**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

EASTERN BAND OF CHEROKEE INDIANS, et al.,

Plaintiffs,

and

THE CHEROKEE NATION,

Plaintiff-Intervenor,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

THE CATAWBA INDIAN NATION,

Defendant-Intervenor.

Civil Action No. 20-cv-00757-JEB

**MEMORANDUM OF LAW IN SUPPORT OF THE CATAWBA INDIAN NATION'S (1) MOTION FOR DISMISSAL OF OR SUMMARY JUDGMENT ON ALL CLAIMS IN THE AMENDED COMPLAINTS AND (2) OPPOSITION TO THE EASTERN BAND OF CHEROKEE INDIANS' AND THE CHEROKEE NATION'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

For over two decades, the Eastern Band of Cherokee Indians ("EBCI") has reaped billions of dollars in revenue from its North Carolina casinos, enabling it to dramatically improve its economy and the quality of life for its members. Yet for over ten years now, EBCI has waged a relentless crusade to deny the Catawba Indian Nation ("Catawba") the same opportunity to use gaming to alleviate the widespread poverty and other crippling hardships afflicting *its* members.

This case is the latest step in that crusade. But it is not about an unlawful agency reversal or a nefarious casino developer, no matter how often EBCI repeats these false mantras. (In fact, there was no reversal, and EBCI's "bad-actor" tale is irrelevant, offensive, and devoid of support in the record.) This case is about stamping out a would-be competitor, pure and simple.

In any event, the claims in the lawsuit lack merit. The EBCI plaintiffs and intervenor the Cherokee Nation (collectively, "plaintiffs") ask this Court to vacate the Interior Department's decisions (1) to take a parcel of North Carolina land into trust for the Catawba and (2) to deem that land eligible for gaming. But as Interior's decision letter explained, the Catawba satisfied all of the applicable requirements for both a discretionary taking of land into trust and for gaming on that land. Interior also explicated that development of an entertainment complex on the land will provide much-needed revenue, job opportunities, and cultural expression for the economically distressed Catawba. And as Interior explained, that in turn will promote the Catawba's economic self-sufficiency and self-determination—the overarching goals of modern federal Indian policy.

Seeking to deny the Catawba these benefits, plaintiffs claim that Interior's decision letter violates the Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946); the Catawba Indian Tribe of South Carolina Land Claims Settlement Act ("Settlement Act"), Pub. L. No. 103-116, 107 Stat. 1118 (1993); the Indian Reorganization Act ("IRA"), Pub. L. No. 73-383,

48 Stat. 984 (1934); the Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988); the National Historic Preservation Act ("NPHA"), Pub. L. No. 89-665, 80 Stat. 915 (1966); and the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970). Those claims all lack merit. Indeed, they all lack merit even without applying any deference. But deference is required as to most of plaintiffs' claims, under principles of agency deference, the Indian canon of construction, and/or the APA's narrow standard of review. Applying the requisite deference confirms that all of plaintiffs' claims must be rejected.[1]

**STATEMENT**

The Catawba Indian Nation is a federally recognized tribe, and currently "the only federally recognized tribe in South Carolina." AR447. It has several thousand members, over 250 of whom live in North Carolina. AR3842. The Catawba's connection to the southeastern United States dates back centuries: Its "aboriginal territory [was] in what is now North and South Carolina," *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 (1986), and its members have resided on that land since before English settlement, *see* AR3735.

Today, the Catawba continue to face significant economic challenges. The Catawba's pre-COVID unemployment rate was 13.8%, more than triple the pre-COVID rates in North and South Carolina. AR3866. And the Catawba have a median household income of $33,029, which is 40% below the equivalent figures for the Carolinas. *Id.* The Catawba also have little tax revenue, leaving the Nation largely dependent on (uncertain) U.S. government funding. AR456.

Seeking to overcome these economic challenges, the Catawba have undertaken numerous efforts "to establish enterprises that were intended to produce tribal revenue." AR456. But none

[1] This brief focuses on the Settlement Act, IRA, and IGRA claims. Largely for the reasons the government's brief gives, plaintiffs lack standing and their NHPA and NEPA claims fail as a matter of law. The Catawba thus move for dismissal or summary judgment on those claims too.

has been "capable of providing substantial, stable sources of revenue to meet growing tribal needs," *id.*, in part because the Catawba have little land on which to pursue such opportunities, AR3881; *see also* AR455, AR3842. In fact, the Catawba's current trust-land base, which is only 1,012 acres, "is subject to development restrictions" stemming from a settlement between the Catawba and South Carolina involving several of the Catawba's historic land claims. AR3881.

That settlement, which is central to this case, ended centuries of disputes. The specifics of those disputes do not bear directly on this case, but the general story is a familiar one in Indian country: Through the colonial period and much of U.S. history, the Catawba gradually lost more and more of its aboriginal land, largely through determined indifference and broken promises by state officials and others. *See, e.g.*, AR1173-1174; AR3765-3766; AR3868-3872; *South Carolina*, 476 U.S. at 501. Then, in 1959 (after the Catawba had organized under the IRA, *see South Carolina*, 476 U.S. at 502-503), Congress enacted the Catawba Tribe of South Carolina Division of Assets Act, Pub. L. No. 86-322, 73 Stat. 592 (repealed 1993). This law ended the trust relationship between the United States and the Catawba, distributed the Catawba's tribal assets, and lifted restrictions on the alienation of the Catawba's federal reservation. AR3872. That left the Catawba with only the 630-acre reservation in South Carolina. AR3872 n.122.[2]

**APPLICABLE STANDARDS**

All of plaintiffs' claims seek relief under the APA, which allows courts to "set aside agency action[s], findings, and conclusions" only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). This "'narrow' standard of review[] … appropriately encourages courts to defer to the agency's expertise." *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 261 (D.D.C. 2014) (Boasberg, J.). A

[2] The Catawba adopt and incorporate the statement in the government's brief.

court "'is not to substitute its judgment for that of the agency,' nor to 'disturb the decision of an agency that has examine[d] the relevant data and articulate[d] … a rational connection between the facts found and the choice made.'" *Id.* at 261-262 (alterations and omission in original) (quoting *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013)).

Plaintiffs also challenge Interior's interpretations of the Settlement Act and IGRA, as well as Interior's interpretation and application of its own regulations. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an agency decision receives judicial deference if it rests on a "permissible" interpretation of a law that Congress "has authorized [the agency] to implement," *Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016). Under the Indian canon of construction, moreover, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*; *accord, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). And an agency receives deference in the interpretation and application of its own regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413-2417 (2019); *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995).

## ARGUMENT

### I. INTERIOR CORRECTLY CONCLUDED THAT THE SETTLEMENT ACT DOES NOT PROHIBIT THE CATAWBA FROM ACQUIRING LAND OUTSIDE SOUTH CAROLINA UNDER SECTION 5 OF THE IRA (EBCI COUNT I)

Count I of EBCI's amended complaint claims that Interior violated the Settlement Act (and thus the APA) by taking the land at issue (the "Kings Mountain site") into trust under IRA section 5 and the IRA's implementing regulations. *See* Mot. 22-28. This claim fails because it rests on the premise that the Settlement Act allows the Catawba to "acquire trust lands only" in South Carolina (Mot. 23), i.e., that the law imposes a 49-state ban on the Catawba ever acquiring such land. That premise is wrong; two different provisions of the Settlement Act (sections 9(a)

and 4(b)) each authorize Interior to take land outside South Carolina into trust for the Catawba under the IRA. EBCI cites no persuasive evidence to support its contrary view that the statute—which was enacted to implement a settlement of litigation over land *in South Carolina*—adopted a draconian nationwide ban on the Catawba ever acquiring trust land outside the state (including within the Catawba's ancestral homeland). As explained in Part IV, moreover, even if the statute were ambiguous in this regard, that ambiguity would have to be resolved in defendants' favor, under both principles of agency deference and the Indian canon of construction. Accordingly, defendants are entitled to summary judgment on count I of EBCI's amended complaint.

**A. Section 9(a)**

1. Interior correctly determined that it had authority under section 9(a) of the Settlement Act to take land into trust for the Catawba. AR3876-3877. That section states that the Catawba "shall be subject to [the IRA] except to the extent [the IRA's] sections are inconsistent with this Act." 107 Stat. at 1125. This language "parallels [language] found in … statutes" that the Supreme Court has determined "extended the IRA to particular tribes." AR3876. As Interior reasoned, then, section 5 of the IRA (authorizing Interior to take land into trust) applies to the Catawba unless such an application is inconsistent with the Settlement Act.

EBCI's claim that there is such an inconsistency (Mot. 22-25) rests largely on sections 12, 13, and 15 of the Settlement Act. Sections 12 and 13 establish procedures by which the Catawba can acquire reservation and non-reservation land, respectively, *in South Carolina*. Specifically, section 12(c) provides that the Catawba can generally expand its reservation to land within certain "Zones"—all of which are in South Carolina. 107 Stat. at 1134; *see also* AR567-568. And section 13(b) permits the Catawba to acquire "non-Reservation lands," but provides that South Carolina law will govern on such land. 107 Stat. at 1136; *see also* AR571. Lastly, section 15(e) of the Act "approv[es]" and "ratifi[es]" (107 Stat. at 1137) section 19.1 of the

settlement agreement and South Carolina Code Annotated section 27-16-40, which both provide that "land … held in trust by the United States … for the" Catawba "is subject to the jurisdiction of [South Carolina] and the civil and criminal jurisdiction of the courts of the State." These provisions all contemplate that the Catawba will acquire land in South Carolina, and that such land will be subject to that state's law. EBCI argues, however (Mot. 23), that the provisions *also* bar the Catawba from "invok[ing] IRA Section 5 to obtain trust lands outside South Carolina."

Nothing in the Settlement Act justifies that enormous leap. To begin with, none of the supposed inconsistencies EBCI posits under Interior's reading of the statute (Mot. 23) exists. Each rests on the notion that the law did not displace IRA acquisitions even *in* South Carolina. *See id.* But Interior did not adopt that notion. EBCI cannot prevail by mischaracterizing the agency's decision and faulting Interior for the consequences of a reading it never embraced.

Sections 12 and 13, moreover, simply *authorize* land acquisitions by the Catawba *in* South Carolina. That does not mean that they *prohibit* acquisitions by the Catawba *outside* the state. EBCI points to no language anywhere in the Act expressly imposing such a ban, because there is none. And that is fatal to EBCI's claim, given that a nationwide prohibition on land acquisitions—including within the Catawba's aboriginal territory, which encompasses North as well as South Carolina, *see South Carolina*, 476 U.S. at 500—would be not only a departure from the established IRA regime, but also an extreme, draconian step. Effecting such a step would thus require clear congressional language, because "Congress … does not … hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). That is particularly true where, as here, there is no rationale for the "elephant": EBCI offers no reason why Congress would have deemed it appropriate to bar the Catawba from having land taken into trust outside South Carolina—including, again, in the Catawba's aboriginal territory—nor any

reason why either party to the settlement agreement would have wanted such a prohibition.[3]

EBCI argues, however (Mot. 22), that Interior's (and the Catawba's) reading of the Settlement Act is "nontextual" because "the Act specifies that the '[j]urisdiction and status of all non-Reservation lands shall be governed by section 15 of the Settlement Agreement,'" and the "phrase 'all non-Reservation lands' means … wherever located" (alteration in original). That is meritless. Although "all" is an expansive word, it does not always connote a complete lack of limitation, nor is it interpreted in a vacuum or out of context. As the Supreme Court has stated, "any" is also an expansive word—equivalent to "all," in fact, *see, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997)—yet the Court, in construing Congress's use of "any," has rejected a "wherever located" gloss just like the one EBCI urges, *see Small v. United States*, 544 U.S. 385, 387 (2005) ("any court" means only courts located in the United States). It has also cautioned more broadly that "general words" (like "any") must "be limited" in their application "to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C.J.); *accord, e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004). EBCI's argument thus ignores the "fundamental principle of statutory construction … that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Yates v. United States*, 574 U.S. 528, 537 (2015). Interior's construction of the Settlement Act, which rightly takes into consideration textual and historical context, is indeed the "natural reading" (Mot. 25)—far more natural than EBCI's, which rests on the senseless notion that Congress thought the Catawba should be forever confined to South Carolina.

EBCI similarly belittles Interior's interpretation of the Settlement Act as atextual in

[3] EBCI claims (Mot. 5, 13 n.4) that the Kings Mountain site is within *its* aboriginal territory, not the Catawba's. That is wrong, *see, e.g.*, ECF No. 12 at 28, but irrelevant here.

claiming that "Interior [1] declared that [a] 'literal reading … produces an absurd result,' [2] re-wrote the Act's text, and [3] deemed the Act inapplicable to North Carolina." Mot. 25 (omission in original) (quoting AR3880); *see also* Mot. 11. But EBCI's suggestion that *it* is espousing a "literal reading" of the text is false. The "literal reading" in question is that "any lands the Nation acquires …, *including lands outside South Carolina*, would be subject to South Carolina … jurisdiction." AR3880 (emphasis altered). EBCI does *not* espouse that reading, and Interior rightly rejected it as absurd because it would mean that South Carolina law could govern land in other states. *Id.* EBCI simply offers an alternate way of avoiding the absurd result that the literal reading produces. Specifically, whereas Interior avoided it by concluding that the Settlement Act's South Carolina-specific land-into-trust mechanisms apply only in South Carolina, EBCI would avoid it by concluding that the statute bars the Catawba from ever acquiring land outside that state. *That* is the interpretive dispute here, not one between textual and non-textual readings. And for all the reasons given above (and below), Interior's reading is manifestly the correct one.

Indeed, EBCI's reading of the Settlement Act is refuted not just by the lack of an express ban on the Catawba acquiring land outside South Carolina and the fact that such a ban would be an extreme and senseless step, but also by significant contrary textual and contextual evidence.

As to text, several other provisions of the Settlement Act explicitly have a geographic scope beyond South Carolina. For example, section 3(9) defines the Catawba's "service area" to include South Carolina *and* six North Carolina counties (including Cleveland County, where the Kings Mountain site is located). 107 Stat. at 1120. Likewise, sections 6(a) and 6(d)(1)—which ratify the Catawba's land transfers and extinguish its aboriginal title—apply to "lands located anywhere in the United States." *Id.* at 1122-1123. The absence of any similar language in sections 12, 13, and 15(e) indicates that Congress intended for those provisions to apply only in

South Carolina, because "[w]here Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally … in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983).

As to context, the Settlement Act's primary purpose was—as its title indicates—to *settle* the decade-long litigation between the Catawba and South Carolina over land within that state. The statute includes multiple findings about that litigation, *see* §2(a)(5), (7), 107 Stat. at 1119, and it also makes clear that its central purpose was to approve the settlement of the litigation, *see* §2(b)(1), 107 Stat. at 1119. It thus makes sense that the Act would address only the Catawba's entitlement to (and procedures for) land in South Carolina. That is especially true given that "North Carolina … was not a party to the Settlement Agreement," AR3880. The parties (and Congress) therefore had no reason to address the Catawba's ability to acquire land there.

This same point refutes EBCI's suggestion (Mot. 19-20) that because Congress was aware of the Catawba's historical connection to North Carolina but did not expressly provide for the Catawba's acquisition of land in that state, it must have intended to bar the Catawba from acquiring land in North Carolina. Again, the Act's purpose was to settle disputes over land in South Carolina; Congress thus had no need to address Interior's authority in other states. And as explained, the *absence* of express language cannot support the conclusion that Congress took the extreme step of forever confining the Catawba to South Carolina. *See supra* p.6. In any event, Congress, as also explained, *did* provide for acquisitions in North Carolina, by making the IRA applicable to the Catawba except as inconsistent with the Settlement Act. *See supra* p.5.

2. If more were needed, Interior's reading of the Settlement Act as not limiting the Catawba's land acquisitions outside South Carolina is—as Interior explicated (AR3879-3880)—supported by a Second Circuit decision interpreting similar statutes.

The Mohegan Nation of Connecticut Land Claims Settlement Act, Pub. L. No. 103-377, 108 Stat. 3501 (1994), "provide[d] a mechanism" by which the Mohegan Nation could "add property to its reservation" with the use of settlement funds, *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 87 (2d Cir. 2000). But it was silent on whether Interior could exercise its ordinary IRA land-into-trust authority with respect to property *not* acquired with settlement funds. *Id.* When Interior tried to exercise that authority to take such property into trust for the Mohegan, Connecticut sued, arguing (as EBCI does here) that the statute provided the *exclusive* mechanism for the tribe to acquire property. *Id.* The Second Circuit disagreed. It explained that the law was not "intended to settle once-and-for-all the extent of the [tribe]'s sovereignty"; rather, the law "emerged from the specific land dispute arising out of … lawsuits filed by the Tribe." *Id.* at 90. Congress saw the statute as "providing the necessary federal implementation of the private agreement negotiated between the parties" to end the lawsuit and—as the law's findings explained—to "remove all clouds on titles resulting from" the suit. *Id.* The Catawba Settlement Act was likewise "necessary" to end litigation, and it makes almost identical findings, *see* Settlement Act §2(b)(4), 107 Stat. 1120 (the Act was intended "to remove the cloud on titles *in the State of South Carolina*" (emphasis added)). It also should not be read to set an "outermost boundar[y]" on the Catawba's land, *Blumenthal*, 228 F.3d at 90.

That conclusion is strengthened, as the Second Circuit observed, by the fact that Congress clearly knows how to "prohibit the [Interior] Secretary from taking into trust *any* lands outside of specifically designated" territory, *Blumenthal*, 228 F.3d at 90 (emphasis added). For example, the Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (1980), broadly prohibited the secretary from taking land into trust anywhere in Maine on behalf of the relevant tribes, other than in delineated plots: "Except for the provisions of" the Act, the law

stated, "the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians … in the State of Maine." 25 U.S.C. §1724(e). "The absence of an analogous provision in the [Mohegan] Settlement Act," *Blumenthal* explained, confirmed that that statute "was not meant to eliminate the Secretary's power under the IRA" to take land into trust in contexts not governed by the law. 228 F.3d at 90. Precisely the same is true here.

EBCI's response to the Maine statute (Mot. 26 n.8) is that it "shows only that Congress has multiple ways to accomplish the same result." But that is circular, assuming the answer to the very question in dispute, i.e., whether the Settlement Act and Maine statutes *do* accomplish the same result. EBCI cannot show that its reading is correct simply by assuming that it is.

EBCI's response to *Blumenthal* similarly falls short. EBCI argues (Mot. 25-26) that the law at issue there differs from the Settlement Act because, in referring to lands "acquired under [a] subsection" of the statute, the law there made clear that it established a non-exclusive mechanism. But the fact that the Connecticut law contained textual indicia that it was meant to establish a mechanism to resolve only *some* land acquisitions does not distinguish it from the Catawba Settlement Act at all. As explained, the Catawba Act, too, "read as a whole strongly, if not conclusively, suggests that" the mechanisms established by sections 12 and 13 were meant to apply only to lands in South Carolina, *Blumenthal*, 228 F.3d at 89. And to the extent the statute remains ambiguous, *Blumenthal* confirms that the ambiguity is resolved (even setting aside *Chevron* deference and the Indian canon, *see infra* Part IV) by an examination of the law's purpose, because that purpose—settling specific land claims—shows that the statute's limitation on Interior's authority to acquire land in one context should not be read as a sweeping limit on the agency's authority to acquire land for that tribe everywhere else. *See supra* p.10.

3. EBCI's remaining arguments fail. First, EBCI invokes the Settlement Act's

legislative history, citing materials (Mot. 7-8, 23-24) that supposedly show the Catawba understood it would be limited to acquiring land through the mechanisms in sections 12 and 13. But "reliance on legislative history is hazardous at best." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 242 (1990). In any event, the cited materials suggest no such understanding. At most, they suggest that the Catawba knew they would be limited to acquiring *South Carolina* land via the Act's mechanisms. But virtually every key official involved in negotiating the Act understood that it and the agreement did *not* restrict the Catawba's trust-land acquisitions in North Carolina. *See, e.g.*, AR1157 (Chairman of the House Indian Affairs Subcommittee Bill Richardson: "Congress did not intend to limit Catawba land into trust acquisitions for expansion of their reservation only to South Carolina—and nothing in the Act says otherwise."); AR1159-1160 (Bureau of Indian Affairs Director Bill Ott: It was the BIA's "understanding" that "the South Carolina [s]trictures would not apply" outside South Carolina); *see also* AR982-986.

EBCI also argues (Mot. 24-25) that Interior previously embraced a contrary reading of the Act, when it denied the Catawba's first application to take the Kings Mountain site into trust. That is wrong. The first application was for a *mandatory* trust acquisition, and the Catawba argued that the Settlement Act's mechanisms should be applied (in modified form) to land outside the state. AR181-428. Interior disagreed, explaining that the Act's South-Carolina-specific mechanisms required "limiting *mandatory* trust acquisitions to South Carolina." AR433 (emphasis added). But it recognized that there were "other avenues through which the Kings Mountain parcel may be brought into trust" and invited the Catawba to "file a *discretionary* fee-to-trust application" under the IRA (which the Act makes applicable to the Catawba). AR434 (emphasis added). When the Catawba filed such an application, Interior granted it. AR3855.

There is thus no "revers[al]" here (Mot. 25) for the agency to explain. At all times,

Interior's view has been that it would be "absurd" to apply the mechanisms in sections 12 and 13 to land in North Carolina. AR432; AR3880. And at all times, Interior has concluded that those mechanisms do not apply in North Carolina. EBCI responds by pointing to Interior's statement that "[t]he Settlement Act may not be reasonably read to provide authority to take lands in North Carolina into trust for the Catawba reservation without further congressional action." AR434. But this statement clearly reflects Interior's view that *sections 12 and 13* of the Act do not confer such authority. Otherwise Interior would not have invited the Catawba to "file a discretionary fee-to-trust application" under IRA section 5, as it proceeded to do in the very next sentence of the memorandum denying the Catawba's mandatory application, *id.* There is no inconsistency.

Next, EBCI attacks Interior's conclusion that the Settlement Act provides a "broad extension of the Secretary's general authority to take lands into trust for the Nation under Section 5" of the IRA, AR3879. EBCI claims (Mot. 25) that "the 1993 Act nowhere says one word about any 'general [Section 5] authority.'" That is incorrect. As explained, the statute provides that the Catawba "shall be subject to [the IRA] except to the extent [the IRA's] sections are inconsistent with this Act." §9(a), 107 Stat. at 1125. That language is indeed a "broad extension of the Secretary's general [land-into-trust] authority … under Section 5" of the IRA, AR3879.

EBCI also briefly argues (Mot. 28) that Interior's land-into-trust decision is "[e]specially [u]nlawful" because the Catawba supposedly bought the Kings Mountain site using funds from the Land Acquisition Trust Fund, which (according to EBCI) violates the Settlement Act. Here too EBCI's statutory reading is wrong, but it does not matter because, as explained in the attached declaration, the site was not in fact purchased with money from that fund.

Finally, in its complaint, its preliminary-injunction papers, and its amended complaint, EBCI asserted that the settlement *agreement* revealed the parties' intent to bar the Catawba from

invoking section 5, in that it allegedly included a list of the IRA provisions that were "consistent with" the agreement—a list that omitted section 5. *See* ECF No. 1 at ¶33; ECF No. 2 at 17; ECF No. 41 at ¶83. As EBCI now concedes in a footnote, however (Mot. 24 n.7), the version of the settlement agreement that was attached to both its complaint and its amended complaint, ECF No. 41-12, is not the final version. And the final version omits the list entirely, providing only—as the Settlement Act itself does—that the IRA shall apply "except to the extent [its] sections are inconsistent with the" Settlement Act. AR549. Seeking to salvage something from this repeated misstatement, EBCI asserts (Mot. 24 n.7) that the change had no substantive effect. But the Supreme Court and the D.C. Circuit have rejected that argument in the statutory context, holding that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24, *quoted in, e.g.*, *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 231 (D.C. Cir. 2001).

In short, Interior's acquisition in trust of the Kings Mountain site under IRA section 5 was authorized by section 9(a) of the Settlement Act and is fully consistent with that statute.

**B. Section 4(b)**

Section 4(b) of the Settlement Act independently authorized Interior to take the Kings Mountain site into trust for the Catawba. That provision states that "the Tribe and [its] Members shall be eligible for all benefits and services furnished to federally recognized Indian tribes and their members because of their status as Indians." 107 Stat. at 1121. One such benefit and service is having land taken into trust. *See, e.g.*, 25 U.S.C. §2703(4)(B) (referring to lands "held in trust by the United States *for the benefit* of any Indian tribe" (emphasis added)); 25 C.F.R. §292.2 (similar). Interior's decision can therefore be sustained on this ground, too.

In seeking a preliminary injunction, EBCI argued that under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), this Court cannot consider section 4(b) because Interior's decision letter did not

rely on it, *see* ECF No. 17 at 38. But Interior explicitly cited section 4(b) in its approval letter, AR3876, and *Chenery* "does not bar … counsel from … elaborating on the … agency['s]" decision, *Chiquita Brands Int'l Inc. v. SEC*, 805 F.3d 289, 299 (D.C. Cir. 2015). In any event, *Chenery*'s mandate that courts "judge the propriety of [agency] action solely by the grounds invoked by the agency," 332 U.S. at 196, applies only "to agency actions that involve policy-making or other acts of agency discretion," *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 305 (D.C. Cir. 2015), not to issues of law. *Accord Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016). Whether section 4(b) of the Settlement Act authorizes Interior to take land into trust on the Catawba's behalf is a purely legal question, so the *Chenery* doctrine does not apply.

EBCI also asserted at that time (ECF No. 17 at 38) that taking land into trust pursuant to the IRA is not one of the "benefits and services" contemplated by the Act. The "plain language" of section 4(b), EBCI argued, "makes … clear" that the "benefits and services" contemplated by the Act were limited to those specifically identified in section 4(b). *Id.* at 38-39. But section 4(b) contains no such limitation, and courts "may not narrow a provision's reach by inserting words Congress chose to omit," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Indeed, section 4(b) states that the Catawba and its members "shall be eligible for *all* benefits and services furnished to federally recognized Indian tribes and their members because of their status as Indians." 107 Stat. at 1121 (emphasis added). EBCI assumes that the next sentence—listing some "benefits and services," *id.*—exhaustively defines that term. But nothing in that sentence justifies that reading; in fact, the sentence states that the Catawba "shall be eligible to [receive] the special services performed by the United States for tribes because of their status as Indian tribes." *Id.* EBCI has never explained why taking land into trust is not such a "service."

* * *

Because sections 9(a) and 4(b) of the Settlement Act each authorize Interior to take land outside South Carolina into trust for the Catawba, defendants are entitled to summary judgment on count I of EBCI's amended complaint.

## II. INTERIOR CORRECTLY CONCLUDED THAT THE KINGS MOUNTAIN SITE WOULD BE ELIGIBLE FOR GAMING ONCE IN TRUST (EBCI COUNT II)

EBCI contends (Mot. 17-21) that Interior also violated the Settlement Act and the APA by applying IGRA to the Catawba's land-into-trust application, because the Settlement Act (EBCI asserts) bars the application of IGRA to the Catawba nationwide. That is wrong largely for the same reason that EBCI's IRA argument fails: The relevant provisions of the Settlement Act apply only to South Carolina. And again, as explained in Part IV, once *Chevron* deference or the Indian canon is applied (or both are), it is even clearer that ECBI's contention fails.

Section 14(a) of the Settlement Act provides that IGRA "shall not apply to the" Catawba, 107 Stat. at 1136, while section 14(b) provides that gaming by the Catawba is governed by South Carolina law, *id.* Although section 14(b) indisputably applies only in South Carolina, EBCI says (Mot. 18) that section 14(a) applies nationwide. But like EBCI's IRA argument, this argument rests on the premise that the Settlement Act (and settlement agreement) impose *nationwide* restrictions on the Catawba, rather than merely establishing procedures by which the Catawba may operate within South Carolina. As discussed, that premise is infirm. *See supra* Part I.A.

Indeed, section 14 itself leaves no doubt that the statute makes IGRA inapplicable only in South Carolina. As noted, section 14(b) states that the "laws, ordinances, and regulations of the State" (South Carolina) "shall govern the regulation of gambling devices and the conduct of gambling or wagering by the [Catawba] on and off the Reservation." 107 Stat. at 1136; *see also* AR571-572. As EBCI never denies, section 14(b) must be limited to gaming in South Carolina, or else South Carolina law would govern a Catawba casino in North Carolina, Las Vegas, or

anywhere else. Just as Interior concluded with respect to the South-Carolina-specific provisions of section 13, that would be an absurd result. AR3880. In fact, it would be unconstitutional, as the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The fact that section 14(b) is limited to South Carolina means section 14(a) must be too. "Courts have a 'duty to construe statutes, not isolated provisions.'" *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). Hence, "unless the text clearly indicates otherwise, adjacent subsections on similar topics presumably have the same scope." *Stanford v. United States*, 2014 WL 2574492, *3 (E.D. Ky. June 9, 2014) (Thapar, J.) (citing *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1366 (Fed. Cir. 2013)); *accord Franklin Fed. Sav. Bank v. Dir., Office of Thrift Supervision*, 927 F.2d 1332, 1339 (6th Cir. 1991) (citing *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 573-575 (1989)). And as discussed, section 14(b) of the Settlement Act must be limited in scope to South Carolina. There is no basis (textual, historical, or otherwise) to give the immediately adjacent provision a far broader scope.

EBCI's counterarguments lack merit. First, EBCI cites cases (Mot. 18) that supposedly support its position. But even setting aside that the relevant statements from those cases are dicta, none of the cases addressed the question here: whether IGRA applies to the Catawba *outside* South Carolina. EBCI's citation to other statutes that "limit IGRA's applicability" (Mot. 20) fails for the same reason. There is no dispute that the Settlement Act "limit[ed] IGRA's applicability"; the question is whether it did so outside South Carolina, or only inside. The other statutes, like EBCI's cases, are silent on that question. Finally, EBCI criticizes Interior (Mot. 18) for "[i]gnoring" section 14. But EBCI does not argue that Interior's decision should actually be

vacated on this ground. Nor could it, because the basis of Interior's action "may reasonably" (indeed, easily) "be discerned," *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016), both from its current decision letter and from its decision on the Catawba's first application (AR434 n.18). The basis—as Interior explained after discussing extensively whether the key provisions of the Settlement Act apply only in South Carolina or nationwide—is that they set out "South Carolina-specific restrictions," AR3881; *see also* AR434 n.18 ("IGRA would apply to any 'Indian Lands' acquired by the Tribe through the discretionary fee-to-trust process"). That conclusion is sound, and thus defendants are entitled to summary judgment on Count II.[4]

## III. INTERIOR CORRECTLY CONCLUDED THAT THE KINGS MOUNTAIN SITE SATISFIES IGRA'S RESTORED-LANDS EXCEPTION (EBCI COUNT III)

Count III of EBCI's amended complaint alleges that Interior erred in concluding that the Kings Mountain site is gaming-eligible under IGRA's restored-lands exception, 25 U.S.C. §2719(b)(1)(B)(iii). That provision authorizes tribal gaming on lands that are "taken into trust as part of … the restoration of lands for an Indian tribe … restored to Federal recognition." According to EBCI (Mot. 28-32), this provision does not apply because (1) the Kings Mountain site was not taken into trust as "part of" the Catawba's land restoration, (2) Interior erred in interpreting its own regulation (25 C.F.R. §292.12) as applying here, and (3) Interior erred in concluding that the Catawba satisfied that regulation. Each argument is baseless (and that conclusion is reinforced, as to the first argument, by the application of *Chevron* deference, *see infra* Part IV). Defendants are therefore entitled to summary judgment on count III.

[4] EBCI argues briefly (Mot. 21-22) that if the Court finds error in Interior's gaming-eligibility determination, the entire decision letter must be vacated. That is wrong, but it is a remedy question, arising only if the Court finds error. EBCI offers no reason for this Court to address a remedy question now rather than following its approach in other APA cases, i.e., doing so only if necessary, and with the benefit of supplemental briefing focused on remedial issues. *See, e.g.*, *Ctr. for Biological Diversity v. Ross*, 2020 WL 1809465, at *10 (D.D.C. Apr. 9, 2020); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engr's*, 255 F. Supp. 3d 101, 147-148 (D.D.C. 2017).

### A. The Kings Mountain Site Is "Part Of" The Catawba's Restoration of Lands

EBCI first argues that the Kings Mountain site does not qualify as restored lands because only land acquired via the Settlement Act's "framework for restoring lands to the Catawba" (Mot. 29) are "part of" the Catawba's restoration, 25 U.S.C. §2719(b)(1)(B)(iii). And according to EBCI, this "framework" includes only section 12's procedures for acquiring reservation land. But here again, EBCI assumes that the law's mechanisms for land acquisitions in South Carolina barred acquisitions elsewhere. That is wrong for the reasons given above—including that the Settlement Act makes IRA section 5 applicable to the Catawba. The law's "framework" for restoring lands to the Catawba therefore includes section 5, so lands taken into trust under that section are "part of … the restoration of lands for" the Catawba, 25 U.S.C. §2719(b)(1)(B)(iii).

EBCI's contrary arguments fail. First, EBCI asserts (Mot. 29) that the "whole premise" of Interior's decision "was that the Kings Mountain acquisition was outside the [Settlement] Act's 'framework' for acquiring 'additional land in trust.'" That is exactly backwards: Interior determined that section 12's "restrictive provisions" for reservation lands do *not* constitute the Settlement Act's "comprehensive framework for all lands the [Catawba] seeks." AR3878-3879. Interior rejected EBCI's "narrow reading" as "contrary to the statutory language," AR3879, concluding that section 5 is part of the Settlement Act's procedures for acquiring trust land, *id.*

Second, EBCI's definition of "part"—"an essential portion"—is not compelling, because IRA section 5 *is* "an essential portion" of the Settlement Act's restoration framework. After all, absent that mechanism, the Catawba would be unable to acquire land *anywhere* outside South Carolina, including within its aboriginal territory in North Carolina. Nor does it help EBCI that IGRA's phrase "restoration of lands," 25 U.S.C. §2719(b)(1)(B)(iii), "fits 'comfortably with the concept of restitution,'" Mot. 30 (quoting *City of Roseville v. Norton*, 348 F.3d 1020, 1027 (D.C. Cir. 2003)). Even if "the 'restitution' Congress decided to provide was the [Settlement] Act's

provisions that restore lands to the Catawba," Mot. 30, section 9(a) of the Act—which applies section 5 of the IRA to the Catawba—is one of those provisions. Finally, EBCI notes (Mot. 29-30) that Congress used the definite article "the" in the phrase "the restoration of lands," arguing that "'the' restoration of lands to the Catawba is what the [Settlement] Act provides." But, again, section 5 of the IRA is a component of "the" restoration that the Settlement Act provides.

If EBCI is arguing simply that IGRA's phrase "restoration of lands" (which Congress did not define, *see City of Roseville*, 348 F.3d at 1024) is limited to lands specifically enumerated in a tribe's restoration act, that is wrong for the reasons courts have given in rejecting the argument. First, such a reading would gainsay the plain meaning of "restoration." *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 163-164 (D.D.C. 2000); *see also Oregon v. Norton*, 271 F. Supp. 2d 1270, 1280 (D. Or. 2003) ("'[R]estoration of lands' was not intended by Congress to be narrowly construed and limited to the lands included in the congressional enactments which restore tribal status."); *infra* p.25 (explaining that the Indian canon requires interpreting ambiguous statutory provisions in favor of the Indians). Second, it would be inconsistent with the provision's purpose, which is "to confer a benefit onto tribes that were landless when IGRA was enacted." *City of Roseville*, 348 F.3d at 1032; *see also id.* (rejecting another narrow reading of the restored-lands provision in light of this purpose).

This does not mean, as EBCI suggests (Mot. 30), that the restored-lands exception "appl[ies] anytime that any lands are provided to a restored tribe." Interior's regulations provide that if a tribe was restored to federal recognition by legislation (as the Catawba were), and if the legislation does not establish a limited geographic area for the restoration of lands (as in the case of the Settlement Act), then the tribe must show that it has "modern connections to the land," "a significant historical connection to the land," and "a temporal connection between the date of the

acquisition of the land and the date of the tribe's restoration." 25 C.F.R. §292.12(a)-(c). These requirements significantly and appropriately cabin the scope of the restored-lands exception.

In short, the "restrictive provisions" of section 12 of the Settlement Act, AR3878, are not the outer bounds of the Catawba's land restoration under IGRA. The Kings Mountain site, acquired in trust under section 5 of the IRA—which the Settlement Act expressly extends to the Catawba—is likewise a "part of" that restoration, 25 U.S.C. §2719(b)(1)(B)(iii).

### B. Interior Reasonably Interpreted Its Own Regulation To Conclude That Section 292.12 Applies

EBCI fares no better in claiming (Mot. 30-31) that 25 C.F.R. §292.12 does not apply here. Interior stated (AR3860) that section 292.12 applies per section 291.11(a), which says that if a law restoring a tribe's relationship with the United States "does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12." Interior correctly concluded that the Settlement Act "does not provide a specific geographic area for the restoration of lands." AR3860. As explained, the statute authorizes Interior to take land into trust for the Catawba anywhere in the United States, either (for South Carolina land) via the Act's South Carolina-specific procedures, or (for other land) via the IRA. The statute thus does not *restrict* the area in which land can be restored to a tribe—which is the meaning of "does not provide a specific geographic area for the restoration of lands," 25 C.F.R. §292.11(a). Indeed, a dictionary EBCI cites (Mot. 29, 32) defines "specific" as "restricted to a particular individual, situation, relation, or effect," e.g., "a disease *specific to* horses." *Merriam-Webster* (second definition), https://www.merriam-webster.com/dictionary/specific. It was certainly reasonable for Interior to interpret its own regulation that same way. *See Kisor*, 139 S. Ct. at 2413-2417.

EBCI's contrary view is that the Settlement Act provides a "specific geographic area," 25 C.F.R. §292.11(a), because the law permits or authorizes Interior to take land into trust in South

Carolina. Mot. 31. But simply offering a contrary reading is insufficient; EBCI must show that Interior's reading is foreclosed by the regulatory language or unreasonable. *See Kisor*, 139 S. Ct. at 2413-2417. It is neither. Indeed, it is EBCI's reading that is unreasonable. If a law just had to refer to any area in which lands could (or had to ) be taken into trust, then only the particular "geographic area[s]" identified in a tribe's restoration act could qualify under section 292.11(a) as "restoration of lands" under IGRA, 25 U.S.C. §2719(b)(1)(B)(iii). This argument, in other words, largely reprises EBCI's statutory challenge—which fails for the reasons given in Part III.A. And Interior knew when issuing section 292.11(a) that the reading EBCI now urges would be contrary to IGRA's plain language, because Interior had previously espoused that very same reading regarding IGRA's restored-lands provision, and been rebuffed. *See Confederated Tribes*, 116 F. Supp. 2d at 164; *see also Norton*, 271 F. Supp. 2d at 1280. Interior was well within its discretion not to interpret its regulation in a way that multiple courts had rejected.

### C. Interior Reasonably Applied Its Own Regulation

Finally, EBCI contends (Mot. 31-32) that Interior erred in concluding that the Catawba satisfied the first requirement in section 292.12's multi-factor connections test: that the Catawba be "located" in North Carolina, "as evidenced by the tribe's governmental presence and tribal population," 25 C.F.R. §292.12(a). Interior determined that the Catawba are "located" in North Carolina under this test because the Catawba have a significant tribal population there (253 members), AR3861, and "operate[] many governmental programs and provide[] various services in North Carolina" "to advance the general welfare of [these] members," AR3861-AR3862.

EBCI's response (Mot. 31-32) is that the dictionary definition of "located" is "settled" or having "established a residence," and that the Catawba cannot be located in North Carolina because "governmental functions," "governmental buildings[,] and tribal businesses are all located in South Carolina." But both EBCI's dictionary definition and the location of any "tribal

businesses" are irrelevant because the regulation provides that "location" is determined by "governmental presence and tribal population." 25 C.F.R. §292.12(a). That definition controls, and those are the factors that Interior considered. As to that controlling definition, moreover, EBCI has nothing to say about the tribal-population factor, which alone is enough to reject its challenge given that hundreds of Catawba members reside in North Carolina. In any event, its only arguments regarding "governmental presence" (Mot. 32) are that the "Catawba perform all governmental functions" in South Carolina and that "the Catawba's governmental buildings … are all located in South Carolina." The first argument is just factually wrong; as Interior's decision states, the Catawba's many governmental services in North Carolina include, "but [are] not limited to," *eleven* distinct services, such as "[c]hildcare assistance," "[s]ubstance abuse services," "[c]ollege scholarship programs," and "[j]ob placement services." AR3861-3862. And the second argument (about the location of government buildings) falls short because—as just shown—a government need not have brick-and-mortar buildings somewhere in order to have a "presence"; it can instead have a presence through the services it provides. Those services, together with the Catawba population in North Carolina, amply demonstrate that the Catawba are located in North Carolina under section 292.12. Certainly Interior's conclusion to that effect must stand given that an agency's fact-dependent "application of its own regulations[] receives 'an even greater degree of deference than the *Chevron* standard,'" *Consarc*, 71 F.3d at 915.

In sum, Interior—interpreting and applying its own regulation—reasonably concluded that the Catawba (and the Kings Mountain site) satisfy IGRA's restored-lands provision. Defendants are therefore entitled to summary judgment on count III of EBCI's complaint.

## IV. *CHEVRON* DEFERENCE AND THE INDIAN CANON OF CONSTRUCTION REINFORCE THE INFIRMITY OF EBCI'S CHALLENGES TO INTERIOR'S STATUTORY CONSTRUCTIONS

As explained, EBCI's arguments about the meaning of the Settlement Act and IGRA lack

merit. *See supra* Parts I-III.A. But even if those arguments showed that either law is ambiguous, summary judgment for defendants would still be required because *Chevron* deference and/or the Indian canon of construction would require the ambiguity to be resolved in defendants' favor.

A. *Chevron* deference applies to Interior's interpretations of the Settlement Act because Congress authorized Interior "to implement the terms of [the] Settlement Agreement," Settlement Act §2(b)(2), 107 Stat. at 1119, and that directive encompasses implementation of the Settlement Act, *see Blumenthal*, 228 F.3d at 93 (deferring to Interior's interpretation of an ambiguous land-claim settlement act). Interior's interpretations of IGRA also receive *Chevron* deference. *See Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 465-467 (D.C. Cir. 2007); *Mich. Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 7 (D.D.C. 2007).

EBCI does not dispute that *Chevron* deference can apply to Interior's readings of either law; it instead argues first (Mot. 26) that no deference is required here because on the relevant points, each statute "could not be clearer." That is demonstrably untrue. For example, the Settlement Act nowhere expressly states that the Catawba may acquire land only within South Carolina (and there are many contrary indicia, *see supra* pp.8-9). Similarly, there is no serious argument, given the South-Carolina-specific scope of section 14(b), that section 14(a) of the Act clearly makes IGRA inapplicable to the Catawba nationwide. And likewise, it cannot reasonably be contended that IGRA's restored-lands exception (which, again, does not define "restoration of lands") clearly forecloses application of that exception here. Finally, EBCI's only other argument against *Chevron* deference (Mot. 26) is that the decision letter constitutes an "abrupt departure" from Interior's prior position. As explained, that is incorrect. *See supra* pp.12-13.[5]

[5] *Chevron* deference does not apply to the issues addressed above in Parts III.B and C. As discussed, however, deference on those issues—which involve Interior's interpretation and fact-specific application of its own regulations—is required under the APA.

B. The Indian canon applies here too. The Settlement Act was enacted to "promote [the Catawba's] self-determination and economic self-sufficiency" and "in recognition of the United States[']s obligation to the" Catawba. Settlement Act §2(a)(1), (8), 107 Stat. at 1118-1119. Accordingly, the "principles of equitable obligations" that are "applicable to the [U.S.-Indian] trust relationship" and that animate the Indian canon, *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), militate strongly in favor of a reading of the law that favors the Catawba.

That conclusion is not affected by the fact that the opposing parties are also Indians (*see* Mot. 27). The Settlement Act was enacted for the benefit of the Catawba, not EBCI or the Cherokee Nation. And as another judge in this district has concluded, "[i]t would be strange to construe a statute against the only Tribe it seeks to benefit simply because another Indian tribe objects," *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 80 (D.D.C. 2020), *appeals docketed*, Nos. 20-5123, 20-5125, 20-5127, 20-5128 (D.C. Cir. May 8, 2020). As that judge explained, cases declining to apply the canon in similar circumstances (*see* Mot. 27) involved the interpretation of generally applicable Indian laws like the IRA or IGRA, rather than a law, like the Settlement Act, enacted for the specific benefit of one tribe. *See id.*[6]

Applying the Indian canon, *Chevron* deference, or both confirms that Interior did not err in interpreting either the Settlement Act or IGRA in its decision letter. Again, then, defendants are entitled to summary judgment on counts I-III of EBCI's amended complaint.

## V. INTERIOR DID NOT UNLAWFULLY AUTHORIZE A KNOWN "BAD ACTOR" TO DEVELOP A CASINO (EBCI COUNT IV)

As a final basis for vacatur under the APA, EBCI reprises (Mot. 33-34) the phony narrative with which its complaint and motion begin: that Interior's approval of the Catawba's land-into-trust application is the result of a nefarious scheme by a malevolent mastermind, one

[6] The Catawba does not urge application of the Indian canon as to count III EBCI's complaint.

who easily bends federal officials and agencies to his will and manipulates a sovereign tribal nation with the ease that a puppeteer would a marionette. This fanciful smear campaign cannot conceal or distract from the weakness of EBCI's legal claims; it should be rejected out of hand.

A. Several threshold points warrant mention. First, EBCI's assertion that Wallace Cheves (or any private citizen) can steamroll the United States Department of the Interior into making a land-into-trust decision is facially absurd. And EBCI's claim that the Catawba were a pawn for Mr. Cheves to deploy ("a tool in his scheme" (Mot. 1)) is repugnant and offensive. The Catawba, not anyone else, decided to pursue the Kings Mountain project, to help their people overcome a history of mistreatment and the severe economic challenges that have resulted. There is no doubt, moreover, that the Kings Mountain project will bring enormous benefits to the Catawba. It is both "concern trolling" and paternalism of the highest order for EBCI to say that the Catawba chose poorly in determining how to achieve these immense benefits for its people.

EBCI's libelous narrative, moreover, is internally inconsistent. As EBCI recounts (Mot. 9-10), before the Catawba submitted its successful land-into-trust application, it tried for years to win approval of its prior application and to secure enactment of federal legislation approving a mandatory acquisition. Mr. Cheves (as EBCI admits (*id.*)) was involved in both those efforts—neither of which succeeded. Yet EBCI does not even try to explain why, if he is truly the grand manipulator of sovereign nations that EBCI claims, he failed with both efforts; *accord* Mot. 4-5 (claiming Interior acted with "haste" and in a "rush to appease Cheves," without explaining why Interior, after taking years to resolve the Catawba's applications, was suddenly in a rush).

Finally, EBCI's yarn is notably devoid of citations to the record. EBCI tries to excuse this fatal failing both by blaming Interior (*e.g.*, Mot. 3) and by saying that its story is irrelevant to its claims (*e.g.*, Mot. 4). That is unavailing. EBCI could have sought to have material added to

the record; it chose not to. It should not be heard to blame Interior for that choice—or for the consequences. EBCI's admission that its narrative is irrelevant, meanwhile, only confirms that EBCI is simply wasting the Court's time trying to distract from its unseemly motive for suing.

B. All that aside, EBCI's arguments on this claim are baseless. EBCI asserts (Mot. 33) that Interior "improperly applied IGRA to the Catawba's application without considering [Mr. Cheves's] criminal history." Agency action, however, must "take into consideration all *relevant* factors." *Pension Benefit Guaranty Corp. ("PBGC") v. LTV Corp.*, 496 U.S. 633, 645 (1990) (emphasis added). Mr. Cheves is not a member of the Catawba and was not one of the applicants for the land-into-trust acquisition. His background is simply irrelevant to both Interior's decision that the Catawba's application met the requirements for a discretionary land-into-trust acquisition and its decision that the land, once in trust, will be eligible for gaming.

In arguing otherwise, ECBI cites (Mot. 33) IGRA's "Declarations of Policy," 25 U.S.C. §2702(2)-(3)). But those declarations are not actionable, and agency action may not "be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered," *PBGC*, 496 U.S. at 646. Otherwise, "a very large number of agency decisions might be … invalidat[ed]." *Id.*; *see also Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661 (2016) (rejecting reliance on "[v]ague notions of a statute's 'basic purpose'"). As for the other provisions EBCI cites (Mot. 33), they have nothing to do with Interior or the decisions at issue here. They concern the National Indian Gaming Commission's evaluation of (1) ordinances adopted by tribes to regulate tribal gaming operations (25 U.S.C. §2710(d)(2)(B)(ii)) and (2) proposed management contracts for class II gaming facilities (*id.* §2711(e)). No such ordinances or contracts are even arguably at issue here.

Put simply, there is nothing arbitrary or unlawful about Interior's refusal to take EBCI's

(shameful) bait and make this case about something it is not. This Court should refuse as well.

## VI. PLAINTIFFS' NEPA ARGUMENTS FAIL (EBCI COUNT VI, CHEROKEE COUNT II)

Plaintiffs say (Mot. 45) that Interior had to consider alternatives outside what they say is Cherokee territory. That is foreclosed by *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519, 551, 553-554 (1978). Plaintiffs also say (Mot. 43-44) that Interior had to consider a "jurisdictional quagmire." But plaintiffs admit that such a "quagmire" could exist only if someone decided that South Carolina law applied outside the state. Again, that is absurd and unconstitutional. *See supra* pp.8, 16-17. Interior did not have to consider the scenario where its sensible reading of a statute is rejected in favor of an absurd and unlawful result—especially since plaintiffs offer no reason even to think that will ever occur.

## CONCLUSION

Plaintiffs' motion for summary judgment should be denied, and plaintiffs' amended complaints should be dismissed for lack of jurisdiction. Alternatively, summary judgment should be entered for defendants on each claim in plaintiffs' amended complaints.

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Respectfully submitted,

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