proposed Catawba land acquisition and project could impact Cherokee cultural sites because the land is within Cherokee traditional territory. To address these concerns, Principal Chief Sneed said that "real consultation must take place to protect Cherokee cultural resources in the project area." *Id.* at. ¶ 15.

At no point, however, did any of the Defendants take the opportunity, with EBCI leadership sitting in their offices, to inform the EBCI that they would not provide additional communication or testing related to Cherokee cultural resources. *Id.* at ¶ 16.

Furthermore, none of the three Interior officials indicated that the Federal Defendants needed additional information from the EBCI's Principal Chief or Tribal Council about the Draft EA, Cherokee aboriginal ties to the land, or Cherokee religious or cultural ties to the land. *Id.* at ¶ 17.

Defendants now, in their April 3, 2020 submission to this Court, claim the fact that the EBCI THPO did not respond directly to the letter in Acting Regional Director Melville's email meant that Defendants' duty to consult in good faith with the EBCI was "fulfilled." *see* Defs.' Br. 5-6; *see also* Defs.' Br. 6 (quoting Final EA, 735) ("'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.'"). However, the EBCI not only responded with a written submission on February 7, 2020 (*see* Ex. A), EBCI leadership actually traveled to Washington, D.C. to meet with Defendants face to face.

Defendants' attempt to mischaracterize the facts and attribute their lack of consultation to the EBCI's alleged failure to guess the correct manner of communication (email to the Acting Regional Director Melville versus requesting an in-person meeting with submission of the February 7 Briefing Paper directly to Defendant Assistant Secretary Sweeney) underscores the arbitrary nature of Defendants' actions, as well as their blatant failure to engage in *good faith* consultation. Consultation is not a guessing game.

When EBCI elected leaders were available and offering to provide additional information, the Assistant Secretary—the official who signed the FONSI *and* the March 12, 2020 Decision—refused to meet with them and never indicated that Defendants needed any additional information from the EBCI. Chief Sneed Decl. ¶¶ 12,17.

D. **The Federal Defendants Did Not Consult with the Cherokee Nation at All**

While Defendants failed to properly consult with the EBCI in good faith, they did not consult with the Cherokee Nation at all. The Cherokee Nation never received any request for review or comment on the Draft EA for the Kings Mountain site in Cleveland County, North Carolina, which is within the Cherokee treaty and historical territory ceded to the state of North Carolina via treaty in 1777. Toombs Decl. ¶ 6. Consistent with the experience of the EBCI THPO, the BIA typically engages the Cherokee Nation THPO in consultation *prior to* the release of a draft EA for lands that are within the Cherokee Nation's treaty and historical territory. *Id*. at ¶7. If the BIA had contacted the Cherokee Nation THPO, she "would have requested that the BIA conduct a cultural survey on the land at issue because of the potential for adverse impacts upon religious or cultural items present at the site. If no cultural survey was conducted, I would have registered my objection on the basis that this site has religious and cultural significance to the Cherokee Nation." *Id*. at ¶ 8.

E. **The Final EA and FONSI Were Not Issued until After Defendants Took Final Agency Action, and After The EBCI Filed This Suit.**

Furthermore, Defendants aver that "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." Defs.' Br. 18. Of course, the EBCI had no way of knowing this when the EBCI filed the underlying Complaint in this action, as well as the Tribe's Motion for Preliminary Injunction on March 17, 2020, because Defendants did not send a copy of the Final EA, or the FONSI, to the EBCI, and Defendants did not share the Final EA or FONSI on a website until March 23, 2020—eleven days after taking final agency action and six days after the EBCI filed this lawsuit.

III. STANDARD OF REVIEW

Preliminary injunctive relief is appropriate where Plaintiff has made a "clear showing" of all four requisite factors this Court must consider, warranting relief. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). The case law is well established in the D.C. Circuit that, in order to grant a plaintiff the "extraordinary remedy" of a preliminary injunction, the plaintiff must clearly establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)).

Traditionally, courts weighed these factors on a "sliding scale," allowing an injunction to issue if the plaintiff's "showing in one area is particularly strong," though "the showing in other areas are rather weak." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *see also Tyndale House Publrs., Inc v. Sebelius*, 904 F. Supp. 2d 106, 113 (D.D.C. 2012) (granting preliminary injunctive relief, noting that "[t]he District of Columbia Circuit has applied a 'sliding scale' approach in evaluating the preliminary injunction factors."). Despite its

"suggestive dicta," the D.C. Circuit has "explicitly abstained" from deciding whether the "sliding scale" analysis remains, or whether there are free standing requirements of "irreparable harm" and "likelihood of success" after *Winter*. *Stand Up for Cal.! v. United States DOI*, 919 F. Supp. 2d 51, 62 (D.D.C. 2013).

This Court has found, irrespective of the "extent" to which irreparable harm and success on the merits must be shown, "some fundamentals of the four-factor test bear reiterating." *Kimberly-Clark Corp. v. D.C.*, 286 F. Supp. 3d 128, 136 (D.D.C. 2017). A plaintiff must show that irreparable injury is more than a mere "possibility" because "the basis of injunctive relief in the federal courts has always been irreparable harm." *Hudson v. AFGE*, 292 F. Supp. 3d 145, 152 (D.D.C. 2017), *vacated* (Jan. 12, 2018) (vacated on basis of withdrawn count) (quoting *Chaplaincy*, 454 F.3d at 297). Though this Court has also emphasized it is "particularly important for the movant to demonstrate likelihood of success on the merits[,]" *Taseko Mines Ltd. V. Ragin River Capital*, 185 F. Supp. 3d 87, 91 (D.D.C. 2016)—as to the other three factors—if the plaintiffs "showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Chaplaincy*, 454 F.3d at 297. A preliminary injunction will be granted where "'the movant, by a clear showing, carries the burden of persuasion' on each of the factors." *D.C. v. U.S. Dep't of Agric.*, No. 20-119-BAH, 2020 WL 1236657, at *8 (D.D.C. March. 13, 2020) (quoting *Sherley v. Sebelius*, 689 F.3d 776, 781-82 (D.C. Cir. 2012) (*Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997)).

To be sure, the provision of preliminary injunctive relief is not quite as "extraordinary" as Defendants make it out to be. *See, e.g., Hudson v. AFGE*, 292 F. Supp. 3d 145 (D.D.C. 2017) (granting preliminary injunctive relief); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) (same); *Kimberly-Clark Corp v. D.C.*, 286 F. Supp. 3d 128 (D.D.C. 2017) (same); *Mons v.*

McAleen, No. 19-1593-JEB, 2019 WL 4225322 (D.D.C. Sept. 5, 2019) (same). In this instance, each of the four factors favor granting the EBCI's Motion for Preliminary Injunction.

IV. ARGUMENT

A. The EBCI Has Established Irreparable Harm

Defendants assert that the transfer of the Kings Mountain Site into trust for Catawba cannot cause irreparable harm to the EBCI because it can simply "be undone upon resolution of the merits." Defs.' Br. 23. However, taking tribal land out of trust once it has been fully transferred is not as simple as Defendants characterize it, nor is it an available remedy for the EBCI. Defendants do not cite to a single case where, after resolution of the merits in Plaintiff's favor, land *was* taken out of trust. This is because it has never been done before absent an act of Congress.

Defendants cite to *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) to claim that the "Supreme Court has recognized that any 'injury' from taking land into trust is not irreparable." Defs.' Br. 23; *see also* Catawba Br. 17. However, Defendant's interpretation of *Patchak* is stretched and misleading. The sole focus of *Patchak* is a federal waiver of sovereign immunity under the Quiet Title Act, 86 Stat. 1176 (an act not at issue in this case), 567 U.S. 209, 213, and whether the plaintiff had standing to bring suit under the "zone of interests" test (a legal issue not presently before this Court), *id*. at 214—with no discussion or mention of irreparable injury. The *Patchak* Court never reached consideration of this issue—and the land was never taken out of trust—because, while *Patchak* was still pending, Congress passed the Gun Lake Act, 128 Stat. 1913, which stripped the court of jurisdiction relating to the lawsuit and reaffirmed the trust land status.

The subsequent cases Defendants rely on pose similar flaws—none turn to the question of if or how tribal land can be taken out of trust, and none involve a final agency action by the

DOI to acquire land into trust in a Tribal Nation's historic treaty territory without first engaging in good faith consultation and permitting the Nation to undertake the requisite cultural survey to ensure historic and cultural resources are not permanently destroyed. *See* Defs.' Br. 24-25 (citing *Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 83 (D.D.C. 2013); *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); *Town of Verona v. Jewell*, No. 608CV0647LEKDEP, 2014 WL 12894093, at *3 (N.D.N.Y. Aug. 12, 2014)).

Further, there is serious doubt as to whether a procedural mechanism even exists to take tribal land acquired into trust under the IRA out of trust via administrative action—a non-existent remedy that has never been accomplished before—as is exhibited in the recent *Littlefield v. Mashpee Wampanoag Indian Tribe* case. In *Mashpee*, the land was taken into trust despite challenges, and the Mashpee already began constructing a casino when the First Circuit declared that the Mashpee was not eligible for land into trust under the IRA pursuant to *Carcieri v. Salazar*. *See Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F. 3d 30 (1st Cir. 2020). Now, the Mashpee land is surrounded with mass chaos and confusion concerning the current status of the land causing great hardship and economic stress to not only the Tribe, but local communities as well. Secretary of Interior Orders Mashpee Wampanoag Reservation 'Disestablished,' Tribe Says, WBUR News (Mar. 28, 2020), https://www.wbur.org/news/2020/03/28/mashpee-wampanoag-reservation-secretary-interior-land-trust.

Defendants also assert "the harms that Plaintiff alleges may flow from this transfer are speculative" because "whether the site is in fact Cherokee historic treaty territory . . . is a factual question which is, at best, unsettled." Defs.' Br. 25. This statement is false, and Defendants know it is false. Federal agencies routinely consult with the EBCI concerning final agency actions taken in Cleveland County, *see* Townsend Apr. 10 Decl. ¶ 3, because the County sits squarely

within Cherokee's traditional treaty territory. *See* Toombs Decl. ¶ 6 ("[T]he Kings Mountain site in Cleveland County, North Carolina, . . . is within the Cherokee treaty and historical territory ceded to the state of North Carolina via treaty in 1777."). Federal agencies have consulted the EBCI THPO concerning major federal actions in Cleveland County no less than seven times since 2013. Townsend Apr. 10 Decl. ¶ 3. And if Defendants truly believed that Catawba's planned construction at the Kings Mountain Site could never damage Cherokee burials or cultural resources, they would not have listed consultation with the EBCI's THPO as protocol in the Final EA if and when human remains are in fact discovered at the King Mountains Site. Final EA 16-17, ECF No. 13-1. Defendants' attempt to turn fact into fiction underscores the unlawful nature of the March 12 Decision, and in no way does this mischaracterization undermine the EBCI's claim of irreparable harm.

Likewise, Defendants' reliance on the fact that the North Carolina SHPO "conducted a review" and "was aware of no historic resources which would be affected by the project" does not demonstrate that the March 12 Decision does not threaten irreparable injury. *See* Defs.' Br. 26 (citing FONSI, ECF No. 13-3). The EBCI's THPO *is* aware of historical archaeological evidence at the Kings Mountain Site, and if the Defendants had fulfilled their NHPA and NEPA obligations, they would have known this. *See* Townsend Decl. ¶ 17; *see also* Townsend Apr. 10 Decl. ¶ 5 (the EBCI's THPO stating that when the EBCI "conducted a review of available archaeological data in Cleveland County located about ten miles from Kings Mountain—a short distance in the world of pre-historic Cherokee archaeology—[the EBCI] identified sites that included pre-historic Cherokee ceramics that are found throughout the Cherokee historical territory."). Relying on the state SHPO to identify Cherokee cultural resources does not protect the EBCI from irreparable harm—which is exactly why NHPA and NEPA impose special obligations on federal agencies to consider and consult with Indian tribes.

Finally, Defendants make the claim that the EBCI asserts "procedural injury alone," which "does not constitute irreparable harm." Defs.' Br. 27. However, the EBCI has made it very clear that the procedural harm suffered because of the Defendants' bad actions does not stand alone—it stands within the context of the EBCI's historic treaty rights, aboriginal territory, cultural patrimony, and sovereign right to government-to-government consultation.[1] Defendants recognize that only when "procedural harm arising from a NEPA violation" is "*standing alone*" does it completely preclude procedural injury as "irreparable harm." Defs.' Br. 27 (quoting *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003)); *see also Nat'l Parks Conservation Ass'n v. Semonite*, 282 F. Supp. 3d 284, 290 (D.C. Cir. 2017) ("Procedural harm arising from a NEPA violation coupled with 'irreparable aesthetic injuries' can constitute irreparable harm.") (quoting *Fund For Animals*, 281 F. Supp. 2d at 222); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009) ("When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury.").

This Court has held that "the NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur." *Brady Campaign to Prevent Gun Violence*, 612 F. Supp. at 24 (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985)). Further, "[i]f [EBCI] succeeds on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury." *Id*. Absent a preliminary injunction, the EBCI—and Cherokee Nation—face the permanent loss of aboriginal Cherokee territory and the right to investigate the

[1] Catawba claims the EBCI's "procedural" claims were "not raised in [the EBCI's] motion." Catawba Br. 16. This is incorrect, however, as the EBCI motion and brief in support fully incorporate the Complaint and the Townsend Declaration to support its motion for preliminary injunction. *See* EBCI Mot. 4, ECF No. 2.

archaeological area at the Kings Mountain Site. *See* Townsend Decl. ¶ 21; *see also* Toombs Decl. ¶ 9 ("If the Kings Mountain site is taken into trust for the Catawba Indian Nation, the land will fall under the governance of that tribe, and the Cherokee Nation will lose the right to consult on and protect Cherokee religious and cultural sites."). The total failure of Defendants to consider its special duties to sovereign Tribal Nations, as well as the imminent loss of the sovereign right to protect cultural patrimony in Cherokee aboriginal territory satisfies the governing standard that procedural harm coupled with other irreparable injury does warrant injunctive relief.

This threat of irreparable injury warrants the provision of immediate injunctive relief.

B. **The EBCI Is Likely To Succeed On Its Claims**

1. The EBCI is Likely to Succeed on its NEPA Claims

Defendants assert that "Plaintiff likewise will not succeed on its NEPA claim because DOI fulfilled its obligations under that statute." Defs.' Br. 18. Defendants' conduct, however, falls far short of NEPA's governing standards.

The EBCI has consistently maintained that Defendants' proposed final agency action compels the creation of an Environmental Impact Statement. *See* EBCI Comments 6, ECF No, 2-3 ("An EA is insufficient to assess the impacts on the environment and impacted parties. As a result, the EBCI demands that the deficiencies in the document be addressed through the preparation of an Environmental Impact Statement (EIS)."); *see also* Compl. ¶ 56t (same); EBCI Points and Authorities, 24. ECF No.2 (asserting that Defendants must "undertake the preparation of a full and complete EIS.").[2]

[2] Catawba's assertion that the EBCI's "motion does not challenge Interior's decision to forgo an EIS" Catawba Br. 18, is likewise absurd given that the EBCI's January 22 Comments and Complaint both assert that preparation of a full EIS is necessary, and the EBCI's Points and Authorities filed in support of the EBCI's motion states explicitly that Defendants must

Defendants attempt to mischaracterize the EBCI's NEPA claims as nothing more than an argument that "Interior violated NEPA because it did not publish a final EA or FONSI." Defs.' Br. 18. Such a statement has never encapsulated the entirety of the issues that the EBCI has repeatedly raised since submitting formal comments on the Draft EA on January 22, 2020. *See* ECF No. 1-3; Compl. ¶¶ 56, 144-164; Chief Sneed Decl. ¶¶ 10-17.

Moreover, Defendants conveniently skate over the EBCI's complaint that Defendants failed to even *complete* or *issue* a final EA or FONSI "before commencing with a 'major federal action,'" as mandated by NEPA. EBCI Points and Authorities 2, ECF No. 2 (quoting 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18(a)); *see also id*. at 3 (quoting 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18(a)); *see also id*. at 3 ("Defendants have pushed through a final agency decision on the matter without even *completing* or publishing a Final EA or a FONSI.") (emphasis added). Instead, Defendants chose to rush to complete and issue a Final EA on March 23, 2020—six days after the EBCI commenced this lawsuit and eleven (11) days after Defendant Assistant Secretary Sweeney completed her final agency action. *See* Final EA, ECF No. 13-1; *see also* http://catawbanationclevelandcountyea.com/ (dating publication of EA and FONSI as March 23, 2020).

To be sure, NEPA mandates that the Defendants complete and issue a final EA and FONSI *prior to* undertaking a final agency action—not *eleven days after* a final agency action and in response to a legal challenge. *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng'rs*, *et al*., No. 16-1534, 2020 WL 1441923, *2 (D.D.C. Mar. 25, 2020) ("First, an agency must draft an Environmental Assessment . . . that briefly provides sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI] . . . If any significant

"undertake the preparation of a full and complete EIS," EBCI Points and Authorities 24, ECF No. 2; *see also id*. at 14; *id.* at 6; *id*. at 14-15; *id*. at 18; *see also* Pl. Mot. 3, ECF No. 2.

environmental impacts might result from the proposed agency action, then an EIS must be prepared *before agency action is taken*.") (emphasis added) (internal quotations and citations omitted); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F. 3d 683, 703 (10 Cir. 2009) ("*Before* embarking upon any major federal action, an agency must conduct an environmental assessment ('EA') to determine whether the action is likely to significantly affect the quality of the human environment.") (internal citations omitted) (emphasis added); *Sierra Club v. Marsh*, 872 F. 2d 497, 500 (1st Cir. 1989) ("It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action.") (emphasis in original). By taking final agency action and *then* completing the Final EA and FONSI, Defendants have turned NEPA on its head.

This is especially true where Defendants undertake a federal action without precedence. *See* 40 CFR § 1501.4 ("the agency shall make the finding of no significant impact available for public review . . . for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin . . . [when t]he nature of the proposed action is one without precedent."). Here, Defendants' decision to take land into trust on behalf of a Tribe whose land into trust acquisitions is governed by a specific State/Tribal Land Claims Settlement Act *outside of the State* that the Land Claims Settlement Act governs is entirely without precedent. Never before has a federal court upheld a DOI decision to take land into trust for a Tribe *outside* of (1) the State where the Land Claims Settlement expressly permits land into trust acquisitions, and (2) where the Tribe is located. This factor, alone, required Defendants to publish their FONSI *before* making a final agency decision, not after.

Furthermore, the fact that Defendants have finally completed and published their Final EA and FONSI in no way obliviates their obligation to prepare a full EIS since the Final EA relies on the same flawed reasoning as the Draft EA.[3] To be sure, Defendants have made no argument, and have offered no defense, to support their decision to forgo the preparation of an EIS, despite having been repeatedly requested to do so. *See* Defs.' Br. 18-19; *see also* EBCI Comments 6, ECF No. 1-3; *see also* Compl. ¶ 56(t) (same); EBCI Points and Authorities 24, ECF No. 2 (asserting that Defendants must "undertake the preparation of a full and complete EIS."). This arbitrary and capricious action, alone, is sufficient to demonstrate the requisite likelihood of success on the merits necessary to warrant injunctive relief.

Under NEPA, agencies are required to '"consider every significant aspect of the environmental impact of a proposed action,'" including "how a project will affect a tribe's treaty rights." *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng'rs*, *et al*., No. 16-1534, 2020 WL 1441923, *1-2 (D.D.C. Mar. 25, 2020) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)). NEPA compels agencies to "take a hard and honest look at the environmental consequences of their decisions." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F. 3d 1075, 1082 (D.C. Cir. 2019) (internal citations omitted). To satisfy the "hard look" requirement, agencies must prepare a full EIS that "identifies and rigorously appraises the project's environmental effects" for any action "significantly affecting the quality of the human environment." *Id*. (citing 42 U.S.C. § 4332(2)(C)). "[S]uch effects can be, among others, historic,

[3] For example, the EBCI's January 22 Comment notifies the Defendants that they must consider legitimate alternatives, Compl. 2, ECF No. 1-3—yet the Final EA contains the same alternatives as the Draft EA and considers no alternatives outside of Cherokee treaty territory. *See* Draft EA 7-20, ECF No. 12-2; Final EA 8-22, ECF No. 13-1. The Final EA also fails to explain why the Defendants did not fulfill their consultation duties.

aesthetic, or cultural." *National Parks Conservation Association v. Semonite*, 916 F. 3d 1075, 1082 (D.C. Cir. 2019) (citing 40 C.F.R. § 1508.8.).

To determine whether the action requires an EIS, "an agency must examine both the 'context' and the 'intensity' of the action." *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng'rs*, *et al*., No. 16-1534 JEB, 2020 WL 1441923, *2 (D.D.C. Mar. 25, 2020) (citing 40 C.F.R. § 1508.27). When analyzing "intensity," an agency must consider the ten factors listed in 40 C.F.R. § 1508.27(b). The relevant factors to the present case are (3), (4), (6), and (8), which state that among the things an agency must consider are:

> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

40 C.F.R. § 1508.27(b). An agency action "[i]mplicating any one of the[se] factors may be sufficient to require development of an EIS." *Semonite*, 916 F.3d at 1082 (citing *Grand Canyon Tr. v. F.A.A.*, 290 F.3d 339, 347 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002). Defendants' March 12 Decision implicates no less than five. Defendants' Final EA, however, fails to adequately consider any of the ten factors required by 40 C.F.R. § 1508.27(b), and certainly not factors (3), (4), (6), and (8). Defendants' failure to complete a full EIS, therefore, constitutes an arbitrary and capricious decision, contrary to law.

First, given the Defendant's blatant disregard for the important status of the 1777 Cherokee Treaty Territory and Cherokee cultural patrimony, Defendants failed to consider factor

(3): "Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." As this Court has recently held, "NEPA . . . requires an agency to determine how a project will affect a tribe's treaty rights." *Standing Rock Sioux Tribe,* No. 16-1534 JEB, WL 1441923 at *2 (D.D.C.2020). Defendants' failure to do so renders their decision *not* to do an EIS arbitrary and capricious.

Similarly, Defendants failed to consider factor (8): "The degree to which the action may . . . cause loss or destruction of significant scientific, cultural, or historical resources." The Kings Mountain Site is located squarely within Cherokee traditional treaty territory in a county, Cleveland County, where other Cherokee cultural artifacts and resources are known to exist. Townsend Apr. 10 Decl. ¶ 5; *see also* Townsend Decl. ¶ 17 ("State of North Carolina site files show that there is evidence of an archaeological investigation on the Kings Mountain site[,]" containing "an historical pottery kiln and prehistoric lythic scatter – human made stone tools."). Defendants would have known this had Defendants fulfilled their NEPA obligations and afforded the EBCI, the Cherokee Nation, and UKB the opportunity to further investigate the site and engage in good faith consultation. The failure of the Defendants to take a "hard look," 42 U.S.C. § 4332(2)(C), at the significant impact of their action, whether "historic, aesthetic, or cultural," *Semonite,* 916 F. 3d at 1082, before issuing the March 12 Decision constitutes an arbitrary and capricious action in violation of NEPA.

Defendants also failed to consider factor (4): "The degree to which the effects on the quality of the human environment are likely to be highly controversial." This Court recently analyzed this factor extensively in *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng'rs*, *et al*., No. 16-1534, 2020 WL 1441923 (D.D.C. Mar. 25, 2020). In *Standing Rock*, this Court ordered Defendant Army Corps of Engineers to prepare a full EIS where expert criticisms

of a proposed agency action were left "unanswered" and "unrebutted," and where the action "remains highly controversial under NEPA." *Id.* (citing 40 C.F.R. § 1508.27(b)). The effects of a proposed agency action are "controversial" when "substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Id*. at 6 (internal citations omitted). "The question [wa]s not whether the [agency] attempted to resolve the controversy, but whether it succeeded." *Id*. at *7.

Here, Defendants have not even attempted to address the substantial controversy concerning their decision to take a North Carolina parcel of land into trust for a Tribe in South Carolina, let alone "resolve" it—a failure that more than demonstrates the EBCI's strong likelihood of success on its NEPA claims. Additionally, the D.C. Circuit has held that an effect is "highly controversial" "[w]here, as here, two federal agencies have argued for years over the size, nature, and effect of the project . . ." *National Parks Conservation Association v. Semonite*, 916 F. 3d 1075 (D.C. Cir. 2019). Likewise here, the EBCI, DOI, BIA, and Catawba have been in dispute for *years* over fundamental aspects of the Kings Mountain Site acquisition. For example, in October 2013, the EBCI Tribal Council enacted a resolution opposing the Catawba land-into-trust application. *See* EBCI Resolution, ECF No. 1-7.

There is no question that Defendants' final agency action presents circumstances that are "highly controversial." Defendants have not succeeded in resolving, or even attempted to resolve, the significant controversy surrounding their decision to take the Kings Mountain Site into trust for Catawba. *See, e.g.,* Associated Press, *US government OKs letting SC tribe build NC casino US government OKs letting SC tribe build NC casino* (March 16, 2020), https://www.laurinburgexchange.com/news/34580/us-government-oks-letting-sc-tribe-build-nc-casino ("Dozens of North Carolina legislators, Republican Senate leader Phil Berger among them — and Democratic North Carolina Gov. Roy Cooper opposed the U.S. senators' measure

last year. State legislators called the bill an 'unprecedented overreach,'"); A.P. Dillon, *Proposed Catawba Indian casino in King's Mountain moves forward*, North State Journal (March 18, 2020) http://nsjonline.com/article/2020/03/proposed-catawba-indian-casino-in-kings-mountain-moves-forward/ ("Thirty-eight N.C. state lawmakers signed a letter opposing the casino project bill. . . . introduced by a South Carolina senator to allow property in North Carolina to be given to a South Carolina tribe . . . .").

Additionally, Defendants failed to consider factor (6): "The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." The precedent this decision could set for other Tribes seeking to reservation shop outside of their home State of location, and within the ancestral treaty territory of other Tribal Nations, will create great discord and conflict between Tribal Nations, and their trustees, DOI and BIA. This was at the heart of the USET Resolution cited in the EBCI Resolution. USET Resolution 2, Ex. B (stating that USET is opposed to the efforts of Indian Nations "to acquire lands for purposes of establishing reservations . . . frequently in other states where they have no reservation or trust land status . . . for the sole purpose of pursuing gaming opportunities."). Failure to consider the harmful precedent Defendants are setting, and the conflict it will create in Indian Country and amongst Tribes, renders Defendants' decision to forgo an EIS arbitrary and capricious.

Defendants were further required to adequately consider alternatives. Defendants baldly claim that "Interior studied and evaluated alternatives as part of its decision-making process" Defs.' Br. 19, but the Final EA does not substantiate such a lofty claim. *See* Final EA, ECF No. 13-1. The Final EA does *not* consider alternative locations for taking land into trust for Catawba. *See id.* The Final EA merely states that "[e]valuating any other parcels would be speculative and beyond the scope and control of the BIA action." *Id*. at 8. Circumventing NEPA's requirement to

consider alternative locations on the basis that doing so would be "speculative" is the hallmark of an arbitrary and capricious final agency action. *See New Mexico ex rel. Richardson*, 565 F.3d at 708 ("The 'heart' of an EIS is its exploration of possible alternatives to the action an agency wishes to pursue.") (citing 40 C.F.R. § 1502.14).

Catawba asserts that the Final "EA lays out three alternatives to taking the land into trust, *see* Final EA, at 19-22, and it analyzes those alternatives' impact across twelve different environmental categories, including land and water resources, air quality, noise, and cultural resources." Catawba Br. 19. A review of these "three alternatives," however, reveals that none of them consider taking different parcels of land into trust *not* within traditional Cherokee treaty territory. Instead, these alternatives include different options for use of the land at the Kings Mountain Site (including a non-gaming alternative), but none of the alternatives considered include the option to take land into trust for Catawba *outside* of Cherokee treaty territory and within Catawba's own homelands. *See* Final EA 19-22, ECF No. 13-1. Of course, there is the "No Action Alternative," but that alternative is quickly dismissed as not meeting "the purpose and need for Proposed Action." *See id.* at 22. Defendants' failure to consider an alternative whereby Defendants would take land into trust *outside* of Cherokee treaty territory constitutes an arbitrary and capricious action, contrary to law. Instead of a sentence stating the agency will not consider taking alternative parcels of land intro trust for Catawba, the agency must "provide *legitimate* consideration to alternatives . . . ." *New Mexico ex rel. Richardson*, 565 F.3d at 711 n.32 (emphasis added). Defendants cannot dismiss their obligation to discuss and consider alternative parcels of land by labeling such consideration "speculative." Such consideration is not speculative, it is required by law.

Defendants' extensive NEPA violations, as well as their failure to complete a full EIS, render the March 12 Decision arbitrary and capricious and thus contrary to law.

2. The EBCI is Likely to Succeed on the Tribe's NHPA Claims

The EBCI is likely to succeed on its claims under the NHPA. Although Defendants admit that their "obligation [wa]s to make reasonable or good faith efforts" to consult with the EBCI, they did not. *See* Defs.' Br. 13. Defendants sent one letter to the EBCI inviting consultation on January 31, 2020—an entire year *after* Defendants reached out to the State's Historic Preservation Officer to invite the State of North Carolina to engage in consultation on January 31, 2019. *See* Defs.' Br. 3, 4. Defendants gave the State over a year to consider, research, and analyze the potential impacts of their planned final agency action at the Kings Mountain Site. In contrast, Defendants gave, at worst six weeks (from January 31, 2020 to March 12, 2020), and at best two and a half months (if one considers the email to Principal Chief Richard Sneed sharing the Draft EA in late December 2019 an invitation to consult, *see* Compl. ¶ 50).

Defendants offer no reason as to why they invited the State to consult eleven months before they invited the EBCI. *See* Defs.' Br. 13-16; Compl. ¶ 58; Townsend Decl., ¶ 10. Given the fact that Defendants have offered no rational reason for not inviting the EBCI to consult in January 2019, when they invited the State, it is clear that Defendants' view the act of inviting a Tribal Nation to consult is nothing more than an empty formality. Engaging in empty formalities, however, does not satisfy Defendants' obligations under the NHPA. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108-09 (S.D. Cal. 2010) ("The consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.") (quoting § 800.2(c)(2)(ii)(C)). To be sure, Defendants do not owe the State of North Carolina the same trust duty and responsibility that they owe to Tribal Nations, including the EBCI. *See e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (holding the United States "has

charged itself with moral obligations of the highest responsibility and trust" with respect to Tribes—a "distinctive" obligation.). And yet, Defendants invited the State to consult almost an entire year before they sent the invitation to the closest Tribal Nation with ancestral ties to the land at issue, the EBCI. This disparate treatment is not reasonable, nor does it evince good faith.

Nor can Defendants rely on their consultation with the North Carolina SHPO to assuage their duty to consult with the EBCI. *See, e.g.,* Defs.' Br. 14 (contending that "the DOI satisfied [its consultation] obligation [because it relied on what t]he State Historic Preservation Officer (SHPO) specifically reported . . ."); *see also* Catawba Br. 22 (stating contact with the North Carolina SHPO was a "reasonable and good faith step, because North Carolina had jurisdiction over the Kings Mountain site."). Courts have been clear that consulting with the SHPO is no substitute for consulting with the Tribe and the Tribe's THPO. *See, e.g., Pueblo of Sandia v. United States*, 50 F.3d 856, 858 (10th Cir. 1995) (concluding that agency failed to abide its § 106 duties to consult with the Tribe where the agency relied on "the SHPO['s] concurre[nce] in the Forest Service's final conclusion that there is no evidence [of] Indian traditional cultural properties" at the site at issue).

Defendants further contend that "Interior fulfilled its consultation duties" because Defendants wrote to the EBCI's THPO, and then "[s]ix weeks later, when the DOI made its decision, it had received no response." Defs.' Br. 13, 15. By relying on a single letter—sent via email—to fulfill the entirety of their consultation obligations, it is clear that Defendants have "confuse[d] 'contact' with [NHPA's] required 'consultation.'" *Quechan Tribe*, 755 F. Supp. 2d at 1118. One letter, alone, does not satisfy the agency's obligation since "a mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires." *Sandia*, 50 F.3d at 860. And in this instance, Defendants are misrepresenting the facts; Defendants *did* receive a response. As discussed in depth above, *supra*, at 5-9, EBCI's Principal

Chief, Richard Sneed, traveled to Washington, D.C. to meet with Defendants—and attempt to engage in consultation in person—on February 10, 2020. Chief Sneed Decl. ¶¶ 6-17.[4]

The EBCI requested this meeting for EBCI Chief Richard Sneed on January 31, 2020, *after* receiving Acting Regional Director Melville's letter, and the EBCI provided Defendants with the "February 7 Briefing Paper." Chief Sneed Decl. ¶ 10. The February 7 Briefing Paper reiterated the concerns the EBCI previously expressed about Catawba's land-into-trust application, including the encroachment on Cherokee aboriginal lands. Chief Sneed Decl. ¶ 11. Specifically, the February 7 Briefing Paper states:

> Finally, the EA reflects that there was no attempt to invite EBCI to consult on the project, despite the parcel at issue being within Cherokee aboriginal boundaries—demonstrating a total absence of any reasonable or good faith effort to comply with the National Historic Preservation Act's implementing regulations that require an agency "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."
>
> February 7 Briefing Paper 3, Ex. A.

At no point during this February 10, 2020 meeting did any of the Defendants take the opportunity, with EBCI leadership sitting in their offices, to inform the EBCI that Defendants were planning to take final agency action in less than five weeks and the consultation the EBCI

[4] Catawba mistakenly relies upon the Western District of Oklahoma's opinion in *Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes* to assert that Defendants' March 12 Decision is valid and the agency can escape the regulatory provisions, which state '"[c]onsultation should commence early in the planning process."' Catawba Br. 26 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A) and citing 2016 WL 3080971, at *9 (W.D. Okla. May 31, 2016)). The Western District's finding that "Caddo Nation was offered the opportunity to participate but did not take it" is readily distinguishable from the situation at hand, since the Caddo Nation did not respond for over a year after being "specifically asked" to "timely respond." *Id*. at *8. The EBCI, though given no deadline to respond by, responded to the agency's letter with a written request to meet in person that *very same day*, *see* EBCI Meeting Request Email, Ex. C, a written submission on February 7, 2020, *see* February 7 Briefing Paper, Ex. A, and a meeting between the EBCI leadership and individuals in the Solicitor's Office, in person, on February 10, 2020, where they informed the agency of their concerns and requested formal consultation. *See* Chief Sneed Decl. ¶¶ 13-16.

had requested would not be possible. Chief Sneed Decl. ¶ 16. Furthermore, no one from the Assistant Secretary's Office indicated that Defendants needed additional information from the EBCI's Council and/or Principal Chief before Defendants would be able to effectuate the government-to-government trust responsibility Defendants owe to the EBCI. *Id*. at ¶ 17.

Defendants now, in their April 3, 2020 submission to this Court, claim that the fact that the EBCI did not respond directly to the email sending Acting Regional Director Melville's letter meant that Defendants' duty to consult in good with the EBCI had been "fulfilled." *see* Defs.' Br. 5-6; *see also* Defs.' Br. 6 (quoting Final EA, 735) ("'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.'"). However, the EBCI not only responded with a written submission on February 7, 2020 (*see* Ex. A), EBCI leadership actually traveled to Washington, D.C. to meet with Defendants face to face.

Defendants' attempt to mischaracterize the facts and attribute their lack of consultation to the EBCI's alleged failure to guess the correct manner of communication (email to the Acting Regional Director Melville versus requesting an in-person meeting with submission of the February 7 Briefing Paper directly to Defendant Assistant Secretary Sweeney) underscores the arbitrary nature of Defendants' actions, as well as their blatant failure to engage in *good faith* consultation.

The arbitrary and unlawful nature of Defendants' exclusive reliance on their January 30, 2020 letter is further underscored by the fact that their January 30, 2020 letter did not resolve—or even acknowledge—the issues the EBCI had raised with regards to the Draft EA. Compl. at ¶ 58. As Defendants acknowledge, '"NHPA implementing regulations require agencies to provide a tribe with 'a *reasonable opportunity* to . . . participate in the resolution of adverse effects."' Defs.' Br. 14 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)) (emphasis added in citation). The EBCI

identified the issues, but was never allowed to participate in any resolution. As the EBCI emphasized in its Complaint, Defendants' actions went far outside standard consultation for such concerns. *See* Townsend Decl. ¶ 12 (stating, ordinarily, "concerns such as those raised in the EBCI comments would trigger a process where the BIA would work with [the EBCI THPO] to conduct a cultural survey on the land at issues so [both parties] could determine whether religious or cultural items were present at the site").

Defendants erroneously state that "[t]he fact that Plaintiff could identify no historic values associated with the site will be independently dispositive of Plaintiff's NHPA claim." Defs.' Br. 16. Federal courts, however, have made clear that federal agencies' § 106 duties encompass aiding in the discovery of historic properties eligible for protection; federal agencies cannot refuse to make a good faith effort to search for and identify such properties and then rely on the absence of any identification to satisfy their § 106 duties. *See Slockish v. United States FHA*, 682 F. Supp. 2d 1178, 1202 (D. Or. 2009) ("The NHPA and its implementing regulations are intended not only to protect previously identified resources, but also to aid in the discovery of previously unknown or uncertain resources which are eligible for protection.") (citing 36 CFR § 800.4(b)(1)). Indeed, the governing regulation states that "the agency official shall take the steps necessary to identify historic properties within the area of potential effects" including "*make[ing] a reasonable good faith effort to carry out appropriate identification efforts*." 36 CFR § 800.4(b)(1)).

The "appropriate identification efforts," in this instance, are those that the agency ordinarily undertakes. *See* Townsend Decl. ¶ 12. For instance, ordinarily—in carrying out the appropriate identification efforts—"the BIA consults with the EBCI THPO multiple times per week on various projects in Cherokee traditional aboriginal territory. The BIA typically reaches out to [the EBCI] early in the process, so [the EBCI] can participate in the development of

research design and scopes of work, not simply review completed documents." *Id.* at ¶ 10. The EBCI's THPO, Mr. Townsend, stated that "[h]aving worked with the BIA for many years on these issues, concerns such as those raised in the EBCI comments would trigger a process where the BIA would work with me, as the EBCI THPO, to conduct a cultural survey on the land at issue so we could determine whether religious or cultural items were present at the site." *Id.* at ¶ 12. Mr. Townsend has further explained that "[i]f there are any human remains at the site, then they are potentially intact below the zone of impact from the 2005 work." *Id.* at ¶ 18. "The Section 106 review process is meant to address these types of concerns prior to ground disturbance at a project location. Until we receive data about this site, we cannot determine whether Cherokee religious or cultural sites exist at the proposed location." *Id.*

Finally, Defendants, along with Catawba, also erroneously rely on the First Circuit's decision in *Narragansett Indian Tribe v. Warwick Sewer Authority* to assert that "[w]here no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [government].'" Defs.' Br. 17 (quoting *Narragansett Indian Tribe v. Warwick Sewer Auth*., 334 F.3d 161, 168 (1st Cir. 2003)); Catawba Br. 28 (same). In *Narragansett*, the First Circuit held that a sewer authority complied with the NHPA by mailing a letter to the Tribe and the Tribe's "failure to respond within thirty days permitted the Authority to proceed." 334 F.3d at 167. In contrast to the present case, however, the sewer authority complied with NHPA because they engaged with the Tribe on a *daily* basis and permitted the Tribe to "have contact with the Authority" during the duration of the project—including a "meeting with the executive director of the Authority early in the consultation process and daily cell phone communication with PAL [the defendants' archeologists] during the test excavations. . . ." *Id.* at 164. The Tribe's own deputy THPO testified "that he spoke daily with PAL during its field research in the Buckeye Brook area." *Id*. at 167. It was within this context of constant

contact and actual archeological survey activities *involving the Tribe's THPO* that the First Circuit concluded that the absence of the discovery of any historic properties was dispositive and the Defendant had abided its full NHPA consultation responsibilities. *See id.* Unlike the Tribe in *Narragansett*, however, the EBCI never had a "reasonable opportunity to identify its concerns," and was never able "to take a role in the consultation process." *Id.* at 167.

Defendants have failed to make "a reasonable good faith effort to carry out appropriate identification efforts," 36 CFR § 800.4(b)(1), and accordingly, Plaintiff is likely to succeed on the merits of its NHPA claims that Defendants failed to adequately engage in good faith consultation under NHPA § 106.

3. The EBCI is Likely to Succeed on its APA Claims

a. The EBCI Has Standing to Bring its Claims

First, Defendants assert that "it is doubtful that Eastern Cherokee even has standing to assert its claims." Defs.' Br. 21. Defendants' attack on the EBCI's standing, however, only underscores the arbitrary and capricious nature of Defendants' final agency action.

Defendants argue the EBCI must not have standing to bring its claims because the assertion that Kings Mountain Site "was once Cherokee territory . . . is dubious at best." Defs.' Br. 22. This statement is not only ludicrous in light of the fact that federal agencies routinely consult with the EBCI regarding final agency actions taken in Cleveland County (*see* Townsend Decl. ¶ 4, ECF No. 1-1; Townsend Apr. 10 Decl. ¶ 3; Toombs Decl. ¶ 4; *see also supra*, at 13, and because the United State signed a treaty with the Cherokee Nation concerning this particular parcel of land, Compl. ¶ 18, but it is all the more ludicrous that Defendants'' Final EA includes contact information for the EBCI's THPO, Russell Townsend, in the event "an archaeological find is determined to be significant by the archaeologist or paleontologist" or in the event "human remains are discovered during ground-disturbing activities on Tribal lands, pursuant to

NAGPRA . . . .” Final EA 16-17, ECF No. 13-1. Defendants’ baseless attacks on the EBCI’s legitimate connections to its own treaty territory highlights the lawlessness—as well as the abandonment of trust duties and responsibilities—that have persisted throughout Defendants’ environmental review and (complete absence of any) consultation process.

To be sure, however, the EBCI has standing to bring its claims. There can be no question that preventing a Tribal Nation from exercising its right to engage in § 106 consultation constitutes a cognizable harm. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior,* 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) (concluding that if “the tribe hasn’t been adequately consulted and the project goes ahead anyway, this legally-protected procedural interest would effectively be lost”).

Furthermore, the EBCI has a unique and particularized interest, as the only federally recognized Tribe in the State of North Carolina, in protecting and consulting on projects that impact Cherokee historic territory —an interest that is now at risk as the March 12 Decision gave little to no weight to the EBCI’s lawful right and interests in planning and otherwise developing any cultural or archeological surveys prior to issuing the March 12, 2020 Decision. Accordingly, the EBCI’s injury is “traceable to the Bureau’s actions, because the taking of the site in trust” and approving the site for gaming activities pursuant to IGRA violates the 1993 Settlement Act, and that action alone has caused the EBCI’s injury. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (causation element satisfied where agency action authorizes conduct that would be illegal otherwise).

Defendants’ cursory attack on the EBCI’s standing to bring its claims fails.

b. Neither Section 9(a) of the 1993 Settlement Act, Nor the Land Claim Settlement Acts of other Tribal Nations, Nullify the 1993 Settlement Act's Prohibition on the Application of Section 5 of the IRA to Catawba

Defendants have made no attempt to deny or defend against the EBCI's claim that the 1993 Settlement Act precludes Defendants from exercising their authority to take land into trust on behalf of Catawba under Section 5 of the IRA. *See* Defs.' Br. 19-21.

As the EBCI explained in its Complaint, the Settlement Agreement leaves no ambiguity or discretion as to which provisions of the IRA can be considered consistent with the Settlement Agreement and which cannot. *See* Compl. ¶ 33. The 1993 Settlement Agreement explicitly authorizes Catawba "to 'organize under the Indian Reorganization Act, 25 U.S.C. Sections 461 - 479, (IRA) and [to] adopt and apply to the Tribe any of the following provisions *to the extent they are consistent with this Agreement*: Sections 461, 466, 469, 470, 470a, 471, 472, 472a, 473, 475a, 476, 477, 478, 478a , and 478b." Settlement Agreement § 9.1, ECF No. 1-6 (emphasis added). This language in the Settlement Agreement expressly omits Section 5 of the IRA, (formerly codified at 25 U.S.C. § 465). *See* Compl. ¶ 33; Settlement Agreement § 9.1, ECF No. 1-6.

Defendants themselves acknowledge that "application of the IRA to the Nation is limited only to the extent it is inconsistent with the specific provisions of the Settlement Act" March 12 Decision 23, ECF No. 1-2—the interpretation of which must be consistent with the Settlement Agreement. *See* 1993 Settlement Act § 15(e) (noting that the provisions "of the Settlement Agreement . . . [are to] be complied with in the same manner and to the same extent as if they had been enacted into Federal law"); 1993 Settlement Act § 10(4) ("Whether or not the Tribe, under section 9(a), elects to organize under the Act of June 18, 1934, the Tribe, in any constitution adopted by the Tribe, may be authorized to exercise such authority *as is consistent with the Settlement Agreement* and the State Act.") (emphasis added).

The Settlement Agreement's purposeful omission of IRA Section 5 from the list of IRA Sections that Defendants, and Catawba, may utilize has the governing effect—according to the 1993 Settlement Act—as though it has "been enacted into Federal law." *See id.* The 1993 Settlement Act expressly prohibits the application of IRA Section 5 to any land into trust Defendants receive from Catawba, absent some subsequent legislation enacted by Congress to amend or replace the 1993 Settlement Act.

Defendants offer no response and make no argument as to how they were able to circumvent this plain language in the 1993 Settlement Act and the Settlement Agreement in issuing their March 12 Decision. Catawba contends that the Settlement Agreement's purposeful omission of IRA Section 5 must be overlooked because "[a]ny limitations in section 9.1 [] do not apply to land acquisitions in North Carolina." Catawba Br. 35.

Of course, there is no language in the 1993 Settlement Act that limits the Act's incredibly restrictive terms and language to apply only to land acquisitions in South Carolina because no Member of Congress ever imagined Catawba would advocate that the legislation, which Catawba sought to secure to settle its land claims with *South Carolina*, would be used to advocate that Catawba could take land into trust anywhere in the entire United States. *See, e.g.,* 139 Cong. Rec. 139 Cong. Rec. S10809-01, S10809 (statement of Senator Fritz Hollings) ("The bill permits only two types of lands. First, the land held in trust by the United States as the expanded reservation. Any other land not qualifying for reservation status will be held in fee simple and have all the jurisdictional attributes of any other land in South Carolina.").

Moreover, nothing in Section 9(a) authorizes Defendants to ignore the unambiguous language in § 9.1 of the Settlement Agreement and §§ 10(4) and 15(e) of the Settlement Act to apply Section 5 of the IRA to Catawba's land into trust request. Section 9(a) of the 1993 Settlement Act specifically states "The Tribe shall be subject to [the IRA] except to the extent

such sections are in consistent with this subchapter." 1993 Settlement Act § 9(a). Section 9(a) explicitly prohibits a broad and general application of IRA provisions that the Settlement Agreement expressly omits. Notably, the Settlement Agreement individually lists sections of the IRA that may apply to the Catawba, but omits every section of the IRA dealing with land. *See* 25 U.S.C. § 462 (regarding the extension of restrictions on alienation upon lands held in trust for tribes); § 463 (regarding restoration of surplus reservation lands to tribal ownership); § 464 (regarding transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations); § 465 (regarding the acquisition of lands in trust for Indians); § 467 (regarding the establishment of new Indian reservations); § 468 (regarding allotments or holdings outside of reservations).

Defendants' newfound interpretation of the 1933 Settlement Act also directly contradicts its contemporaneous characterization of the legislation as "diminish[ing]" the agency's authority. Just before the 1993 Settlement Act's passage, the Area Director for the BIA's Eastern Office, Bill Ott—accompanied by the Associate Solicitor for Indian Affairs, David Moran, and the BIA's Eastern Area Acting Trust Officer Ralph Gonzales—presented Interior's concerns with the 1993 Settlement Act to the Senate Committee on Indian Affairs. *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993: Hearing on S. 1156 Before the Senate Comm. on Indian Affairs*, 103rd Cong. 341, at 92 (1993) (Statement of Bill D. Ott, Area Director, Eastern Office, BIA, Department of the Interior, VA, Accompanied By David Moran, Associate Solicitor for Indian Affairs; and Ralph Gonzales, Acting Trust Officer, Eastern Area). In written testimony, Mr. Ott explained Interior's view that "the legislation as drafted . . . diminishes the Department's authority and its ability to discharge its duty as trustee. The bill would relinquish much of the Secretary's authority to the State with regard to trust land transactions." *Id.* Furthermore, Mr. Ott provided Interior's view that the restoration provided for

was only partial, as the 1993 Settlement Act "subordinate[s] the tribe to State, County, and city authority, while limiting tribal authority and jurisdiction." *Id.*

In a cursory effort to dismiss the EBCI's claims that the March 12 Decision violated the plain letter law of the 1993 Settlement Act, and was therefore arbitrary and capricious under the APA, Defendants lean on court precedents interpreting *other* Tribal Land Claim Settlement Acts that vary drastically in historical context, terms, and application. *See* Defs.' Br. 20-12 (citing the Connecticut Indian Land Claims Settlement Act and the Maine Indian Claims Settlement Act).

Defendants' reliance on *other* Settlement Acts to support its twisted and strained interpretation of the 1993 Settlement Act fail.[5] Take for instance Defendants' reliance on the Second Circuit's adjudication of the Connecticut Indian Land Claims Settlement Act, in a case where the Tribe at issue, the Mashantucket Pequot, was *not* attempting to use its State Settlement Act to acquire lands beyond the borders of the State implicated in the governing Act. *See Connecticut ex. Rel. Blumenthal v. U.S. Dep't. of the Interior*, 228 F.3d 82, 84-86 (2nd Cir. 2000). So yes, it is true that the Connecticut Indian Lands Claim Settlement Act "was silent regarding the DOI's authority to take land into trust outside" of Connecticut, Defs.' Br. 20, but the Second Circuit did not consider or address whether express jurisdictional and governance limitations in the Connecticut Indian Land Claims Settlement Act would remove or otherwise limit the DOI's authority to take land into trust on behalf of the Mashantucket Pequot in States

[5] Leading up to the passage of the 1993 Settlement Act, Members of Congress and officials from the Department of the Interior repeatedly stated that the 1993 Settlement Act was unique among tribal settlement acts. *See* Compl. ¶ 72; *see also* 139 Cong. Rec. H7690-01 ("The[] [Tribe] ha[s] compromised in an effort to obtain this settlement. This bill is not a model for future settlements and is not intended to be a precedent for other tribes. The bill reflects choices made by the Catawba and the State of South Carolina in a unique settlement of claims under a British treaty and the Non-Intercourse Act. The committee will respect the choices the tribe has made."); 139 Cong. Rec. S10977-01, S10978 ("[T]his settlement stands on its own unique facts and specific circumstances. It does not establish a precedent for any other settlement. If this were not the case, I would object to its consideration.").

other than Connecticut, so the Second Circuit's decision in *Connecticut* is entirely unhelpful to Defendants, as well as Catawba. *See Connecticut ex. Rel. Blumenthal*, 228 F.3d at 87. Furthermore, the Second Circuit reached its decision based in large part on language that does not exist in the 1993 Settlement Act. *Id.* at 89. Specifically, the Second Circuit found that the Act's restrictive section, Section "(b)(8) applies only to lands purchased with settlement funds ('acquired under this subsection')." *Id.* Unlike the Connecticut Settlement Act, no such restrictions apply to the 1993 Settlement Act based on whether property was acquired with settlement funds or other funds.

At the time of enactment, Members of Congress, and Catawba's elected leadership, repeatedly stated that the 1993 Settlement Act was like no other Tribal Land Claim Settlement Act. For instance, before the 1993 Settlement Act passed, Senator Daniel Inouye asked the attorney for Catawba "[w]hy [] the Tribe agreed to relinquish those attributes of sovereignty that are customarily retained by other federally-recognized tribes?" *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993: Hearing on S. 1156 Before the Senate Comm. on Indian Affairs*, 103rd Cong. 341, at 262 (1993) (statement of Senator Daniel Inouye).

Further, Senator Inouye asked whether Catawba's relinquishment of attributes of its sovereignty should set precedent for the larger body of Federal Indian law. *Id.* at 262-63. In response, Catawba's attorney explained that while the jurisdictional allocation in the 1993 Settlement Act is similar to three other Indian land claim settlement acts, "[*t]he specific provisions of jurisdictional compact negotiated by the Tribe are tied directly to the specific historical and legal circumstances of the [Catawba] and its land claims, for which no other precedent exists*." *Id.* (emphasis added). Accordingly, comparison to other settlement acts, generally, does not support Defendants' assertion that the 1993 Settlement Act grants Defendants with the requisite authority to take land into trust for Catawba outside of the State of South

Carolina for gaming purposes under IGRA, when the 1993 Settlement Act expressly prohibits such agency action. *See* 1993 Settlement Act, § 14(a) (Congress states in plain terms: "INAPPLICABILITY OF THE INDIAN GAMING REGULATORY ACT.—The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the [Catawba] Tribe."); *see also* Compl. ¶ 36.

c. Section 4(b) of the 1993 Settlement Act Does Not Authorize Defendants to Undertake Land-into-trust acquisitions Under Section 5 of the IRA

Catawba next relies on the broad language in Section 4(b) of the Settlement Act, wherein the Act states that '"the Tribe *and its members* shall be eligible for all *benefits* and *services* furnished to federally recognized Indian tribes and their members because of their status as Indians."' Catawba Br. 29-30 (quoting 1993 Settlement Act, Section 4(b)). Moreover, Catawba asserts that because Section 4(b) includes the phrase "[n]otwithstanding any other provision of law" (*id.*), this "reflects an intent to 'supersede all other laws." Catawba Br. 30 (quoting *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991)).

Nothing in the D.C. Circuit's decision in *Liberty Maritime*, however, supports the conclusion that Congress's inclusion of the phrase "notwithstanding any other provision of law" must be interpreted to contradict and nullify the plain language of other provisions within the very same law, enacted at the same time—not as subsequent amendments—as the "notwithstanding" phrase. *See Liberty Mar. Corp. v. United States*, 928 F.2d 413, 417 (D.C. Cir. 1991) (where "complementary amendments [were] intended to provide the Secretary with broad discretion . . . under Title XI [of the Merchant Marine Act]"). But even if the "notwithstanding" language in the 1993 Settlement Act was applied broadly, it would not serve to nullify the restrictive terms of the 1993 Settlement Act. In *Liberty Maritime*, the D.C. Circuit determined that sections outside of § 1105(c) of the Merchant Marine Act "continue to apply to transactions

other than those governed by § 1105(c) and so have continuing effect independent of § 1105(c). . . ." *Id*. at 418. Indeed, Catawba's interpretation is unsupported by federal court precedent, and it is likewise unsupported by the explicit language in the 1993 Settlement Act itself, since Section 15(a) of the Act states that "[i]f any provision of section 4(a), 5, or 6 of this Act is rendered invalid by the final action of a court, then all of this Act is invalid." Catawba's asserted interpretation of the language in Section 4(b) would render the entirety of the Act that restored Catawba's federal recognition invalid. It is doubtful this is truly what Congress intended.

Catawba further asserts that Defendants relied on Section 4(b) of the 1993 Settlement Act in issuing its March 12 Decision to take land into trust under IRA Section 5 and on behalf of Catawba. Catawba Br. 30 ("Interior cited section 4(b) in granting the Nation's application. *See* Approval Letter 22. Yet the Eastern Band never even mentions the provision. That silence is telling."). While it is true that Defendants cite to Section 4(b), a review of this citation reveals that Defendants did not utilize Section 4(b) as a basis for applying Section 5 of the IRA to Catawba. *See* March 12 Decision 22, ECF No. 1-2. The March 12 Decision merely states that:

> Section 4(b) of the Settlement Act generally addresses the Nation's eligibility for federal benefits and services upon restoration of the federal trust relationship, providing that the Nation "shall be eligible for all benefits and services furnished to federally recognized Indian tribes and their members of the status as Indians.

Id. Defendants do not even attempt to assert that Section 4(b)'s reference to "federal benefits and services" to individual Catawba "members" includes taking land into trust on behalf of the Tribal Nation under Section 5 of the IRA—something that is not an individual "service" or "benefit" that comes from being an individual Indian or a citizen of a federally recognized Tribe. *See id.*

The plain language in the 1993 Settlement Act itself makes this clear, since the Act defines "services" to include "educational benefits, medical care, and welfare assistance provided by the United States to Indians because of their status as Indians, and the Tribe shall be

eligible to the special services performed by the United States for tribes because of their status as Indian tribes." 1993 Settlement Act 4(b). The Settlement Act does not define "services" as processing land intro trust applications through Section 5 of the IRA. *See* 1993 Settlement Act §§ 12(b)(2), 12(m) (the only mention of services in relation to taking land into trust is in § 12 (b)(2), and does not classify land acquisitions as a "service"); *see also Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993: Hearing on S. 1156 Before the Senate Comm. on Indian Affairs*, 103rd Cong. 341, at 71-72 (1993) (statement of Senator Strom Thurmond) ("The settlement agreement also calls for Federal recognition of the Catawba Indian Tribe, *qualifying the Tribe for Federal Indian programs*. . . . It ratifies prior land transfers, and extinguishes future claims by the tribe.") (emphasis added).

The understanding that restoration, and the accompanying services and benefits detailed in § 4(b) meant access to programs and grants—as opposed to IRA § 5 and IGRA—was summarized by Representative John Spratt a month before the 1993 Settlement Act became law:

> Federal Restoration of the Catawba Indian Tribe: The trust relationship between the Catawba Tribe and the United States will be restored. The tribe and its members will qualify for federal Indian programs, such as health and education benefits, housing loans, and grants and loans for reservation development.

139 Cong. Rec. H7002-04, H7022 (statement of Rep. John Spratt). Furthermore, the Congressional Budget Office provided a cost estimate of the 1993 Settlement Act, and explained in pertinent part that:

> Section 4 would restore the federal trust relationship with the Catawba Tribe and would make members eligible for benefits and services available to federally recognized tribes. *Thus, while no additional expenditures are mandated or specifically authorized by the bill, relevant federal agencies would be required to include additional members of the tribe among those eligible for benefits and may seek additional funds in order to provide such benefits*. . . .

S. REP. 103-124, 36 (emphasis added).

Catawba's stretched reading of the 1993 Settlement Act Section 4(b)'s language is certainly creative, but it is directly discounted by the plain language in the Act itself, and moreover, any creative interpretation Catawba might now offer is irrelevant since Defendants did not conclude that Congress's reference to "benefits" or "services" in Section 4(b) somehow grants DOI the requisite authority to over the Settlement Agreement's clear prohibition on the application of IRA Section 5 to Catawba. *See* ECF No. 1-2, at 22; *see also* Compl. ¶¶ 32, 34.

d. The 1993 Settlement Act Expressly Prohibits the Application of IGRA to Defendant-Intervenor

Even if Defendants could get past the prohibitions against the application of § 5 of the IRA—they cannot—the 1993 Settlement Act expressly prohibits the application of IGRA to the "Catawba Tribe." 1993 Settlement Act § 14(a) ("[t]he Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the Tribe."); *see also TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) ("When Congress intends to prohibit a tribe from gaming activity, it says so affirmatively. *See, e.g.,* Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub.L. No. 103–116, § 14, 107 Stat. 1118, 1136 (1993).").

Again, Catawba seeks to circumvent the plain language in the 1993 Settlement Act itself, as well as the reasoning and rationale behind all of the federal courts that have concluded IGRA does not apply to Catawba, by asserting that "section 14 [does not] prohibit[] the Nation from engaging in gaming activity in *any* state"—just South Carolina. Catawba Br. 38. As stated in greater detail above, Congress—and Defendants—did not interpret the restrictive language in the 1993 Settlement Act as granting DOI broad authority to transfer land into trust for gaming purposes anywhere in the United States. *See supra*, at 31-37; *see also* 139 Cong. Rec. H7002-04, H7023 ("The tribe and the State have agreed that the federal law known as the" Indian Gaming Regulatory Act" will not apply to the Catawba Indian Tribe.") (statement of Rep. John Spratt). In

fact, even Chief Harris has acknowledged the 1993 Settlement Act's broad prohibition on IGRA gaming. *Testimony of William Harris, Chief Catawba Indian Nation On S. 790 Before the Senate Committee on Indian Affairs* (May 1, 2019), https://www.indian.senate.gov/sites/default/files/Written%20Testimony%20of%20Catawba%20Chief%20William%20Harris%20on%20S%20790.pdf, ("The Catawba Federal Settlement Act set forth the Tribe's gaming rights in South Carolina*, but it also broadly provides that IGRA does not apply to the Tribe*.") (emphasis added).

The 1993 Settlement Act prohibits the application of IGRA to Catawba, and Defendants' attempt to circumvent this prohibition renders their final agency action arbitrary, capricious, and contrary to law.

e. Defendants are Not Entitled to *Chevron* Deference

Finally, Defendants erroneously aver that "Chevron deference applies" to Defendants' interpretations of the 1993 Settlement Act in their March 12 Decision. Defs.' Br. 21. It does not.

Blatantly disregarding the Settlement Act's incorporation of the Settlement Agreement's omission of IRA Section 5, while ignoring the Act's prohibition on the application of IGRA altogether, does not constitute the requisite "permissible" interpretation of a governing statute that entitles an agency to *Chevron* deference. *See Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 384 (D.C.Cir.2005) (internal citations omitted) ("Even when Congress has stated that the agency may do what is necessary, whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed.").

Moreover, the Indian Canons of Construction are inapplicable to support Catawba's asserted liberal construction of the 1993 Settlement Act because, in the first instance, the canons "do[] not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S.

498, 506 (1986); and in the second instance, "the canon is inapplicable when the competing interests at stake both involve Native Americans." *Cherokee Nation v. Bernhardt*, No. 12-CV-493-GKF-JFJ, 2020 WL 1429946, at *9 (N.D. Okla. Mar. 24, 2020); *see also Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995); *Cherokee Nation of Oklahoma v. Norton*, 241 F. Supp. 2d 1374, 1380 (N.D. Okla. 2002); *see also N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). It would likewise be absurd for the EBCI to assert that the Indian Canons of Construction require the Court to liberally construe and bend the plain language in the NEPA and NHPA in the EBCI's favor simply because the EBCI is a Tribe. Defendants owe trust duties and obligations to both Catawba and the EBCI, and the Indian Canons of Construction do not permit Defendants to violate the plain letter of federal law to benefit one Tribe when the violation of that law harms another.

The EBCI is likely to succeed on all of its claims brought under and pursuant to the APA.

C. **The Balance of Equities Tip in The EBCI's Favor**

Defendants erroneously assert that the balance of equities tip in Defendants' favor because "[i]f, 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." Defs.' Br. 29. For the reasons discussed above, that is simply not the case. *See supra*, at 11-13.

And in contrast to Defendants' protestations otherwise, the loss of this sovereign cultural right to a Tribal Nation does constitute irreparable harm. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior,* 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) (concluding that if "the tribe hasn't been adequately consulted and the project goes ahead anyway, this legally-protected procedural interest would effectively be lost"); *see also Save Strawberry Canyon v. Dep't of Energy,* 613 F.Supp.2d 1177, 1187 (N.D. Cal. 2009) (based on alleged NEPA

violations, the court found that the plaintiff was "virtually certain to suffer irreparable procedural injury absent an injunction") (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992)). The EBCI was never consulted, and its sovereign right as a Tribal Nation to engage in NHPA § 106 consultation concerning a major federal action within its traditional homeland will "effectively be lost" without injunctive relief. There are no remedies that would adequately compensate for the EBCI's eroded sovereignty that it has fiercely protected since time immemorial.

Defendants' actions place the EBCI's sovereign cultural authority at stake by depriving it of its sovereign right to consultation pursuant to the APA, NEPA, and NHPA. This deprivation is an invasion of the EBCI's sovereignty, and "such an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006). Such harm outweighs any temporary harm to Defendants and Intervenor-Defendant. *See id.* (Finding the harm of invasion of sovereignty outweighs harm to the State of Kansas due to delayed enforcement of its gaming laws). Considering these circumstances, the potential harm to the EBCI greatly outweighs any adverse consequences to Defendants resulting from injunctive relief.

Defendants further assert that the balance of equities tip in their favor because "[t]his project, once brought to fruition, will provide substantial economic and social benefits to Catawba . . ." Defs.' Br. 29. While the EBCI is mindful of the economic and social issues afflicting Intervenor-Defendant, the planned project is not nearly as rosy as Defendants make it out to be. While Defendant and Intervenor-Defendant are touting the project as one aimed at saving Catawba, the true aim of the project is to fill the pockets of a "former member of [Senator] Graham's campaign finance committee Wallace Cheves," who "brought undue

political influence on DOI and other federal officials in their quest to obtain BIA approval of [this] casino in North Carolina." Compl. ¶ 48.

Mr. Cheves has a colorful history in the commercial gaming industry. In 2003, Mr. Cheves and others were indicted in the U.S. District Court for the Northern District of Ohio for illegal gambling, conspiracy to defraud the United States, and money laundering. *See U.S. v. Simons, et al.*, No. 5:02-cr-00504-PCE-14 (N.D. OH filed Dec. 17, 2002). In 2013, Alabama Attorney General (and former U.S. Senator) Luther Strange successfully brought a forfeiture action against Mr. Cheves and others after Alabama law enforcement authorities seized 691 illegal slot machines and $283,657 in cash as contraband. *See Houston Cty. Econ. Dev. Auth. v. State,* 168 So. 3d 4 (Ala. 2014) (upholding lower court's forfeiture decision that names Segway Gaming Systems of Alabama, a company in which Cheves is or was a partner, as having ownership interest in illegal gambling devices). In 2001, the South Carolina Attorney General determined that Mr. Cheves operated illegal sweepstakes games. Charlie Condon, Attorney General of South Carolina, *Letter to S.C. Law Enforcement Division Chief* (Jan. 8, 2001), (naming First Link, a company in which Cheves did or does hold an executive position, as operating "illegal gambling inside and out"). Mr. Cheves's conduct runs counter to the primary purpose of IGRA, which is to "provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. §2702(2). Although IGRA provides protections for tribal governments and the public against "any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming," 25

U.S.C. § 2710(b)(2)(F), apply to "primary management officials" and "key employees," not developers like Mr. Cheves.[6]

But regardless of the protections IGRA is intended to afford, under the 1993 Settlement Act, IGRA cannot apply to the Catawba, further opening the door to bad actors like Mr. Cheves, who could avoid background checks and investigation. The balance of equities tips towards enforcing the governing federal law that puts a process in place to keep bad actors out of the tribal gaming industry, and not towards endorsing casino deals with them.

Nonetheless, Defendants and Intervenor-Defendant both argue that injunctive relief will harm the substantial economic and social benefits from revenue generated from the completed project. Any economic harm to Catawba is insufficient to tip the balance of equities in favor of Defendants. Economic harm to Intervenor-Defendant, however, is purely speculative at this time given the fact that the COVID-19 public health crisis has closed nearly all Indian gaming casinos. *See* Press Release, *AGA CEO Statement on Economic Impact of COVID-19 on U.S. Casino Gaming Industry* (Mar. 19, 2020), https://www.americangaming.org/new/aga-ceo-statement-on-economic-impact-of-covid-19-on-u-s-casino-gaming-industry/ ("Nearly all (95%) of the country's 465 commercial casinos, and eight-in-ten (83%*) of the country's 524 tribal casinos, have shuttered their doors.").

[6] Intervenor-Defendant's casino developer, Wallace Cheves, lists Intervenor-Defendant's counsel, Wilmer Cutler Pickering Hale and Dorr, as his top legal and lobbying firm on the Kings Mountain Site project, thus it is unclear if the Federal-Defendants are deferring to Intervenor-Defendant or the casino developer in the positions they have taken. http://skyboatgaming.wpengine.com/areas-of-expertise/law-partners/. Further complicating their representation of Intervenor-Defendant and the casino developer is the fact Hale and Dorr served as legal counsel for the State of South Carolina in the negotiations that resulted in the 1993 Catawba Indian Tribe of South Carolina Land Claims Settlement Act. *See* 138 Cong. Rec. E2089-01, E2090 ("Hale and Dorr, the law firm representing the State of South Carolina in this suit . . . .").

Any economic and social benefits Intervenor-Defendant hopes to realize from the Kings Mountain project will be delayed for the foreseeable future as the COVID-19 pandemic continues, regardless of injunctive relief. Even if Catawba rushed to commence construction, the facility would most likely not be operational as North Carolina has declared a State of Emergency that recommends mass gathering events "that primarily draw high-risk persons, including those that attract older adults," be cancelled or postponed to slow the spread of COVID-19. *See* Press Release, *Governor Cooper Declares State of Emergency to Respond to Coronavirus COVID-19: Department of Health and Human Services Issues Recommendations to Slow Spread* (Mar. 10, 2020), https://governor.nc.gov/news/governor-cooper-declares-state-emergency-respond-coronavirus-covid-19. Any economic and social benefits would be delayed regardless of the issuance of injunctive relief. The equities, therefore, tip in the EBCI's favor.

D. **Granting Preliminary Injunctive Relief Will Serve the Public Interest**

Finally, Defendants assert that "enjoining the transfer is contrary to the public interest as it would frustrate the federal interest in '"furthering Indian self-government.'" Defs.' Br. 30 (quoting *Morton v. Mancari*, 417 U.S. 22 535, 551 (1974)). Defendants cite several cases to support their assertion that injunctive relief at this time would harm the principles of Indian self-government, but *none* of the cases Defendants cite deal with enjoining a federal agency from effectuating a final agency action in a Tribal Nation's traditional treaty territory without having first engaged in good faith consultation with that Tribal Nation.

Moreover, although Defendants cite to precedents such as *Morton v. Mancari* and others to assert that the injunctive relief should be denied because it would undermine the '"strong federal policy favoring tribal self-government [and] tribal self-sufficiency,"' Def. Br. 30 (quoting *Bowen v. Doyle,* 880 F. Supp. 99, 137 (W.D.N.Y. 1995)), such canons of construction have no place in lawsuits where "the [competing] interests at stake both involve Native Americans."

Utah v. Babbitt, 53 F.3d 1145, 1150 (10th Cir. 1995); *see also Cherokee Nation v. Bernhardt*, 2020 WL 1429946 at *9 (N.D. Okla. 2020) (When "two Indian tribes have competing interests with regard to whether [one Tribe] is legally permitted to conduct gaming [at a particular location,] . . . [t]he canon is . . . inapplicable in th[e] case.").

There is no doubt that federal policy favors tribal self-government regarding Catawba; however, there is equally no doubt that federal policy likewise favors "advancement of the public interest in preserving the [EBCI's cultural] resources." *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985); *see also S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (concluding that when defendant has not complied with the procedural requirements of NEPA or NHPA, "[s]uspending a project until that [compliance] has occurred [] comports with the public interest"); *Fund for Animals, Inc. v. Espy,* 814 F. Supp. 142, 152 (D.D.C. 1993) (finding "there is a strong public interest in meticulous compliance with the law by public officials"). Although Defendants cite to *Cal. Valley Miwok Tribe v. Jewel* and *Stand Up for Cal!*, neither consider the right of a sovereign Tribal Nation to engage in consultation concerning a final agency action within the Nation's treaty territory. Defs.' Br. 30. Federal policy goals of encouraging tribal self-governance and tribal self-sufficiency does not justify the violation of the federal laws that, specifically NEPA and NHPA*,* grant Tribal Nations specific rights. Instead, "in enacting NHPA, Congress has adjudged . . . the rights of Indian tribes to consultation to be in the public interest." *Quechan Tribe*, 755 F. Supp. 2d at 1122.

Finally, the majority of Tribes and tribal organizations have denounced precisely what Intervenor-Defendant is doing here – reservation shopping for an off-reservation casino in another Tribe's ancestral homelands. For instance, the United South and Eastern Tribes ("USET") stated in a 2005 resolution that USET specifically requests Congress to enact

legislation that would prohibit Indian Nations form acquiring trust land in a state other than the state where that Nation is currently located or where they have an aboriginal connection. USET Resolution, Ex I, 2; *see also id.* (stating that USET is opposed to the efforts of Indian Nations "to acquire lands for purposes of establishing reservations . . . frequently in other states where they have no reservation or trust land status . . . for the sole purpose of pursuing gaming opportunities").

And contrary to Catawba's claim that its Kings Mountain project is in the public's interest, Catawba Br. 43, not everyone in North Carolina agrees. For instance, the North Carolina legislature has publicly state that there is "broad opposition to the Catawba Nation's request for land to be taken into trust for the purposes of gaming in Cleveland County. In 2013, over 100 members of the General Assembly opposed the Catawba gaming application with the Bureau of Indian Affairs." 2019 Letter from NC Gen. Assembly, Ex. D; *see also* Final EA 772 (" In a few days standing at a local grocery store over 1000 signatures in opposition were procured."). Here, the public interest is best served by maintain the status quo until a decision can be reached on the merits.

E. **Exempting EBCI From Bond Requirement Would Be Appropriate**

Finally, Defendants do not object to the EBCI's request that this Court waive the bond requirement. *See* Defs.' Br. 1-31 (voicing no objection to this Court's granting a waiver of the bond requirement). Catawba objects on the grounds that "there are no 'unusual circumstances' here that would warrant waiving a bond." Catawba Br. 44 (quoting *Federal Prescription Service, Inc. v. American Pharmacy Association*, 636 F.2d 755, 760 (D.C. Cir. 1980)).

The D.C. Circuit's decision in *Federal Prescription Service*, however, is not nearly as helpful to Catawba as the Intervenor-Defendant would like it to be. The *Federal Prescription* Court opined that "the district court in its discretion may order partially secured or unsecured

stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery." *Fed. Prescription Serv., Inc. v. Am. Pharm*. Ass'n, 636 F.2d 755, 760–61 (D.C. Cir. 1980). Here, as Catawba has vociferously pointed out, the applicant for equitable relief, the EBCI, has considerable assets and there is no question that the EBCI would be able to cover the cost of damages if the determination is made that a wrongful injunction has been implemented—a conclusion that is, of course, highly unlikely given high likelihood of success the EBCI has demonstrated on its APA, NEPA, and NHPA claims.

Catawba dismisses the EBCI's claims as "flimsy" Catawba Br. 44, however, this Court, very recently, issued a decision holding that "NEPA additionally requires an agency to determine how a project will affect a tribe's treaty rights," *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2020 WL 1441923 at *2, (D.C. Cir 2020), and the EBCI signed a treaty with the United States that included the Kings Mountain Site, *see* Compl. 2, and Defendants did not determine, let alone consider, how this project would affect the EBCI's treaty rights. While this is no guarantee that the EBCI will prevail on its claims in the current action, it is sufficient to demonstrate the EBCI's claims are far from "flimsy."

As discussed in great detail above, the EBCI has demonstrated a high likelihood of success on the merits of its claims, and the provision of injunctive relief in this case, alone, will not cause Catawba economic calamity. Building a casino within traditional Cherokee treaty territory is not the only option Catawba has in its search for economic development. It may be the only option that a bad actor like Wallace Cheves may elect to pursue and fund on behalf of Catawba, but Catawba's partnership with Cheves is of its own choosing, and the consequences of pursuing a flawed and rushed process to obtain a land into trust decision from Defendants is not the EBCI's fault.

If a bond is required here, the amount of the bond should be sufficient "to protect [the] adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." *Garrett v. City of Escondido*, 465 F.Supp.2d 1043, 1059 (United States District Court, S.D. California. 2006). Such protection is unwarranted, for the reasons discussed above. Accordingly, the Court should waive security or, in the alternative, require only nominal security from Plaintiff.

V. CONCLUSION

For the above reasons, Plaintiff's Motion for Preliminary Injunction should be granted.

Respectfully submitted this 13th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Mary Kathryn Nagle, hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on April 13, 2020, upon all counsel of record.

By: /s/ Mary Kathryn Nagle
Mary Kathryn Nagle