IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN BAND OF CHEROKEE INDIANS Plaintiff, and THE CHEROKEE NATION Intervenor-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

The Cherokee Nation's First Amended Complaint in Intervention

Intervenor-Plaintiff the Cherokee Nation (herein the "Nation"), seeks relief against Defendant United States Department of the Interior ("Interior" or "DOI"), 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") and, in support thereof, states as follows:

NATURE OF THE ACTION

1. Intervenor-Plaintiff the Cherokee Nation brings this action to protect and preserve the

Nation's sovereign cultural authority over lands, religious sites, burials, and cultural patrimony within the historic Cherokee territory. The United States has enacted laws to protect the inherent right of Tribal Nations to assert their sovereign cultural authority over lands within their historic territory. Defendants' *ultra vires* actions have violated nearly all of them.

2. On March 12, 2020, Defendant Assistant Secretary Tara Sweeney took final agency action and signed her Decision ("March 12 Decision") instructing Defendant Eastern Region Acting Director Glen Melville to "immediately acquire the land into trust" at the Kings Mountain site, in Cleveland County, North Carolina, for Catawba Indian Nation ("Catawba"), a Tribe headquartered in South Carolina. The land at issue, the Kings Mountain site, sits squarely within the Cherokee historic territory.

3. Federal laws, specifically the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., and the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 *et seq*., prohibit any and all federal agencies from taking "final agency action" with regards to lands within a Tribal Nation's traditional treaty territory until and unless that federal agency has consulted in good faith with the Tribal Nation's Tribal Historic Preservation Officer ("THPO") regarding the Nation's cultural patrimony, sacred sites, and burials located within the territory.

4. Defendants know this. Defendants routinely engage in good faith consultation with the Nation's THPO concerning final agency actions Defendants are considering undertaking in Cherokee treaty territory in what today constitutes North Carolina. *See* July 6, 2020 Declaration of Cherokee Nation's Tribal Historic Preservation Officer Elizabeth Toombs ("Toombs July Decl.") ¶ 6-7, ECF No. 42-1.

5. As it concerns the Kings Mountain site, however, Defendants did not consult with the

Cherokee Nation. Defendants did not send the Cherokee Nation any communication informing the Cherokee Nation of their plans to undertake this final agency action. Instead of abiding their trust duties and obligations under federal law to consult with the Cherokee Nation to identify cultural interests in Cherokee historical territory (*see* Toombs July Decl. ¶ 8, Defendants rushed out a decision and ran roughshod over the APA, NEPA, and the NHPA and took final agency action on March 12, 2020, without having issued a Final Environmental Assessment ("Final EA") or Finding of No Significant Impact ("FONSI"), in direct violation of the APA and NEPA. In this instance, governing federal law, specifically the APA, NHPA, and NEPA, required Defendants to undertake a full Environmental Impact Statement ("EIS") before issuing the March 12 Decision.

6. Defendants never consulted with the Cherokee Nation – and specifically never consulted about the possibility that the Kings Mountain site contained historical or cultural artifacts of interest to the Nation. Nor do communications with other Tribes absolve Defendants of their obligation to consult with the Cherokee Nation. Even if it were true that Defendants satisfied their obligations to consult with the Eastern Band of Cherokee ("EBCI") – which the Cherokee Nation understands that the EBCI very much disputes – federal law required Defendants to engage in good faith consultation with the Cherokee Nation.

7. Defendants' failure to abide by the routine procedural requirements in the APA, NEPA, and the NHPA carry profound consequences. Proper and timely consultation with the Cherokee Nation might well have led to DOI not issuing the March 12 Decision. And because DOI instead abandoned its consultation obligations and issued the March 12 Decision, the Cherokee Nation faces imminent, particularized, and irreparable harm. The March 12 Decision takes into trust for the Catawba a parcel of land that sits within Cherokee treaty territory. Absent

relief from this Court, "the land will fall under the governance of [the Catawba], and the Cherokee Nation will lose the right to consult on and protection of Cherokee religious and cultural sites." Toombs July Decl. ¶ 11. Moreover, the March 12 Decision paves the way for construction at the Kings Mountain site, which will inflict further irreparable harm on the Cherokee Nation by destroying Cherokee cultural resources that may exist at the site. These threats of irreparable injury warrant the Court's imposition of injunctive relief.

8. Defendants' actions are shocking since Defendants routinely comply with federal law and engage in good faith consultation with Tribal Nations concerning any potential final agency action Defendants are considering undertaking within a particular Tribal Nation's treaty territory. Here, however, Defendants issued the Draft Environmental Assessment ("Draft EA") on the land acquisition on December 19, 2019, issued a FONSI on March 12, 2020, and published the FONSI and Final Environmental Assessment ("Final EA") on March, 23, 2020 without having ever invited the Cherokee Nation to consult in the process.

9. The Cherokee Nation never received any notice of an opportunity to comment, much less consult, at any point in the Defendants' development of their plan for the Kings Mountain site.

10. Intervenor-Plaintiff therefore seeks judicial intervention to overturn the *ultra vires*, arbitrary, and capricious actions of Defendants and furthermore to enjoin Defendants from engaging in further conduct contrary to federal law, including their ongoing violations of their trust duties and obligations to the Cherokee Nation. The Cherokee Nation challenges the March 12 Decision and seeks an order permanently enjoining Defendants from transferring this parcel of land into trust status for Catawba, and, alternatively, ordering Defendants to properly carry out procedural and substantive responsibilities that protect Cherokee cultural resources and the

environment, including consulting with the Cherokee Nation and completing a full EIS. The Cherokee Nation also seeks an order enjoining the Catawba from commencing construction at the Kings Mountain site until and unless a full EIS is completed and Defendants fulfill their trust duty and responsibility to consult with the Cherokee Nation regarding Cherokee cultural resources.

PARTIES

11. Plaintiff the Eastern Band of Cherokee Indians is a federally-recognized Tribal Nation with its headquarters located on the Qualla Boundary, the Eastern Band Cherokee Reservation, at 88 Council House Loop, Cherokee, North Carolina, 28719.

12. Intervenor-Plaintiff the Cherokee Nation is a federally recognized Tribal Nation with its headquarters located in Tahlequah, Oklahoma. The Nation's reservation boundaries encompass all or part of fourteen counties in what is now the northeastern part of Oklahoma—the Nation's home since forced removal from Cherokee historical territory. The Nation and the Government entered into numerous treaties and other agreements throughout the years and continue to enter into various agreements.

13. Defendant Department of the Interior ("Interior" or "DOI") is a federal executive department of the United States government, which was established by Congress and charged with responsibility for managing and administering certain federal authorities and obligations related to Indian Tribes, and upholding trust responsibilities owed to Indian Tribes, including the Cherokee Nation.

14. Defendant Bureau of Indian Affairs is a sub-bureau of, and an agency within, Interior that has the responsibility for carrying out substantial trust responsibilities to the Nation.

15. Defendant David Bernhardt is the Secretary of the United States Department of the

Interior, whose office is located at 1849 C Street, N.W., Washington D.C., 20240. In his capacity as Secretary, Congress has authorized and delegated responsibilities to carry out federal administration of tribal lands acquisition and programs. The Secretary has delegated his authority to take lands into trust to the Assistant Secretary for Indian Affairs by Part 209, Chapter 8 of the Departmental Manual. He is sued in his official capacity only.

16. Defendant Tara Katuk Mac Lean Sweeney is the Assistant Secretary for Indian Affairs, whose office is located at 1849 C Street, N.W., Washington D.C., 20240. The Assistant Secretary has direct line authority over the Bureau of Indian Affairs ("BIA") Regional Offices, including the Eastern Region. She is sued in her official capacity only.

17. Defendant R. Glen Melville is the Acting Regional Director for the Eastern Regional Office of the BIA, whose office is located at 545 Marriott Drive, Suite 700, Nashville, Tennessee, 37214. Director Melville oversees the transfer of title from fee simple to tribal trust and has been directed to take the lands in North Carolina into trust upon completion of ministerial tasks. He is sued in his official capacity only.

JURISDICTION AND VENUE

18. This Court has subject matter and personal jurisdiction over Intervenor-Plaintiff's claims as they present civil actions arising under the laws of the United States (28 U.S.C. § 1331), are brought by a federally recognized Indian Tribe wherein the matter in controversy arises under federal law (28 U.S.C. § 1362), and are premised upon legal wrongs committed by a federal agency under the APA, 5 U.S.C. §§ 702, 706. This case challenges the legality of Department decisions and actions based on the NHPA and NEPA, and the federal regulations implementing them.

19. Venue is proper in the U.S. District Court for the District of Columbia under 28 U.S.C.

§ 1391(b) and (e)(2) because the United States and federal officers acting in their official capacities and under color of legal authority are Defendants, and substantial parts of the events giving rise to these claims occurred in the District.

20. The United States has waived its sovereign immunity from suit in 5 U.S.C. § 702.

21. The March 12, 2020 Decision declares that it is a final agency action subject to judicial review under the APA, 5 U.S.C. § 704, *see* ECF No. 1-2, and in accordance with 40 C.F.R. § 1500.3, the NHPA and NEPA claims involve actions that will result in irreparable injury to the Cherokee Nation.

STATEMENT OF FACTS

A. The Cherokee Nation and Its Treaty and Historical Territory

22. The Cherokee Nation is a federally recognized Tribal Nation based in Tahlequah, Oklahoma.

23. With more than 370,000 citizens, the Cherokee Nation is the largest Tribe in the United States. The Nation's citizens descend primarily from the Cherokees who survived the Trail of Tears—the forced removal of Cherokees from the Nation's historic territory, which includes present-day Cleveland County, North Carolina, to what is now Oklahoma.

24. Before contact with non-Indians, the Cherokee lived in and governed the southeastern part of what is now the United States, in the states of North Carolina, South Carolina, Alabama, Georgia, Kentucky, Tennessee, and Virginia.

25. Despite removal, the Cherokee Nation has fought to preserve its separate history, culture, language, and sovereignty. Because of this commitment, the Cherokee Nation continues to maintain traditional cultural practices, many of which are tied to Cherokee historical territory that has existed since time immemorial.

26. The Cherokee Nation also fights to protect from disturbance Cherokee remains and items of cultural patrimony within Cherokee treaty and traditional lands.

27. The Cherokee Nation, primarily through its Tribal Historical Preservation Officer ("THPO"), relies on NHPA and NEPA requirements to protect Cherokee patrimony within the Cherokee historical territory. The Cherokee Nation THPO consults with federal agencies, private organizations and companies, and individuals to ensure NHPA and NEPA compliance, reviewing between 4,000 and 5,500 cultural resource consultation requests per year. Toombs July Decl. ¶ 5.

28. Through the Cherokee Treaty of July 20, 1777, the Cherokees agreed to cede certain lands in present-day North Carolina to the Commissioners from the State of North Carolina. The 1777 Treaty cession area includes present-day Cleveland County, North Carolina[1].

29. Because Cleveland County is within the Cherokee historical and treaty territory, federal agencies, as a matter of course, contact the Cherokee Nation to ensure federal actions properly evaluate and protect Cherokee cultural resources.

30. The Cherokee Nation continues to exercise cultural sovereignty over the Cleveland County area—which borders South Carolina—through cultural resource protection through the Nation's THPO. Toombs July Decl. ¶ 6.

31. Since October 1, 2019, the Cherokee Nation has completed ninety (90) cultural resource reviews in the State of North Carolina, two (2) of which were in Cleveland County,

[1] The Cherokee Nation subsequently entered into the Treaty of New Echota on December 29, 1835, wherein, the Cherokee Nation ceded all land holdings east of the Mississippi River. Treaty of New Echota art. 1, *eff*. May 23, 1836, 7 Stat. 478.

North Carolina.[2] Toombs July Decl. ¶ 6. All such reviews were conducted upon receiving notice of proposed federal agency action to satisfy the requirements of the NHPA and NEPA. *Id*. at ¶ 6.

B. Catawba's Land Into Trust Application

32. On September 17, 2018, Catawba submitted a discretionary application pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108 (formerly codified at 25 U.S.C. § 465), and implementing regulations at 25 C.F.R. Part 151, requesting an off-reservation acquisition.

33. In December 2019, the BIA published a Draft Environmental Assessment ("Draft EA") online on a non-governmental website (http://catawbanationclevelandcountyea.com) for the transfer of the Kings Mountain site into federal trust status for Catawba. The Draft EA listed Catawba as Applicant, and the Department of the Interior, BIA, Eastern Region Office as Lead Agency. The Cherokee Nation was not among the parties consulted prior to completion of the Draft EA.

34. The Cherokee Nation never received notice or communication from the Defendants concerning the availability of a Draft EA, or a request for the Cherokee Nation to review and comment on the Draft EA. Toombs July Decl. ¶ 8.

35. The Draft EA makes no mention of the Kings Mountain Site being within Cherokee treaty or historic lands.

36. The Defendants did not attempt to initiate any type of communication with the Cherokee Nation concerning the Kings Mountain site, much less invite the Nation to consult on the project. *See* Toombs July Decl. ¶ 8. At no point before or after the preparation of the Draft

[2] Since October 1, 2017, the Cherokee Nation has completed 525 cultural resource reviews in the State of North Carolina, eight (8) of which were located in Cleveland County North Carolina. *See* Toombs July Decl. ¶ 7.

EA did the BIA extend an offer to consult, or attempt to engage in any consultation with the Cherokee Nation—as required by § 106 of the NHPA, which is incorporated into NEPA—to "make a reasonable and good faith effort to identify any Indian tribes . . . that might attach[] religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2).

37. The BIA failed to make a good faith or reasonable effort to involve the Cherokee Nation as an interested Tribe under the NHPA.

38. Defendants' failure to consult with the Cherokee Nation constitutes an arbitrary and capricious agency action in violation of federal law. Defendants' duty under federal law is to consult with *all* Tribes that maintain historical ties to a site and might be affected by a federal undertaking at that site. Whatever communication Defendants may have had with the EBCI concerning the Kings Mountain site could never satisfy Defendants' duty to engage in good faith consultation with the Cherokee Nation.

39. Although Defendants did not give the Cherokee Nation an opportunity to comment on the Draft EA, the Cherokee Nation agrees with and incorporates the issues the EBCI raised in its January 22, 2020 comments on the Draft EA concerning Defendant's failure to appropriately evaluate and protect cultural resources within the Cherokee aboriginal and historic territory. *See* ECF No. 1-3.

40. Even after the EBCI submitted their concerns, and their request for an EIS, Defendants did not invite the Cherokee Nation to consult on the Kings Mountain site.

41. The fact that BIA did not reach out to the Cherokee Nation *prior* to drafting, creating, and publishing the Draft EA was indeed surprising, since, as Ms. Toombs explained:

> In my experience, the BIA typically consults with the Cherokee Nation prior to the release of a draft Environmental Assessment for lands that are within the Cherokee Nation's treaty and historical territory.

Toombs July Decl. ¶ 7.

42. The Cherokee Nation has reviewed and agrees with the conclusion of the EBCI's THPO that the Kings Mountain is likely to contain Cherokee cultural resources. Toombs July Decl. ¶ 12.

43. Defendants *never* contacted the Cherokee Nation or the Nation's THPO in relation to identifying and otherwise protecting Cherokee cultural or ceremonial items of patrimony at the Kings Mountain site.

44. Had Defendants consulted with the Cherokee Nation, however, the Nation's THPO "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." Toombs July Decl. ¶ 10.

45. No one from the BIA ever informed anyone at the Cherokee Nation that Defendants were moving forward with *final agency action* and that Defendants would not, in this instance, work with the Cherokee Nation's THPO to conduct the cultural survey that ordinarily the parties would collaboratively undertake.

46. Without the good faith consultation process guaranteed by the NHPA, Defendants' final agency could destroy or harm Cherokee religious or cultural sites. *See* Toombs July Decl. ¶ 10 ("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*. The substantive threat that Cherokee cultural resources will be destroyed constitutes an irreparable injury that warrants the provision of immediate injunctive relief.

C. The Department's March 12, 2020 Decision

47. On March 12, 2020—without engaging in proper tribal consultation and without publishing a Final EA, FONSI, or EIS—Defendant Tara Sweeney, Assistant Secretary – Indian Affairs, signed and issued a Decision directing the transfer of the Kings Mountain site into trust for Catawba, constituting a final agency action for purposes of judicial review. March 12 Decision, ECF No. 1-2.

D. The March 12 Decision Does Not Comply with the Laws the BIA Actually Applied to the Decision

48. In addition to the foundational flaws, the March 12 Decision falls far short of complying with the APA, NEPA, and the NHPA.

a. The March 12 Decision does not include any mention of tribal consultation under § 106 of the NHPA.

b. The March 12 Decision does not consider the fact that the Kings Mountain site is located within Cherokee historic and treaty lands.

c. The March 12 Decision does not consider the significant cultural and historical ties the Cherokee Nation and the EBCI have to the Kings Mountain site.

d. The March 12 Decision does not consider the EBCI's January 22, 2020 Comments alerting the BIA to substantial deficiencies in the Draft EA, and fails to provide an explanation as to why Defendants did not consult at any point with the Cherokee Nation as an interested party in identifying historic cultural areas.

e. The March 12 Decision claims that a "final" EA was completed in March 2020, but the Final EA was not published until March 23, 2020, and even then, generically states that it was prepared in "March 2020," omitting the specific date on which it was actually completed.

f. The March 12 Decision purportedly relies upon a Final EA that shows that Defendants never communicated—much less consulted—with the Cherokee Nation.

49. Simply put, the Assistant Secretary's actions are contrary to law, arbitrary, capricious, and constitute an abuse of discretion.

50. The Assistant Secretary's issuance of a Decision before the Final Environmental Assessment and Finding of No Significant Impact have been published, and before any consultation with the Cherokee Nation has occurred, constitutes an abuse of discretion and was improper.

51. The Assistant Secretary's issuance of a Decision based on a Final EA that willfully ignores the Cherokee Nation's interest in Cherokee historical territory at the Kings Mountain site constitutes an abuse of discretion and was improper.

52. Despite having received a communication from the EBCI's THPO on March 16, 2020 indicating that Defendants needed to undertake a cultural survey to ensure Cherokee cultural resources would not be harmed, the Final EA, completed seven days later on March 23, 2020, makes no mention of the EBCI THPO's March 16 communication to Defendants. This omission underscores the arbitrary and capricious nature of Defendants' actions. Nor does the Final EA address why the Cherokee Nation—having co-extensive historic territory with the EBCI at this location—was not consulted on the Kings Mountain project.

53. If injunctive relief does not issue to maintain the status quo, the Cherokee Nation will be irreparably harmed because the Cherokee Nation will have lost its sovereign right, as a Tribal Nation, to engage in NHPA § 106 consultation concerning a major federal action within traditional Cherokee homeland. *See* 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 consultation on and protection of Cherokee religious and cultural sites.").

54. Moreover, once the land is transferred into trust for Catawba, the Cherokee Nation will never be able to recover cultural items or investigate the known archaeological evidence at the Kings Mountain site. *See* Toombs July Decl. ¶ 11. This presents an imminent threat of irreparable harm to the Cherokee Nation.

E. The Final EA and FONSI—Published on March 23, 2020—Do Not Cure the Defects of the March 12 Decision; Nor Do Arguments Subsequently Relied Upon by Defendants

55. The Final EA and FONSI are completely devoid of any mention of the Cherokee Nation, including any mention of the Nation's sovereign interest in protecting and preserving items of Cherokee cultural and ceremonial patrimony that still exist in Cherokee historical treaty territory.

56. The Final EA and FONSI fail to resolve any of the issues raised in the EBCI's January 22 Comments.

57. The mitigation measures Defendants placed in the Final EA will do nothing to mitigate the damage Defendants' final agency action has caused, and will continue to cause, absent injunctive relief, to the Cherokee Nation's sovereign interest in protecting Cherokee cultural resources. The Final EA's mitigation measures do not authorize a professional archaeologist approved by the Cherokee Nation to assess the significance of any historical properties or cultural patrimony discovered during future construction at the site.

58. The Final EA does not require notification of the Cherokee Nation's THPO of any discovery of human remains or cultural resources.

59. Even if such a find is significant, the Final EA does not require the responsible archaeologist—who will be chosen by Interior or by the Catawba—to meet with the Cherokee Nation's THPO to determine the appropriate course of action.

60. The Final EA does not require notification of the Cherokee Nation's THPO if human remains are uncovered during construction at the site.

61. Even if such remains are Native American, the Final EA does not require construction to halt while the Cherokee Nation's THPO makes findings as to the remains' origins and disposition.

62. The Cherokee Nation has never been consulted and will face immediate and irreparable harm should the Defendants be allowed to take the Kings Mountain site into trust for Catawba. The harm is neither speculative nor distant, as Defendants have made clear to this Court they are willing to remove Cherokee historical territory from the consultation process without even sending an invitation to the Cherokee Nation to consult.

63. Moreover, the recent statements Defendants have made calling into question the Cherokee Nation's legitimate connection to lands the Nation ceded pursuant to the Treaty of 1777 reveal that Defendants have violated, and continue to violate, their trust duties and obligations to the Cherokee Nation.

CLAIMS FOR RELIEF

Count I: Violation of the APA and the NHPA

64. Intervenor-Plaintiff incorporates by reference the allegations in the preceding paragraphs.

65. The APA requires a court to set aside an agency's actions if they are "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

66. The Defendants' failure to provide adequate notice and consult with the Cherokee Nation constitutes an arbitrary and capricious action that violates the NHPA and, as a result, the APA.

67. Section 106 of the NHPA, 56 U.S.C. § 306108, requires that agencies of the United States, "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."

68. Prior to approval of a federal undertaking, the agency must: (a) identify the "historic properties" within the area of potential effects; (b) evaluate the potential effects that the undertaking may have on historic properties; and (c) resolve the adverse effects through the development of mitigation measures. 36 C.F.R. §§ 800.4; 800.5; 800.6.

69. The regulations implementing the NHPA recognize and honor the government-to-government relationship the United States maintains with Indian Nations, and consequently, in implementing the NHPA, the regulations establish a framework through which consulting with Indian Nations is not optional, but instead, is mandatory.

70. Consultation with an Indian Tribe must recognize the government-to-government relationship between the Federal Government and the Tribe, and the consultation should be conducted in a manner "sensitive to the concerns and needs of the Indian Tribe . . ." 36 C.F.R. § 800.2(c)(2)(ii).

71. Consultation should provide the Tribe with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic

properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A).

72. Tribal consultation should be conducted concurrently with NEPA analyses, as historic and cultural resources are expressly included among the factors to be considered under NEPA's own requirements. 36 C.F.R. § 800.8.

73. The regulations acknowledge that Indian Tribes have special expertise in identifying historic properties. *See* 36 C.F.R. § 800.4 (c)(1) ("The agency official shall acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.").

74. In initiating the § 106 process, Defendants were required to make a "reasonable and good faith effort" to identify Indian Tribes who may attach "religious and cultural significance" to historic properties that may be affected by the proposed undertaking and invite them to participate as consulting parties in the § 106 process. 36 C.F.R. § 800.2(c)(2)(ii) (A)-(D); § 800.3(f)(2).

75. Defendants were also required to consult with interested parties, including Indian Tribes, in the identification of potentially affected historic properties. To satisfy the requirement of reasonable, good faith efforts to determine potential adverse effects, Defendants were required to gather information from a variety of sources, including a review of "existing information on historic properties within the area of potential effects." 36 C.F.R. § 800.4(a)(2).

76. Defendants were required to "[s]eek information" from "consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties

in the area and identify issues relating to the undertaking's potential effects on historic properties." 36 C.F.R. § 800.4(a)(3).

77. In addition, the governing regulations required Defendants to "[g]ather information from any Indian tribe . . . to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them . . . recognizing that an Indian tribe . . . may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites." 36 C.F.R. § 800.4(a)(4).

78. Defendants' obligation to make a reasonable and good faith effort may include "background research, consultation, oral history interviews, sample field investigation, and field survey." 36 C.F.R. § 800.4(b)(1).

79. Defendants must "take into account" "the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." 36 C.F.R. § 800.4(b)(1). The area of potential effects is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. § 800.16(d).

80. The NHPA regulations also establish criteria for determining an adverse effect on a historic site.

81. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative. 36 C.F.R. § 800.5(a)(1).

82. After applying these and other considerations, if and when Defendants make a finding of no adverse effect, Defendants are required to notify the consulting parties of that finding and

provide them with specific documentation sufficient to review the finding. 36 C.F.R. § 800.5(b) and (c).

83. Despite the aforementioned laws and governing regulations, Defendants never emailed, mailed, or shared with the Cherokee Nation, in any format, the Draft Environmental Assessment they completed in December 2019.

84. Despite the aforementioned laws and governing regulations, Defendants never invited the Cherokee Nation to engage in consultation, under NHPA §106. Defendants sent no written correspondence to the Cherokee Nation's THPO, nor did Defendants call or engage in any form of communication that could be interpreted as an invitation to consult concerning Defendants' proposed final agency action of taking the Kings Mountain site into trust for Catawba. Defendants made *no effort* whatsoever to consult with the Cherokee Nation.

85. Defendants did not make any efforts to consult with the Cherokee Nation in good faith during the environmental review process encompassing the historic preservation analysis. Defendants never called an elected leader, the THPO, or any employee at the Cherokee Nation or sent a representative to the tribal headquarters to make a good faith attempt to consult. *See* Toombs July Decl. ¶8. Any communications Defendants may have had with the EBCI cannot satisfy Defendants' duty, under federal law, to consult with the Cherokee Nation before taking the Kings Mountain site into trust on behalf of the Catawba.

86. The Cherokee Nation THPO is responsible for consulting with federal agencies who must comply with the National Historic Preservation Act and the National Environmental Policy Act within the Cherokee aboriginal and historical territory, which includes Cleveland County, North Carolina, where the land Defendant Department of the Interior plans to take land into trust for Catawba *See* Toombs July Decl. ¶ 4.

87. The Cherokee Nation THPO has engaged in numerous consultations with federal agencies concerning federal agency actions they were considering undertakings within Cherokee Nation's historic treaty territory, and consequently NHPA §106 requires federal agencies to consult, in good faith, with the Cherokee Nation before undertaking final agency action in Cleveland County.

88. Defendants, in this litigation, have taken the position that they were under no obligation to consult with the Eastern Band of Cherokee Indians or Cherokee Nation because the Nation's treaty claims to Cleveland County are "dubious" at best. Defendants' arguments, in this regard, render their final agency action arbitrary and capricious since the analysis of the Cherokee Nation's historical connections to the Kings Mountain site, pursuant to the Treaty of 1777, was not considered—or even dismissed—in Defendants' March 12 Decision.

89. Likewise, Defendants' attempt to denounce the Cherokee Nation's treaty ties to the Kings Mountain site requires reversal of their final agency action as it renders the action contrary to law. NHPA § 106 requires federal agencies to engage in good faith consultation with Tribal Nations if and when the agency considers undertaking a final agency action on lands that a Tribal Nation ceded by treaty. Nothing in NHPA § 106 grants Defendants any authority to question the legitimacy of a treaty and the Defendants' decision to do so here, albeit a litigation strategy, renders their actions in violation of the Department of Interior's trust obligations to the Cherokee Nation and requires reversal of Defendants' final agency action, as well as this Court's ordering that Defendants complete a full EIS that involves good faith consultation with the Cherokee Nation.

90. As explained above, the Kings Mountain site is likely to contain Cherokee cultural resources and these resources may be disturbed as a result of construction at the Kings Mountain

site, absent consultation with the Cherokee Nation THPO and performance of the requisite cultural survey.

91. If the Cherokee Nation THPO had been contacted, the THPO 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, the THPO would have registered an objection on the basis that the site has religious and cultural significance to the Cherokee Nation. *See* Toombs July Decl. ¶ 10.

92. These identifications, alone, trigger a process where Defendants are obligated, under NHPA § 106 and implementing regulations to work with the Cherokee Nation to conduct a cultural survey on the land at issues so Cherokee Nation could determine whether religious or cultural items are present at the site—but Defendants have never undertaken this requisite cultural survey, nor have they even communicated to Cherokee Nation that they were considering undertaking a final agency within Cherokee Nation's historic treaty territory.

93. Defendants acted arbitrarily and capriciously and with abuse of discretion by issuing the March 12 Decision permitting the transfer of aboriginal Cherokee lands into trust status for Catawba without ever publishing a Final EA, FONSI, or EIS.

94. Defendants acted arbitrarily and capriciously and with abuse of discretion by failing to engage in the requisite identification efforts with the Cherokee Nation, as required by 36 C.F.R. § 800.2(c)(2)(ii)(A).

95. As a result, the Cherokee Nation never had a chance to exercise its sovereign right to protect Cherokee cultural patrimony and cultural resources, including potential burials, and now faces the imminent threat of losing access to its aboriginal territory forever.

96. The loss of the Cherokee Nation's sovereign right to protect its cultural resources

within its historic treaty territory constitutes a substantive right that is not procedural in nature.

97. Defendants failed to consult with the Cherokee Nation in good faith during the environmental review process, and as a result, Defendants' actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA as a result of the allegations in this Complaint, Defendants have violated NHPA (56 U.S.C. § 306108) and the APA (5 U.S.C. § 706(2)(A)).

98. Defendants' failure to even send the Draft EA, or a simple email or letter, to the Cherokee Nation concerning its plans to take the Kings Mountain site into trust demonstrates Defendants' blatant disregard for the law and warrants the imposition of immediate injunctive relief to prevent Defendants from completing the land-into-trust acquisition.

Count II: Violation of the APA and the NEPA

99. Intervenor-Plaintiff incorporates by reference the allegations in the preceding paragraphs.

100. The APA requires a court to set aside an agency's actions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

101. NEPA's procedural requirements are triggered where a federal agency engages in a "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

102. 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)).

103. Pursuant to the Council on Environmental Quality's implementing regulations, federal agencies may comply with NEPA by preparing either an environmental impact statement ("EIS") or an environmental assessment ("EA"). 40 C.F.R. § 1501.4.

104. An EA is a public document containing information relating to the need for the proposed action being considered, other alternatives, the environmental impact of the proposal and its alternatives, and a listing of agencies and persons consulted. 40 C.F.R. § 1508.9(b).

105. An EIS is a detailed statement of the environmental impact of a proposed project as required by § 102 of NEPA, 42 U.S.C. § 4332, including the "environmental effects" for any action "significantly affecting the quality of the human environment." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F. 3d 1075, 1082 (D.C. Cir. 2019) (internal citations omitted) (citing 42 U.S.C. § 4332(2)(C)). "[S]uch effects can be, among others, historic, 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.); *see* 40 C.F.R. § 1508.11.

106. When determining whether to undertake a full 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).

107. When analyzing "intensity," an agency must consider the ten factors listed in 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.

108. Defendants' Final EA 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.

109. By disregarding the important status of the 1777 Cherokee Treaty Territory and Cherokee Nation's treaty rights to protect its 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."

110. 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." Defendants' March 12 Decision constitutes the first time Defendants have decided to take land into trust, in the treaty territory of other Tribal Nations, for a Tribe located in a different State.

111. Defendants did not send any communication or invitation to the Cherokee Nation THPO, or the Nation itself, to permit the Cherokee Nation to engage in the good faith consultation to preserve and protect the cultural resources that Factor 8 commands Defendants consider. Accordingly, Defendants' completion of the Final EA, and failure to instead undertake a full EIS, constitutes an error of law that requires this Court's reversal and remand.

112. Under the relevant factors in 40 C.F.R. § 1508.27(b), the Defendants' proposed final

agency action compels an EIS. An EA is insufficient to assess the impacts on the environment and impacted parties, including the significant controversy and unprecedented nature of Defendants' actions.

113. Defendants' failure to undertake an EIS is arbitrary and capricious, an abuse of discretion, and in violation of law.

114. Instead of undertaking an EIS, in December 2019, the BIA published a Draft Environmental Assessment ("Draft EA") online on a non-governmental website (http://catawbanationclevelandcountyea.com) for the transfer of the Kings Mountain site into federal trust status for Catawba for. The Draft EA listed Catawba as Applicant, and the Department of the Interior, BIA, Eastern Region Office as Lead Agency. The Cherokee Nation was not among parties consulted prior to the Draft EA. The BIA also published Notices of Availability for the EA in the *Charlotte Observer*, on December 22, 2019, *Gaston Gazette* on December 28, 2019, and *Shelby Star* on January 3, 2020.

115. Although the EA assessed the development of the Kings Mountain site, it made no mention of the Site being within historic Cherokee treaty or historic lands.

116. The BIA did not attempt to invite the Cherokee Nation for public comments when the Draft EA was published.

117. At no point before the preparation of the Draft EA did the BIA extend an offer to consult, or attempt to engage in any consultation with the Cherokee Nation—as required by § 106 of the NHPA, which is incorporated into NEPA—to "make a reasonable and good faith effort to identify any Indian tribes . . . that might attach[] religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2).

118. The BIA failed to make a good faith or reasonable effort to involve the Cherokee Nation as an interested Tribe under the NHPA.

119. If Defendants determined that an EIS is not necessary, NEPA and its implementing regulations require Defendants to issue a "Finding of No Significant Impact" prior to undertaking a major federal action. 40 C.F.R. § 1508.27. Defendants failed to complete and issue either a Final EA or a FONSI until March 23, 2020—eleven days after taking final agency action on March 12, 2020. *See* Final EA, ECF No. 13-1; *see also* http://catawbanationclevelandcountyea.com/ (dating publication of EA and FONSI as March 23, 2020).

120. Defendants' Final EA does not satisfy Defendants' obligations under NEPA because the Final EA does not list the Cherokee Nation as a party whom Defendants consulted, in violation of 40 C.F.R. § 1508.9(b). *See* Final EA, Appendix L, ECF No. 13-1.

121. Defendants' Final EA does not satisfy Defendants' obligations under NEPA because the Final EA does not consider the Cherokee Nation's historical ties to the land or mention the Cherokee Nation at all. *See* Final EA, ECF No. 13-1.

122. Defendants' failure to consult with the Cherokee Nation during the environmental review process is arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA.

123. Defendants' failure to consider the Cherokee Nation's historical and cultural interest in the Kings Mountain site is arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA.

124. Defendants' failure to publish a Final EA or a FONSI prior to undertaking major federal action demonstrates their failure to comply with the mandate that NEPA documentation present the public and the decision maker with a "hard look" at the impacts of the federal action.

125. NEPA and its implementing regulations require that federal agencies take a "hard look" at environmental impacts of proposed projects and measures to mitigate these environmental impacts. Agencies are required to develop, discuss in detail, and identify the likely environmental consequences of proposed mitigation measures. 40 C.F.R. § 1508.25(b); 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h); 40 C.F.R. § 1505.2(c).

126. This is especially true where Defendants undertake a federal action without precedent. *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] the nature of the proposed action is one without precedent.").

127. Defendants issued a Final EA that contains *no* genuine alternative courses of action (aside from taking no action at all). The omission of these alternatives from the Final EA fails to comply with the mandate that NEPA analysis and documentation be based on a reasonable range of alternatives. 42 U.S.C. §§4332(C)(iii) & (E).

128. NEPA requires that agencies consider, evaluate and disclose to the public "alternatives" to the proposed action and "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of resources." 42 U.S.C. §§ 4332(C)(iii), (E). NEPA's implementing regulations require federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14. Additionally, the evaluation of

alternatives must constitute a "substantial treatment," presenting the impacts of the alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and public." *Id.*

129. Agencies must "provide *legitimate* consideration to alternatives . . . ." *New Mexico ex rel. Richardson*, 565 F.3d at 711 n.32 (emphasis added).

130. The "alternatives" section is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14.

131. The "alternatives" section in the Final EA offers no alternatives to the Kings Mountain site development project. Rather, the only alternatives considered in the Final EA (besides taking no action at all) are various adjustments to the size and scope of the project on the Kings Mountain site. *See* Final EA 8-23, ECF No. 13-1.

132. The Final EA does not list any alternatives outside of Cherokee Treaty Territory. *Id*. The failure to consider taking land into trust for Catawba outside of Cherokee Nation's treaty territory is arbitrary, capricious, an abuse of discretion, and demonstrates that Defendants final agency action was not in accordance with law in violation of the APA.

133. Defendants' decision to consider *no* alternatives to taking the Kings Mountain site into trust in preparing their EA is arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA.

134. NEPA regulations require that a Finding of No Significant Impact be made "available to the affected public" and that the public and other affected agencies shall be involved in NEPA procedures. 40 C.F.R. §§ 1501.4(e)(1), 1506.6.

135. Adequate notice requires a meaningful effort to provide information to the public

affected by Defendants' actions. "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. §§1500.1(b), 1506.6(b)(1) ("In all cases the agency shall mail notice to those who have requested it on an individual action."). NEPA implementing regulations additionally provide extensive public involvement requirements. *Id.* at §1506.6.

136. Defendants' failure to publish either a Final EA or a FONSI prior to undertaking major federal action establishes that Defendants have failed to provide adequate public notice.

137. NEPA's regulations require Defendants to "send the FONSI notice . . . *to the appropriate tribal,* local, State and Federal agencies . . . ." 24 C.F.R. § 58.43(a) (emphasis added). Defendants have failed to do so.

138. Defendants did not provide any notice to the Cherokee Nation of the EA or FONSI.

139. To date, Defendants have never shared the EA or FONSI with the Cherokee Nation.

140. Defendants have not attempted to consult or made any contact with the Cherokee Nation regarding the EA, FONSI, or Catawba land into trust application. As a result, the Cherokee Nation never had a reasonable opportunity to comment on the EA, never had the opportunity to engage in government-to-government consultation, and has not had any opportunity to investigate cultural resources or provide input regarding the Defendants' major federal action over Cherokee Treaty Territory.

141. Defendants violated NEPA and its implementing regulations by failing to complete an EIS, which is arbitrary and capricious, an abuse of discretion, and not in accordance with law and therefore in violation of the APA, 5 U.S.C. § 706(2)(A).

142. Defendants have additionally violated their NEPA duties by failing to provide

adequate public notice of the EA and FONSI, failing to provide any notice to the Cherokee Nation, failing to consult with the Cherokee Nation, failing to consider the cultural and historical Cherokee ties to the Kings Mountain site, and failing to consider legitimate alternatives in the EA.

PRAYER FOR RELIEF

WHEREFORE**,** Intervenor-Plaintiff respectfully requests:

1. The Court declare that Defendants violated the APA and NHPA §106 consultation process by failing to engage in good faith consultation with the Cherokee Nation and that these actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A);
2. The Court declare that Defendants violated the APA and NEPA and its implementing regulations by failing to consult with the Cherokee Nation, failing to consider reasonable alternatives, and failing to provide complete and publish a Final EA and FONSI prior to taking final agency action, and that these actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A);
3. The Court issue an Injunction enjoining Defendant United States Department of the Interior, Defendant United States Bureau of Indian Affairs, Defendant DOI Secretary David Bernhardt, Defendant Assistant Secretary for Indian Affairs Tara Sweeney, and Defendant Acting BIA Eastern Regional Office Director R. Glen Melville from taking 16.57 acres of land into trust at the King Mountain Site, in Cleveland County, North Carolina, for the benefit of Catawba, a Tribe headquartered in South Carolina;

4. The Court issue an Injunction enjoining Defendant United States Department of the Interior, Defendant United States Bureau of Indian Affairs, Defendant DOI Secretary David Bernhardt, Defendant Assistant Secretary for Indian Affairs Tara Sweeney, and Defendant Acting BIA Eastern Regional Office Director R. Glen Melville from rendering unilateral determinations of Cherokee historical territory without consultation with the Cherokee Nation;
5. The Court issue an injunction enjoining Intervenor-Defendant Catawba Indian Nation from commencing construction at the Kings Mountain site until or unless Defendants have undertaken a full EIS and consulted with the Cherokee Nation in good faith.
6. The Defendants, their agents and employees, be ordered to initiate and conduct good faith consultation with the Cherokee Nation, including but not limited to the conduction of a full archeological and cultural survey at the Kings Mountain site under the Cherokee Nation THPO's oversight and administration;
7. The Defendants be ordered to complete an Environmental Impact Statement;
8. The Defendants be assessed the costs of this action;
9. That attorneys' fees be awarded to Intervenor-Plaintiff as authorized under 54 U.S.C. § 307105 for claims brought under the NHPA through the APA; and
10. The Intervenor-Plaintiff have such other and further relief as the Court deems just.

Respectfully submitted this 6th day of July, 2020.

Sara Elizabeth Hill (admitted *pro hac vice*)
Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948

Tel – 918-456-0671
Fax – 918-458-5580
Email – sara-hill@cherokee.org

Chad Harsha (admitted *pro hac vice*)
Secretary of Natural Resources
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
Tel – 918-207-3836
Fax – 918-458-6142
Email – chad-harsha@cherokee.org

/s/ Paiten Taylor-Qualls
Paiten Taylor-Qualls (OK0013)
Assistant Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
Tel – 918-453-5239
Fax – 918-458-5580
Email – paiten-qualls@cherokee.org

Attorneys for Intervenor-Plaintiff Cherokee Nation

CERTIFICATE OF SERVICE

I, Paiten Taylor-Qualls, hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on July 6, 2020, upon all counsel of record.

By: /s/ Paiten Taylor-Qualls