Oral Argument Not Yet Scheduled

Case No. 19-1009

In the United States Court of Appeals
for the District of Columbia Circuit

Narragansett Indian Tribal Historic Preservation Office,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent,

Tennessee Gas Pipeline Company, LLC,

Intervenor.

On Petition for Review of the Orders of the
Federal Energy Regulatory Commission,
Notice to Proceed with Tree Clearing and Construction (April 12, 2017);
Tennessee Gas Pipeline Company, LLC, 162 FERC ¶ 61,013 (Jan. 10, 2018); and
Tennessee Gas Pipeline Company, LLC, 165 FERC ¶ 61,170 (Nov. 28, 2018).

PETITIONER'S FINAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Petitioner submits:

A. Parties and Amici

Petitioner: Narragansett Indian Tribal Historic Preservation Office

Respondent: Federal Energy Regulatory Commission

Intervenor for Respondent: Tennessee Gas Pipeline Company, LLC

Amici: None

RULE 26.1 DISCLOSURE STATEMENT

The Narragansett Indian Tribal Historic Preservation Office is an official Political Subdivision of a Sovereign Nation, a federally recognized Indian Tribe. *See* Department of the Interior, Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983). It was authorized by the National Park Service under Section 101(d)(2) of the National Historic Preservation Act on September 12, 1996, and by the Advisory Council on Historic Preservation under Section 101(d)(5) on November 27, 2000. As a governmental body, it does not have a parent corporation and does not issue stock.

B. Rulings Under Review

Notice to Proceed with Tree Clearing and Construction (April 12, 2017); *Tennessee Gas Pipeline Company, LLC*, 162 FERC ¶ 61,013 (January 10, 2018); and *Tennessee Gas Pipeline Company, LLC*, 165 FERC ¶ 61,170 (November 28, 2018).

C. Related Cases

The Narragansett Indian Tribal Historic Preservation Office filed a prior petition for review, Case No 18-1069, which was dismissed on May 31, 2018.

Dated: August 19, 2019

Respectfully submitted,

/s/ Anne Marie Garti
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GLOSSARY

Add.	Addendum to this brief
ACHP *	The Advisory Council on Historic Preservation
Advisory Council	The Advisory Council on Historic Preservation
Algonquin Project	Algonquin Incremental Market Project
APA	Administrative Procedure Act
Army Corps	United States Army Corps of Engineers
Certificate Order	*Tennessee Gas Pipeline Co., LLC*, 154 FERC ¶ 61,191 (March 11, 2016) [J.A. 108-171]
Commission	Federal Energy Regulatory Commission
CSL *	Ceremonial stone landscapes, sacred stones
EA	Environmental Assessment (Oct. 23, 2015)
FERC	The Federal Energy Regulatory Commission
Gas Act	Natural Gas Act
Handbook	Advisory Council, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Dec. 2012), https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf
J.A.	Joint Appendix

…….

* Acronyms marked by a star appear in the record, statutes, and / or regulations.

Limited Delegation	Advisory Council, *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (July 1, 2011), https://www.achp.gov/sites/default/files/guidance/2018-09/Tribal%20Consultation%20Delegation%20Federal%20Limitations.pdf
Mass SHPO *	Massachusetts State Historic Preservation Office
Massachusetts Preservation Office	Massachusetts State Historic Preservation Office
MOA	Memorandum of Agreement, signed by FERC (Feb. 17. 2017), Advisory Council (Feb. 24, 2017), and Tennessee (Feb. 17, 2017). [J.A. 263-278]
NEPA	National Environmental Policy Act
NHPA *	National Historic Preservation Act
NITHPO *	Narragansett Indian Tribal Historic Preservation Office
Notice of Adverse Effects	The Commission's notification to the Advisory Council, (Dec. 29, 2016), 36 C.F.R. § 800.6(a)(1).
P	Paragraph in FERC's orders.
Power Act	Federal Power Act
Preservation Act	National Historic Preservation Act
Project	Connecticut Expansion Project
Rehearing Order I	*Tennessee Gas Pipeline Co., LLC*, 162 FERC ¶ 61,013 (Jan. 10, 2018) [J.A. 5-26]

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* Acronyms marked by a star appear in the record, statutes, and / or regulations.

Rehearing Order II	*Tennessee Gas Pipeline Co., LLC*, 165 FERC ¶ 61,170 (Nov. 28, 2018) [J.A. 27-39]
Rehearing Request I	Tribal Office's request for rehearing of the Staff Order (May 9, 2017) [J.A. 320-345]
Rehearing Request II	Tribal Office's request for rehearing of Rehearing Order I (Feb. 2, 2018) [J.A. 347-364]
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SHPO *	State Historic Preservation Office
Staff Order	Notice to Proceed with Tree Clearing and Construction (April 12, 2017) [J.A. 3-4]
Tennessee	Tennessee Gas Pipeline Company, LLC
THPO *	Tribal Historic Preservation Office
Tribal Office	The Narragansett Indian Tribal Historic Preservation Office
Tribal Report	Mashantucket (Western) Pequot, Mohegan, Wampanoag of Gay Head (Aquinnah), and Narragansett Indian Tribal Historic Preservation Offices, and Ceremonial Landscapes Research, LLC, *Technical Report: Sandisfield Ceremonial Stone Landscape Survey* (Sept. 30, 2016) [Sealed Appendix 1-8]
Treatment Plan	Tennessee's Treatment Plan for the Massachusetts Loop: Avoidance, Minimization, and Mitigation [Sealed Appendix 9-32]
USET *	United South and Eastern Tribes

…….

* Acronyms marked by a star appear in the record, statutes, or regulations.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review an order issued by the Federal Energy Regulatory Commission ("Commission" or "FERC") if an aggrieved party is denied rehearing and petitions for review of the same issues within sixty days of a final order. 15 U.S.C. §§ 717r(a), (b) (2018). The Narragansett Indian Tribal Historic Preservation Office ("Tribal Office") moved to intervene [J.A.295-303] prior to the issuance of FERC's April 12, 2017 Order granting a Notice to Proceed with Tree Clearing and Construction ("Staff Order") [J.A.3-4] and requested rehearing within thirty days of its issuance ("Rehearing Request I") [J.A.320-345]. The Commission denied Tribal Office's motion to intervene on January 10, 2018. *Tennessee Gas Pipeline Company, LLC*, 162 FERC ¶ 61,013, P 4 (2018) ("Rehearing Order I") [J.A.6]. Tribal Office requested rehearing within thirty days and sought party status *nunc pro tunc* ("Rehearing Request II") [J.A.347-364]. *See Georgia Pacific Corp*., 98 FERC ¶ 61,312, n.40 (2002). FERC denied Rehearing Request II on November 28, 2018, *Tennessee Gas Pipeline Company, LLC*, 165 FERC ¶ 61,170 (2018) ("Rehearing Order II") [J.A.27-39]. Tribal Office petitioned for review within sixty days [J.A.1-2].

Tribal Office claims violations of due process and federal trust doctrine. This Court has jurisdiction to hear federal questions under 28 U.S.C. § 1331 and federal questions for claims brought by an Indian Tribe under 28 U.S.C. § 1362.

STATEMENT OF ISSUES

1. Whether the Commission violated its federal trust responsibility, the National Historic Preservation Act ("Preservation Act"), the Natural Gas Act ("Gas Act"), and the Administrative Procedure Act ("APA") by failing to schedule a survey of ceremonial stone landscapes until it was too late in the process to consider alternative routes or other means of avoidance. [Raised, J.A.323-327].

2. Whether the Commission violated its federal trust responsibility, the Preservation Act, and the APA by failing to follow proper procedures once it determined there would be adverse effects to ceremonial stone landscapes. [Raised, J.A.326-334]. These violations include:

   a. denying Tribal Office its right to participate in the resolution of adverse effects; and

   b. issuing a Memorandum of Agreement ("MOA") without a State Historic Preservation Office or Tribal Historic Preservation Office as a signatory.

3. Whether the Commission failed to engage in meaningful consultations. [Raised, J.A.327-331].

4. Whether the Commission's regulations, which force a Tribe to choose between its right to government-to-government communications and its right to intervene, violate the federal trust doctrine and/or Tribes' due process rights. [Raised, J.A.335-336; J.A.354-357; J.A.363-364].

5. Whether the Commission's denial of Tribal Office's Motion to Intervene violates the Gas Act and the APA. [Raised, J.A.353-362].

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are in the Addendum, which is separately bound.

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

The Commission must determine the effect of pipelines on historic properties and follow the implementing regulations of the Preservation Act. 54 U.S.C. § 306108; 36 C.F.R. part 800 ("Section 106").[1] The federal trust doctrine requires FERC to consider the best interest of Tribes and engage in meaningful consultations.

A. Jurisdiction

"Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958). "The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers." *Id*. at 582.

[1] Section 106 is used in this brief in order to be consistent with prior decisions.

B. Due Process

"No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. Due process claims require a two-step inquiry: (1) whether there has been a deprivation of a protected interest; and, if so (2) determining what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

C. Federal Trust Doctrine

Tribes are domestic sovereign nations with the right to government-to-government relationships with the federal government. 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). However, "[t]heir relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Thus, federal agencies have a fiduciary duty to act in Tribes' best interests. *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990) ("The trustee must always act in the interests of the beneficiaries. . . ."). Case law, executive orders, statutes, regulations, and agency guidance have consistently recognized this federal trust responsibility, which includes the need for meaningful consultations. *See, e.g.* Exec. Order 13175, § 2, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (2000) ("EO 13175"). FERC acknowledges its fiduciary duty in its policy statement on tribal consultations. 18 C.F.R. § 2.1c(b). If

a federal agency violates a statute that affects a Tribe, it also breaches its fiduciary duty. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006).

D. Section 106 of the National Historic Preservation Act

Congress enacted the Preservation Act in 1966 to preserve our collective history.[2] Subdivision five specifies the responsibilities of federal agencies and requires them to "take into account the effect of the undertaking on any historic property" "prior to the issuance of any license[.]" 54 U.S.C. § 306108. The Advisory Council on Historic Preservation ("Advisory Council") is empowered to "promulgate regulations…to govern the implementation of section [106]…." *Id.* § 304108(a). Advisory Council's implementing regulations allow federal authorization of "nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c).

Authorized tribes assume the role of the state on tribal lands, 54 U.S.C. § 302702; 36 C.F.R. § 800.2(c)(2)(i), which are defined as "all land within the exterior boundaries of any Indian reservation. . . ." 54 U.S.C. § 300319(1). However, Tribal preservation offices have a power that State preservation offices

[2] *See Congressional Findings*, Section 1, 1966 National Historic Preservation Act, Pub. L. No. 89-665, 16 U.S.C. §§ 470 *et seq.*, as amended by Pub. L. No. 96-515.

do not have–the right to consult in areas outside of their geographic jurisdiction. *Compare* § 302303(a), *with* § 302706(a), (b); *See also* 36 C.F.R. § 800.2(c)(2)(ii)(D). Tribal rights are detailed throughout Section 106, and require direct consultation with federal agencies. "[F]ederal agencies cannot unilaterally delegate their tribal consultation responsibilities to an applicant nor presume that such discussions substitute for federal agency tribal consultation responsibilities."[3]

Section 106 is sequential, logical, and thorough, with subsections describing specific requirements: 800.1 purposes; 800.2 participants; 800.3 initiation of the process; 800.4 identification of historic properties; 800.5 assessment of adverse effects; 800.6 resolution of adverse effects; and 800.7 failure to resolve adverse effects. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 252-54 (3rd Cir. 2001). Advisory Council has issued guidance, including a handbook, to ensure compliance with Tribal rights.[4]

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[3] Advisory Council, Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act (July 1, 2011), https://www.achp.gov/sites/default/files/guidance/2018-09/Tribal%20Consultation%20Delegation%20Federal%20Limitations.pdf ("Limited Delegation").

[4] *See Id.*; Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (Dec. 2012), https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf ("Handbook"); Traditional Cultural Landscapes in the Section 106 process (March 19, 2012), https://www.achp.gov/sites/default/files/guidance/2018-06/TCLsintheSection106ReviewProcess.pdf; Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers (July 11,

E. Natural Gas Act

The Commission is authorized to issue certificates of public convenience and necessity for the interstate transportation of natural gas. 15 U.S.C. §§ 717f(c), (e). Before a company constructs a pipeline, it must "comply with all other federal, state, and local regulations not preempted by the [Gas Act]." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). To verify compliance with the Preservation Act, FERC must oversee its own role under Section 106. *Tennessee Gas Pipeline Company, LLC*, 154 FERC ¶ 61,191, App. B, ¶ 9 (2016) ("Certificate Order") [J.A.167]. The Commission is also required to set schedules for all federal authorizations and maintain a docket for judicial review of all licenses and permits. 15 U.S.C. §§ 717n(c),(d).

The Commission's rules generally preclude off-the-record communications. 18 C.F.R. § 385.2201(b). According to these rules, Tribes are only entitled to engage in off-the-record government-to-government communications if they are not a party. *Id*. § 385.2201(e)(1)(v). If a Tribe chooses to engage in mandatory government-to-government communications with FERC, it cannot be a party to the proceedings. *Id*.

2012), https://www.achp.gov/sites/default/files/guidance/2018-06/NativeAmericanTCLsintheSection106ReviewProcessQandAs.pdf; and Recommendations for Improving Tribal-Federal Consultation (Sept. 14, 2015) https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf.

II. FACTUAL BACKGROUND

A. Surveys Were Performed After the Certificate Order Was Issued

Tennessee Gas Pipeline Company, LLC ("Tennessee") submitted an application for a certificate of public convenience and necessity for the Connecticut Expansion Project ("Project") on July 31, 2014. EA, 1 [J.A.80]. Its plans included two segments of 36-inch pipeline, 1.4 miles in New York ("New York Loop") and 3.8 miles in Massachusetts ("Massachusetts Loop"), as well as an 8.3-mile, 24-inch pipeline in Massachusetts and Connecticut ("Connecticut Loop"). EA, 5-8 [J.A.84-87]. FERC assigned Docket No. CP14-529 to the Project.

On August 22, 2014, the United South and Eastern Tribes submitted a policy letter to the Commission, asking it to fulfill its federal trust responsibility by quickly initiating formal consultation with Tribes in gas pipeline projects, and to follow up by consulting with them in a meaningful manner. United Tribes' Letter, Att.2 [J.A.56-57]. The Tribes attached a June 4, 2014 resolution that described the need for FERC "*to establish a pro-active CSL and cultural resource avoidance policy before right of way plans are destructively cast in stone.*" *Id.*at Att.1 [J.A.54-55]. This correspondence was filed by FERC in Docket No. CP14-529. [J.A.52-57]. However, FERC later stated the Tribes' immediate concern was the Algonquin Incremental Market Project ("Algonquin Project"), not this Project. EA, 91 [J.A.97].

The Commission continued to confuse the two projects. On November 5, 2014, FERC filed a memorandum regarding an October 17, 2014 Section 106 consultation for the Algonquin Project in the docket for this Project. Algonquin Consultation Memo [J.A.65]. FERC concluded, "it would be appropriate to survey the Tennessee Gas Pipeline Connecticut Expansion Project (CP14-529) for ceremonial stone landscapes." *Id*. However, in a February 27, 2015 letter to FERC, Tennessee stated that it did not attend the October 17, 2014 meeting and that the consultant at the meeting was not there as a subcontractor of Tennessee. Tennessee Letter [J.A.75]. In addition, on February 11, 2015, Tennessee stated that it "is not aware that the Commission has initiated government-to-government consultation meetings on this Project with the Tribes." Tennessee Response [J.A.68].

On October 23, 2015, a full year after FERC said it would be appropriate to survey the Project for ceremonial stones, FERC issued an Environmental Assessment ("EA") in which it admitted that "to date, a meeting regarding ceremonial stone landscape survey has not yet occurred." EA, 91 [J.A.97].

On December 8-10, 2015, a Section 106 Consultation for this Project was finally held, during which it was decided that a survey was needed for the Massachusetts Loop of the Project. Consultation Memo [J.A.106-107]. However, FERC failed to set a schedule for initiating or completing the task.

The March 11, 2016 Certificate Order did not mention Tribes or missing surveys for ceremonial stone landscapes. Certificate Order [J.A.108-171]. However, three environmental conditions in Appendix B required Tennessee to complete the Preservation Act's requirements. Environmental condition 5 anticipated the need for approvals of route changes "resulting from: [] implementation of cultural resources mitigation measures[.]" *Id*. at App. B, ¶ 5 [J.A.165]. Environmental condition 9 required documentation that all authorizations required under federal law had been obtained. *Id*. at ¶ 9 [J.A.167]. Environmental condition 26 required completion of cultural resources surveys, comments by State preservation offices on those reports, and other pertinent tasks as a condition for constructing the Project. *Id*. at ¶ 26 [J.A.171].

B. FERC Refused to Delay the Project to Avoid Ceremonial Stones

On October 3, 2016, two years after FERC noted the need to study the route for ceremonial stones, a survey of the Massachusetts Loop was filed as a privileged document. *See* Mashantucket (Western) Pequot, Mohegan, Wampanoag of Gay Head (Aquinnah), and Narragansett Indian Tribal Historic Preservation Offices, and Ceremonial Landscapes Research, LLC, *Technical Report: Sandisfield Ceremonial Stone Landscape Survey* (Sept. 30, 2016) ("Tribal Report") [Sealed Appendix 1-8]. The Tribes asked that the sacred stones be avoided, *id*. [Sealed Appendix 4], an option specified in condition 5 of the Certificate Order. Certificate

Order, App. B, ¶ 5 [J.A.165]. However, ten days later, the Tribes were told that many of the sacred stones would have to be removed for the construction of the project, and Tennessee showed them which ones could not be avoided. Rehearing Request I, Ex.B [J.A.341]. Harris Decl. ¶ 13, Att.1. Add.63, 67-70.

The U.S. Army Corps of Engineers ("Army Corps") did not concur with the destruction of ceremonial stone features that were located within the area over which it had jurisdiction. In a November 22, 2016 letter to FERC, it stated that Tennessee agreed to implement measures to avoid the twenty sites within its permit area. Army Corps Letter, 1 [J.A.200]. The Army Corps emphasized the importance of implementing early consultation with Tribes. *Id*. at 1-2 [J.A.200-201].

The Commission did not follow the Army Corps' lead. On December 5, 2016, FERC held a meeting at which five Tribes were allowed to comment on a Treatment Plan developed by Tennessee. Treatment Plan, 4 [Sealed Appendix 14]. Claiming that some ceremonial stone landscapes could not be avoided, Tennessee proposed dismantling them and piecing them back together once the pipeline was installed. *Id*. at 5, 8-9 [Sealed Appendix 15, 18-19]. Disclosure of the October and December meetings, as well as other communications, were not promptly filed in the docket, as required under FERC's off-the-record regulations. 18 C.F.R. § 385.2201(g)(1). On December 15, 2016, Tribal Office submitted an *ex parte* letter,

pointing out the religious nature of these stones and urging innovative approaches to avoidance. Rehearing Request I, Ex. A [J.A.338-339].

On December 29, 2016, FERC notified Advisory Council that the Project would cause adverse effects to ceremonial stone landscapes ("Notice of Adverse Effects"). [J.A.204-216]. In the attached documentation, FERC stated that 73 ceremonial stone features had been identified along the Massachusetts Loop, but it was too late to select an alternative route because Tennessee had already acquired the easement the Commission authorized in the Certificate Order from the State of Massachusetts through condemnation proceedings. Notice of Adverse Effects, 5-6 [J.A.212-213]. "Because any adjustments outside the current easement would also have to be condemned, Tennessee's ability to adjust the pipeline route to avoid CSL features is limited." *Id*. at 6. However, final judgment, which required Tennessee to pay Massachusetts $580,030 for the easement, was not entered until February 14, 2017. Final Judgment, 4-5 [J.A.227-228].

On January 3, 2017, Tribal Office objected to the Notice of Adverse Effects, stating there had not been an opportunity for the Tribes to "participate in the resolution of adverse effects." Tribal Office Letter [J.A.217-218]. It noted that "[t]he words are in the law, but where is the implementation of the process for Tribes?" *Id*. at 2 [J.A.218]. Tribal Office characterized Tennessee's plans as "a path to destruction and desecration." *Id*. In a January 5, 2017 letter to Advisory

Council, Tribal Office stated that the Tribes were merely shown the sacred stones Tennessee was planning destroy. Rehearing Request I, Ex.B [J.A.341]. "The Tribes have yet to participate in an organized action to resolve (with Tribal participation) the adverse effects that are proposed for each of the 1/3 of 73 identified ceremonial stone features. This area has revealed itself as a landscape of active ancestral 'prayers in stone'. For those who recognize and honor their 'religious and cultural significance', their loss cannot be supported or taken lightly." *Id*.

In its Notice of Adverse Effects, FERC stated Massachusetts Preservation Office "has chosen not to participate." Notice of Adverse Effects, letter, 1 [J.A.204]. On January 3, 2017, Advisory Council sent an email to Massachusetts Preservation Office saying, "I don't have a copy of any letter from SHPO regarding stepping out of the consultation." Advisory Council email [J.A.368]. Massachusetts responded to Advisory Council by sending its prior comments on historic resources. Massachusetts' email, comments [J.A.371-373]. Wishing to move the project forward, FERC sent an email to Advisory Council on January 24, 2017, suggesting a solution. "I believe a termination letter to the Advisory Council may check the boxes for FERC to proceed. I would base the termination of consultation on the SHPO not being able to review the Ceremonial Stone Landscape report and not responding to my outreach." FERC email [J.A.374].

Even though Massachusetts Preservation Office never sent a termination letter, Advisory Council followed FERC's suggestion. In its January 27, 2017 letter, Advisory Council claimed Massachusetts could not participate because the Tribes refused to share the Tribal Report, and therefore, Advisory Council would sign a "two party" MOA with FERC. Advisory Council letter, 1-2 [J.A.219-220]. This story was quickly challenged by Tribal Office in an *ex parte* email, saying it attempted to email the Tribal Report to Massachusetts and made follow-up phone calls, which were never returned. Rehearing Request I, Ex.C [J.A.344]. Harris Decl., ¶ 16. Add.64. The MOA incorporated Tribal Office's version of events and did not state Massachusetts Preservation Office had terminated consultation. MOA, 2-3 [J.A.264-265]. Tribal Office also corrected Advisory Council's timeline of events, pointing out that consultations begin when Tribes meet with FERC, not when a project applicant contacts Tribes. Rehearing Request I, Ex.C, 2 [J.A.344].

Advisory Council faulted FERC for delaying the study of ceremonial stones. "FERC's practice of issuing decision documents under the National Environmental Policy Act (NEPA) and Certificates of Public Convenience and Necessity (Certificate) prior to completion of Section 106 is problematic and inconsistent with the requirements of the Section 106 regulations (36 CFR § 800.1(c))." Advisory Council letter, 2 [J.A.220].

On February 28, 2017, Tennessee sent the Treatment Plan it developed to the consulting parties, including Massachusetts Preservation Office. Tennessee email [J.A.380]. On April 6, 2017, Tennessee requested a Notice to Proceed with Construction of the Project. Request to Construct Project [J.A.281-294]. It included a chart of Federal Permits and Consultations, but did not list FERC as the federal licensing agency responsible for the Section 106 review. *Id*. at Att. A [J.A.284-287]. The three preservation offices were listed, but no termination letter was included from Massachusetts. *Id*. at Tab 5 [J.A.286; J.A.288-294]. Tennessee stated that the tribal consultation process was complete. *Id*. at 1 [J.A.281].

Tribal Office moved to intervene on April 9, 2017, [J.A.305-319], and opposed Tennessee's two requests for Notices to Proceed on April 12, 2017, [J.A.304]. FERC granted Tennessee's requests to construct the Project on April 12, 2017, stating "We have confirmed the receipt of all federal authorizations…." Staff Order, 1 [J.A.3]. Tribal Office requested rehearing of the Staff Order on May 10, 2017. Rehearing Request I [J.A.320-345]. The Commission rejected Tribal Office's request and denied its Motion to Intervene on January 10, 2018. Rehearing Order I, P 4 [J.A.6]. Tribal Office requested rehearing of the denial of its Motion to Intervene on February 2, 2018. Rehearing Request II [J.A.347-364]. The Commission denied it on November 28, 2018. Rehearing Order II, P 1

[J.A.27]. Tribal Office seeks party status *nunc pro tunc* so that the Commission's violations can be addressed.

SUMMARY OF THE ARGUMENT

The federal trust doctrine requires the Commission to consider the best interest of Tribes and consult with them in a sensitive and meaningful manner. In addition, FERC must follow the detailed requirements of Section 106.

Here, instead of attentive care and step-by-step oversight, FERC ignored and truncated the requirements of Section 106. For example, it improperly delegated its consultation responsibilities to Tennessee, which created an unreasonable delay in the identification of historic properties. Once ceremonial stones were found, FERC: (1) abused its discretion by claiming it was too late in the process to avoid them; (2) arbitrarily dismissed Tribal Office's attempts to meaningfully participate in the resolution of adverse effects; and (3) capriciously fabricated Massachusetts Preservation Office's termination of consultation so it could check off boxes on its regulatory to do list.

After FERC initiated consultation, Tribal Office participated as a Tribal consulting party. Its sovereign role precluded it from seeking party status because FERC's regulations unconstitutionally force Tribes to choose between their right to intervene and their right to off-the-record government-to-government communications. When consultations ended, Tribal Office moved to intervene out-

of-time, hoping to enforce the conditions in the Commission's license before a final order was issued. However, its efforts were rebuffed by FERC, in a capricious attempt to avoid judicial review.

STANDING

The Narragansett Indians are the descendants of the indigenous people of what is now Rhode Island, as well as areas beyond its borders, including submerged lands.[5] Their beauty and customs were praised by Verrazzano, who explored the eastern seaboard of North America for the King of France almost 500 years ago.[6] In the late seventeenth century, the Narragansett Indians were subjected to genocide and displaced from their lands.[7] Some refugees sought shelter in Western Massachusetts, welcomed by the powwow Umpachene.[8] Over the next three centuries, the Narragansetts maintained their culture and achieved federal recognition in 1983. *See* Department of the Interior, Final Determination for

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[5] Johanna Knapschaeffer, *Villages Beneath the Sea* (Dec. 2, 2015), *available at* http://web.uri.edu/quadangles/villages-beneath-the-sea.

[6] Giovanni da Verrazzano, Letter to King Francis 1, 6-8 (1524), *available at* http://nationalhumanitiescenter.org/pds/amerbegin/contact/text4/verrazzano.pdf.

[7] Lisa Brooks, *Our Beloved Kin, A New History of King Philip's War*, Yale University Press, pp 11, 44-45, 142-145, 203-207, 238-245 (2018).

[8] James W. Mavor, Jr. and Byron E. Dix, *Manitou: The Sacred Landscape of New England's Native Civilization*, Inner Traditions International, Ltd., pp 166-7 (1989).

Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983).

Tribal Office is an official Political Subdivision of the Narragansett Indian Tribe. It was authorized by the National Park Service under Section 101(d)(2) of the Preservation Act on September 12, 1996, and by the Advisory Council under Section 101(d)(5) on November 27, 2000. Tribal Office attaches religious and cultural significance to ceremonial stone landscapes and works to preserve them.[9] It relies on the federal trust doctrine and the Preservation Act to protect them.

Tribal Office was engaged in off-the-record, government-to-government communications with FERC during the regulatory review of the Project, a status that precluded it from intervening earlier in the process. Harris Decl. ¶ 18-19. Add.64. 18 C.F.R. § 385.2201(e)(1)(v) ("[A]Tribal agency that is *not a party* in the Commission proceeding" may engage in off-the-record communications.) (emphasis added). Tribal Office moved to intervene on April 9, 2017, prior to the issuance of the orders it is challenging, and seeks party status as of that date. It contends the Commission is denying it the right to intervene in order to shield FERC's actions from judicial review.

[9] John Brown, THPO, and Doug Harris, Deputy THPO, *Running Wolf's Advice: Let the Landscape Speak for Itself*, 10-11, National Park Service Tribal Historic Preservation Program (2017), *available at* https://www.nps.gov/articles/upload/997-066-Tribal_Preservation_Program_jm4-1.pdf. Tribal Office also protects burial sites and other features and resources that are not at issue in this petition for review.

Tribal Office was not allowed to participate in the resolution of adverse effects. Harris Decl. ¶ 15. Add.63. Because of FERC's scheduling delay and other procedural errors, construction of the Project resulted in the destruction of twenty-one ceremonial stone features in the Massachusetts Loop. FERC's *ex parte* regulation precluded it from intervening sooner and seeking a stay prior to this desecration. *Id*. at ¶ 19. Add.64. Tribal Office's injuries were caused by FERC and can be redressed by this Court. Thus it has standing. *City of Jersey City v. Consolidated Rail Corp*., 668 F.3d 741, 744-45 (D.C. Cir. 2012).

STANDARD OF REVIEW

FERC's decisions under the Preservation Act and Gas Act are reviewed under the APA's arbitrary, capricious, abuse of discretion, or contrary to law standard. 5 U.S.C. § 706. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1102 (D.C. Cir. 2019). Since FERC does not administer the Preservation Act and did not promulgate the Section 106 regulations, its interpretation of them is not entitled to deference. *Id*. Instead, Advisory Council's "regulations command substantial judicial deference." *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992). However, Advisory Council's comments during project review are not entitled to deference. *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 760 (D.C. Cir. 1995) ("[A]n agency need not

heed any advice it receives from the ACHP."). Thus, this Court conducts a *de novo* review. *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999).

"The court reviews *de novo* the [Tribes'] challenge to the constitutionality of the procedures under the…regulations." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). "'[I]nterpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.'" *Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) (internal citations omitted). The Commission is not due deference on jurisdictional issues. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990).

ARGUMENT

I. FERC VIOLATED THE PRESERVATION ACT, THE GAS ACT, AND ITS FEDERAL TRUST RESPONSIBILITY BY FAILING TO FOLLOW MANDATORY STEPS IN THE SECTION 106 PROCESS

Congress passed the Preservation Act to preserve our Nation's historic resources. *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 438 (9th Cir. 1976). Like NEPA, the Preservation Act requires federal agencies to "stop, look, and listen" so that adverse impacts can be considered before projects are approved. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 805 (9th Cir. 1999). While the Preservation Act does not require substantive outcomes, "when procedures are established by law, those procedures must be followed." *Friends of Trail*, 252 F.3d at 267.

Many of the problems encountered in this Project were caused by the Commission's systemic failure to lead the Section 106 review. Under the Act,

> the head of any…independent agency having authority to license any undertaking, …prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

54 U.S.C. § 306108. FERC does not follow this congressional mandate. Its leadership void is revealed in its chart of required permits/approvals/consultations, which does not list the Preservation Act under FERC's name. EA, 27 [J.A.89]. Instead, FERC impermissibly delegates its responsibilities. "Tennessee would be responsible for obtaining all permits and approvals required to construct and operate the projects…." EA, 29 [J.A.91]. While this approach may be appropriate for laws administered by other agencies, the Preservation Act requires FERC to be in charge. 36 C.F.R. § 800.4. Tennessee is merely a consulting party. *Id*. § 800.2(c)(4). "[T]he lead agency in a federal project has the responsibility for resource identification and protection..., whose duties under the regulations were non-delegable." *National Indian Youth Council v. Watt*, 664 F.2d 220, 227 (10th Cir. 1981).

A. FERC Failed to Schedule a Survey Until It Was Too Late to Consider Alternatives

> The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

36 C.F.R. § 800.1(c). Nondestructive activities are allowed prior to licensing, "provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." *Id*. Here, in direct violation of this regulation, the Commission admitted that it delayed the study of ceremonial stones until alternatives could no longer be considered.

> [T]he CSL survey had not occurred [when the Environmental Assessment was released], and those resources could not be factored into the decision to support the originally proposed route adjacent to the existing pipeline. Tennessee took the State of Massachusetts to condemnation proceedings to get access to the property. Because any adjustments outside the current easement would also have to be condemned, Tennessee's ability to adjust the pipeline route to avoid CSL features is limited.

Notice of Adverse Effects, 6 [J.A.213]. As discussed *infra* in Sections I.B., C., FERC compounded its errors by taking shortcuts in the remaining Section 106 review so Tennessee could quickly begin construction of the Project.

Tribal Office is not challenging the Certificate Order or the Commission's authority to attach reasonable conditions to it. 15 U.S.C. § 717f(e). However, if FERC postpones the identification of historic resources, then alternatives must still be available for consideration, because that is what Section 106 requires. 36 C.F.R. § 800.1(c). *See Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1153 (D. Mont. 2004) ("BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the leases herein.").

1. FERC Violated the Preservation Act by Failing to Lead the Section 106 Review and Ensure Its Timely Completion

In the summer of 2014, United Southern and Eastern Tribes voiced its concerns about FERC's policy and emphasized the need "*to establish a pro-active CSL and cultural resource avoidance policy before right of way plans are destructively cast in stone.*" United Tribes Letter, Att.1 [J.A.54]. In spite of this outreach, ceremonial stones were not studied and avoided before the route was "destructively cast in stone." Thus, as Advisory Council noted, FERC violated section 800.1(c). Advisory Counsel letter, 2 [J.A.220]. This failure occurred because FERC delegated its responsibilities to Tennessee. "Under the regulations of the ACHP, *the federal agency must*, in consultation with the relevant State Historic Preservation Officer, identify the project's 'area of potential effect,' locate all historic properties in that area, and assess the actual effect of the project upon those specific properties. 36 C.F.R. §§ 800.4(b), 800.4(c), 800.5." *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1508 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994) (emphasis added).

On October 17, 2014, FERC held a Section 106 consultation for the Algonquin Project. Algonquin Consultation Memo [J.A.65]. FERC concluded, "it would be appropriate to survey the Tennessee Gas Pipeline Connecticut Expansion Project (CP14-529) for ceremonial stone landscapes." *Id.* However, that meeting did not relieve FERC of its duties for this Project. In a February 27, 2015 letter to

FERC, Tennessee stated that it did not attend the October 17, 2014 meeting and that the consultant at the meeting was not there as a subcontractor of Tennessee. Tennessee Letter [J.A.75]. In an earlier filing, Tennessee stated that it "is not aware that the Commission has initiated government-to-government consultation meetings on this Project with the Tribes." Tennessee Response [J.A.68]. These warnings were ignored by FERC.

On October 23, 2015, a full year after FERC said it would be appropriate to survey the Project for ceremonial stones, the Commission admitted that "to date, a meeting regarding ceremonial stone landscape survey has not yet occurred." EA, 91 [J.A.97]. It was not until December 2015 that a Section 106 Consultation for this Project was finally held. Consultation Memo [J.A.106-107]. The participants decided that a survey was needed for the Massachusetts Loop of the Project, but FERC failed to set a schedule for it. *Id*. [J.A.107].[10] The Commission also failed to mention the missing survey for ceremonial stone landscapes in its March 11, 2016 Certificate Order. [J.A.108-171]. The Tribal Report was filed on October 3, 2016. [J.A.192].

These delays occurred because the Commission impermissibly delegates its responsibilities. "[While] [t]he agency official may authorize an applicant…to

[10] In P 30 of Rehearing Order I [J.A.17], FERC claims a schedule was set at this meeting, citing page 2 of its Notice of Adverse Effects [J.A.209]. Neither document includes a schedule for the Tribal surveys.

initiate consultation with the SHPO/THPO and others…[,] Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes." 36 C.F.R. § 800.2(c)(4). "Accordingly, the authorization to applicants to initiate Section 106 consultation does not apply to the initiation of consultation with Indian tribes unless expressly authorized by the Indian tribe to do so." Limited Delegation, 1. *See also* Handbook, 19. Tribal Office has not authorized FERC to delegate these responsibilities. Harris Decl. ¶ 6. Add.61-62. "Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues…." 36 C.F.R. § 800.2(c)(2)(ii)(A). Instead of fulfilling this fiduciary duty, FERC mailed form letters to Tribes. Rehearing Order I, P 30 [J.A.17].

The requirement for government-to-government consultation does not end with initiation, and is not limited to resources on Tribal lands.

> Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe…that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property.

Id. § 800.2(c)(2)(ii). These consultations are unique and require sensitivity. *Id*. §§ 800.2(c)(2)(ii)(A)-(D).

In spite of these clear directives, FERC's regulations ask applicants to contact Tribes before the Commission initiates consultations. 18 C.F.R. §§ 380.12(f)(1), (f)(2). If there is a problem, a "project sponsor may contact the

Commission at any time for assistance." *Id.* § 380.14(a). However, when Tennessee reminded FERC, on February 11, 2015, that the Commission had not initiated government-to-government consultations, [J.A.68], FERC did not follow up for ten months. Consultation Memo [J.A.106-107]. Thus, the Commission's failure to initiate Tribal consultations early in the process, and continue them, as required under 800.1(a), 800.2(c)(2)(ii)(A)-(D) and 800.2(c)(4), created unreasonable delays that foreclosed avoidance, in violation of section 800.1(c). "While Section 106 may seem to be no more than a 'command to consider,'... the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 302 (5th Cir. 1981), *cert. denied*, 454 U.S. 828 (1981).

2. FERC Violated the Gas Act by Failing to Set a Schedule for the Section 106 Review

In addition to the Commission's failures under the Preservation Act, FERC also violated the Gas Act. Congress empowered FERC to be the lead agency for pipeline reviews. 15 U.S.C. § 717n(b). ("The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations…."). Using that authority, "[t]he Commission shall establish a schedule for all Federal authorizations." *Id.* § 717n(c)(1). *See also, Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, P.12, n.21 (2018) ("[T]he Commission indisputably has a central role in coordinating agency actions and in setting and enforcing deadlines in NGA

proceedings."). This includes FERC's role in the Preservation Act. 15 U.S.C. § 717n(a).

On September 1, 2015, FERC issued a schedule for the environmental review of the Project that set October 23, 2015 as the date for the issuance of the Environmental Assessment and January 21, 2016 as the deadline for all federal authorizations. FERC Schedule, 1 [J.A.76]. It stated that "[i]f a schedule change becomes necessary, additional notice will be provided so the relevant agencies are kept informed of the Project's progress." *Id*. No other schedule was issued for this Project.

FERC issued the Environmental Assessment on time, but failed to complete the Section 106 review by January 21, 2016, as required by its own schedule. This dilatory behavior continued. FERC did not set a date in its March 16, 2016 Certificate Order for completion of the missing ceremonial stone surveys. Instead, under condition 5, it established an open-ended option to change the route "resulting from: [] implementation of cultural resources mitigation measures[.]" Certificate Order, App. B, ¶ 5 [J.A.165]. However, once cultural resources were identified, FERC arbitrarily stated it was too late to choose alternative routes or other means of avoidance. Notice of Adverse Effects, 5-6 [J.A.212-213]. By failing to set a schedule for Tribal surveys and apply its schedule to the Preservation Act, FERC violated section 717n(c)(1).

FERC also failed to enforce its own regulations, which state "survey report[s] must be filed with the application." 18 C.F.R. § 380.12(f)(2). "If the comments of the SHPOs, THPOs, or land-management agencies are not available at the time the application is filed, they may be filed separately, but they must be filed before a final certificate is issued." *Id.* § 380.12(f)(2)(i). Here the Tribal Report was filed over two years after the application was made and over six months after the Certificate Order was issued. "It is a well-known maxim that agencies must comply with their own regulations." *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 474 (9th Cir. 1999).

B. FERC Denied Tribal Office its Right to Participate in the Resolution of Adverse Effects

During the summer of 2016, four Tribes that attach religious and cultural significance to ceremonial stones surveyed the Massachusetts Loop, where they discovered seventy-three sacred stones within the construction easement. Rehearing Order I, P 31 [J.A.17]. They found the ceremonial stones eligible for listing on the National Register and requested avoidance. Tribal Report, 3 [Sealed Appendix 4]. "We will cooperate with the project's proponents and cognizant government agencies in their development of this plan of avoidance." *Id*. Faced with a possible delay in its Project, Tennessee quickly organized an on-site

meeting, with FERC in attendance.[11] Harris Decl., ¶ 13, Att.1. Add.63, 67-70. There, ten days after they filed their report, the Tribes were shown which ceremonial stones would be dismantled. Rehearing Request I, Ex.B [J.A.340].

FERC acknowledged there would be adverse effects, [J.A.204-216], but failed to follow the proper procedures to resolve them.

> **§ 800.6 Resolution of adverse effects.**
> (a) Continue consultation. The agency official shall consult with the SHPO/THPO and *other consulting parties, including Indian tribes*…, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

36 C.F.R. § 800.6(a) (emphasis added). These Tribal consultations "should be conducted in a sensitive manner…." *Id.* § 800.2(c)(2)(ii)(B). In spite of these clear directives, there is nothing in the record documenting sensitive government-to-government consultations in which Tribal Office was allowed "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects" on stones that have religious significance to Narragansett Indians. *Id.* § 800.6(a). In fact, the Commission's position is that section 800.6(a) does not apply to Tribal Office, and that only 800.2(c)(2)(ii)(A) applies. *See* Rehearing Order I at P 32 [J.A.18]. To reach this erroneous

[11] The October 13, 2016 meeting, as well as other meetings and off-the-record communications, were not disclosed by FERC, as required under 18 C.F.R. § 385.2201(g)(1) and 15 U.S.C. § 717n(d).

interpretation, FERC arbitrarily deleted the words "*and other consulting parties, including Indian tribes…*" out of 800.6(a). *Id*.

Participants in the Section 106 process are outlined in section 800.2. Tribes are listed as consulting parties and granted the right to "participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A). Project applicants, like Tennessee, are also listed as consulting parties. *Id*. § 800.2(c)(4). The rights of consulting parties to resolve adverse effects are described in more detail in section 800.6(a). The first part of the sentence states that all the consulting parties, *including Indian tribes*, have the same rights as State or Tribal preservation offices. *Id*. The second part lists those rights. Consulting parties, *including Indian tribes*, should develop and evaluate alternatives or modifications to resolve adverse effects. *Id*.

Unfortunately, Tribal Office was not allowed to participate in the specified manner, even though it tried on more than one occasion to make the process match the regulations. Rehearing Request I, Ex.A, 2 [J.A.339]; Tribal Office Letter, 2 [J.A.218]; Harris Decl. ¶ 15, Add.63. While FERC let Tribal Office comment on Tennessee's draft treatment plan, the Commission's position was that it was too late in the process to avoid the ceremonial stones. Notice of Adverse Effects, 5-6 [J.A.212-213]. However, as explained *supra* in Section I.A., FERC lacks discretion to postpone surveys that are required to take place early in the process and then use

the delay it created as an excuse for non-avoidance. The Commission justified its position by claiming Tennessee had already acquired the easement from Massachusetts. *Id*. at 6 [J.A.213]. However, this was not true. Final judgment in those proceedings was not entered until February 14, 2017. Final Judgment [J.A.236]. Thus, a route change was still possible in 2016, as authorized by condition 5. Certificate Order, App. B, ¶ 5 [J.A.165]. In addition, Tennessee proceeded with the condemnation proceedings at its own risk. *See Grapevine*, 17 F.3d at 1509.

Unlike FERC, the Army Corps would not countenance the destruction of ceremonial stone features that were located within the area over which it had jurisdiction. In a November 22, 2016 letter, it stated Tennessee would implement measures to avoid the twenty sites within its permit area. Army Corps Letter, 1 [J.A.200]. The Army Corps emphasized the importance of implementing early consultation with Tribes. *Id*. at 1-2 [J.A.200-201]. FERC, on the other hand, arbitrarily denied Tribal Office its right to develop and evaluate alternatives or modifications to resolve adverse effects, in violation of sections 800.2(c)(2)(ii)(A)-(C), and 800.6(a). *See City of Phoenix v. Huerta*, 869 F.3d 963, 970-71 (D.C. Cir. 2017) (holding FAA's approval of new flight routes to be arbitrary and capricious and in violation of Section 106).

C. FERC Erroneously Issued a MOA Without a Preservation Office as a Signatory

In its order granting Tennessee the right to construct the Project, FERC claimed the Section 106 review was complete. "We have confirmed the receipt of all federal authorizations relevant to the approved activities herein." Staff Order, 1 [J.A.3]. However, Massachusetts Preservation Office never terminated consultation, which means the "two-party" MOA that lead to the destruction of ceremonial stones was improperly executed. Since it is null, the Section 106 review was never completed. Tribal Office raised this issue, but FERC failed to respond in regards to Massachusetts. Rehearing Request I, 11 [J.A.330]; Rehearing Order I, P 48 [J.A.25].

The resolution of adverse effects, under 800.6(b), requires precise steps. The mandatory signatories for an agreement depend upon whether Advisory Council is participating and whether a required agency has terminated consultation. Under 800.6(a) the federal agency is required to consult with State or Tribal preservation offices and ask Advisory Council if it wishes to participate. Here, the Advisory Council decided to participate, after being notified of adverse effects. Advisory Council Letter, 1 [J.A.219]. However, the Commission failed to consult with Massachusetts, claiming it "has chosen not to participate." Notice of Adverse Effects, Letter, 1 [J.A.204]. However, there is no termination letter from Massachusetts Preservation Office in the record. Tennessee, Request to Construct

Project, Att. A [J.A.289-294]. Since the MOA was only signed by FERC, Advisory Council, and Tennessee, without the explicit termination of consultation by Massachusetts, this agreement is void. MOA, 3 [J.A.265].

> Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

36 C.F.R. § 800.7(a). Tribal Office did not receive a termination letter from Massachusetts Preservation Office, and the MOA does not state that Massachusetts terminated its consultation. Harris Decl., ¶¶ 17, 20, Att. 3. Add.64, 80.

When Advisory Council and FERC asked Massachusetts about the Tribal Report, Massachusetts resubmitted its prior comments, an action that proves it did not terminate its consultation. Massachusetts email, comments [J.A.368-377]. While the reasons for Massachusetts refusal to participate are not germane to this Petition, it is relevant that Massachusetts was negotiating a $580,030 easement agreement with Tennessee, giving the State a significant financial interest in the existing route. Final Judgment, 4 [J.A.227]. In addition, in a prior regulatory review involving Tribal Office, the Keeper of the National Register of Historic Places determined that ceremonial stones at Turners Falls were eligible for listing, overruling Massachusetts Preservation Office's opinion that they were not.[12]

[12] Keeper of the National Register, Determination of Eligibility (Dec. 11, 2008), *available at* https://www.achp.gov/sites/default/files/2018-05/National%20Register%20of%20Historic%20Places%20determination%20of%2

However, the issue here is not what Massachusetts did, but how FERC subverted the Section 106 review. Wishing to move the Project forward, FERC's Tribal Liaison suggested a solution. "I believe a termination letter to the ACHP *may check the boxes for FERC to proceed*. I would base the termination of consultation on the SHPO not being able to review the Ceremonial Stone Landscape report and not responding to my outreach." FERC email [J.A.374] (emphasis added). Even though Massachusetts did not file the termination letter, FERC proceeded anyway. The Commission claims the "MOA, signed pursuant to section 800.6(c)(1)(iii), correctly had the agency and the Council as signatories." Rehearing Order I, P 48 [J.A.25]. However, this is contrary to law because section 800.6(c)(1)(iii) is contingent upon a preservation office's termination of consultation and such termination requires written notification to other consulting parties. *Id*. § 800.6(a). Here, Massachusetts never sent a written termination to other consulting parties, so its signature was required on the MOA. *Id*. § 800.6(c)(1)(ii). "Because [FERC] did not follow the required procedures, we conclude that it abused its discretion in implementing the MOA and in terminating [Massachusetts] consultation." *Friends of Trail*, 252 F.3d at 267. While the Staff Order stated that FERC had complied with the Preservation Act, that "compliance" was based on the fabrication of Massachusetts termination. "Such an

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arrangement…serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a [pipeline] project." *Hoopa Valley Tribe*, 913 F.3d at 1104.

D. FERC Violated Its Federal Trust Responsibility

1. FERC Breached Its Fiduciary Duty by Violating Statutes and Regulations

In addition to its statutory requirements, FERC also owes a fiduciary duty to Tribes. Justice Marshall described this trust relationship over 185 years ago, and case law, statutes, executive orders, regulations, and agency guidance documents have reinforced this federal duty since then. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) ("Their relation to the United States resembles that of a ward to his guardian."). *See also, United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'") (internal citations omitted); EO 13175, § 2(a) ("The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes."). "The Commission acknowledges that, as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes." 18 C.F.R. § 2.1c(b).

When a federal agency violates a statute or regulation, it also breaches its fiduciary duty. *Pit River Tribe*, 469 F.3d at 788 ("Because we conclude that the agencies violated…NHPA during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes."). Thus, FERC breached its fiduciary duty to Tribal Office when it violated the Preservation and Gas Acts.

The Commission erroneously asserts that its duty is minimal. "The Commission's fiduciary responsibility to tribes does not require us to afford them greater rights than they would otherwise have under federal law." Rehearing Order I, P 47 [J.A.24-25]. In fact, the Preservation Act establishes FERC as the fiduciary for Tribes' religious and cultural resources that are located outside of their current jurisdiction. 54 U.S.C. § 302706. "[A]s the Tribes' fiduciary, [the Commission] is held to strict standards and is required to exercise the greatest care in administering its trust obligations." *Assiniboine & Sioux Tribes v. Bd. of Oil and Gas Conservation,* 792 F.2d 782, 794 (9th Cir. 1986). While Section 106 is generally considered a procedural statute, it requires an affirmative duty to Tribes. 36 C.F.R. § 800.2(c)(2)(ii)(B)-(D); *Confederated Tribes*, 746 F.2d at 475. "Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries." *Assiniboine,* 792 F.2d at 794.

FERC's reliance on *Skokomish* is unavailing because it was brought under the Federal Power Act ("Power Act"), not the Preservation Act. Rehearing Order II, n.60 [J.A.38]. *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) ("[T]he Tribe's permit application is barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance."). Here, Tribal Office is asserting rights that are guaranteed under the Preservation Act, not applying for permits under the Gas Act, so *Skokomish* is inapplicable.

2. FERC Failed to Engage in Meaningful Consultations

A federal agency, such as FERC, is required to engage in government-to-government consultations with Indian Tribes. 54 U.S.C. § 302706. Tribal consultations have requirements that are distinct from consultations with non-Tribal participants. "[Tribal] Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues…." 36 C.F.R. § 800.2(c)(2)(ii)(A). As discussed *supra* in Section I.A., this did not happen here. The first in-person consultation for this Project did not take place until December 2015, approximately a year and a half after Tennessee filed its application, and over a month after FERC issued its Environmental Assessment, even though FERC had been aware of the need for Tribal surveys for well over a year. This delay was an abdication of responsibility. *Id.* § 800.1(c) ("The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that

a broad range of alternatives may be considered during the planning process for the undertaking."). FERC's failure to comply with section 800.1(c) is also a violation of its consultation requirements under 800.2(c)(2)(ii)(A).

FERC's failure to engage in early, and therefore, meaningful consultations stems from its regulations, which delegate its Section 106 responsibilities to project applicants. 18 C.F.R. §§ 380.12(f)(1), (2), 380.14(a). While this may be an acceptable approach for non-Tribal resources, it is contrary to the Advisory Council's regulations when dealing with Tribes. *See* Limited Delegation. Unfortunately, "this was not a one-off decision by [FERC]. Rather, it appears to reflect the agency's settled practice." *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 532 (D.C. Cir. 2018).

FERC's unwillingness to engage in sensitive and meaningful consultations continued after ceremonial stones were found. In fact, FERC's Tribal Liaison admitted that his goal was to check off boxes on his regulatory to-do list in order to move the Project forward. FERC email [J.A.374]. This attitude is inconsistent with the level of care required of a fiduciary. "The same trust principles that govern private fiduciaries determine the scope of FERC's obligations to [Tribal Office]." *Covelo Indian Community*, 895 F.2d at 586. Here the Commission violated its duty by authorizing the destruction of ceremonial stones even though it knew Massachusetts Preservation Office had not terminated its consultation.

As discussed *supra* in Section I.B., FERC also denied Tribal Office its right to develop and evaluate alternatives or modifications to resolve adverse effects, under section 800.6(a), by claiming its rights were limited to those described in 800.2(c)(2)(ii)(A). Rehearing Order I, P 32 [J.A.18]. The Commission is wrong. Tribal Office is a consulting party under 800.6(a) because it attaches religious and cultural significance to the ceremonial stones along the Massachusetts Loop. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't. of Interior*, 755 F.Supp.2d 1104, 1109, n.4 (S.D. Cal. 2010) ("The fact that the properties are not on the Tribe's own land doesn't affect this status."). Therefore, as a result of FERC's erroneous interpretation of Advisory Council's regulations, Tribal Office was unable "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). Instead, Tribal Office was just shown which stones would be destroyed. Rehearing Request I, Ex. B [J.A.341].

The Commission claims it fulfilled its duty by holding a meeting on December 5, 2016 and hosting a conference call in early January 2017. Rehearing Order I, P 33 [J.A.18-19].[13] However, holding a meeting and hosting a conference call after it had already been decided that it was too late to change the route to avoid the destruction of ceremonial stones are not meaningful consultations. *See*

[13] No memo was filed in the docket about these off-the-record meetings.

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 720 (8th Cir. 1979) ("We do not believe that the two meetings of the tribal delegates with Washington officials fulfilled the requirement of 'meaningful consultation' with tribal governing bodies as contemplated by the guidelines."). This failure is another breach of the Commission's fiduciary duty. *Id*. at 721.

E. FERC Failed to Comply with the Preservation Act

For all of the foregoing reasons, Tribal Office contends that the requirements of the Preservation Act had not been fulfilled when the April 12, 2017 Staff Order was issued. In spite of these deficiencies, the Commission stated that all relevant federal authorizations had been received and that Tennessee had submitted all of the "information necessary to meet the pre-construction environmental conditions" in the Certificate Order. Staff Order [J.A.3].

II. FERC'S OFF-THE-RECORD REGULATION, WHICH FORCES TRIBES TO CHOOSE BETWEEN THEIR RIGHT TO GOVERNMENT-TO-GOVERNMENT CONSULTATIONS AND THEIR RIGHT TO INTERVENE, VIOLATES DUE PROCESS AND/OR THE FEDERAL TRUST DOCTRINE

"No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. Due process claims require a two-step inquiry: (1) whether there has been a deprivation of a protected interest; and, if so (2) determining what process is due. *Logan v. Zimmerman Brush Co.,* 455 U.S.

422, 428 (1982). Three factors are considered in making that determination. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A. FERC's Regulation Deprives Tribes of a Property Interest

Tribes have a constitutional and statutory right to government-to-government consultations. U.S. CONST. art. 1, § 8, cl. 3; EO 13175, § 2; 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). Tribes also have a statutory right to intervene in the Commission's proceedings and petition for review of FERC's orders. 15 U.S.C. §§ 717r(a), (b). The right to petition the government is protected by the First Amendment. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). The Commission violated that right by promulgating off-the-record regulations that force Tribes to chose between engaging in government-to-government consultations or becoming parties that can petition for judicial review.

> (e) Exempt off-the-record communications.
> (1) Except as provided by paragraph (e)(2), the general prohibitions in paragraph (b) of this section do not apply to:
> (v) An off-the-record communication to or from a Federal, state, local or *Tribal agency that is not a party* in the Commission proceeding….

18 C.F.R. § 385.2201(e)(1)(v) (emphasis added). The Commission acknowledges this catch-22. "[Tribal Office] is correct that the Commission's rules prohibit intervenor tribes from participating in off-the-record communications with

staff….” Rehearing Order II, P 26. [J.A.38]. However, the Commission is not authorized to deprive Tribes of their Sovereign right to engage in government-to-government consultations. Therefore, FERC’s off-the-record rule precludes Tribes from petitioning a circuit court for review, which is the only available method to settle disputes with FERC. Therefore, as in *Boddie*, “this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.” *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971).

The right to challenge the validity of the Commission’s orders is a discrete property interest protected by the Due Process Clause. *See Logan,* 455 U.S. at 428. “[The] Due Process Clause has been interpreted as preventing the [government] from denying potential litigants use of established adjudicatory procedures, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed [rights].’” *Id.* at 429-30 (quoting *Boddie*, 401 U.S. at 380). This property right, “cannot be removed except ‘for cause.’” *Id.* at 430.

Here, there was no cause. Tribal Office, as a representative of a Sovereign Nation, was engaged in off-the-record communications with decisional employees of FERC about matters that were relevant to the Project, which was a contested on-the-record proceeding. Rehearing Request I, Ex. A [J.A.338-339]. Harris Decl. ¶ 18, Att. 1, 2. Add.64, 67-77. This status precluded it from intervening. 18 C.F.R. §

385.2201(e)(1)(v). Once those government-to-government consultations were completed, Tribal Office moved to intervene. Motion to Intervene [J.A.295-303]. It then requested rehearing of the Staff Order. Rehearing Request I [J.A.320-345]. The Commission denied the motion to intervene nine months after it was filed, and also rejected the request for rehearing. Rehearing Order I, P 4 [J.A.6]. The Commission subsequently denied Tribal Office's request for rehearing regarding party status. Rehearing Order II, P 1 [J.A.27]. Thus, Tribal Office has been deprived of a protected property interest – its right to "established adjudicatory procedures." *Logan,* 455 U.S. at 429.

B. Tribes Are Entitled to Both Government-to-Government Consultations and Party Status

The first factor in the due process test is the significance of the deprivation of the private interest. *Mathews*, 424 U.S. at 335. Here, Tribes have a statutory and regulatory right to engage in government-to-government consultations. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). In addition, parties have the right to challenge orders issued by FERC. 15 U.S.C. §§ 717r(a), (b). The Commission lacks authority to deny Tribes these rights.

In *Boddie*, the Supreme Court described judicial review as a fundamental method for preserving our democracy. *Boddie*, 401 U.S. at 374-77. It held that Connecticut could not deny indigents access to the courts for divorce proceedings based upon their inability to pay court fees and process servers. *Id*. at 374, 380-81.

Applied here, the Commission cannot deny Tribes their right to challenge its orders in court just because they are engaged in off-the-record government-to-government consultations, which are required by statute.

The Commission claims the loss of the right to intervene and seek judicial review is not a due process violation because Tribal Office was able to participate during the administrative proceedings. Rehearing Order II, PP 10, 26 [J.A.31-32; 38]. In other words, FERC believes its orders should be immune to legal challenges by Tribes as long as it considers Tribal comments before issuing them. This would deprive Tribes of judicial review, a significant right that is guaranteed by statute. 15 U.S.C. §§ 717r(a), (b).

The Commission admits its "rules prohibit intervenor tribes from participating in off-the-record communications with staff[.]" Rehearing Order II, P 26 [J.A.38]. This means that if Tribes intervene, then they cannot engage in government-to-government consultations, as required by Section 106. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). Thus, FERC's *ex parte* rule unconstitutionally forces Tribes to choose between two significant rights, and be deprived of one or the other. As such, it establishes unconstitutional conditions. *See Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014) ("The government has conditioned their eligibility for the valuable benefit of [government-to-government consultations] on their willingness to limit their First Amendment right to petition

government."). *See also, Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Thus, the first factor weighs heavily in favor of Tribal Office.

The second factor in the due process test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]" *Mathews*, 424 U.S. at 335. Since FERC's regulation states that only nonparty Tribes can engage in off-the-record government-to-government consultations, the risk of an erroneous deprivation is 100%. 18 C.F.R. § 385.2201(e)(1)(v). The Commission asserts that Tribes can intervene by assuming the same role as other consulting parties under the Preservation Act. Rehearing Order II, PP 11-13 [J.A.31-33]. However, there is no value in this substitute procedure because it forces Tribes to forego their statutory right and Sovereign duty to engage in off-the-record government-to-government consultations. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). Alternatively, it forces Tribes to forego their statutory and constitutional right to intervene and petition the government. 15 U.S.C. §§ 717r(a), (b). Thus, the second factor also weighs heavily in favor of Tribal Office.

The third factor in the due process test is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Here, the government has multiple interests, including its federal trust

responsibility to Tribes and its need to maintain impartial quasi-judicial proceedings. Instead of establishing distinct rights for Tribes engaged in direct off-the-record communications when it promulgated its off-the-record rule, FERC established identical requirements for Tribes and agencies. 18 C.F.R. § 385.2201(e)(1)(v). Fortunately, the regulation can be refined to harmonize the dual roles FERC must maintain with Tribes. "[T]he Commission may, by rule or order, modify any provision of this subpart, as it applies to all or part of a proceeding, to the extent permitted by law." *Id.* § 385.2201(a). Direct government-to-government consultations with Tribes are not only permitted, but required by law. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D). Thus, the rule should be amended so that consulting Tribes are allowed to intervene and engage in off-the-record communications with decisional staff at FERC. These communications, or summaries of them, should be promptly placed in the docket, as required under 385.2201(g)(1).

C. FERC's Off-the-Record Rule Violates the Federal Trust Doctrine

> An exemption to the *ex parte* rule permits an off-the-record communication to or from a tribe…*that is not a party* in the Commission proceeding, subject to a disclosure of the communication in the record. However, if a tribe becomes a party, the exemption would not apply, and any off-the-record communication…between the tribe and the Commission relating to the merits of a proceeding would be prohibited.

Rehearing Order II, P 10 (emphasis in original) [J.A.30-31]. In addition to denying due process, the Commission's rule violates the federal trust doctrine because it forces Tribes to forego their statutory duty to engage in off-the-record government-to-government consultations if they become a party. *See Pit River Tribe*, 469 F.3d at 788 (holding that "the agenc[y] violated [its] minimum fiduciary duty to the…Tribe when [it] violated the statutes."). Alternatively, FERC violates the doctrine by foreclosing party status if Tribes engage in off-the-record government-to-government communications. *Id*. The Commission's position is that Tribes can intervene and then consult like non-Tribal parties. Rehearing Order II, PP 10-13 [J.A.30-33]. "[N]othing in the *ex parte* rule prevents any party from filing written comments regarding the merits of a proposed project, including cultural resource issues." *Id*. at P 10 [J.A.31]. However, commenting is not equivalent to Tribal consultations, which require interactions that are deeper and more complex than notice and comment. "The consultation obligation is an affirmative duty." *Confederated Tribes*, 746 F.2d at 475. Here, if Tribal Office had moved to intervene sooner, FERC would have denied it the right to engage in the off-the-record government-to-government consultations that the Preservation Act requires. Harris Decl. ¶ 19. Add.64. Thus the Commission's *ex parte* rule violates the federal trust doctrine.

III. FERC ABUSED ITS DISCRETION BY DENYING PARTY STATUS TO TRIBAL OFFICE [14]

The Commission has a liberal policy for late interventions. Rehearing Order I, P 16 [J.A.10-11]. FERC considers several factors, including: (1) whether there was good cause for intervening late; (2) whether it would cause any disruption to the proceeding; (3) whether the movant's interest is adequately represented by others; (4) any prejudice to, or burdens on, existing parties; and (5) the movant's interest. 18 C.F.R. § 385.214(d). However, this rule was promulgated under the Power Act, not the Gas Act. "Section 308 of the [Power] Act gives the Commission the power to promulgate regulations governing the process through which interested persons become 'parties' within the meaning of the Act." *Cal. Trout v. FERC*, 572 F.3d 1003, 1013-14 (9th Cir. 2009). There is no comparable clause in the Gas Act.

While five factors are listed, FERC *may* consider only one, or all five. *Id. at* 1014-15, 1020. This flexibility enables FERC to choose who can seek judicial review, and who cannot. *Id*. at 1026 (Gould dissenting) ("The Commission may be happy as a clam to have no party able to challenge its judgment, giving it in effect totally unconstrained discretion, but in such a case the real loser is the public which will not have [] issues aired….") Tribal Office contends that the systemic issues raised in this petition are in the public interest and need resolution.

[14] This issue is placed last because its analysis relies on prior Sections.

The Commission's denial in this case was based on decisions and standards that apply when movants intervene after a certificate is issued with the goal of challenging the certificate, or a prior environmental review. Rehearing Order I, P 10; Rehearing Order II, PP 8-9, n.17-18 [J.A.7-8; J.A.29-30]. That is not the situation here. Tribal Office is seeking to enforce the Certificate Order, not challenge it, and moved to intervene before the Staff Order was issued, a procedural posture that appears to be without precedent.[15] Therefore, the cases on which FERC relies can be distinguished.[16] "[W]hen a late intervention motion is filed after the proceeding to which the motion is addressed has produced a final decision, the Commission has repeatedly stated that it will act favorably on the motion only in extraordinary circumstances[.]" *City of Orrville v. FERC*, 147 F.3d 979, 988 (D.C. Cir. 1998). Tribal Office contends that the Staff Order is the final decision. Even if the Court disagrees, the "extraordinary circumstances" here are the Commission's prejudicial *ex parte* rule and unconscionable violations of

[15] For this reason, Tribal Office argued that this situation is comparable to post licensing procedures under the Power Act. Rehearing Request II, 6, 13-15. [J.A.352; 359-361].

[16] In all of the cases cited by FERC in Rehearing Order I, the people moved to intervene and requested rehearing of the certificate after it was issued. *See* Rehearing Request II, n.63 for details [J.A.357]. In Rehearing Order II, PP 8-9, n.17-18 [J.A.29-30], three new cases were cited. All of them involved people who moved to intervene and sought rehearing of a certificate after it was issued: *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, PP 2-3, 9-12 (2018); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, PP 4-5 (2018); and *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,136 (2017).

Section 106. These justify granting Tribal Office party status as of April 9, 2017 so the Petition can be decided on its merits.

A. Tribal Office Had Good Cause to Intervene Out-of-Time

1. FERC's Off-the-Record Rule Precluded Tribal Office from Intervening Sooner

As discussed *supra* in Section II., FERC's off-the-record rule precludes consulting Tribes that are engaged in government-to-government consultations from intervening, and Tribes with party status from engaging in government-to-government consultations. These unconstitutional conditions violate due process and are legally sufficient (i.e., good cause) for a late intervention.

The Commission disagrees, claiming Tribal Office is incorrectly interpreting its *ex parte* rule. Rehearing Order II, PP 11-13 [J.A.31-33]. "The Commission's rules do not prevent a *consulting party* under the NHPA from becoming an intervenor." *Id*. at P 12 (emphasis added) [J.A.32]. FERC reaches this erroneous conclusion by relying on the wrong regulation and by failing to distinguish between Tribal and nonTribal consultations. *Id*. at P.11, n.21 [J.A.31]. Tribal Office is not an "Additional consulting party" under 800.2(c)(5), as FERC claims. It is an Indian Tribe "that attaches religious and cultural significance to historic properties…. " 36 C.F.R. § 800.2(c)(2)(ii). In that role, FERC is obligated to communicate directly with Tribal Office on a government-to-government basis. *Id*. §§ 800.2(c)(2)(ii)(B)-(D). These off-the-record communications precluded Tribal

Office from intervening sooner. Thus, the Commission's interpretation of Section 106 is contrary to law.

Since Tribal Office was forced to choose between its right to off-the-record, government-to-government consultations and its right to intervene, it chose the former. For example, Tribal Office attended off-the-record meetings. Consultation Memo [J.A.106-107]. It also engaged in *ex parte* communications with decisional staff members at FERC. Rehearing Request I, Ex, A, C [J.A.337-339; 342-345]. Harris Decl. ¶ 18, Att. 1, 2. Add.64, 67-76. However, when Tennessee asked FERC to grant it a notice to proceed with construction, it became clear that government-to-government consultations had ended. Tribal Office then moved to intervene. Motion to Intervene [J.A.295-303]. Since FERC's *ex parte* rule precluded Tribal Office from intervening while engaged in government-to-government consultations, it had good cause for intervening out-of-time.

2. FERC Violated the Preservation Act and Its Federal Trust Responsibility

As discussed *supra* in Section I.A., FERC violated the Preservation Act by delaying the study of ceremonial stones until it was too late to choose alternative routes or other means of avoidance. Notice of Adverse Effects, 5-6 [J.A.212-213]. It further violated Section 106 by failing to follow proper procedures in the resolution of adverse effects and by issuing a two-party MOA even though Massachusetts Preservation Office never terminated its consultation. (*See* Sections

I.B., C. *supra*.) A statutory violation is a per se breach of the federal trust doctrine. (*See* Section I.D. *supra*.) FERC's failures to follow the procedural requirements of Section 106 are good cause for late intervention.

In terms of timing, the Commission claims that Tribal Office had ample opportunity to intervene before its second deadline of November 23, 2015. Rehearing Order II, P 2 [J.A.27-28]. It also claims that Tribal Office "was aware of the project's potential impacts as early as December 2015." *Id*. at P 6 [J.A.29]. However, December 2015 was when the initial Section 106 consultation took place, and no surveys were scheduled at the meeting. Consultation Memo [J.A.106-107]. Harris Decl. ¶ 9. Add.62. In addition, by the time this meeting occurred, the second intervention deadline had already passed. If the Commission had scheduled surveys for ceremonial stones earlier in the process, as required under 36 C.F.R. §§ 800.1(c), 800.8(a), or had developed an integrated schedule, as required under 15 U.S.C. §§ 717n(c)(1), then it is possible that Tribal Office would have been able to intervene on time. That, however, is not what happened. The Tribal Report was filed almost seven months after the Certificate Order and almost a year after the Environmental Assessment. Therefore, it is because FERC failed to timely initiate and properly lead the Section 106 process that Tribal Office was forced to intervene out-of-time.

In *Power Resources*, FERC granted two late interventions over a licensee's objection because of new information. *See Power Resources Development Corporation*, 44 FERC ¶ 61,432, 62,367 (1988) ("These concerns were not, as Power Resources contends, addressed during the licensing proceeding."). Similarly, ceremonial stones were not addressed during the licensing proceeding here, but FERC arbitrarily denied late intervention.

> Power Resources further argues that…neither DEC nor AWA were parties to the proceeding at the time they filed their appeals....Power Resources' position is without merit....[It] would effectively limit appeals of staff action to those entities who had obtained intervenor status prior to the staff action. The Commission clearly has the authority to grant late intervention status effective retroactively to facilitate the filing of an appeal by someone who had not previously been a party.

Id. Like DEC and AWA, Tribal Office moved to intervene before the Staff Order was issued, yet the Commission chose not to grant party status *nunc pro tunc*. Thus, FERC's action was arbitrary and not in the best interest of Tribal Office.

In *California Trout*, new information was not considered good cause for late intervention. *See California Trout*, 572 F.3d at 1017-21. However, that challenge concerned NEPA, which does not have the strict procedural requirements of the Preservation Act. *Id*. at 1015-17. In addition, Petitioners in *California Trout* wanted to challenge an Environmental Assessment that was issued before it intervened *Id*. at 1016, 1026. Here, Tribal Office is seeking to enforce the Certificate Order, not challenge it, yet FERC denied its motion.

B. The Staff Order Is the Final Order

The Commission claims it has to reject Tribal Office's motion because it was made after the final order was issued. However, its definition of a final order varies with the Commission's interest in the procedure being challenged. In *Bradwood*, FERC stated that "it is the Notice to Proceed which represents the Commission's 'final decision[.]'" *Bradwood Landing LLC, NorthernStar Energy LLC*, 128 FERC ¶ 61,216, P 17 (2009). It takes this position so it can justify the delay in finalizing other regulatory reviews. Yet here, in the context of whether there will be judicial review of its orders, FERC takes the opposite position, claiming the Certificate Order is the final order. Rehearing Order II, P 8 [J.A.29].

This Court allows agencies to issue licenses before other federal approvals needed to construct a project have been obtained. For example, FERC has been allowed to condition its certificates as long as the final order ensures compliance with NEPA and the Clean Water Act. *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990); *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017). In *Grapevine*, the Department of Transportation was allowed to issue a conditional approval under the Preservation Act. *Grapevine*, 17 F.3d at 1509. However, none of them addressed subsequent violations. When the Commission wants to delay other regulatory reviews, it agrees with this Court's approach. "The [conditional] order is an 'incipient authorization without current

force or effect' because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied." *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,046, P 24 (2016).

Here, like in *Constitution*, the Certificate Order did not authorize construction of the project, as there were many environmental conditions that had to be met before FERC would decide if the Project could be built. Certificate Order, App. B. [J.A.164-171].[17] According to *Bradwood*, the Staff Order, which granted Tennessee a Notice to Proceed, was the final decision from FERC. *Bradwood*, 128 FERC at P 17. In spite of this, the Commission maintains that the Certificate Order is the dispositive order, and Tribal Office cannot intervene after it was issued. Rehearing Order II, P 8, n.17 [J.A.29-30]. FERC's position cannot be reconciled with this Court's decisions that conditional certificates are not dispositive because they do not authorize activities. *See Grapevine*, 17 F.3d at 1509; *Pub. Utils. Comm'n*, 900 F.2d at 282; *Delaware Riverkeeper*, 857 F.3d at 399. Nor can FERC's position in Rehearing Order II, which calls the Certificate Order the final order, be reconciled with *Bradwood*, which calls the Notice to Proceed the final decision. *Compare* Rehearing Order II, P 8 with *Bradwood*, P 17.

Not only are FERC's positions in conflict, they also are unfair. Here, the Commission allowed intervention through the comment stage of the environmental

[17] Environmental conditions 5, 9, and 26 concerned the Preservation Act.

review. Rehearing Order II, P 2 [J.A.27-28]. This approach is equitable if the environmental review is complete. However, FERC admitted in the Environmental Assessment that "to date, a meeting regarding ceremonial stone landscape survey has not yet occurred." EA, 91 [J.A.97]. Under the Preservation Act, Federal agencies are expected to coordinate their environmental review with the Section 106 review. 36 C.F.R. §§ 800.3(b), 800.8(a). This did not happen here. If resource surveys can be performed after a certificate is issued, as they were here, then the date to intervene should also be extended. Otherwise, Tribes have no way of knowing whether they have an interest that needs protecting until it is too late. *See Oglala Sioux*, 896 F.3d at 535 ("How, after all, can [a] Tribe show that [the] project will irreparably damage its cultural artifacts if there has not been a survey adequate to determine where those artifacts are located?").

C. Tribal Office Did Not Cause Delay, Prejudice, or Additional Burdens on Other Parties

After Tribal Office moved to intervene, it waited nine months for its motion to be denied, and then waited another ten months for an order on its request for rehearing on that denial. Meanwhile, Tennessee moved forward with constructing the Project and FERC authorized service on November 1, 2017. Authorization to Commence Service [J.A.346]. The Commission claims late intervention causes delay, prejudice, and additional burdens, but fails to explain how. Rehearing Order II, P 23 [J.A.37]. Its generic response is not applicable here because Tribal Office

is seeking to enforce the explicit terms the Commission included in its Certificate Order. Tennessee did not seek rehearing of the Certificate Order, so it must have agreed with those terms. Finally, because Tribal Office chose to consult on a government-to-government basis, as Section 106 requires, FERC's off-the-record rule precluded it from intervening sooner.

D. No Other Parties Can Represent Its Interests

No other Tribes are parties to this proceeding, and no other parties can represent Tribal Office's interests in this matter. The Commission mentions MassPLAN, but its request for rehearing concerned the public's interest, which, under 800.2(d), is distinct. Rehearing Order II, P 24 [J.A.37]. In addition, MassPLAN did not petition for review.

CONCLUSION AND PRAYER FOR RELIEF

For all of the foregoing reasons, Tribal Office respectfully asks this Court to grant it party status as of April 9, 2017, so its Petition can be reviewed on the merits. Rather than vacate the order for a pipeline that is in operation, Tribal Office asks that the remedy focus on the Commission's systemic violations. FERC's off-the-record rule, 18 C.F.R. § 385.2201(e)(1)(v), must be amended so that consulting Tribes are allowed to both intervene and engage in off-the-record, government-to-government communications with FERC. In addition, FERC's regulations, which delegate Tribal consultations to project applicants, 18 C.F.R. §§ 380.12(f)(1), (2),

380.14(a), must be changed so that the Commission initiates Tribal consultation early in the process and leads the Section 106 review, as required under 54 U.S.C. § 306108, 36 C.F.R. §§ 800.1(c), and 800.2(c)(2)(ii)(A). These consultations should be sensitive and meaningful, as required under 54 U.S.C. § 302706(b), 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(D), and the federal trust doctrine. Consulting Tribes should be allowed to fully participate in the resolution adverse effects, as required under 36 C.F.R. § 800.6(a). Remand may be required for some of the procedural errors in this case. Finally, Tribal Office asks for attorney's fees and costs, 54 U.S.C. § 307105, and any other relief the Court deems just.

Dated: August 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that the foregoing Final Opening Brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) as this Brief contains 12,992 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1). I further certify that this Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) as this brief was prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to Circuit Rule 25(a), I hereby certify that on August 19, 2019, I electronically filed the foregoing Final Opening Brief with the Clerk of the Court by using the appellate CM/ECF System, which effected service on all ECF-registered counsel.

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