

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND**

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

Plaintiff,

v.

RHODE ISLAND DEPARTMENT OF  
TRANSPORTATION; FEDERAL HIGHWAY  
ADMINISTRATION; ADVISORY  
COUNCIL ON HISTORIC PRESERVATION;  
RHODE ISLAND HISTORICAL  
PRESERVATION & HERITAGE  
COMMISSION,

Defendants

C.A. No. 17-125-S-LDA

**MEMORANDUM OF LAW IN SUPPORT OF FEDERAL DEFENDANTS’  
REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

In its original Motion to Dismiss Plaintiff’s Complaint, ECF No. 18, the United States argued two bases upon which the Court should dismiss the Complaint as to the Federal Highway Administration and the Advisory Council on Historic Preservation, (collectively, “Federal Defendants”). Upon further review of the language of the Programmatic Agreement, Federal Defendants no longer seek dismissal pursuant to Rule 12(b)(6) and withdraw their argument in Section IV.B. of their Memorandum in Support of the Motion to Dismiss. *See* Mem. In Supp. of Fed. Defs.’ Mot. to Dismiss Pl.’s Compl., ECF No. 18-1 at 10 (“Fed. Defs.’ Mem.”). However, the Court still should dismiss the Complaint for lack of jurisdiction.

As explained in Federal Defendants’ prior memorandum, the United States’ waiver of sovereign immunity for claims challenging agency action is limited by the Administrative

Procedure Act's final agency action requirement. Fed. Defs.' Mem 9 (citing *Baillargeon v. DEA*, 638 F. Supp. 2d 235, 242 (D.R.I. 2009); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 46 (1st Cir. 2009); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007)). Plaintiff argues that the NHPA affords it a private right of action independent of the APA. See Pl.'s Mem. of Law in Supp. of Objs. to Fed. and State Defs.' Mots. to Dismiss Pl.'s Compl. 3-4, ("Pl's Objs."), ECF No. 23-1. However, Plaintiff misinterprets the caselaw on which it relies in support of this argument and fails to show such a right of action exists. Accordingly, Federal Defendants respectfully request that the Court grant their Motion to Dismiss.

### **ARGUMENT**

Plaintiff argues that the First Circuit implicitly recognized that the NHPA provides a private right of action. Pl.'s Objs. 4-5. In fact, the First Circuit has not spoken to the question of whether there is a private right of action under the NHPA. Plaintiff relies on *Narragansett Indian Tribe v. Warwick Water & Sewer Authority*, 334 F.3d 161 (1st Cir. 2003), in which the Court noted that "[b]oth the parties and the district court *assumed* that the NHPA gives the Tribe a private right of action." *Id.* at 166 n.4 (emphasis added). However, the First Circuit ultimately held that, because the question raised an issue of jurisdiction under the statute rather than Article III, it could bypass the issue because it was possible to resolve the question on another basis. *Id.* (citing *Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 59-60 (1st Cir. 2003)). Thus, contrary to Plaintiff's interpretation, the First Circuit did not recognize, either expressly or implicitly, that the NHPA provides any private right of action. Rather, the court recognized only that the parties and the district court had so assumed, and it elected to sidestep the question and to affirm the district court's denial of the plaintiff's request for injunctive relief

on other grounds. *See id.* at 169 (finding that the Tribe had failed to carry its burden with respect to likelihood of success on the merits and irreparable injury).

Plaintiff also argues that the decisions of courts in six other jurisdictions indicate that the NHPA provides a private right of action. However, Plaintiff overstates the significance of such decisions.<sup>1</sup> For example, Plaintiff misapprehends the holding in *Presidio Golf Club v. National Park Service*, 155 F.3d 1153 (9th Cir. 1998). Pl.’s Objs. 4. In fact, the Ninth Circuit held that, consistent with the Federal Defendants’ position, the plaintiffs had standing under the APA to bring their claims alleging violations of the NHPA and the National Environmental Policy Act (“NEPA”). *Id.* at 1160. *See also 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) (“*Presidio* has been mis-cited as holding that there is a private right of action under the NHPA . . . but it does not.”). In *San Carlos Apache Tribe*, the district court expressly found that “[t]here is no private right of action under the NHPA,” and it cited several Ninth Circuit cases involving NHPA challenges brought under the APA. *Id.* (citing *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir.1998); *Tyler v. Cisneros*, 136 F.3d 603, 605 (9th Cir. 1998). The Ninth Circuit subsequently affirmed the district court’s ruling. *San Carlos Apache Tribe*, 417 F.3d at 1094.

Other cases on which Plaintiff relies have been discounted or contradicted by subsequent decisions of those courts and others. For example, although Plaintiff correctly states that in

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<sup>1</sup> Notably, Plaintiff also fails to cite cases from another court of appeals, the Tenth Circuit, which does not recognize a private right of action under the NHPA. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dep’t of Transp.*, 843 F.3d 886, 901 (10th Cir. 2016) (“Because neither NEPA nor NHPA ‘provide a private right of action, we review’ the two [agency] decisions as ‘final agency action[s] under the’ APA.” (quoting *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 823 (10th Cir. 2008))).

*Vieux Carre Property Owners, Residents & Associates v. Brown*, 875 F.2d 453, 457-58 (5th Cir.1989), the Fifth Circuit held that the NHPA does provide a private right of action, more recently in *Friends of St. Francis Xavier Cabrini Church v. FEMA*, 658 F.3d 460 (5th Cir. 2011), the Court noted that, notwithstanding prior case law, including *Vieux Carre Property Owners*, “the Supreme Court's recent jurisprudence casts serious doubt on the continued viability of the private right of action under the NHPA.” 658 F.3d at 466 n.2 (citations omitted). The Ninth Circuit also has distinguished the holding in *Vieux Carre Property Owners*, as well as the Third Circuit’s decision in *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991), which Plaintiff also cites. *See San Carlos Apache Tribe*, 417 F.3d at 1098-99 (explaining that, although the attorneys’ fee provision in the NHPA on which the decisions in *Vieux Carre Property Owners* and *Boarhead Corp.* were based “permit[s] fees in an action to enforce the NHPA,” it does not authorize suit under NHPA itself, apart from “the well-established procedures set out under the APA.”).

In addition, Plaintiff represents that the Second Circuit recognizes that the NHPA provides a private right of action. Pl.’s Objs. 4 (citing *WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979)). However, that court more recently made clear that it has not yet spoken to the issue. *See Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 590 (2d Cir. 2005). *See also Friends of Hamilton Grange v. Salazar*, No. 08 Civ. 5220 (DLC), 2009 WL 650262, at \*19-21 (S.D.N.Y. Mar. 12, 2009); *Weiss v. Inc. Vill. of Sag Harbor*, 762 F. Supp. 2d 560, 579 n.11 (E.D.N.Y. 2011).

Finally, Plaintiff cites and specifically relies upon *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F. Supp. 2d 977 (D.S.D. 2002), *see* Pl.’s Objs. 4, wherein the United States District Court for the District of South Dakota found that the NHPA provides a private

right of action. Seven years after that decision, however, in *Sisseton-Wahpeton Oyate v. United States Department of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009), the same district court contradicted its prior ruling and found that “nothing in the statutory language of NHPA explicitly authorizes a private cause of action.” *Id.* at 1080. The court therefore held that “no private right of action was created by the NHPA,” and that it could consider challenges under the NHPA “only within the confines of the APA.” *Id.*

Plaintiffs’ argument that the NHPA provides a private right of action and that decisions of other federal courts, including the First Circuit, corroborate its position is not well founded. Accordingly, this Court should find that the NHPA does not provide a private right of action and that it can review Plaintiff’s NHPA claims only pursuant to the APA, which requires that there have been final agency action.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Federal Defendants’ motion and dismiss Plaintiffs Complaint against Federal Defendants.

Dated this 28th day of July, 2017.

Respectfully submitted,

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