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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MOTION FOR SUMMARY JUDGMENT

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 MacLean 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 (Federal Defendants), hereby respectfully move the Court, pursuant to FRCP 56, LR 7(h)(2), and Minute Order Entered August 11, 2020, to grant summary judgment for Federal Defendants on the grounds that the challenged decisions of the Federal Defendants are supported by the record and by the law and, for the same reasons, to deny Plaintiffs' motion for summary judgment (ECF No. 52) (Pls.' Mot.).

This motion is supported by the supporting Memorandum that follows.

Respectfully submitted,

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November 9, 2020.

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

On September 17, 2018, Catawba Indian Nation (Catawba) filed an application with the Department of the Interior (Interior) requesting that it take the Kings Mountain site in North Carolina into trust for Catawba's benefit. *See* AR3855-56; *see generally* Indian Reorganization Act, 25 U.S.C. §§ 5101-5144 (IRA); 25 C.F.R. Part 151 (2020). Catawba also asked for a determination of whether the land, once in trust, would be eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). *See* AR3855; *see also* 25 C.F.R. Part 292 (2020) (applicable regulations). Following an eighteen-month administrative process, Interior approved the application on March 12, 2020. AR3855-92. Immediately thereafter the Eastern Band of Cherokee Indians (EBCI) filed suit seeking to invalidate the approval.

Federal Defendants are entitled to judgment. Particularly in light of the deference owed Interior's determinations (that the Kings Mountain site can be taken into trust, and used for gaming) those determinations easily withstand scrutiny under the Administrative Procedure Act. Plaintiffs' contrary arguments rest heavily on the notion that Catawba's 1993 settlement with South Carolina must be read as having controlling effects well beyond the parties' evident intentions, beyond the language of the agreement, and beyond the powers of the State. Plaintiffs' arguments under NHPA fail on the facts: nothing indicates that Cherokee patrimony is present at the site and even if it were Plaintiffs were more than adequately consulted and their interests are more than adequately protected going forward. Plaintiffs' cursory NEPA arguments likewise gain no traction: given that the land at issue is heavily degraded Interior's 800+ page Environmental Assessment is if anything procedural overkill.[1]

[1] Federal Defendants and Catawba have tried to coordinate their filings to spare the Court the burden of duplicative arguments. Federal Defendants generally endorse Catawba's arguments and here generally adopt them as complementing the arguments advanced herein.

II. STATEMENT OF FACTS

A. Catawba's Litigation and Settlement with South Carolina

In 1980, after failing to obtain a legislative settlement of its claims to its historical lands in South Carolina, Catawba sued South Carolina, setting off more than a decade of litigation. *See, e.g.*, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986); *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564 (Fed. Cir. 1993). But in 1992, Catawba, South Carolina, and the United States agreed to settle Catawba's claims, a comprehensive settlement that encompassed federal recognition of Catawba and the restoration of its trust status. As relevant here, this settlement is reflected in three documents.

First, Catawba and South Carolina executed an "agreement in principle" to settle Catawba's land claims against the state. AR539-583. It provided that Catawba would dismiss its lawsuits. AR546. In return, for South Carolina would transfer title to Catawba's existing reservation to Interior, AR563, as well as pay (along with the United States) into a trust fund established in part to permit Catawba to acquire additional land. AR544-545.

The settlement also established procedures by which land purchases in South Carolina could take place. AR563-571. This included purchases of both reservation and non-reservation land, both of which would be "subject to the laws, ordinances, taxes, and regulations of" South Carolina. AR571. The settlement further provided that gaming by Catawba in South Carolina ("on and off the reservation") would be governed by state law (as modified by the agreement and state implementing legislation), not federal law. AR571-572.

Second, Congress enacted the Settlement Act to approve aspects of the settlement that required such approval. The Act "restored" the "trust relationship between the [Catawba] and the United States," Settlement Act § 4(a)(1), 107 Stat. at 1121, and made Catawba "eligible for all

benefits and services furnished to federally recognized Indian tribes and their members," *id.* §4(b), 107 Stat. at 1121. It also allowed Catawba to organize under the IRA, providing that Catawba would be "subject to [the] Act." *Id.* §9(a), 107 Stat. at 112. And the law adopted the settlement's land-acquisition and gaming provisions. *Id.* §§12-14, 107 Stat. at 1133-1136.

Third, South Carolina enacted Catawba Indian Claims Settlement Act, 1993 S.C. Act No. 142, S.C. Code Ann. §§ 27-16-10 to 27-16-150 (1993). Among other things, the State Act implemented the settlement agreement's procedures for Catawba's acquisition of new land, as well as the rules that would govern Catawba's conduct of gaming activities within South Carolina. *See* S.C. Code Ann. §§27-16-90, -100, -110.

B. Catawba's Land-Into-Trust Application

Roughly a decade ago, Catawba—in an effort to generate much-needed revenue and economic development for its people—sought to develop a casino and entertainment complex on the 16.57-acre Kings Mountain site adjoining an I-85 interchange in Cleveland County, North Carolina. AR181-428; AR 2530; AR3856. The land is only thirty-four miles from Catawba's South Carolina headquarters, AR3850, and within Catawba's aboriginal lands, AR3863; *see also* AR467. The site has experienced varied development over the last century, including tin prospecting, AR3240, the development of I-85, AR3810-25, and use as a borrow pit (and grading) for road construction in 2005-2006. AR3238. The complex is expected initially to generate $72 million in income, growing to $150 million in its fifth year. AR3851. It will create 2,600 jobs. AR3881. And it will include an "on-site gift shop [that] will enable [Catawba] to provide its members with a commercial outlet to help preserve and share [its] unique artistic and cultural heritage." AR3851. That is particularly valuable to Catawba, because although Catawba's "pottery tradition" is of "vital importance … to the expression of Catawba identity,"

tribal artisans "struggle to financially support themselves on their craft alone." *Id*.

Catawba first submitted a land-into-trust application for the Kings Mountain site to Interior in 2013, AR181-428, seeking a mandatory trust acquisition "pursuant to Section 12 of the Settlement Act." AR182. In 2018, however, the then-Deputy Secretary of Interior concluded that "the Settlement Act cannot be reasonably interpreted to support a *mandatory* trust acquisition in North Carolina without further Congressional action." AR430 (emphasis added). "[T]he Settlement Act incorporates the terms of the Settlement Agreement," the Deputy Secretary explained, and "[b]ecause North Carolina is not a party to the Settlement Agreement, the terms of the Settlement Agreement … do not and cannot bind or impose requirements on the government of North Carolina." AR430-31. Applying the "South Carolina Specific Requirements" of the Settlement Act to North Carolina, he added, would lead to "an absurd result." AR432. The Deputy Secretary recognized, however, that "there are other avenues through which the Kings Mountain parcel may be brought into trust" for Catawba, including "a discretionary fee-to-trust application under 25 C.F.R. Part 151"—i.e., pursuant to Interior's regulations implementing IRA section 5. AR434. "IGRA would apply to any 'Indian lands' acquired by the Tribe through the discretionary fee-to-trust process," he opined, because section 14 of the Settlement Act is "best read" as "replacing the IGRA framework with the [gaming] framework set forth in the Settlement Agreement for … lands" acquired pursuant to the Settlement Agreement (i.e., land in South Carolina) "*and those lands only*." AR434 n.18 (emphasis added).

Shortly thereafter, Catawba withdrew its application, AR435, and submitted a new one. AR439. This second application asked Interior to take the land into trust pursuant to the agency's land-acquisition regulations at 25 C.F.R. Part 151. AR447. It also asked for a determination of whether the land, once in trust, would be eligible for gaming. *See* AR3855.

Interior granted Catawba's second application on March 12, 2020, after completing consultation processes concerning historic properties on and environmental impact to the Kings Mountain site. AR3855-3892. The public NEPA/NHPA process was kicked off on March 19, 2019. AR3192. The Draft Environmental Assessment (EA) was published on December 22, 2019. AR3231. BIA made the EA available for state and local governments, resource agencies, and public review on December 22, 2019, for a thirty-day comment period. AR3885. The State of North Carolina received an extension until February 10, 2020, to provide comments. *Id*. BIA published Notices of Availability for the EA in the Charlotte Observer on December 22, 2019, Gaston Gazette on December 28, 2019, and Shelby Star on January 3, 2020. BIA also made the EA available online at *http://catawbanationclevelandcountyea.com*. *Id*. BIA also made sure to give the EBCI an opportunity to comment on the project, received a detailed comment letter, and responded to those comments in the Final EA. AR4199-4205, 3215, 3317-22, 3238-45.

BIA concluded that the project would have no significant environmental impact and that historic properties would not be affected. AR2504-3330 (Final EA), AR3893-3898 (FONSI).

On Catawba's application, Interior determined both that the land could properly be taken into trust under the IRA and that the land would be eligible for gaming under IGRA once in trust. AR3891; *accord* AR434 & n.18. Interior concluded both that its authority under section 5 of the IRA was (outside of South Carolina) undisturbed by the Settlement Act and that the application satisfied Interior's IRA regulations for taking land into trust. These requirements include "that acquisition of the Site in trust will facilitate tribal self-determination and economic development," AR3867; that Catawba "needs additional land … because its existing land base and tribal ventures are unable to meet [its] needs," AR3865; and that "the gaming and entertainment facility will provide a major economic benefit to" Catawba, AR3891.

Interior concluded that the site would be eligible for gaming once in trust because Catawba satisfied both parts of the "'restored lands' exception," 25 C.F.R. §292.7, to IGRA's general bar on gaming on Indian lands acquired after October 17, 1988. First, Catawba is a "restored tribe," *i.e.*, it "was federally recognized at one time," "lost its government-to-government relationship," and then was "restored to federal recognition." AR3857-59, 3872. Second, the Kings Mountain site is "restored lands," because Catawba has both modern and historical ties to it, and because Catawba's land-into-trust application was timely. AR3855-65.[2]

C. This Lawsuit

Five days after Interior approved Catawba's application, EBCI filed this action. ECF No. 1. EBCI also moved for a preliminary injunction against the Kings Mountain site being taken into trust, ECF No. 2, a motion this Court denied, ECF Nos. 21-22. By then, Catawba had intervened as a defendant, *see* ECF No. 7, and soon thereafter, the Cherokee Nation intervened as a plaintiff. *See* ECF No. 26. Defendants then moved to dismiss the complaints, ECF Nos. 36, 37, and Plaintiffs filed amended complaints (adding, in EBCI's case, individual claimants). ECF Nos. 41, 42. Defendants answered, ECF Nos. 44-45 (Federal Defendants), 46-47 (Catawba), and Plaintiffs moved for summary judgment. ECF No. 52.

EBCI brings claims under four federal laws. ECF No. 41 (EBCI Amended Complaint (EBCI Compl.)) Counts 1-4 allege that Federal Defendants violated various provisions of Catawba Indian Tribe of South Carolina Land Claims Settlement Act, Pub. L. No. 103-116, § 2(a)(4)(A), 107 Stat. 1118, 1118 (1993) (Settlement Act). Counts 1-4 also invoke provisions of IGRA and the IRA. Count 5 alleges violations of the National Historic Preservation Act, Pub. L.

[2] Notice of Interior's approval of the Catawba's land-to-trust application was published in the Federal Register. See *Land Acquisitions; Catawba Indian Nation, Kings Mountain Parcel, North Carolina*, 85 Fed. Reg. 17,093 (Mar. 26, 2020).

No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470-470x-6) (NHPA). Count 6 alleges violations of the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370m-12) (NEPA). Because none of these statutes creates a private right of action, EBCI invokes, in all six of its counts, the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559) (APA). The Cherokee Nation offers two counts, similar to EBCI's Counts 5 and 6 (under NHPA, NEPA, and APA). ECF No. 42 (Cherokee Amended Complaint ("Cherokee Compl.")).

III. ARGUMENT

"Challenges to agency decisions under the APA are properly resolved on motions for summary judgment." *Berry v. Esper*, 322 F. Supp. 3d 88, 90 (D.D.C. 2018). "Unlike with a typical summary judgment motion, however, the relevant question is not whether the record creates a material dispute of fact. Instead, the court's job is to review the decision in light of the record before the agency and to decide whether it complied with the APA." *Id*. A court can only set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "The arbitrary and capricious standard is deferential; it requires that agency action simply be reasonable and reasonably explained." *Comtys. for a Better Env't v. E.P.A.*, 748 F.3d 333, 335 (D.C. Cir. 2014) (citation and internal quotation marks omitted).

BIA's challenged decisions easily withstand APA scrutiny, and Defendants are therefore entitled to summary judgment. The determinations that the Kings Mountain site is eligible to be taken into to trust, for gaming, are consistent with governing laws and regulations; Plaintiffs' contrary arguments are based almost entirely on twin fallacies: that the proscriptions of the 1993

Settlement Agreement (and its legislative implementations) apply outside South Carolina, and that the BIA's determinations here are somehow inconsistent with Interior's decision in 2018 rejecting Catawba's mandatory land acquisition request. On their face, the Settlement and implementing Acts refute Plaintiffs' contentions. The Secretary's decisions also fully complied with the requirements of the NHPA and NEPA. As a preliminary matter, however, most of Plaintiffs' claims fail for Plaintiffs' want of standing, the subject to which we turn first.

A. Plaintiffs Lack Standing to Sue Under NHPA and the Settlement

Plaintiffs fail to demonstrate how Federal Defendants' alleged violations of NHPA have caused, or will cause, any concrete harm to their interests. None of the Plaintiffs alleges any present legal right or interest in the land. Plaintiffs assert that EBCI "exercise[s] cultural sovereignty" over the area, EBCI Compl. ¶¶ 2, 51, this legally unrecognized "cultural sovereignty" is premised on the disputed[3] assertion that the site was once Cherokee territory: even if true, that fact alone does not confer constitutional standing on EBCI, its individual plaintiffs, or the Cherokee Nation to bring suit in the absence of any actual or imminent on-the-ground injury.

Plaintiffs' claims under the Settlement fail because their asserted interests are not within the zone of interests promoted by those statutes.

1. Legal standards

Plaintiffs bear the burden of proof to establish federal jurisdiction. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992). "The Constitution limits [federal] 'judicial Power' to 'Cases'

[3] *See* ECF No.12 at 28; ECF No.13 at 22, 25, 29. *See also* AR3863-64 ("the Site is located within Catawba ancestral lands and is likely within the Nation's last reservation in North Carolina"); 25 C.F.R. § 292.2 (defining "significant historical connection" in part as land located "within the boundaries of the [Catawba's] last reservation under a ratified or unratified treaty"); ECF No. 18-1 at 3-7, 11-12 (April 15, 2020 demonstrative exhibits).

and 'Controversies," *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017) (citing U.S. Const. art. III, § 2, cl. 1), and "there is no justiciable case or controversy unless the plaintiff has standing." *Id*. (citation omitted). "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim it seeks to press." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

To meet Article III's "irreducible constitutional minimum of standing," a plaintiff must establish three elements. *Lujan*, 504 U.S. at 560. First, a plaintiff must show that it has suffered an "injury in fact" that is "concrete and particularized", not "conjectural" or "hypothetical." *Id*. (citations and internal quotation marks omitted). A plaintiff's injury must also be actual or imminent; it must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013) (citations omitted). "[A]llegations of *possible* future injury' are not sufficient." *Id*. at 409 (citation omitted). Second, a plaintiff must demonstrate "a causal connection between the injury and the conduct complained of" such that Plaintiff's injury is "fairly . . . trace[able]" to the conduct of the Defendant. *Lujan*, 504 U.S. at 560-61 (citations omitted). Third, a plaintiff must show it is likely that its injury will be redressed by a favorable decision of the Court. *Id*. at 561. "When conjecture is necessary, redressability is lacking." *West*, 845 F.3d at 1237 (citation omitted).

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. Fed. Energy Regul. Comm'n*, 807 F.3d 267, 273 (D.C. Cir. 2015). In what used to be referred to as "prudential standing," a plaintiff cannot sue under statutes never intended to promote the interests plaintiff's suit would advance, because "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v.*

Static Control Components, Inc., 572 U.S. 118, 129 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Accordingly, "[t]o secure judicial review under the APA, [Plaintiff] must show that the injuries [it] assert[s] fall within the 'zone of interests' of the relevant statute." *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 499 (D.C. Cir. 1994) (citing *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388 (1987)).

2. Plaintiffs lack standing under NHPA

Plaintiffs have not alleged or shown that the site contains any Cherokee cultural or religious artifacts, or Cherokee human remains. EBCI Compl. ¶ 206; s*ee Mem. Op.* 7-10, ECF No. 22. Plaintiffs' assertion that it is *likely* that the site contains such artifacts or remains, EBCI Compl. ¶ 206, is unsupported. While EBCI alleges that North Carolina files "show that there is evidence of an archeological investigation on the [site]," *id.*, it does not allege that this investigation pertains to, or has uncovered, Cherokee artifacts. Likewise, the fact that there may be a "historical pottery kiln and prehistoric lythic scatter" at the site, *id.* ¶¶ 9, 167, falls short of alleging harm to Plaintiffs, who do not allege that any of those materials are Cherokee.

To the contrary, EBCI's THPO, Mr. Townsend, concedes that EBCI "is unable to determine whether this final agency action will destroy or harm Cherokee religious or cultural sites," (Compl. ¶ 68, ECF No. 1), and "cannot determine whether Cherokee religious or cultural sites exist at the site." *Id.* ¶ 85. Similarly, Plaintiffs have not alleged that any human remains have been, or are likely to be, found at the site. Instead, EBCI offers only the conjecture that "[i]f there are any human remains at the site, then they are *potentially* intact below the zone of impact from" the use of the site as a borrow pit. ECF No. 41-2 ¶ 24 (emphasis added). Allegations of a "conjectural" or "hypothetical" injury do not suffice. *Lujan*, 504 U.S. at 560 (citation omitted). As the D.C. Circuit recently put it, "[s]peculation . . . 'is ordinarily fatal to standing.'" *Elec.*

Privacy Info. Ctr. v. U.S. Dep't of Com., 928 F.3d 95, 102 (D.C. Cir. 2019) (citation and internal quotation marks omitted).

Because the site is privately owned[4], Plaintiffs' suit cannot redress any supposed injury to Cherokee historical remains. Were this Court to find that there was no legal authority for the Department to take the parcel into trust, the site will remain privately owned and fully developable. *Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll.*, 799 F. Supp. 1571, 1581–82 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993) ("in the absence of ongoing federal involvement and control there is no jurisdiction for a federal court to order a federal agency to undertake NHPA review or to enjoin the project of private actors . . . [T]he redress sought is unavailable.")

To the extent EBCI and its members are seeking to promote their interests in relation to EBCI's operation of two casinos with which Catawba facility would compete, *see* EBCI Compl. ¶ 2; AR2547 (EA analyzing likely impact on EBCI casinos), their NHPA claims also fail the zone of interests test. Purely economic interests are not protected by NHPA. *Role Models Am., Inc. v. Harvey*, 459 F. Supp. 2d 28, 38 (D.D.C. 2006) (collecting cases), *aff'd on other grounds sub nom. Role Models Am., Inc. v. Geren*, 514 F.3d 1308 (D.C. Cir. 2008).

3. EBCI does not assert interests protected by the Settlement Agreement and its implementing legislation (Counts 1-3)

EBCI's first three Counts allege that Federal Defendants violated the Settlement and its implementing statutes, EBCI Compl. ¶¶ 216-49, and their motion advances those same allegations. Pls.' Mot. at 17-33. Nothing in any of the materials relied upon -- the Settlement (AR539-583), the South Carolina Act (1993 S.C. Act No. 142), and the Federal Settlement Act --

[4] ECF No. 19 at 1 (Catawba Apr. 17, 2020, Notice) ("[T]he land is currently owned by Roadside Truck Plaza, Inc., a private company owned by a citizen of North Carolina").

suggests that the interests EBCI might advance by its lawsuit are within the interests promoted, and the "right to have the Government act in accordance with law" does not confer standing. *Allen*, 468 U.S. at 754.

The parties to the Settlement are Catawba and the State of South Carolina. AR541. The land at issue was Catawba land in South Carolina. AR542. The South Carolina Act was designed to resolve claims asserted by Catawba against the State and the United States. S.C. Code Ann. § 27-16-20; *see also* 25 U.S.C. § 941(2)(b). The interests promoted are those of Catawba, South Carolina, and the United States. EBCI's interests are in no way implicated. Indeed, it is hard to see how anyone residing outside of South Carolina could assert claims within the zone of interests promoted by the Settlement.

Two cases involving the Alaska Native Claims Settlement Act (ANCSA), *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987) and *Akiachak Native Community v. U.S. Department of Interior*, 584 F. Supp. 2d 1 (D.D.C. 2008), illustrate the point. In *Akiachak* plaintiffs, Alaska Native Tribes, challenged Interior's taking Alaskan land into trust for the benefit of Native Tribes. The State of Alaska sought intervention, which plaintiffs opposed on the grounds that the State lacked prudential standing. The court held that, because Alaska was a party to ANSCA, and because plaintiffs' claims implicated ANSCA provisions of central interest to the State, the State had prudential standing. 584 F. Supp. 2d at 8 ("Alaska, as a party to ANCSA and obligated under its terms . . . could sustain injury that is clearly within the zone of interests protected and regulated under this statute") (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 155 (1970)).

In contrast, in *Griles*, plaintiffs were environmental protection organizations who challenged a Bureau of Land Management policy implementing ANCSA. The challenged policy

had the effect of removing submerged lands from federal control and vesting control in Tribal grantees. 824 F.2d at 7. The court held that, because plaintiffs could not allege that they (or their members) used the lands in question, they lacked standing. Absent such actual usage, the court noted, "the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question." *Id*. at 12; *see also id*. ("In short, the issue in each case is whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action.").

EBCI does not allege that its members use the lands whose ownership was resolved by Catawba settlement and its implementing legislation (the "Catawba Claim Area," AR542). Nor do they claim any ownership interests in that land.[5] Counts 1-3 therefore fall outside the zone of interests promoted by the Settlement and are not cognizable here.

B. The Secretary Properly Granted Catawba's Fee-into-Trust Application, Correctly Determining that the Relevant Terms of the Settlement Agreement (and Settlement Acts) Do Not Apply Outside South Carolina

The 1993 Settlement (and the implement Acts) contain both prescriptions and proscriptions. Neither apply outside South Carolina. More than anything else, that simple fact explains the correctness of the Secretary's determinations that the Kings Mountain site is eligible to be taken into trust under the IRA and eligible to host gaming under IGRA. And nothing highlights the correctness of those determinations, and the invalidity of Plaintiffs' attacks upon

[5] The South Carolina Act noted that the Catawba Claim Area potentially impacted "large numbers of landowners, citizens, and communities" in South Carolina. S.C. Code Ann. § 27-16-20(2). Similarly, one of the Federal Act's purposes was "to remove the cloud on titles in the State of South Carolina resulting from [Catawba's] land claim." 25 U.S.C. § 941(2)(b)(4). These landowners, as intended beneficiaries, might be able to establish prudential standing to enforce provisions in the settlement Acts, but Plaintiffs are not among them.

them, more clearly than the consistency of the Secretary's 2018 decision rejecting Catawba's mandatory acquisition request and its 2020 decision granting the applications at issue in this lawsuit. The asserted *in*consistency of those decisions is the linchpin to Plaintiffs' motion: remove the linchpin, the motion fails.

In many ways it is apparent that the Settlement (AR539-83) is limited to South Carolina. The "claim area" for which the agreement provides compensation is limited to "144,000 acres in York, Lancaster, and Chester Counties, South Carolina." AR542 (§ 2.9). The Catawba reservation (both existing, and as it may be expanded) is limited to South Carolina -- *id*. (§ 2.13); AR563-71 (§ 14) -- and the jurisdiction and governance provisions of the Settlement are limited to the reservation. AR550 (§10). The agreement contemplates Catawba's purchase of new lands – both as part of, and external to, the Tribe's reservation -- all of which are limited to South Carolina. AR558 (§13.4.2 – use of settlement funds for land acquisition); AR563-71 (§ 14 – purchase of new reservation land); AR571 (§ 15 – purchase of non-reservation lands). The Settlement creates two "expansion zones" eligible for addition to the Catawba reservation, both of which "are located entirely in South Carolina." AR432.[6]

Additional expansion zones may, under the Settlement, be proposed, but they must "be first approved . . . by ordinance of the [relevant] county council, and by a law or joint resolution enacted by the General Assembly signed by the Governor of South Carolina." AR565 (§ 14.2.5).

[6] Plaintiffs' argument that the reference to "all non-Reservation lands" in Section 13(a) of the Federal Act includes lands outside South Carolina (Pls.' Mot. at 22) cannot be reconciled with the stipulations in the Federal Act and the Settlement that "[a]ll non-reservation properties, and all activities conducted on such properties, shall be subject to the laws, ordinances, taxes, and regulations of the State" (1993 Act § 13(a); AR571 (§§ 15.1-2.)) – unless we are to interpret these provisions as extending the jurisdiction of South Carolina's laws nationwide. Legislative history references do not fix the problem. Senator Hollings' remarks, for example (Pls.' Mot. at 23), are limited to lands in South Carolina. 139 Cong. Rec. 19,919 (1993).

North Carolina does not have county councils,[7] and neither the General Assembly nor the Governor of South Carolina has authority over North Carolina lands. New non-reservation lands, similarly, will be subject to the "laws, ordinances, taxes, and regulations of the State," AR571 (§ 15.2), and the "State" is the State of South Carolina. AR541 (§ 2.3).

The provisions of Section 14 of the Settlement (AR563-71) amply support the Deputy Secretary's initial determination (AR430-34) that that section could not be used as support for Catawba's mandatory addition of North Carolina land to Catawba's reservation. *See* AR434 ("The Settlement Act may not be reasonably read to provide authority to take lands in North Carolina into trust for Catawba reservation . . .".). As the Deputy Secretary noted, "[b]ecause North Carolina is not a party to the Settlement Agreement, the terms of the Settlement Agreement, standing on their own, do not and cannot bind or impose requirements on the government of North Carolina." AR431. Equally germane, and still more fundamental, South Carolina cannot exert control beyond its boundaries. "[T]he jurisdiction of a state is coextensive with its territory." *Rhode Island v. Massachusetts*, 37 U.S. 657, 733 (1838). "A state's sovereign authority over persons, property, and activities extends only to its territorial limits . . . ." *Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 136 (4th Cir. 1996) (citations omitted).

Thus the prescriptions of the Settlement Agreement and the Settlement Acts, such as the land acquisition procedures and requirements of Section 14 at issue in the Deputy Secretary's 2018 determination, have no application beyond South Carolina's borders. But as noted, the Agreement and the Acts also have *pro*scriptions, such as the preclusion of IGRA gaming (25 U.S.C. § 941m) and the exemption of Catawba from the Secretary's discretionary fee-into-trust

[7] http://www.ncacc.org/DocumentCenter/View/1094/White-Paper-Basics-of-North-Carolina-County-Government.

procedures. AR571 (§ 14.16). These likewise have no application beyond South Carolina's borders.[8] That is why the Assistant Secretary's determination under review in this case – that IGRA and the Department's fee-into-trust authority and regulations apply outside South Carolina – are entirely consistent with the Deputy Secretary's 2018 decision.[9]

Take the proscription against applying the IGRA. Section 16 of the Settlement provides:

> The [IGRA] shall not apply to the Tribe. This Agreement, and the implementing legislation passed pursuant to this Agreement, and all laws, ordinances, and regulations of the State of South Carolina . . . shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation, except as specifically provided in this section.

AR571-72 (§ 16.1). For many reasons, including the reference to gambling "on and off the Reservation," this language, like the entirety of the Agreement, is limited to South Carolina. When the Federal Act incorporated substantially identical language (25 U.S.C. § 941m) it is similarly limited. Indeed, the Federal Act was conceived as ratifying and giving effect to the Settlement. 25 U.S.C. § 941b(a)(2) ("the Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter . . . ").[10]

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[8] Thus Plaintiffs reliance on Section 9(a) of the Federal Act (25 U.S.C. § 941h -- "The Tribe shall be subject to [the IRA] except to the extent such sections are inconsistent with this Act") is misplaced, because application of the IRA outside of South Carolina cannot be "inconsistent with [the Settlement Act]."

[9] Plaintiffs obscure this with partial quotations from the 2018 decision. According to Plaintiffs that decision concluded that "[t]he 1993 Act 'may not reasonably be read to provide authority to take lands in North Carolina into trust.'" Pls.' Mot. at 25 (citing AR434). What the decision actually said is: "The Settlement Act may not be reasonably read to provide authority to take lands in North Carolina into trust *for the Catawba reservation* . . ." AR434 (emphasis added). Similarly, Plaintiffs (Pls.' Mot. at 25, citing Section 2(a)(8)) quote the Federal Act as being "comprehensive," when what the Act actually says is that the Act furthers the goal of accomplishing "comprehensive settlement agreements," a very different matter.

[10] In fairness, it must be noted that Catawba, initially, made the same mistake, concluding that application of IGRA to the Kings Mountain site was precluded by the "plain language" of the Settlement Act. AR461.

Plaintiffs offer no reason why, contrary to its express language and stated purpose, the Federal Act should be construed as having a scope far in excess of the Settlement and State Act. Thus the Deputy Secretary was correct in 2018 (AR434 n.18), as was the Assistant Secretary in 2020, that the proscription against applying IGRA to Catawba does not apply in North Carolina.

C. The Assistant Secretary Correctly Determined That the Kings Mountain Site Meets the Requirements for the Restored Lands Exception

1. The Kings Mountain site was taken into trust as part of Catawba's restoration

The Assistant Secretary correctly concluded that the Kings Mountain site falls within the "restored lands" exception under IGRA. Plaintiffs argue that, under 25 U.S.C. § 2719(b)(1)(B)(iii), [t]he Kings Mountain property . . . was taken into trust not 'as part of' [the restoration of lands to Catawba], but separate from it." Pls.' Mot. at 29. The argument goes nowhere.

First, precedent establishes that because "the IGRA does not define 'restoration of lands'. . . [the term is] ambiguous and [to be] interpreted . . . broadly." *Butte Cnty. v. Hogen*, 609 F. Supp. 2d 20, 29 (D.D.C. 2009) ("*Butte Cnty. I*")[11] (citing *City of Roseville v. Norton*, 348 F.3d 1020, 1026–27 (D.C. Cir. 2003)), and that an agency's interpretation of its own regulations is ordinarily controlling. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Second, Plaintiffs' argument – that because acquisition of the site happened some years after the Settlement was implemented, it is not "part of" the "restoration of lands" that the Settlement accomplished – has been specifically repudiated by the courts and by regulation. According to this court in *Butte Cnty.I*, 609 F. Supp. 2d at 27-28, "[t]he leading case" on point is

[11] *Butte Cnty. I* was vacated and remanded on other grounds in *Butte County v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) ("*Butte Cnty. II*"). The decision on remand (reaching the same result) is *Butte County v. Chaudhuri*, 197 F. Supp. 3d 82 (D.D.C. 2016) ("*Butte Cnty. III*"), which was affirmed in *Butte County v. Chaudhuri*, 887 F.3d 501, 504 (D.C. Cir. 2018) ("*Butte Cnty. IV*").

Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F. Supp. 2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*").

The court in *Grand Traverse II* specifically rejected the argument, advanced here by Plaintiffs, that lands acquired years after a Tribe is restored cannot be acquired "as part of" the restoration. 198 F. Supp. 2d at 935-37. Instead, the court adopted a three-part test, looking at the Tribe's historical connection to the acquired lands, the Tribe's modern-day connections to the acquired lands, and the temporal connection between the restoration and the acquisition. *Id.*; *see Butte Cnty. I*, 609 F.Supp.2d at 28. The Secretary has since adopted this three-part test by regulation. *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,378 (May 20, 2008) (codified at 25 C.F.R. § 292.12). That test likewise calls for considering three factors: (i) "modern connections to the land," (ii) "historical connection[s] to the land," and (iii) "a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration." *Id.*; *see also Butte Cnty. IV*, 887 F.3d at 508.

The correctness of the Secretary's finding that the requirements of 25 C.F.R. § 292.12 are here met is demonstrated in Catawba's cross-motion for summary judgment, Section III(C).

2. The Secretary also correctly determined that the "specific geographic area" provision of IGRA does not apply

Plaintiffs argue that, under 25 C.F.R. § 292.11(a)(1), the Settlement Act constitutes "legislation require[ing] or authoriz[ing] the Secretary to take land into trust for the benefit of the tribe within a specific geographic area," and that 25 C.F.R. § 292.11(a)(2) does not, therefore, apply. Pls.' Mot. at 30. The assertion is that the areas delineated *in South Carolina* by Section 14 of the Settlement constitute the "specific geographic area" referenced by the regulation.

Catawba, too, previously argued that 25 C.F.R. § 292.11(a)(1) applied to its application, contending that the counties in North Carolina identified by the Settlement Act as lying within

Catawba "service area" satisfy the "specific geographic area" requirement. AR1389-90 (citing Settlement Act Section 4(b)).[12]

The Assistant Secretary, however, correctly determined that both arguments are incorrect. The lands delineated in Section 14 of the Settlement Agreement are those that are eligible for inclusion in Catawba reservation. AR563 (§ 14 -- "Establishment of Expanded Reservation.") The provisions of Section 14 are specific to South Carolina, and serve to exempt the referenced lands from BIA's general land acquisition procedures and requirements. Illustratively, Section 14.16 provides that "[t]he general land acquisition regulations of the Bureau of Indian Affairs, currently contained in 25 C.F.R. Part 151, shall not apply to the acquisition of lands authorized by Section 14 of this Agreement." AR571.

Section 14 has nothing to do with North Carolina; as the Assistant Secretary noted, "the Settlement Act does not expressly authorize the Secretary to take land into trust within a specific geographic area in North Carolina." AR3860. Indeed, neither Section 14 of the Settlement nor the parallel provisions of the South Carolina Act could, legally, have any application to lands in North Carolina, because "the jurisdiction of a state is coextensive with its territory." *Rhode Island*, 37 U.S. at 733; *Stover*, 84 F.3d at 136. Consequently, 25 C.F.R. § 292.11(a)(1) does not apply, and the issue whether the site qualifies as "restored lands" is governed by 25 C.F.R. § 292.11(a)(2).

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[12] "The term 'service area' means the area composed of the State of South Carolina and Cabarrus, Cleveland, Gaston, Mecklenburg, Rutherford, and Union counties in North Carolina." 25 U.S.C. § 94la(3)(9) (omitted); Pub. L. No. 103-116 § 3, 107 Stat. at 1120. The definition of "service area" identifies locations where Catawba is eligible for federal services. 25 U.S.C. § 941(b) ("For the purpose of eligibility for Federal services made available to members of federally recognized Indian tribes because of their status as Indian tribal members, Members of the Tribe in the Tribe's service area shall be deemed to be residing on or near a reservation.") The South Carolina Settlement Act does not mention these counties – indeed, it nowhere mentions North Carolina.

D. Plaintiffs' Allegations Regarding Mr. Cheves are Irrelevant

In support of Count IV, EBCI devotes a substantial portion of its Amended Complaint (and a short section of Plaintiffs' motion) to attacking the character of Wallace Cheves in the belief that a decision to accept land into trust for gaming purposes somehow implicates IGRA's "bad actor" provisions. Pls.' Mot. at 33-34; *see* EBCI Compl. ¶¶ 1, 3, 6, 7, 9, 10, 98-107. Those allegations, while colorful, are irrelevant.

Plaintiffs are of course correct that the IGRA established "the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences," 25 U.S.C. § 2702(2), but they overlook the fact that the Act "establishes the NIGC as a commission within the Department of the Interior ('DOI') to monitor tribal gaming and to promulgate the regulations and guidelines necessary to implement the statute." *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 237 (N.D.N.Y. 2020) (citing 25 U.S.C. §§ 2704(a), 2706(b)). For a few years BIA exercised regulatory authority over tribal gaming, *see* 25 U.S.C. § 2709, but in 1993 the IGRA took effect, "at which time the [NIGC] was established and its Regulations were issued." *In re SRC Holding Corp.*, 352 B.R. 103, 174 (Bankr. D. Minn. 2006), as amended (Aug. 30, 2006), *aff'd in part, rev'd in part*, 364 B.R. 1 (D. Minn. 2007), and *rev'd sub nom. Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009). "Since 1993, when the IGRA regulations were promulgated, Indian gaming management contracts have been subject to approval by the Chairman of the Commission. *See* 25 U.S.C. § 2711 (Management contracts)." *United States ex rel. St. Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, 451 F.3d 44, 48 (2d Cir. 2006), as corrected (June 27, 2006). Today, therefore, "the pertinent provisions of the Indian Gaming Regulatory Act . . . [are] enforceable . . . only by the National Indian Gaming Commission." *United States ex rel. Mosay v. Buffalo Bros. Mgmt.*, 20 F.3d 739, 744 (7th Cir.

1994). Only when the NIGC is presented with a management contract for review and approval do factors surrounding a tribe's chosen business partners become relevant. *See* 25 U.S.C. § 2711(a)(1), (e). As neither the NIGC nor review of any management contract is implicated in the decision under review, Plaintiffs' alleged concerns about Mr. Cheves and his role are addressed to the wrong audience. Such allegations have no bearing on the authority of the Assistant Secretary to take land into trust for Catawba. Thus, the Band's Count IV fails as no fact has been alleged, nor do any exist, with respect to any action of the NIGC.

E. The Secretary Complied with NHPA

Both tribal Plaintiffs allege that Interior violated section 106 of the NHPA, 54 U.S.C. § 306108, by failing to consult with them as part of Interior's NEPA review. These claims fail for two key reasons: one, Interior had no obligation under the NHPA to consult with either Tribe because it had reasonably concluded that there were no historic properties on the site; and, two, though not required, Interior did in fact consult EBCI on these issues during its NEPA review. Plaintiffs' NHPA claims therefore fail and Federal Defendants are entitled to judgment.

1. Legal Standard

The NHPA is a procedural statute that requires federal agencies "to consider the effect of their actions on certain historic or culturally significant sites and properties . . . and to seek ways to mitigate those effects." *Narragansett Indian Tribal Hist. Pres. Off. v. FERC*, 949 F.3d 8, 10 (D.C. Cir. 2020) (citation omitted). It requires agencies to "stop, look, and listen." *Ill. Com. Comm'n v. Interstate Com. Comm'n*, 848 F.2d 1246, 1260–61 (D.C. Cir. 1988); *see generally United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 733-34 (D.C. Cir. 2019). A federal agency is not required "to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult the [State Historic Preservation

Officer (SHPO)] and the ACHP[13] and consider the impacts of its undertaking." *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

Where "the undertaking involves 'historic properties of significance to Indian Tribes,' the agency must also consult and consider the views of the affected tribes." *Pub. Emps. for Env't Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 119 (D.D.C. 2014) (quoting 36 C.F.R. § 800.2(c)(2)(ii)); *see also* 54 U.S.C. §§ 302706, 306102. This consultation may involve the ACHP, SHPO, or Tribal Historic Preservation Officers (THPO). *Id*. §§ 302303, 302702; 36 C.F.R. §§ 800.3(c), 800.16(v)-(w) (2019).

When tribal consultation is required, it consists of "provid[ing] the Indian tribe … a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id*. § 800.2(c)(2)(ii)(A). And to ensure that the agency can afford interested tribes that "reasonable opportunity," *id*., the agency must "make a reasonable and good faith effort to identify . . . tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties," *id*. § 800.3(f)(2).[14]

2. Interior had no obligation to consult with either Tribe under the NHPA

As a threshold matter, the section 106 consultation requirement was never triggered with respect to either Plaintiff. As the NHPA regulations make clear, an agency's duty to consult with

[13] The Advisory Council on Historic Preservation (ACHP) is an independent agency responsible for promulgating regulations "to govern the implementation of" Section 106. 54 U.S.C. § 304108(a). Those regulations are found at 36 C.F.R. §§ 800-899 (2019).

[14] While Plaintiffs cite the ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Dec. 2012), in describing Interior's consultation requirements (*see* Pls.' Mot. at 36, 39), it is the regulations and the statute that define Interior's legal obligations. *Turpin v. Ray*, No. CV 19-2394 (RC), 2020 WL 1510412, at *12 n. 18 (D.D.C. Mar. 30, 2020).

an Indian tribe on non-tribal lands, like those at issue here, is triggered only where a tribe "attaches religious and cultural significance to *historic properties* that may be affected by an undertaking." 36 C.F.R. §800.2(c)(2)(ii) (emphasis added). But if there are no historic properties on a site, there cannot be "tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects . . . " 36 C.F.R. §800.3(f)(2). Here, Interior's investigation led it reasonably to conclude that there were no historic properties on the site; thus, it had no obligation to consult with EBCI, the Cherokee, or any other tribe.

The record shows that Interior conducted a thorough investigation of the Kings Mountain site, as part of its NEPA review. And that investigation revealed that the site contained no historic properties or known archaeological sites, and that, given its significant prior disturbance, it was unlikely to contain any. AR2543. Interior's investigation is well documented in both the Draft and Final EA. *See* AR1763-2446 (Draft); AR2504-3330 (Final). Specifically, the Final EA documents that Interior reviewed "historical and archaeological literature[,] and background information . . .". AR2529. Interior also searched for items on the National Register of Historic Places within one mile of the site (as catalogued by an online tool created by the North Carolina SHPO) in order "to identify the types, locations and chronologies of known cultural resources within the project area." *Id*. These searches did not reveal any "verified historic properties or property boundaries" at the site, nor any "eligible or potentially eligible historic properties." AR2530. Interior's research also established that the site was "highly disturbed," having been formerly "prospected for tin," and used as a "soil borrow pit" during a nearby road construction project, and subsequently "graded."[15] AR2526; *see also* AR2291; AR3238.

[15] While the Tribes allege that this disturbance "did not reach 'soils … with deep residuum'" and, thus, "would not have disturbed 'Cherokee artifacts … [that] are likely to be deeper,'" (Pls.' Mot. at 37, n.11, citing ECF No. 41-2), this is speculation. Plaintiffs have identified nothing in

Interior also consulted with the North Carolina SHPO. *See* AR2975 (Letter from NC SHPO); *see also* AR2530; AR2543; AR3194. The NC SHPO, not EBCI or the Cherokee's THPO, was the proper entity for NHPA consultation because the Kings Mountain site is non-tribal land. 36 C.F.R. § 800.16(w); § 800.16(x) ; *see also* AR2543; AR3194. The SHPO confirmed Interior's findings, stating that it "ha[d] conducted a review of the [Kings Mountain] project and [was] aware of no historic resources which would be affected by the project," AR2975; *see also* AR3887, and that the North Carolina Department of Natural and Cultural Resources therefore had "no comment on the project as proposed." AR2975.

Following this investigation, Interior published the Draft EA, on December 22, 2019, and made it available to state and local governments, resource agencies, and the general public for a one-month review and comment period. AR1763-2446 (Draft EA); AR3893 (FONSI). BIA published Notices of Availability for the Draft EA in the Charlotte Observer on December 22, 2019, Gaston Gazette on December 28, 2019, and Shelby Star on January 3, 2020. *Id*.; AR2447-2448; AR2449; AR2454. BIA also made the Draft EA available online. AR3893. Dozens of

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the record that raises any doubts about Interior's conclusion that "the degree of disturbance to the site suggests a low probability for buried cultural resources," AR2543, instead relying on the ruminations of EBCI's THPO, Mr. Townsend, whose very phrasing highlights their speculative nature (noting that artifacts "that are *likely* to exist" are "*likely* to be deeper" and that "*if* there are any human remains" there is a "*chance*" that they are intact. ECF No. 41-2 ¶ 24 (emphasis added)). Mr. Townsend's post-decisional declaration, moreover, is not part of the record and can play no role in assessing the Secretary's decisions and must therefore be stricken. *Fund for Animals v. Williams*, 246 F. Supp. 2d 27, 48 (D.D.C. 2003) ("the court may not consider materials—including declarations—that are outside the administrative record" (citing *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir.1992))), *amended by* 311 F. Supp. 2d 1 (D.D.C. 2004), *aff'd sub nom. Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005), *and vacated sub nom. Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005); *Env't Def. Fund. Inc. v. Costle*, 657 F.2d 275, 285–86 (D.C. Cir. 1981) (affirming district court's decision to strike affidavits that were not part of administrative record); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 58 n. 14 (D.D.C. 2019) ("The Court thus declines to consider Plaintiffs' extra-record exhibits.")

comments were received. AR3230-3322 (Final EA, Appendix M – Comments and Responses). Not one comment, however, suggested that any historic properties were located at the site. *Id*. And even when EBCI submitted its eleventh hour comments, in a letter from its attorney, that letter did not state or suggest that the site contained anything of historical, religious, or cultural significance to EBCI, the Cherokee, or any other tribe. AR3317-22. To date, neither Plaintiff (in their complaints, briefs, and correspondence with Interior) has identified any historic property, or anything of cultural, religious, or historical significance to them at the site.

Plaintiffs instead point to vague and unsupported suggestions regarding an unidentified archaeological site within the project area. Pls.' Mot. at 35, 37. But these suggestions are unhelpful for several reasons. First, their source—an unsigned March 15, 2020, letter that post-dates Interior's final agency action of March 12, 2020 (FONSI, AR3898)—is not part of the administrative record in this case. Plaintiffs' citation to them is improper and the Court should not consider them in evaluating this Motion. Footnote 15, *supra*. Second, even if the Court could consider the extra-record letter, it does not show that any historic properties or artifacts, of significance to either Tribe, are located at the project site. The letter states only that there "is an archaeological site recorded within the project location listed in the NC State Archaeological Site Inventory," which included a "historical pottery kiln and prehistoric lythic scatter—human made stone tools." Pls.' Mot. at 35 (citing Townsend Decl. ECF No. 41-2 ¶ 21, quoting March 15 letter). This testimony about the contents of a document is inadmissible (FRE 1002) and, to be clear, the March 15 letter does not allege that this archeological site, pottery kiln, or lythic scatter, belong to either EBCI or the Cherokee. *Id*. The letter provides no further identifying information for its assertions, which are squarely at odds with the NC SHPO's report, and it expressly admits that the EBCI "cannot determine whether Cherokee religious or cultural sites

exist at the site." ECF No. 1-5 at 2. Contrary to Plaintiffs' suggestion, Pls' Mot. at 42-43, the letter gave Interior no reason to doubt that in all relevant respects the SHPO's conclusions were valid. It still doesn't.

And there is no basis for arguing that Interior was obligated under the NHPA to conduct a survey or archeological dig at the site to uncover as-yet unknown and unidentified archaeological materials simply because the area is alleged to have been historic Cherokee treaty territory. EBCI Compl. ¶ 167; Cherokee Compl. ¶ 90; Pls.' Mot. at 36-37. Setting aside the parties' factual dispute as to the historic bounds of Cherokee territory, it is clear that the NHPA imposes no such duties. *See* 36 C.F.R. § 800.4(b)(1) ("The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which *may* include . . . field survey") (emphasis added); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) ("neither the NHPA nor the Advisory Council regulations require that *any* cultural surveys be conducted for a federal undertaking"). As this Court explained: "The statutes at issue do not compel the Government to conduct extensive surveys, and certainly not archeological digs, within these broad geographical bounds each time it proposes to take a major action — without any proof that items of cultural significance will likely be found there." ECF No. 22 at 11 (citing *Standing Rock Sioux*, 205 F. Supp. 3d at 35). Moreover, because the site was privately-owned property (n. 4, *supra*), Interior did not have authority to survey or excavate the site, or authorize the EBCI or Cherokee THPO to enter the site and conduct their own excavation or archeological dig. Interior cannot be faulted for failing to take actions it had no legal obligation, or even legal authority, to undertake.

Plaintiffs also point to past instances of consultation with the Cherokee and EBCI THPOs as evidence that consultation was required here. Pls.' Mot. at 36. But because every site is unique

the argument wants logic, and nothing in the NHPA or its implementing regulations or interpretive caselaw suggests that an agency's past consultation history creates a legally-enforceable entitlement to consultation on a separate undertaking.

A tribe's NHPA claim based on failure to consult under section 106 fails where, as here, the tribe has not identified historical properties worth consulting about. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010) ("Here, Plaintiffs do not identify any new information that the Tribe would have brought to the attention of the BLM had it been consulted earlier"). "Where no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [government]." *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003); *see also Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 942 (D. Ariz. 2017) (Tribe failed to "identify any cultural sites that were not properly considered in the EA"); *Coyote Valley Band of Pomo Indians of Cal. v. U.S. Dep't of Transp.*, No. 15-cv-04987-JSW, 2018 WL 1569714, at *11 (N.D. Cal. Mar. 30, 2018) (Tribe had adequate opportunity for consultation and "do[es] not identify any new information they would have provided to the Federal Defendants if they had been consulted earlier in the construction process"); *Okinawa Dugong v. Mattis*, 330 F. Supp. 3d 1167, 1188 (N.D. Cal. 2018) ("Plaintiffs have not identified any additional information that they would have provided to supplement or broaden Defendants' analysis. Courts have considered the absence of prejudice in rejecting challenges to the sufficiency of consultation under the NHPA" (citations omitted)).

This makes sense. NHPA's purpose is to protect historic properties, not to mandate pointless procedures. *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir. 1981) ("The purpose of the [NHPA], is the preservation of historic resources."). Where, as here, no

historic properties are identified—by the agency's investigation, the SHPO, any THPO, or the tribes themselves—a federal agency has no duty to consult with a tribe on non-tribal land. Plaintiffs have thus failed to demonstrate that Federal Defendants violated the NHPA.

3. Though not required, Interior consulted with EBCI

Though not required under the NHPA, Interior did consult with EBCI as part of its NEPA review. Interior reached out to EBCI on multiple occasions and offered it months to rebut Interior's conclusion—reached after its own investigation and consultation with the NC SHPO—that the Kings Mountain site did not contain any historic properties. Yet, despite its overtures, Interior received no response from EBCI warranting reconsideration of its findings.

Interior's consultation efforts are well documented:

- On December 20, 2019, BIA provided published notice of the Draft EA (AR3893);
- On December 22, 2019, Interior made the Draft EA publicly available for a one-month review and comment period (AR3893);
- Shortly thereafter, Interior published notices of the Draft EA in three North Carolina newspapers serving the local area, and made it available online (AR3893; AR2447-48; AR2449; AR2454);
- On December 23, 2019, BIA again reached out directly to EBCI seeking comment on the Draft EA—nearly twelve weeks prior to making a final decision on Catawba's application (AR4199-200, AR 4202); on December 27, 2019, EBCI's Chief Sneed confirmed receipt of the Draft EA and told BIA that the Tribe would "review and respond." AR4199.
- After Interior finally received comments from EBCI (AR3317)—on January 22, 2020, the last day of the comment period—it responded, on January 30, 2020, with a letter to EBCI's THPO requesting further input, and explaining that it was seeking "to verify with your office that the proposed project will not impact any specific sites having potential religious or cultural significance to [EBCI]" (AR3215, Jan. 30, 2020, letter from BIA to EBCI's THPO, Mr. Townsend); that letter specifically alerted EBCI to the fact that North Carolina's SHPO had "reviewed the project and was not aware of any historic resources in the area of the project," while also noting that "BIA [was] very interested in hearing from your office regarding this project." *Id.*;
- On February 10, 2020, Interior officials met with EBCI's Chief Sneed in Washington, D.C. to discuss the Tribe's concerns with the project (AR2496-2501);
- On March 12, 2020, when Interior issued its decision, nearly twelve weeks after

> initially contacting EBCI and nearly six weeks after following up with EBCI's THPO, it still had received no response to its January 22 letter and inquiry (AR3238).

The evidence demonstrates that Interior provided EBCI with more than what the NHPA requires: "a *reasonable opportunity* to identify its concerns about historic properties, [and] advise on the identification and evaluation of historic properties," 36 C.F.R. §800.2(c)(2)(ii)(A) (emphasis added). Interior afforded EBCI ample time and opportunity to offer any substantive comments on the project or rebut Interior's (and North Carolina's) conclusion that the site did not contain any historic properties. But at no time did EBCI present any substantive information—such as the identification of historic properties or cultural or religious artifacts—that would have triggered further consultation or led Interior to a different conclusion. *See* AR2498-2501 (briefing paper from EBCI); AR3317-22 (Jan. 22, 2020 letter to BIA from EBCI's attorney). To the extent Interior had any obligations to consult with EBCI, it satisfied those obligations.[16]

Plaintiffs' protestations (Pls.' Mot. at 39-40) that the Secretary's efforts were a mere "fig leaf" and not "genuine consultation" are belied by the record. BIA's correspondence with Chief Sneed and its letter to EBCI's THPO were not form letters or pro-forma communications as Plaintiffs charge. AR3215. They were tailored to the specific issues at hand, namely the NC SHPO's report and the existence of any, as-yet unidentified, "specific sites having potential religious or cultural significance to [EBCI]." *See id*.

Plaintiffs' remaining charges as to the inadequacy of Interior's NHPA consultation, likewise fail. Contrary to Plaintiffs' assertions (Pls.' Mot. at 40-41), Interior had no obligation

[16] While consultation with one tribe does not relieve an agency of its duty to consult under the NHPA with another affected tribe, *see Standing Rock Sioux*, 205 F. Supp. 3d at 32, in this instance, Interior had no reason to consult with the Cherokee given that neither the NC SHPO nor EBCI had identified any historic properties on the site or suggested that the Cherokee should be involved as a consulting party. *See id*.

under the NHPA to provide the Draft EA to EBCI prior to its publication, nor was it obligated to inform EBCI as to its decision-making timeline or expected date of decision. *See* 36 C.F.R. §§ 800.8(a)(1)–(2). Moreover, once Interior reasonably determined that the site contained no historic properties—following consultation with the NC SHPO and EBCI—it had no obligation under the NHPA to "assess the adverse effects" to such (non-existent) properties or "resolve any adverse effects," related to taking the Kings Mountain site into trust. Pls.' Mot. at 36 (citing § 800.5(a); 800.5). While Plaintiffs insist that they were entitled to vastly more expansive consultation, nothing in the NHPA (or any other authority) creates such an entitlement. And the absence of citation to any authority conferring such expansive rights or obligations speaks for itself.

4. Even if the Court finds an NHPA violation, it was harmless

Plaintiffs have not proven a violation of the NHPA, but, even if this Court finds otherwise, that violation is harmless error and does not support vacatur. In APA review cases courts "will not set aside agency action unless 'the party asserting error [can] demonstrate prejudice from the error . . . '" *DSE, Inc. v. United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) (citation omitted); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) ("The APA provides that, in reviewing agency action, the court 'shall' take account of 'the rule of prejudicial error,' that is, whether the error caused prejudice" (quoting 5 U.S.C. § 706)). This rule applies to NHPA violations. *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 63 (1st Cir. 2001); *see also Okinawa Dugong*, 330 F. Supp. 3d at 1188. Here, neither Tribe points to any facts or evidence supporting a plausible conclusion that Interior would have reached a different outcome had it consulted the Cherokee or consulted more extensively with EBCI.

Quite the opposite: both the record and the Tribes' own allegations confirm that any error

was harmless, because there is no evidence of historic properties at the Kings Mountain site. So, even had Interior consulted with the Cherokee or consulted more extensively with EBCI, what would it have learned? Plaintiffs assert that, had Interior consulted with the Cherokee, it would have learned about the "archaeological site recorded within the project location," that "artifacts existed" at the site, and that records identify "Cherokee artifacts as having been found within ten miles of Kings Mountain." Pls.' Mot. at 37. With this knowledge, Plaintiffs assert, Interior "could have identified with greater precision the cultural resources at the Kings Mountain Site." *Id*. None of these statements, or the statements contained in the declarations submitted by the Tribes in this action, the briefing paper from Chief Sneed to Interior, or EBCI's letter to BIA, describe or identify any historic properties or cultural or religious sites of significance to either Tribe in the project area. And the existence of Cherokee artifacts *ten miles* from the project site cannot plausibly be interpreted as evidence that any such artifacts are at the Kings Mountain site itself—particularly given the SHPO's directly contrary conclusion, AR2975, and the documented history of the site having been thoroughly and repeatedly dug up over many years. *See* AR2526.

In addition, if any Cherokee patrimony is discovered, protective procedures are in place. The EA provides that if any historic properties are discovered during construction, "work within 50 feet of the find shall be halted until a professional archeologist . . . , or paleontologist if the find is paleontological in nature, can assess the significance of the find in consultation with BIA, other appropriate agencies and [EBCI]." AR2521. Under the regulations, the agency expert shall also notify EBCI's THPO of the find. *See* 36 C.F.R. § 800.13(b)(3); *see also* AR2522 (listing EBCI's THPO Townsend, as well as Catawba THPO Dr. Wenonah Haire, as contacts). If the find is significant, the THPO shall meet with the government's expert to "determine the appropriate course of action." AR2521-22. Separately, the THPO will also be contacted if

human remains are uncovered. *Id*. Assuming that such remains are Native American, the construction process will halt until "the THPO and [an agency] representative have made the necessary findings as to the origins and disposition." AR2522. These measures preserve EBCI's as well as Catawba's consultation role as well as their opportunity to protect any tribal patrimony. Plaintiffs have failed to allege any imminent or "certainly impending" injury.

F. The Secretary Complied with NEPA

To the (considerable) extent Plaintiffs' NEPA argument restates their argument about non-existent "cultural resources," Pls.' Mot. at 42, and "consultation under [NHPA] Section 106," *id*. at 43, it has been addressed in the preceding section. This appears, for example, to be Plaintiffs' only reason for arguing (*id*.) that an EIS was required, an otherwise facially implausible argument given the highly degraded condition of the site. Plaintiffs' "cumulative impacts" argument relies primarily, and improperly (n. 15, *supra*) on post-decisional materials. Pls.' Mot. at 44 (citing a September 28, 2020 newspaper item). The argument also ignores the fact that "[p]er the City of Kings Mountain and the Cleveland County Planning departments, there are no major new development projects proposed, planned or currently being constructed in the project study area," AR2563, as well as the fact that the EA carefully assessed cumulative impacts to: land and water resources; air quality and biological resources; socioeconomic conditions and transportation; land use and public services (water supply, wastewater service, solid waste service, schools, recreation, electricity and natural gas, law enforcement, fire protection and emergency medical services); noise and visual resource; and climate change. AR2563-69.

Plaintiffs' only criticism of the Secretary's alternatives analysis is that it did not examine sites not located on "Cherokee historical and treaty lands." Because Plaintiffs claim that their

historical lands include "most of Kentucky and substantial portions of Tennessee, the two Virginias, Alabama, Georgia, and the Carolinas," ECF No. 22 at 10 (citing ECF No. 1-8 (Royce Map); ECF No. 18-1 (Demonstrative Exhibits) at 12; Apr. 15, 2020 Hrg. Tr. at 45:9–46:5 (Plaintiff stating that aboriginal lands are identified by a 1777 treaty)), the argument asks for the impossible. *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 18 (D.D.C. 2016) (Infeasible alternatives need not be analyzed).

IV. CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant Summary Judgment for Defendants.

Dated this 9th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on November 9, 2020, upon all counsel of record.

/s/ Peter Kryn Dykema
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