

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NARRAGANSETT INDIAN TRIBE,
ACTING BY AND THROUGH THE
NARRAGANSETT INDIAN TRIBAL
HISTORIC PRESERVATION OFFICE

CA 16- 216

C.A. No.:

V.

NARRAGANSETT ELECTRIC COMPANY
D/B/A NATIONAL GRID; THE PUBLIC ARCHEOLOGY
LABORATORY, INCORPORATED; UNITED STATES
ARMY CORP OF ENGINEERS, NEW ENGLAND
DISTRICT; COLONEL CHRISTOPHER BARREN,
DISTRICT ENGINEER/COMMANDER; MAJ. DANIEL
S. HERLIHY, CORP OF ENGINEERS DEPUTY DISTRICT
ENGINEER, MICHAEL J. ELLIOT, PROJECT MANAGER,
REGULATORY BRANCH; ROBERT J. DESISTA, ACTING
CHIEF, REGULATORY DIVISION; JENNIFER MCCARTHY,
CHIEF, REGULATORY DIVISION; MARK PAIVA,
ARCHEOLOGIST/TRIBAL LIASON, REGIONAL
TECHNICAL SPECIALIST (ARCHEOLOGY); ADVISORY
COUNCIL ON HISTORIC PRESERVATION; JOHN T. EDDINS,
OFFICIAL FOR ADVISORY COUNSEL AND HISTORIC
PRESERVATION; RHODE ISLAND HISTORIC PRESERVATION
AND HERITAGE COMMISSION; EDWARD F. SANDERSON,
EXECUTIVE DIRECTOR, STATE HISTORIC PRESERVATION
OFFICER; CHARLENE DWIN VAUGHN, AICP, ASSISTANT
DIRECTOR FEDERAL PERMITTING; TIMOTHY H. IVES,
PRINCIPAL ARCHEOLOGIST, STATE HISTORIC PRESERVATION
OFFICE

PRELIMINARY STATEMENT

1. This is an action for injunctive and declaratory relief brought by the Narragansett Indian Tribe, by and through the Narragansett Indian Tribe Historic Preservation Office to enjoin

further construction of the Block Island Transmission System (BITS) until such time as an adequate plan has been developed pursuant to the National Historic Preservation Act, 54 U.S.C. 306101 et. seq. and 36 C.F.R. Part 800 – Protection of Historic Properties. The Plaintiff requests an order prohibiting Defendants from further actions in connection with the construction of the Block Island Transmission System (BITS) which violate Federal law protecting historic sites, archeological artifacts, sacred sites, and the further destruction of the Great Salt Pond Archeological District, the Harbor Pond Archeological Site, RI 2554, and all historic properties impacted by the construction of the BITS in accordance with the permit issued by the United States Army Corp of Engineers, Permit No.: **NAE-2012-2724**.

2. This action arises under the Administrative Procedures Act, 5 U.S.C. §701 et seq., the National Historic Preservation Act, 54 U.S.C. §306101 et seq., the Archeological Resources Protection Act 54 U.S.C. §306101 et seq. and the Declaratory Judgement Act, 28 U.S.C. §2201 et seq.

JURISDICTION

3. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 (Federal Question), 28 U.S.C. §1362 (Jurisdiction Over Indian Tribes) and 28 U.S.C. §§2201-2202 (Declaratory Judgment and Injunctive Relief). There is a present and actual controversy between the parties.

PARTIES

4. Plaintiff, The Narragansett Indian Tribe, by and through the Narragansett Indian Tribe Historic Preservation Office, is the duly created political entity responsible for assumption of historic preservation pursuant to the National Historic Preservation Act, §101(d)(2) Agreement

between the National Park Service, U.S. Department of Interior and the Narragansett Indian Tribe dated August 7, 1996.

5. Defendant, the Narragansett Electric Company d/b/a National Grid, is a corporation duly organized and existing pursuant to the laws of the State of Rhode Island with principal offices within the State of Rhode Island.

6. Defendant, the Public Archeology Laboratory, Incorporated, is a corporation organized and existing pursuant to the laws of the State of Rhode Island with a principal office at 26 Main Street, Pawtucket, Rhode Island.

7. Defendant, Army Corp of Engineers is an executive agency of the United States and a division of the United States Department of the Army.

8. Defendant, Colonel Christopher Barren is a District Engineer/Commander of the United States Department of the Army.

9. Defendant, Maj. Daniel S. Herlihy is a Corp of Engineers Deputy District Engineer of the United States Department of the Army.

10. Defendant, Michael Elliot is a Project Manager for the Regulatory Branch of the United States Department of the Army.

11. Defendant, Robert T. DeSista is Acting Chief for the Regulatory Division of the United States Department of the Army.

12. Defendant, Jennifer McCarthy is Chief for the Regulatory Division of the United States Department of the Army.

13. Defendant, Mark Paiva is an Archeologist/Tribal Liason for the Regional Specialist (Archeology) of the United States Department of the Army.

14. Defendant, Advisory Council on Historic Preservation is a council created in accordance with the National Historic Preservation Act, 54 U.S.C. 306101 et seq.

15. Defendant, John T. Eddins is an Officer of the Advisory Council on Historic Preservation.

16. Defendant, the Rhode Island Historical Preservation & Heritage Commission is the duly created State Historic Preservation Office, created pursuant to the National Historic Preservation Act, 54 U.S.C. 306101 et seq.

17. Defendant, Edward F. Sanderson is the Executive Director and State Historic Preservation Officer.

18. Defendant, Charlene Dwin Vaughn, AICP is the Assistant Director for Federal Permitting.

19. Defendant, Timothy H. Ives is the Principal Archeologist for the State Historic Preservation Office.

GENERAL ALLEGATIONS

20. On September 4, 2014, the United States Army Corp of Engineers, New England District, issued a permit authorizing the construction and maintenance of the Block Island Transmission System (BITS) in connection with the development and construction of the Block Island Wind Farm, a 30-MW offshore wind farm located approximately 3 miles south east of Block Island, Rhode Island, Permit No.: MAE-2012-2724. The permit authorized installation of 20 linear miles of submerged transmission cable from New Shoreham, (Block Island) to Narragansett, Rhode Island. The subject cable required the construction of a concrete duct bank system from the Town of New Shoreham's Crescent Beach parking lot on Block Island, traversing

the National Register Eligible Harbor Pond Site and the National Registered-Listed Great Salt Pond Archeological District.

21. On February 3, 2015, the permit issued by the U.S. Army Corp of Engineers was transferred by Deep Water Wind Block Island Transmission System, LLC to the Narragansett Electric Company, d/b/a National Grid.

22. On February 10, 2015, the United States Army Corp of Engineers, New England District, Regulatory Division, issued a letter authorizing the transfer of the permit from Deep Water Wind Block Island Transmission Systems, LLC to National Grid.

23. On April 5, 2016, work was suspended due to a report by Public Archeological Laboratory, Inc. Principal Investigator, Joseph N. Waller, of an “unanticipated archeological discovery” made by PAL Monitor Kirk Van Dyke during the underground transmission cable installation along Beach Avenue, in the vicinity of the Harbor Pond Archeological site and within the Great Pond Archeological district.

24. On April 7, 2016, Timothy H. Ives, Principle Archeologist for Rhode Island Historical Preservation & Heritage Commission circulated an email to numerous persons and parties, including representative of the Plaintiff, advising all recipients of the “unanticipated archeological discovery” during the machine trenching associated with the sea2shore transmission cable on Block Island and providing all recipients with the letter of Edward F. Sanderson, Executive Director, State Historic Preservation Officer, to Michael J. Elliott, Project Manager, Regulatory Branch, U.S. Army Corp of Engineers, New England District.

25. The April 7, 2016 letter of Edward F. Sanderson notified Defendant Elliott that the Rhode Island Historic Preservation & Heritage Commission (SHPO) was contacted by PAL, Joseph Waller, notifying SHPO that an unanticipated archeological discovery was made by PAL

Monitor, Kirk Van Dyke, that notice per a Memorandum of Agreement entered into on June 19, 2014 (MOA) was provided in accordance with attachments C of the Memorandum of Agreement, entitled “Unanticipated Discoveries”, which calls for an expedited review to inform consultation and management decisions between the parties to the MOA; that John Brown, Tribal Historic Preservation Officer of the Plaintiff contacted SHPO about Plaintiff’s concerns regarding the “unanticipated archeological discovery”; that a site visit occurred on the same day (April 5, 2016) and making recommendations following the site visit which promoted further “phase 3 mitigation” amounting to wholesale discovery of the historical site and removal of historic artifacts.

26. On April 9, 2016, Bettina Washington, Tribal Historic Preservation Officer, Wampanoag Tribe of Gay Head (Aquinnah), notified Robert DeSista of Defendant U.S. Army Corp of Engineers that the memorandum of agreement states that the area of the “unanticipated archeological discovery” was cleared and did not require monitoring. Washington stated that the entire project must be reframed regarding the required monitoring and that work is expected to be halted immediately until the project was reframed.

27. On April 14, 2016, Plaintiff’s Historic Preservation Officer, John Brown, wrote an email to Robert DeSista of the Army Corp of Engineers to request an immediate amendment to the MOA to more formally reflect the intent of the National Historic Preservation Act, requesting meeting with Defendant, National Grid and its assignor, Deep Water Wind, and requesting a formal consultation with the Army Corp of Engineers, National Grid, and Deep Water Wind pursuant to the National Historic Preservation Act and 36 C.F.R. Part 800.

28. On April 25, 2016, a meeting was held by the Army Corp of Engineers, New England District Corp, at its office at 696 Virginia Road Concord, Massachusetts. Representatives of the Plaintiff and Defendant National Grid, including PAL, were in attendance. The meeting was

to discuss the “unanticipated archeological discovery” and to begin to establish a mitigation plan for the destruction that had already taken place and a future plan to minimize and mitigate adverse effects of the historic properties and artifacts during the completion of the construction.

29. On April 28, 2016, Robert DeSista forwarded an email to Plaintiff to provide a copy of Defendant National Grid’s new plan for “Supplemental Phase 3 Data Recovery and Research Programs”, prepared by its archeological contractor, Defendant, PAL.

30. On April 28, 2016, following receipt of the “Supplemental Phase 3 Data Recovery and Research Programs” plan, Tribal Historic Preservation Officer, John Brown, emailed the Defendant, Robert DeSista and others to express his objection to the supplemental plan as it called for further destruction of the historic sites on Block Island and archeological artifacts, and expressing that the real value of the historical and cultural sites would be lost if the proposed supplemental plan was instituted as it called for further destruction of intact and irreplaceable historical sites. Mr. Brown also expressed that the plan failed to address mitigation of the previous destruction and promoted the wholesale destruction of the historical properties. Mr. Brown’s email requested that National Grid be made to meet with Plaintiff to mitigate past destruction and consider a design and alternative plan. Lastly, Mr. Brown requested that the Army Corp of Engineers contact the Advisory Council on Historic Preservation regarding the future of the project and plan.

31. Also, on April 28, 2016 at 12:19 p.m., Wendy Levine, of National Grid, sent an email to John Brown, to indicate that National Grid’s first available date to meet with Plaintiff would be May 5, 2016.

32. On May 2, 2016, Mark Paiva, Archeologist/Tribal Liason and Regional Technical Specialist (Archeology) for Defendant, Army Corp of Engineers sent an email to John Brown

regarding a meeting that was to take place on that same date. Mr. Paiva indicated that the meeting was “an internal meeting with the Rhode Island State Historic Preservation Officer and National Grid” to further discuss the future plan, that the meeting was “not a formal consultation meeting with the Tribe” and no final decision will be made on project mitigation. Mr. Paiva expressed the Army Corp of Engineers understanding that the Tribe would be meeting with National Grid and “then there will be a follow up meeting thereafter with the Army Corp of Engineers and the Tribes that would be more geared towards consultation in regards to yours and the Tribe’s concerns”.

33. On May 3, 2016, Jennifer McCarthy of the Army Corps of Engineers and John Brown exchanged emails whereby Defendant, McCarthy asked Brown to comment on the revised plan by May 4, 2016. Mr. Brown responded that he would not comment on the revised plan until the meeting with National Grid took place “as per Mark Paiva’s email”.

34. On May 4, 2016, Defendant, John T. Eddins of Defendant Advisory Council on Historic Preservation, asked the Army Corp of Engineers to put its perspective in writing and that the Advisory Council on Historic Preservation would then respond in writing to the Army Corp of Engineer’s letter.

35. Also, on May 4, 2016, John T. Eddins of the Advisory Council on Historic Preservation sent an email to Jennifer McCarthy, copying Plaintiff and other parties, providing “our letter on the subject undertaking” which was a letter of the same date from Charlene Dwin Vaughn to Jennifer McCarthy. The letter indicates that John Brown has stated that Plaintiff was not appropriately consulted, that identification of the historic sites and artifact were insufficiently identified previously and that PAL failed to report discoveries and only reported post-review discoveries, that work had been suspended on April 5, 2016, that archaeological and construction activities had destroyed in situ historic properties, that the project proponent had changed and

Plaintiff was not consulted. The letter went on to indicate that the Advisory Council on Historic Preservation understood that the Army Corp of Engineers had proposed to treat the discoveries as ineligible property and that it had developed a data recovery plan and asked the Narragansett's to comment on the plan by 4:00 p.m. on May 4, 2016. Defendant, McCarthy goes on to state "please note this is prior to the meeting scheduled with National Grid to discuss avoiding archeological materials and other mitigation. ACHP believes the Corps should refrain from moving forward until after the Narragansetts have had an opportunity to consult with the project proponent.

36. On April 5, 2016, the meeting with National Grid took place. At the meeting, National Grid agreed to propose alternatives and to provide a preliminary letter agreement to memorialize the preliminary agreement with Plaintiff, which was that National Grid would propose alternatives, that it would incur the engineering costs of doing so, and that the alternatives would be presented to Plaintiff for comment. On the same date, Plaintiff received the letter from counsel for Defendant, National Grid, which utterly failed to reflect any of the matters that were preliminarily agreed upon and the initial plan that was discussed and agreed upon at the meeting.

38. On May 6, 2016, Plaintiff responded to the letter of May 5, 2016 from National Grid to point out the misrepresentations regarding the meeting and the initial agreements arrived at at the meeting of May 5, 2016. No further discussions or communications have been had with Defendant, National Grid.

39. On May 9, 2016, Maj. Daniel J. Herlihy, Corp of Engineer's Deputy District Engineer, sent a letter to Defendant, Advisory Council on Historic Preservation. The letter purported to be the Army Corp of Engineers' response to the Advisory Council's letter of May 4, 2016 from Charlene Dwin Vaughn. Maj. Herlihy indicates in the letter that the Narragansett Indian Tribe was consulted throughout the process developed by the Memorandum of Agreement

“as a concurring party”; that “we held a consultation meeting on April 25, 2016” with John Brown in attendance, that the Army Corp has been furnished with a treatment plan on April 28, 2016, that the Narragansett Indian Tribe Historic Preservation Office declined to attend the meeting of May 2, 2016 despite the statements made by Mark Paiva in the email of May 2, 2016 which indicated that the meeting of April 28, 2016 was not a “consultation” meeting and that the meeting of May 2, 2016 was merely “an internal meeting only”. The letter goes on to state that the Army Corp of Engineers initially asked for comments from the Tribe by May 4, 2016 and later extended that date to the close of business on May 6, 2016 and that, although John Brown met with National Grid, the Army Corp of Engineers intended to accept the supplemental plan to meet its “§106 responsibilities” despite the plan outlined by Mark Paiva in his email of May 2, 2016.

40. On May 10, 2016, Edward F. Sanderson, Executive Director of the State Historic Preservation Office, sent a letter to Michael Elliott, Project Manager of the Army Corp of Engineers, stating that the State Historic Preservation Office approved of the supplemental plan.

41. On May 12, 2106, Robert DeSista of the Army Corp of Engineers issued a letter to Erin Worinsky of Defendant, National Grid, information National Grid that the Army Corp of Engineers was allowing the resumption of work.

42. On the same date, Erin Worinsky emailed Plaintiff and numerous other interested persons and entities to indicate that work would proceed at 7:00 a.m. on May 13, 2016.

43. The National Historic Preservation Act requires all Federal agencies to determine the effect of Federal agency undertakings on properties of historic significance. Prior to proceeding with such undertakings, the head of each agency must consult with the Advisory Council on Historic Preservation, as part of the decision making process of determining whether the undertaking has an adverse effect on historic properties. 54 U.S.C. 306101. If it is deemed by

an agency that its proposed action will adversely effect historic properties, mitigation is required under §106 of the Act. *Id.*

44. Consistent with the above requirements, the Advisory Council has determined that the Great Swamp site is listed on the National Register and that the Harbor Pond site is eligible for listing on the National Register.

45. The applicable regulation, 36 C.F.R. Part 800 – Protection of Historic Properties, subpart B – the §106 process, §800.4(d) requires that if the Tribal Historic Preservation Officer objects within 30 days of receipt of an adequately documented finding, the agency (the Army Corp of Engineers) shall “consult” with the objecting party to resolve the disagreement and establish if an appropriate plan that will meet the goals of the National Historic Preservation Act, to preserve historic sites, artifacts, and culture of Native Americans.

46. Despite the objections of Plaintiff, expressed well within the thirty (30) day period required by the applicable regulation, and despite a plan put in place by Mark Paiva of the Army Corp of Engineers to formally complete the consultation process, Defendant, Army Corp of Engineers has now reversed the consultative plan and allowed work to proceed before a plan could be agreed upon that would preserve the historic sites and mitigate adverse impact upon the sites and artifact, along with mitigating the past destruction that has already taken place.

47. The original Memorandum of Agreement entered into on or about June 19, 2014 was not complied with as Plaintiff was not appropriately consulted and the historic sites and artifacts were not sufficiently identified. The Memorandum of Agreement indicates that the historic sites were cleared and did not require monitoring.

48. The consultation process management by the Army Corp of Engineers was absent. The Army Corp of Engineers failed to include any recognized mechanisms in the §106

consultation process such as a “kick off” meeting, a consultation review involving Plaintiff and other consultative parties at the time of the transfer of the project from Deep Water to National Grid, and failed to include a review and significant assessment of the odd assemblage of artifacts that were discovered at the Harbor Pond site by PAL.

49. PAL failed to report discoveries during the construction process and as the discoveries were made and reported only post review discovery.

50. The archaeological and construction process and activities have destroyed historic properties in violation of the National Historic Preservation Act.

51. The current plan, the “Supplemental Phase III Data Recovery and Research programs” plan provides for further destruction of historic sites and artifacts.

COUNT I
ADMINISTRATIVE PROCEDURES ACT

52. Plaintiff re-alleges and incorporates by reference Paragraphs 1-51 above as if fully set forth herein.

53. The Federal Administrative Procedures Act, 5 U.S.C., 701 et seq., prohibits the Defendant, Army Corp of Engineers from engaging in acts that are arbitrary, capricious, and abusive discretion, and otherwise in violation of law.

54. The act of allowing a supplemental plan which does not prevent, but promotes, additional destruction of historical sites and artifacts, and the wholesale destruction and removal of artifacts from the historic sites, and fails to allow from mitigation of past destruction, is a violation of the National Historic Preservation Act and the procedures required by 36 C.F.R. Part 800.

COUNT II
COMPLAINT FOR CONJUNCTIVE RELIEF

55. Plaintiff re-alleges and incorporates by reference Paragraphs 1-54 above as if fully set forth herein.

56. Plaintiff will suffer irreparable injury, and has suffered irreparable injury, without intervention of the Court if construction is not immediately halted until such time as a plan is established that insures preservation of the historic sites at issue, prevents the further removal and destruction of artifacts and features from the sites, and/or provides for an alternative route for the concrete duct bank and cable. The removal of historic artifacts from the historic sites will render the sites meaningless and, thus, will fail to preserve and protect the cultural significance of the sites to the Narragansett Indian Tribe.

57. Plaintiff has no adequate remedy at law for the preservation of its historic sites in culture and this action for Injunctive Relief is Plaintiff's only means for securing relief.

COUNT III
COMPLAINT FOR INJUNCTION UNDER §110 (SO-CALLED) OF THE NATIONAL
HISTORIC PRESERVATION ACT

58. Plaintiff re-alleges and incorporates by reference Paragraphs 1-57 above as if fully set forth herein.

59. §110(a)(1)(so-called) of the National Historic Preservation Act, 54 U.S.C. 306101, provides, in pertinent part:

“The head of each Federal agency shall assume responsibility for the preservation of historic properties that is owned or controlled by the agency....Each Federal agency shall undertake, consistent with the preservation of historic property, the mission of the agency, and the professional standards established pursuant to (c), any preservation as may be necessary to carry out this chapter.

60. The National Historic Preservation Act defines “preservation” as including “protections, managements, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities.” 54 U.S.C. 300315.

61. The National Historic Preservation Act requires that each Federal agency shall establish a program which will ensure the historic properties “under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values in compliance with §106.” 54 U.S.C. 303901.

62. Injunctive relief is appropriate to require the Army Corp of Engineers to consult with the Tribe with regard to protection of the historical sites at issue and preserve them and all artifacts within the sites.

WHEREFORE, Plaintiff respectfully requests an order from the Court as follows.

1. That all construction activity, and activities of any kind, within the historic sites on Block Island cease immediately and pending final hearing and determination of this action cease from further construction, excavation, removal of artifacts, historic, archeological, and cultural objects or soil from the sites on Block Island.

2. An order that all such activities not resume until an adequate plan is agreed upon for the preservation of the historic sites and artifacts.

3. That no artifacts be removed from the historic sites.

4. That an adequate plan include an attempt by National Grid to circumvent the historic sites and install the concrete duct banks and cable in an area other than within the historic sites.

5. An order compelling Defendants to provide Plaintiffs with unfettered access to the historic sites on Block Island and elsewhere.
6. That a consultation, in accordance with the National Historic Preservation Act, be adequately completed.
7. Attorneys' fees and costs of suit.
8. Such other and further relief as the Court deems appropriate.

Plaintiffs,

Narragansett Indian Tribe acting by
and through the Narragansett Indian
Tribal Historic Preservation Office,
By their Attorneys,

Michael R. De Luca
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VERIFICATION

I, Doug Harris, Deputy Historic Preservation Officer for the Narragansett Indian Tribe Office of Historic Preservation, state under oath that I have reviewed the Complaint and to the best of my knowledge, all facts of this Complaint are true.



Doug Harris

Subscribed and sworn to before me this 13th day of May, 2016.



Michael R. De Luca
Notary Public

Commission expires: June 24, 2017.