

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

SIERRA CLUB)	
85 Second Street, 2d Floor)	
San Francisco, CA 94105-3441)	
)	
OHIO VALLEY ENVIRONMENTAL)	No.
COALITION)	
1101 Sixth Avenue, Suite 222)	
Huntington, WV 25701)	
)	
FRIENDS OF BLAIR MOUNTAIN, Inc.)	
224 Wilson Avenue)	
Morgantown, WV 26501)	
)	
WEST VIRGINIA LABOR HISTORY)	
ASSOCIATION)	
PO Box 5156)	
Charleston WV 25361)	
)	
Plaintiffs,)	
)	
v.)	
)	
KEN SALAZAR, in his official capacity as)	
Secretary of the)	
U.S. DEPARTMENT OF THE INTERIOR,)	
an Agency of the United States,)	
1849 C Street, N.W.)	
Washington, D.C. 20240)	
)	
JON JARVIS, in his official capacity as)	
Director, National Park Service,)	
1849 C Street, N.W.)	
Washington, D.C. 20240)	
)	
CAROL SHULL, in her official capacity as)	
Keeper of the National Register of Historic)	
Places)	
1849 C Street, N.W.)	
Washington, D.C. 20240)	
)	
Defendants.)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Sierra Club, Ohio Valley Environmental Coalition, Friends of Blair Mountain, Inc. and the West Virginia Labor History Association (“Plaintiffs”) file this complaint for declaratory and injunctive relief challenging the lawfulness of the action of Defendants Department of the Interior, the National Park Service (“NPS”), and the Keeper of the National Register of Historic Places (“Keeper”) in removing the Blair Mountain Battlefield – the site of the 1921 Battle of Blair Mountain, the largest armed labor conflict in our nation’s history – from listing in the National Register of Historic Places (“National Register”). The Keeper’s action, which was based on the erroneous determination that more than fifty percent of owners of private property within the boundaries of the site objected to the National Register nomination, was arbitrary, capricious, an abuse of discretion, and contrary to the regulations governing the calculation of owners and objections under the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470a(a)(6) and 36 C.F.R. Part 60.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, 28 U.S.C. § 1361, 16 U.S.C. § 470w-4, and 5 U.S.C. § 702. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because all Defendants reside in this District and the decision to remove Blair Mountain Battlefield from the National Register challenged herein was made in this District.

PARTIES

3. Plaintiff Sierra Club (“Sierra Club”) is a national, non-profit environmental and

conservation organization incorporated under the laws of the State of California, which maintains an office in the District of Columbia. The Sierra Club has more than 622,500 members nationwide, 2,000 of whom live in West Virginia and belong to its West Virginia Chapter, including members who reside near and are directly affected by the decision to remove the Blair Mountain site from the National Register of Historic Places. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The West Virginia Chapter of the Sierra Club has been involved in efforts to protect Blair Mountain for many years, participating in earlier campaigns to nominate the site, and providing grants to local residents and organizations to support their work at the site. Listing of the site in the National Register would allow Sierra Club members to enjoy this valuable resource and protect it for future generations. Sierra Club brings this action on behalf of itself and its adversely affected members.

4. Ohio Valley Environmental Coalition (“OVEC”) is a nonprofit environmental organization with approximately 1,500 members. Its principal place of business is Huntington, West Virginia. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. OVEC has members whose forefathers battled for the mine workers union at the Blair Mountain uprising. OVEC members have worked for close to a decade to try to protect and preserve Blair Mountain, including joining in efforts to have the site listed in the National Register of Historic Places. OVEC brings this action on behalf of itself and its adversely affected members.

5. Friends of Blair Mountain was incorporated on August 2, 2010, in the state of West Virginia to protect the historic attributes of the 1600 acre Blair Mountain Battlefield in Logan County, West Virginia. Friends of Blair Mountain has undertaken efforts to educate the public and policymakers about the history and significance of Blair Mountain Battlefield and has supported the effort to secure National Register-listing for the site.

6. The West Virginia Labor History Association (“WVLHA”) is a nonprofit, tax exempt organization founded in 1976 to promote research, preservation and dissemination of West Virginia’s labor history. WVLHA has approximately 100 members. WVLHA was an original supporter of listing Blair Mountain in the National Register. WVLHA brings this action on behalf of itself and its adversely affected members.

7. Plaintiffs and their members use, enjoy, and appreciate the historic resources of Blair Mountain Battlefield. The interests of the Plaintiffs and their respective members in using, enjoying, protecting and appreciating the Blair Mountain Battlefield are threatened and adversely affected by the Defendants’ actions and omissions complained of herein. These members would thus have standing to sue in their own right. Plaintiffs, and their respective members, are and will continue to be aggrieved and adversely affected by the actions of the Defendants, and they have suffered and will continue to suffer injury in fact due to the Defendants’ past, current, ongoing, and prospective failure to comply with the law.

8. Defendant Ken Salazar is sued in his official capacity as the U.S. Secretary of the Interior. In that capacity, defendant Salazar is responsible for the administration, operations, and activities of the Defendant Department of the Interior, including the administration, operations, and activities of the National Park Service (“NPS”), an agency within the Department of the Interior. The Secretary of the Interior is responsible for expanding and maintaining the National

Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture, and for promulgating regulations governing the nomination of properties for inclusion in, and removal from, the National Register. 16 U.S.C. §§ 470a(a)(1)(A), 470a(a)(2)(A)). He is responsible for ensuring that the Department of the Interior and the NPS comply with the requirements of the NHPA, and other legal requirements applicable to the management of the National Register.

9. Defendant Department of the Interior is an agency of the United States responsible, through the National Park Service, for carrying out the national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. 16 U.S.C. §§ 461, 462.

10. Defendant Jon Jarvis is sued in his official capacity as the Director of the National Park Service. In that capacity, Defendant Jarvis is responsible for the administration, operations, and activities of the National Park Service. The National Park Service is the bureau of the Department of the Interior to which the Secretary of the Interior has delegated the authority and responsibility for administering the National Register program. 36 C.F.R. § 60.3(h).

11. Defendant Carol Shull is sued in her official capacity as the Keeper of the National Register. The Keeper of the National Register is the individual who has been delegated the authority by the NPS to list properties in and determine their eligibility for the National Register of Historic Places. 36 C.F.R. § 60.3(f).

STATUTORY AND REGULATORY BACKGROUND

12. The National Historic Preservation Act (“NHPA”) authorizes the Secretary of the Interior “to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology,

engineering, and culture.” 16 U.S.C. § 470a(a)(1)(A).

13. The NHPA directs the Secretary of the Interior to promulgate regulations governing the nomination of properties for inclusion in, and removal from, the National Register of Historic Places. *Id.* § 470a(a)(2)(A).

14. The NHPA further provides that “[i]f the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of a historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn.” *Id.* § 470a(a)(6).

15. The Secretary of the Interior is required by the NHPA to promulgate regulations requiring that, before listing property in the National Register or designating a property as a National Historic Landmark, “the owner or owners of such property, or a majority of the owners of the properties within the district in the case of a historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation.” *Id.* These regulations “shall include provisions to carry out the purposes of this paragraph in the case of multiple ownership of a single property.” *Id.*

16. The regulations promulgated by the Secretary of the Interior implementing this provision of the NHPA state that “[e]ach owner of private property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the historic district.” 36 C.F.R. § 60.6(g).

17. These regulations define owner or owners as “those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not

include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.” *Id.* § 60.3 (k).

18. The regulations contain procedures for notifying owners and ascertaining owner objections in the case of National Register nominations by the State Historic Preservation Officer (“SHPO”). *Id.* § 60.6. As part of the nomination process, “each State is required to notify in writing the property owner(s), except as specified in paragraph (d) of this section, of the State's intent to bring the nomination before the State Review Board. The list of owners shall be obtained from either official land recordation records or tax records, whichever is more appropriate, within 90 days prior to the notification of intent to nominate. If in any State the land recordation or tax records is not the most appropriate list from which to obtain owners that State shall notify the Keeper in writing and request approval that an alternative source of owners may be used.” *Id.* § 60.6(c).

19. In the case of nominations with more than 50 property owners, the SHPO is required to provide “general notice” in “one or more local newspapers of general circulation in the area of the nomination.” *Id.* § 60.6(d). This notice must be made “at least 30 but not more than 75 days in advance of the State Review Board meeting.” *Id.* The required individual or general notice “shall give the owner(s) at least 30 but not more than 75 days to submit written comments and concur in or object in writing to the nomination of such property.” *Id.* § 60.6(c).

20. Under 36 C.F.R. § 60.6(g), upon notification of a National Register nomination by the SHPO, “any owner or owners of a private property who wish to object shall submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the private property, as appropriate, and objects to the listing.” 36 C.F.R. § 60.6(g). “Upon receipt of notarized objections respecting a district or single private property with

multiple owners, it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected.” *Id.*

21. Once a nomination is received by the Keeper of the National Register, the NPS must provide public notice of the nomination in the Federal Register that the property “is being considered for listing in the National Register,” and provide for a 15-day “commenting period.” 36 C.F.R. § 60.13(a).

22. “Nominations will be included in the National Register within 45 days of receipt by the Keeper or designee unless the Keeper disapproves a nomination, an appeal is filed, or the owner of private property (or the majority of such owners for a district or single property with multiple owners) objects by notarized statements received by the Keeper prior to listing.” *Id.* § 60.6(r).

23. A property or site that is listed in the National Register can be removed under procedures established by Secretary of the Interior. 36 C.F.R. § 60.15. Grounds for removal include “prejudicial procedural error in the nomination or listing process.” *Id.* § 60.15(a).

24. Any person or organization may petition in writing for removal of a property from the National Register. In the case of petitions to remove properties that were nominated by the SHPO, petitions for removal must be submitted to the Keeper by the SHPO. *Id.* § 60.15(c).

25. The Keeper of the National Register also has the authority to remove a property from the National Register “on his own motion on the grounds established in paragraph (a) of this section, . . .” *Id.* § 60.15(k). In such Keeper-initiated petitions, “the Keeper will notify the nominating authority, the affected owner(s) and the applicable chief elected local official and provide them an opportunity to comment. Upon removal, the Keeper will notify the nominating authority of the basis for the removal.” *Id.*

FACTS

26. Blair Mountain, in Logan County, West Virginia, is the site of the Battle of Blair Mountain, which was fought along the ridge line of Spruce Fork Ridge between August 30 and September 4, 1921, and was the largest armed uprising on American soil since the Civil War. The battle was the cataclysmic culmination of the United Mine Workers of America's unsuccessful, three-year long struggle to unionize the coal miners of Logan, Mingo, McDowell, and Mercer counties, West Virginia, a battle marked by a level of violence unparalleled in U.S. history that fundamentally affected the direction of American labor history.

27. The 1921 Battle of Blair Mountain was ignited by the murder of Matewan, West Virginia, Police Chief Sid Hatfield, who prevented coal company-controlled armed forces from evicting coal miners from their homes for joining the union, in August 1920, sparking violent confrontations between miners and coal company operators and resulting in the imposition of martial law in Mingo County. On August 30, 1921, a force of at least 7,500 miners began a march to liberate Logan County and to seek the right to unionize and to exercise civil liberties – freedom of speech and assembly, freedom from the industrial feudalism of company towns, and freedom from the terrorism inflicted by coal mining operators and their hired gunmen.

28. The miners' march was met by a force of 3,000 law officers, many of whom were on the coal companies' payrolls, who established a defense line along Spruce Fork Ridge on Blair Mountain that stretched for ten miles, with two armed pickets stationed every fifty yards. These forces dug trenches, blocked roads, felled trees, dropped home-made bombs, and fired an estimated one million rounds of ammunition on the miners from mounted machine guns along the 15-mile ridgeline. At least 16 men died in the fighting. The miners surrendered on September 5, 1921, when federal troops arrived.

29. Efforts to nominate Blair Mountain Battlefield for listing in the National Register of Historic Places date back to 1996, when the NPS asked the West Virginia State Historic Preservation Officer (“WV SHPO”) to assess the Battle of Blair Mountain Site for possible suitability as a National Historic Landmark due to its exceptional significance to the nation as a whole.

30. While the WV SHPO initially declined to nominate Blair Mountain Battlefield to the National Register due to concerns that surface mining activities, particularly along the site’s southern crest, had altered some of the site’s topographical features, the WV SHPO ultimately determined that the site as a whole retains its integrity of feeling, setting, location, and association, and was eligible for listing in the National Register. Accordingly, on July 21, 2005, the West Virginia Archives and History Commission voted unanimously to nominate Blair Mountain Battlefield for listing in the National Register.

31. As nominated, the Blair Mountain Battlefield consists of approximately 1,600 acres stretching approximately ten miles across the summit of Spruce Ridge Fork in Logan County, West Virginia, near the community of Blair. The site also contains numerous documented archaeological sites containing artifacts such as firearms, buttons, shell casings, and ordinance that have the potential to yield important information about the battle of Blair Mountain.

32. On information and belief, the WV SHPO published notice of the nomination in the Logan Banner sometime in 2005, and property owners living within the boundaries of Blair Mountain were advised of their rights to object to the nomination by submitting a notarized statement of objection to the WV SHPO. In response to the notice, a number of objections were received by the WV SHPO. The nomination was then forwarded to the Keeper of the National Register.

33. The Keeper of the National Register received the nomination of the Battle of Blair Mountain on July 26, 2005. On August 12, 2005, the NPS published notice of the National Register nomination of the Battle of Blair Mountain and other nominated properties in the Federal Register and invited “written comments concerning the significance of these properties under the National Register criteria for evaluation” by August 29, 2005, pursuant to 36 C.F.R. § 60.13.

34. On September 26, 2005, the Keeper returned the nomination to the WV SHPO with requests for clarification, including questions about the identification and notification of private property owners.

35. On December 22 and 27, 2007, the State Attorney General’s office conducted property owner research for the WV SHPO, and identified 68 property owners based on the tax records of the Logan County Assessor and Sheriff at the Logan County Courthouse.

36. On January 21 and 23, 2008, the WV SHPO again provided general notice of the proposed nomination of Blair Mountain Battlefield through publication in the Logan Banner. The notice indicated that while the nomination had been revised, the boundaries for the current nomination were the same as for the 2005 nomination. The notice advised that any notarized letters of objection received by the WV SHPO “in 2005 objecting to the May 2005 nomination will be considered by the Keeper of the National Register if the current owners for that parcel are the same.” The notice directed that “any owner or partial owner who objects to listing should submit a notarized statement (certifying ownership and objection to listing) by February 21, 2008” to the WV SHPO. No new objections from current property owners were received by the WV SHPO within this comment deadline.

37. On February 22, 2008, the West Virginia Archives and Historic Commission again

voted unanimously to nominate Blair Mountain based on the revised nomination.

38. On April 17, 2008, the WV SHPO submitted the revised nomination of the Battle of Blair Mountain to the Keeper.

39. On May 12, 2008, the NPS published notice of the National Register nomination of the Battle of Blair Mountain and other nominated properties in the Federal Register and invited “written comments concerning the significance of these properties under the National Register criteria for evaluation” by May 27, 2008, pursuant to 36 C.F.R. § 60.13.

40. In June 2008, property owners Claude Gill, Larry Bryant, Lisa Bryant, French Burke, Peggy Burke, Samuel Craddock, and Bonnie Craddock sent notarized letters certifying that they owned property within the nominated site and objected to the nomination directly to the Keeper of the National Register.

41. On July 1, 2008, the WV SHPO withdrew the National Register nomination of the Battle of Blair Mountain in order to make changes to the maps submitted with the nomination.

42. On October 24, 2008, the WV Attorney General’s office conducted research into West Virginia tax records to identify current owners of property within the boundaries of the Battle of Blair Mountain, resulting in a list of 67 owners (“October 24, 2008 List of 67 Owners”).

43. In accordance with 36 C.F.R. § 60.6(w), the WV SHPO placed a legal notice of the re-processed nomination of Blair Mountain to the National Register in the Logan Banner on November 24, 2008 (“November 24, 2008 Public Notice). The November 24, 2008 Public Notice advised that any persons who own property within the boundaries of the Blair Mountain Battlefield who objected to the listing should submit a notarized statement certifying ownership and objection to the listing to the WV SHPO by December 29, 2008. The November 24, 2008

Public Notice also advised that “any notarized letters received by the West Virginia State Historic Preservation Officer o[r] the Keeper of the National Register object[ing] to the earlier nominations will be considered by the Keeper of the National Register if the current property owners for that parcel are the same and the parcel remains in the current boundary.”

44. No new notarized letters of objection were received by the WV SHPO within this comment period. Twenty-five (25) of the notarized letters of objection previously received by the WV SHPO in response to prior nominations were received from persons whose names appeared on the October 24, 2008 List of 67 Owners.

45. By letter dated January 13, 2009, the WV SHPO re-submitted the nomination of the Blair Mountain Battlefield to the Keeper of the National Register.

46. The WV SHPO’s January 13, 2009 nomination included a calculation of the percentage of owners on the October 24, 2008 List of 67 Owners who submitted notarized objections to the WV SHPO prior to the nomination.

47. The WV SHPO’s calculation of the percentage of owners on the October 24, 2008 List of 67 Owners who objected to the nomination of Blair Mountain Battlefield included all notarized letters of objection received by the WV SHPO prior to transmitting the nomination to the Keeper on January 13, 2009.

48. The WV SHPO’s letter of January 13, 2009 informed the Keeper that the WV SHPO had received objections from less than a majority of owners on the October 24, 2008 List of 67 Owners.

49. The WV SHPO’s January 13, 2009 letter to the Keeper also included an alternative calculation of owner objections based on a list of owners that added eight additional owners to the October 24, 2008 List of 67 Owners and added eight letters of objection to the calculation.

These additional eight owners and objectors had submitted objections and affidavits of ownership in September 2005, in response to notice of the 2005 nomination. However, these eight objectors did not appear on the October 24, 2008 List of 67 Owners, and did not submit updated “affidavits of ownership” to the WV SHPO in response to the November 24, 2008 Public Notice.

50. By letter dated February 27, 2009, Jackson Kelly, a law firm representing several mining companies that own land within the boundaries of the Blair Mountain Battlefield, petitioned the Keeper to reject the nomination pursuant to 36 C.F.R. § 60.6(t). As part of its “petition,” Jackson Kelly provided selected “corrections” to the October 24, 2008 List of 67 Owners. The law firm also requested that the Keeper extend the “period of review” for 30 days, pursuant to 36 C.F.R. § 60.12(a), to allow for the submission of “additional documentation.”

51. By letter to the Keeper dated March 26, 2009, the WV SHPO reiterated that the WV SHPO had received objections from less than fifty percent of the property owners on the October 24, 2009 List of Owners.

52. In its letter of March 26, 2009, the WV SHPO also provided to the Keeper a “recalculated” list of 57 owners of property within the Blair Mountain Battlefield (“March 26, 2009 Recalculated List of 57 Owners”). The March 26, 2009 Recalculated List of 57 Owners eliminated nine property owners from the October 24, 2008 List of 67 Owners, based on information provided by Jackson Kelly concerning changes in ownership since the October 24, 2008 List of 67 Owners was compiled.

53. All told, the WV SHPO provided four alternative lists of property owners within the boundaries of the Blair Mountain Battlefield to the Keeper. For each list, the WV SHPO calculated the percentage of owners on each list who submitted objections to the nomination.

54. The October 24, 2008 List of 67 Owners is the only list of owners that was compiled within 90 days prior to the November 24, 2008 Public Notice.

55. On March 27, 2009, the Keeper received eight additional notarized letters of objection to the National Register listing of Blair Mountain Battlefield. The names of only three of the new objectors – Charles Carpenter, Bonnie Craddock, and Samuel Craddock – appeared on the October 24, 2008 List of 67 Owners. Bonnie Craddock and Samuel Craddock had also previously sent in notarized letters of objection directly to the Keeper in June 2008.

56. Including the objections submitted directly to the Keeper, a total of thirty-three (33) notarized letters of objection were received by either the Keeper or the WV SHPO from persons whose names appeared on the October 24, 2008 List of 67 Owners, in response to the November 24, 2008 Public Notice and to all prior public notices of the nomination. Therefore, less than a majority of owners on the October 24, 2008 List of 67 Owners objected to the nomination and listing of Blair Mountain Battlefield in the National Register.

57. On March 30, 2009, Blair Mountain Battlefield was listed in the National Register.

58. By letter dated April 6, 2009, the WV SHPO advised the NPS that six letters of objection from persons had been “unintentionally overlooked,” and that 30 owners on the March 24, 2009 Recalculated List of 57 Owners had objected to the nomination. These “overlooked objectors” included five letters of objection received directly by the Keeper from Claude Gill, French and Peggy Burke; Larry and Lisa Bryant in June 2008, whose names appeared on the October 24, 2008 List of 67 Owners, whose objections had not been submitted to the WV SHPO prior to the January 13, 2009 nomination.

59. By letter dated July 22, 2009, the NPS advised the WV SHPO that one of the objectors – Loretta White Life Estate – had only a life estate and therefore could not be included

in the list of owners or objectors. However, the Keeper determined that a majority of the remaining owners on the March 26, 2009 Recalculated List of 57 Owners had submitted qualifying objections to the nomination. Accordingly, the NPS stated that the Keeper “intends to remove the Blair Mountain Battlefield from the National Register, pursuant to the provisions of 36 CFR 60.15(k).”

60. On July 9, 2009, the NPS placed a notice in the Logan Banner to notify affected owners of the Keeper’s intent to remove Blair Mountain Battlefield from the National Register and “to provide an opportunity for comment.” *Id.*

61. In response to this notice, Friends of Blair Mountain member Harvard Ayers submitted timely comments to the Keeper identifying numerous errors and disparities in the March 24, 2009 Recalculated List of 57 Owners and the calculation of owner objections based on this list. However, the Keeper refused to consider this information based on the view that “it is the responsibility of the [SHPO] ‘to ascertain whether a majority of owners of private property have objected’ to a National Register nomination.”

62. On December 30, 2009, the Keeper removed Blair Mountain Battlefield from the National Register pursuant to 36 C.F.R. §60.15(k). The basis for the removal was a “procedural error” in the calculation of the percentage of private property owners objecting to the National Register nomination, and the letter by the WV SHPO on April 6, 2009, expressing the view that more than 50 percent of owners on the March 26, 2009 Recalculated List of 57 Owners objected to the nomination.

63. The Keeper’s decision to remove Blair Mountain Battlefield from the National Register was a final agency action.

64. On January 8, 2010 and March 17, 2010, the Keeper published notice in the Federal

Register that Blair Mountain was “removed/determined eligible” for the National Register.

65. On July 6, 2010, the National Trust for Historic Preservation, and Plaintiffs Sierra Clu, and OVEC, submitted a petition for reconsideration to the Keeper and the WV SHPO pursuant to 36 C.F.R. § 60.15(a)(4), identifying legal errors in the Keeper’s decision to remove Blair Mountain Battlefield from listing in the National Register.

66. By letter dated July 29, 2010, the Keeper of the National Register denied this petition for reconsideration.

CLAIMS

COUNT I

(Violation of NHPA, § 470a(1)(6) and 36 C.F.R. § 60.6(c)).

67. Plaintiffs repeat and re-allege the foregoing paragraphs.

68. The Keeper’s action in removing Blair Mountain Battlefield from the National Register was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), the NHPA, § 470a(1)(6) and 36 C.F.R. § 60.6(c), for the following reasons:

- (A) The October 24, 2008 List of 67 Owners is the only list of owners that was compiled “within 90 days prior to the notification of intent to nominate” Blair Mountain for listing in the National Register, as required by 36 C.F.R. § 60.6(c). The requisite notice of the WV SHPO’s “intent to nominate” Blair Mountain Battlefield occurred by virtue of the legal notice placed in the Logan Banner on November 24, 2008.
- (B) The WV SHPO’s original calculation of owners and objections submitted to the Keeper on January 13, 2009 properly counted all qualified letters of

objection received by the WV SHPO as of that date, and correctly concluded that less than a majority of owners on the October 24, 2008 List of 67 Owners had submitted qualifying objections to the WV SHPO as of that date.

(C) After the SHPO has submitted a nomination to the Keeper, the list of owners eligible to object to a National Register nomination under the NHPA cannot be updated or revised. 36 C.F.R. §§ 60.6(c), 60(t).

(D) The Keeper's conclusion that a majority of owners objected to the National Register nomination of Blair Mountain Battlefield was unlawfully based on the March 26, 2009 Recalculated List of 57 Owners. The March 26, 2009 Recalculated List of 57 Owners was not compiled within 90 days prior to the November 24, 2008 Public Notice, as required by 36 C.F.R. § 60.6(c). Instead, the March 26, 2009 List of 57 Owners was an update to the October 24, 2008 List of 67 Owners that included selected changes in ownership occurring after the November 24, 2008 Public Notice, in violation of NPS regulations, which requires that the calculation of owner objections under the NHPA be based on a list of owners compiled "within 90 days prior to the notification of intent to nominate." 36 C.F.R. § 60.6(c).

(E) The Keeper unlawfully relied on the March 26, 2009 Recalculated List of 57 Owners in removing Blair Mountain Battlefield from the National Register. The March 26, 2009 Recalculated List of 57 Owners improperly reduced the number of owners qualified to object to the National Register listing, and thereby increased the weight of objections, resulting in the Keeper's erroneous conclusion that a majority of owners objected to the listing.

- (F) Accordingly, the Keeper's conclusion that there was a prejudicial procedural error in WV SHPO's calculation of owner objections to the nomination of Blair Mountain Battlefield was arbitrary and capricious, an abuse of discretion, and contrary to 36 C.F.R. § 60.6(c).
- (G) A total of thirty-three (33) notarized letters of objection were received by either the Keeper or the WV SHPO from persons whose names appeared on the October 24, 2008 List of 67 Owners, and therefore less than a majority of owners objected to the nomination and listing of Blair Mountain Battlefield in the National Register.
- (H) Accordingly, the Keeper's removal of Blair Mountain from the National Register based on the conclusion that a majority of owners objected to the listing was arbitrary and capricious, an abuse of discretion, and contrary to the NHPA, 16 U.S.C. § 470a(1)(6).
- (I) These violations of the NHPA, its implementing regulations, and the APA by the Keeper threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

COUNT TWO
(Violation of NHPA, § 470a(1)(6) and 36 C.F.R. Part 60))

69. Plaintiffs repeat and re-allege the foregoing paragraphs.

70. The Keeper's conclusion that there was a prejudicial procedural error in WV SHPO's calculation of owner objections to the National Register nomination of Blair Mountain Battlefield was arbitrary and capricious, an abuse of discretion, and contrary to 5 U.S.C. § 706(2)(A), the NHPA, § 470a(1)(6) and 36 C.F.R. Part 60, for the following reasons:

- (A) In initiating an action to remove Blair Mountain Battlefield from the National Register under 36 C.F.R. § 60.15(k) based on purported prejudicial error in the WV SHPO's calculation of owner objections, the Keeper had an independent responsibility to determine whether a majority of owners objected to the nomination based on the totality of the record before the Keeper.
- (B) The WV SHPO fulfilled its responsibility under 36 C.F.R. § 60.6(g) "to ascertain whether a majority of owners of private property have objected" when it submitted nomination to the Keeper the January 13, 2009, which nomination properly considered all qualifying objections received by the WV SHPO as of that date. After the nomination was forwarded to the Keeper by the WV SHPO, the Keeper, not the WV SHPO, was responsible for recalculating owner objections to include qualified objections submitted directly to the Keeper. 36 C.F.R. § 60.6(r).
- (C) Even assuming the WV SHPO erred in failing to recalculate qualified owner objections to include objections submitted directly to the Keeper that were not received by the WV SHPO prior to the submission of the nomination of Blair Mountain Battlefield to the Keeper on January 13, 2009, the Keeper's conclusion that there was prejudicial procedural error in the WV SHPO's calculation of owner objections was arbitrary, capricious, an abuse of discretion, and contrary to law. There was no prejudicial procedural error in the WV SHPO's calculation of owner objections since, counting all qualified objections that were received by both the WV SHPO and the Keeper prior to the listing, less than a majority of owners on the October 24, 2008 List of Owners objected to the listing of Blair Mountain Battlefield in the National Register.

- (D) The WV SHPO has no responsibility under the NPS' regulations, including but not limited to 36 C.F.R. § 60.6(g), for recalculating owner objections in the context of a removal action initiated by the Keeper on its own motion under 36 C.F.R. § 60.15(k).
- (E) In the Keeper's action to remove Blair Mountain from listing in the National Register pursuant to 36 C.F.R. § 60.15(k), the Keeper failed to undertake an independent review of the entire record before the Keeper and determine, in accordance with the NPS regulations, whether a majority of owners had submitted qualifying notarized letters of objection to the National Register listing of Blair Mountain Battlefield. This failure was arbitrary and capricious, an abuse of discretion, and contrary to 36 C.F.R. § 60.15(k).
- (F) These violations of the regulations implementing the NHPA, its implementing regulations, and the APA by the Keeper threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request this Court to grant the following relief:

1. Adjudge and declare that Defendants' removal of Blair Mountain Battlefield from listing in the National Register violated the NHPA, 16 U.S.C. § 470a(1)(6), the APA, 5 U.S.C. § 706(2)(A), and 36 C.F.R. Part 60.
2. Vacate the decision removing Blair Mountain Battlefield from the National Register and direct Defendants to list Blair Mountain Battlefield in the National Register, *nunc pro tunc*, as of March 30, 2009.
3. Award Plaintiffs their attorneys' fees, costs, and disbursements, pursuant to 16 U.S.C.

§ 470w-4 and other applicable statutes authorizing court-awarded attorney's fees.

4. Award such other and further relief as the Court may deem appropriate.

DATED this 9th day of September 2010.

Respectfully submitted,

/s/
/s/ -Andrea C. Ferster (DC Bar # 384648)
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