UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE, ACTING BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE	:	
v.	:	C.A. No. 17-125-S-LDA
RHODE ISLAND DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; ADVISORY COUNCIL ON HISTORIC PRESERVATION; RHODE ISLAND HISTORICAL PRESERVATION & HERITAGE COMMISSION	:	

STATE DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S OBJECTION TO FEDERAL AND STATE DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

I. INTRODUCTION

The State of Rhode Island Department of Transportation (hereinafter, "RIDOT") and the State of Rhode Island Historical Preservation and Heritage Commission (hereinafter, "RIHPHC") (hereinafter, collectively "State Defendants"), respectfully submit this memorandum of law in response to Plaintiff's Memorandum of Law in support of its Objection to Federal and State Defendants' Motions to Dismiss Plaintiff's Complaint (hereinafter, "Plaintiff's Objection"). For the reasons set forth below, the State Defendants request that its Motion to Dismiss be granted.[1]

II. ARGUMENT

A. The cases cited to in support of Plaintiff's Objection are distinguishable from the present lawsuit and fail to establish a private right of action for Plaintiff's claims.

[1] The State Defendants herein incorporate by reference the arguments previously set forth in its Memorandum of Law in Support of Its Motion to Dismiss. See ECF 19.

Plaintiff's Objection states that decisions rendered by several federal courts corroborate Plaintiff's contention that the NHPA provides a private right of action. See Plaintiff's Objection, ECF 23-1, p. 4 ¶2. However, the cases identified by Plaintiff in support of its position have been discounted by subsequent case law, and are easily distinguishable from the matter at hand.

As Plaintiff's Objection points out, in Yankton Sioux Tribe v. United States Army Corps of Engineers, 194 F. Supp. 2d 977, 990 (D.S.D. 2002), the federal district court for the District of South Dakota declared that "[t]he Court finds that a private right of action exists under the NHPA and that the Tribe may seek injunctive relief against the Corps." Notably, the court's determination was limited to the tribe's pursuit of injunctive relief, stating that the court was strictly examining "the issue of whether a private right of action exists under the NHPA for an individual seeking injunctive relief against a federal agency." Id. (underline added). In the present case, Plaintiff's claims for injunctive relief have already been heard and denied by this Court, and Plaintiff has conceded that Count II, seeking injunctive relief, should be dismissed. See ECF 23-1, p. 8 ¶1 (noting that "[w]hile dismissal of this count may be appropriate," such dismissal should be without prejudice). As such, Plaintiff's reliance on Yankton Sioux for the proposition that the NHPA provides a private right of action for Plaintiff's declaratory judgment and breach of contract claims is clearly misplaced.

Plaintiff's Objection further cites to the Yankton Sioux case for the proposition that "a final agency decision is not inherently necessary to invoke the jurisdiction of this Court." ECF 23-1, p. 5 ¶1 (citing Yankton Sioux, 194 F. Supp. 2d at 992) ("The NHPA does not require the Tribe to exhaust administrative remedies prior to seeking judicial review."). However, Plaintiff conveniently fails to mention that, despite this finding, the court in Yankton Sioux ultimately

dismissed the tribe's NHPA claim for that very reason—failure to exhaust administrative remedies. See 194 F. Supp. 2d at 993 ("Therefore, the Court concludes that the Tribe's failure to exhaust administrative remedies in this case requires the dismissal without prejudice of its NHPA claim under 16 U.S.C. § 470f."). As such, Plaintiff's Objection merely selects favorable language from an inapplicable case to support Plaintiff's position.

Nevertheless, even the carefully selected language from the Yankton Sioux case has been distinguished by subsequent case law. In San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 885 (D. Ariz. 2003), aff'd, 417 F.3d 1091 (9th Cir. 2005), the district court for the District of Arizona specifically discredited the Yankton Sioux determination that the NHPA provided a private right of action. The court, citing Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1158 (9th Cir. 1998), flatly declared that "[t]here is no private right of action under the NHPA." San Carlos Apache Tribe, 272 F. Supp. 2d at 885. The court explained that, "[i]n Presidio the court found standing under the APA for plaintiff's NHPA complaint. Other cases in the Ninth Circuit involving NHPA violations also rely on the APA for jurisdiction." San Carlos Apache Tribe, 272 F. Supp. 2d at 855 (citing Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000); Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569 (9th Cir. 1998); Tyler v. Cisneros, 136 F.3d 603, 605 (9th Cir. 1998)). The court noted that subsequent case law, specifically including the Yankton Sioux case, misinterpreted the Presidio case to reach an inapposite conclusion. See San Carlos Apache Tribe, 272 F. Supp. 2d at 855 ("Presidio has been mis-cited as holding that there is a private right of action under the NHPA, see Yankton Sioux Tribe v. United States Army Corps of Engineers, 194 F. Supp. 2d 977, 990 (S. Dak. 2002), but it does not."). The Ninth Circuit affirmed the district court's decision, holding that "Section 106 does not expressly provide that private individuals may sue to enforce its provisions. Nor does

the statute specify a remedy for violation of this section." San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1094 (9th Cir. 2005). The Ninth Circuit's holding was based on the United States Supreme Court's then-recent opinion in Alexander v. Sandoval, 532 U.S. 275, 286 (2001), which held, in part, that a private right of action to enforce a federal law must be expressly created by Congress. See San Carlos Apache Tribe, 417 F.3d at 1093 (reiterating that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") (quoting Sandoval, 532 U.S. at 286).

Since the United States Supreme Court's opinion in Sandoval, circuit courts that have squarely addressed the issue have similarly found that no private right of action exists under Section 106 of the NHPA. See e.g., Karst Envtl. Educ. & Prot., Inc. v. E.P.A., 475 F.3d 1291, 1295 (D.C. Cir. 2007) (noting that "because NHPA, like NEPA, contains no private right of action, we agree with the Ninth Circuit [in San Carlos Apache Tribe] that NHPA actions must also be brought pursuant to the APA."). Similarly, other circuit courts—while not directly resolving the issue—have questioned the viability of a private right of action under the NHPA. See Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency, 658 F.3d 460, 466 n.2 (5th Cir. 2011) (indicating that, although the parties and lower court assumed, based on prior case law, that the NHPA provided a private right of action to enforce its provisions, "the Supreme Court's recent jurisprudence [in Sandoval] casts serious doubt on the continued viability of the private right of action under the NHPA."); see also Bus. & Residents All. of E. Harlem v. Jackson, 430 F.3d 584, 590 (2d Cir. 2005) (similarly declining to reach the question of whether a private right of action exists under the NHPA, while identifying the Ninth Circuit's holding that Section 106 of the NHPA does not give rise to a private right of action).

The First Circuit similarly declined to resolve the issue of whether the NHPA provided a private right of action in Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003)—contrary to Plaintiff's assertion that "the First Circuit's recognition that the NHPA provides the Tribe a private right of action, is significant." ECF 23-1, p. 5 ¶1. In Warwick Sewer Authority, the court assumed, without deciding, that court could entertain the Tribe's appeal of a denial of preliminary injunctive relief, noting that "[b]oth the parties and the district court assumed that the NHPA gives the Tribe a private right of action in this case. Because this is a statutory question rather than one of Article III jurisdiction, we may bypass it where the case can otherwise be resolved in defendant's favor." Id. at 166 n.4 (underline added) (citing Restoration Pres. Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54, 59-60 (1st Cir. 2003)). Thus, the First Circuit assumed without deciding that the Tribe could appeal the lower court's denial of preliminary injunctive relief, but ultimately determined that "the NHPA provides no grounds for an injunction regarding the use of a particular type of digging blade or payment for monitoring personnel[,]" because the property in question had not been identified as a historic property. Id. at 165. As such, Warwick Sewer is easily distinguishable from the present action, wherein the State and Federal Defendants both directly contend that the NHPA does not provide a private right of action to support Plaintiff's declaratory judgment action and breach of contract allegations. Accordingly, because the cases cited to by Plaintiff do not show that the NHPA provides a private right of action to support Plaintiff's claims, the allegations contained in the Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

B. Plaintiff's breach of contract claim must be dismissed because it is wholly based on Plaintiff's erroneous allegation that RIDOT terminated the PA.

Plaintiff's Objection argues that "Plaintiff's Breach of Contract Claim States a Plausible and Substantive Claim." ECF 23-1, p. 6 ¶2. Plaintiff's Objection also specifies that Count III of

the Complaint, alleging breach of contract, "is directed only at RIDOT." ECF 23-1, p. 5 fn.1. Plaintiff further sets forth that the breach of contract "allegations contained in the complaint contend that the State Defendants acted without cause and in bad faith when terminating the PA." ECF 23-1, p. 7 ¶1. As such, Plaintiff's breach of contract allegations are based entirely on Plaintiff's misrepresentation that RIDOT terminated the PA. Id. However, the fact of the matter is that, on February 15, 2017, FHWA terminated the PA in accordance with Section 106 of the NHPA, not RIDOT. Pl.'s Comp. Ex. D, ECF 1-4. Thus, Plaintiff's allegation that the "State Defendants acted without cause and in bad faith when terminating the PA," simply has no basis in law or fact. Accordingly, Plaintiff's allegations sounding in breach of contract against the State Defendants should be dismissed. See Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) ("To survive a motion to dismiss, a complaint must set forth 'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'").

C. Plaintiff's claims for injunctive relief are unsupported and should be dismissed.

On May 3, 2017, this Court issued an order denying Plaintiff's motion for injunctive relief as it relates to the matter at hand. See Text Order, May 3, 2017. To the extent that Plaintiff's Complaint continues to state a claim for injunctive relief, the State Defendants have set forth ample authority for dismissal of such claim; authority that Plaintiff has failed to dispute. ECF 23-1, p. 8 ¶1. As Plaintiff has not met the requisite standard of showing a clear entitlement to the extraordinary remedy of injunctive relief, and has failed to set forth more than unsupported conclusions, Plaintiff's claims for injunctive relief should be summarily dismissed.

VI. CONCLUSION

Based on the foregoing, the State Defendants respectfully request that this Honorable Court grant the State Defendants' Motion to Dismiss in accordance with Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

Defendants,
STATE OF RHODE ISLAND
DEPARTMENT OF TRANSPORTATION and
RHODE ISLAND HISTORICAL
PRESERVATION & HERITAGE COMMISSION

By Its Attorney,

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CERTIFICATION

I, the undersigned, hereby certify that I filed the within document via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the following attorneys of record on this 19th day of July, 2017:

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