UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE, ACTING BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE Plaintiff, v. BRANDYE L. HENDRICKSON in her official capacity as Deputy Administrator of the FEDERAL HIGHWAY ADMINISTRATION, Defendant	C.A. No. 19-cv-158-WES-PAS

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) and for the reasons set forth in the accompanying memorandum of law, Defendant Brandye L. Hendrickson hereby moves to dismiss Plaintiff's Complaint.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff, the Narragansett Indian Tribe ("Plaintiff" or "the Tribe") brings this action against the Federal Highway Administration ("FHWA" or "the Agency"), challenging the Agency's June 28, 2018 decision to re-initiate Section 106 consultation and draft a new Programmatic Agreement to govern the implementation of the Rhode Island Department of Transportation's ("RIDOT") replacement of the I-95 Providence Viaduct. This is not the first time that the Tribe has sought to challenge FHWA's actions under Section 106 with respect to a Programmatic Agreement covering the I-95 Providence Viaduct project. See Narragansett Indian Tribe v. RI Dept. of Transp., C.A. No. 17-125, ECF No. 1 (D.R.I. Sept. 11, 2017) ("Narragansett I") (concluding that the Court lacked subject matter jurisdiction over the Tribe's challenge to the termination of Programmatic Agreement.) (a'ffd. Narr. Indian Tribe v. RI Dep't. of Trans., 903 F.3d 26, 30 (1st Cir. 2018)). As was the case before this Court and before the First Circuit, the Tribe's challenges to the Programmatic Agreement in this case should likewise be rejected.

In the present case, as discussed below, because the June 28, 2018 decision is not a final agency action, the Plaintiff's claims are not yet ripe for judicial review. Furthermore, even if there was a final agency action for the Court to review, Plaintiff cannot show that FHWA's actions were arbitrary or capricious or inconsistent with the National Historic Preservation Act. Accordingly, Plaintiff's Complaint should be dismissed for lack of jurisdiction, or, alternatively, for failure to state a claim upon which relief can be granted.

BACKGROUND

1. The National Historic Preservation Act

The National Historic Preservation Act ("NHPA"), amended and codified at 54 U.S.C. §§ 300101-320303, imposes procedural obligations on federal agencies to consider the effects of projects carried out, funded by, or licensed by federal agencies on historic properties. The "fundamental purpose of the NHPA is to ensure the preservation of historical resources." TeMoak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 609 (9th Cir. 2010). Section 106 of the NHPA "is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." Muckleshoot Indian Tribe v. U.S. Forest Services, 177 F.3d 800, 806 (9th Cir. 1999); see also, 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f) ("Section 106"). Section 106 provides that, "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, [a federal agency] shall take into account the effect of the undertaking on any historic property." Id.; 36 C.F.R. § 800.16(e).[1]

[1] An "undertaking" is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y).

Congress created the Advisory Council on Historic Preservation ("ACHP") to administer the NHPA, see 54 U.S.C. §§ 304101, 304108, and the ACHP has promulgated regulations that govern the implementation of Section 106. See 36 C.F.R. pt. 800. The regulations establish an orderly process to comply with Section 106, pursuant to which the relevant agency is required to consult with a number of specified parties to identify historic properties, assess the adverse effects that the proposed project would have on those properties, and "seek ways to avoid, minimize or mitigate any adverse effects." Id. § 800.1(a). Section 106 regulations authorize, but do not require, the negotiation of a "programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." Id. § 800.14(b). When an undertaking may result in an adverse effect to a historic property, the federal agency has to "consult . . . to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." Id. § 800.6(a). See also, 36 C.F.R. §§ 800.3-800.6 (consultation regulations). However, if, for whatever reason, an agreement to resolve such effects is not reached (through a programmatic agreement for instance), the federal agency then discharges its Section 106 responsibilities through requesting and responding to the ACHP's comments. See id. § 800.7.

The implementation of a programmatic agreement "evidences the agency official's compliance with section 106 . . . and shall govern the undertaking and all of its parts." Id. § 800.6(c); see also § 800.14(b)(3). If a signatory to a programmatic agreement determines that the terms of the agreement cannot be, or are not being, carried out, the regulations require the signatories to consult and seek amendment of the agreement. If an amendment is not agreed upon, any signatory may terminate the agreement, and the agency official shall then either execute a memorandum of agreement with signatories pursuant to section 800.6(c)(1) of the

regulations or request the comments of the ACHP pursuant to section 800.7(a). Id. § 800.6(c)(8). The agency is required to take into account the ACHP's comments in reaching a final decision on the undertaking. Id. § 800.7(c)(4).

2. The Administrative Procedure Act

Because the NHPA does not provide for a private right of action, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for judicial review of challenges to final agency actions under the NHPA. Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113, 119 (2d Cir. 2013); Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("[B]ecause NHPA, like NEPA, contains no private right of action, . . . NHPA actions must also be brought pursuant to the APA.") The APA establishes a framework for judicial review of "final agency action." 5 U.S.C. § 704.

3. Replacement of the I-95 Providence Viaduct

Section 106 regulations allow a programmatic agreement to be employed in certain, specific circumstances, including cases in which "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(ii). Pursuant to this regulation, on October 3, 2011, the FHWA, Rhode Island Department of Transportation (RIDOT), Rhode Island State Historic Preservation Office ("RISHPO"), and the Narragansett Indian Tribe Historic Preservation Office ("NITHPO") executed a Section 106 Programmatic Agreement, concerning the replacement of the I-95 Providence Viaduct (hereafter "Viaduct Project"). (Exhibit 1, Declaration of David Clarke, ¶ 5.) The Programmatic Agreement was amended on January 17, 2013, and all parties signed the amendment to comply with Section 106 of the NHPA. (Id.)

Since entering into the January 2013 amendment to the Programmatic Agreement, the signatories were not able to agree on how to fulfill the mitigation commitments of the amended

Programmatic Agreement, and ACHP attempted to mediate between the signatories to resolve the dispute. (Id. ¶ 6.) On January 19, 2017, FHWA terminated the Programmatic Agreement and referred the matter to ACHP for comment, as required by the ACHP's Section 106 regulations and the termination provision in the Programmatic Agreement. (Id. ¶ 7.) See 36 C.F.R. §§ 800.6(c)(8); 800.7(a)(1), (c). FHWA received comments from ACHP on May 3, 2017. (Exh. 1, ¶ 8.)

Following the termination of the Programmatic Agreement, on March 31, 2017, Plaintiff commenced a civil complaint against FHWA, as well as RIDOT, ACHP, and RISHPO, requesting declaratory and injunctive relief to enforce the terminated Programmatic Agreement. See Narragansett I. This Court entered judgment for the federal defendants, including FHWA, concluding that the Court lacked subject matter jurisdiction over Plaintiff's claims. Id. ECF No. 28-29. This Court's decision was affirmed by the First Circuit on Aug. 30, 2018. Narr. Indian Tribe v. RI Dep't. of Trans., 903 F.3d 26, 30 (1st Cir. 2018). The First Circuit likewise found no subject matter jurisdiction, holding that "[n]othing in the regulations requires a federal agency to enter into" a programmatic agreement, or "prevents the agency from terminating such an agreement." Id.

On June 28, 2018, FHWA notified the parties that, in response to the ACHP comments, it intended to re-initiate Section 106 consultation for the Viaduct Project and draft a new programmatic agreement. (Exh. 1, ¶ 9, Att. A.) On November 28, 2018, the FHWA transmitted a draft of the new proposed Programmatic Agreement to the ACHP for comment. (Id. ¶ 10, Att. B.) FHWA is conducting ongoing consultation meetings with the Tribe and with RIDOT, RISHPO and ACHP. (Id. ¶¶ 12-13.) The Programmatic Agreement goes into effect on the date that it is signed by the ACHP. (Id. ¶ 16.) To date, the Programmatic Agreement has not been signed by the ACHP. (Id.)

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure tests subject matter jurisdiction, which is this Court's "statutory or constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 89 (1998). Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. Wal-Mart P.R., Inc. v. Zaragoza-Gomez, 834 F.3d 110, 116 (1st Cir. 2016); see also Johanson v. United States, 506 F.3d 65, 68 (1st Cir. 2007). Without subject matter jurisdiction, the Court must dismiss the complaint. Belsito Commc'ns, Inc. v. Decker, 845 F.3d 13, 21 (1st Cir. 2016). For purposes of deciding a motion under Rule 12(b)(1), the Court may properly consider materials submitted by the parties beyond the pleadings, without converting the motion to one for summary judgment under Rule 56. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996).

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests whether Plaintiff's complaint states a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). The Court must accept the well-pleaded allegations in the complaint and draw reasonable inferences in favor of Plaintiff. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). The Court need not credit or accept mere conclusory statements or conclusions of law. See Iqbal, 556 U.S. at 678. Dismissal for failure to state a claim is appropriate when the pleadings fail to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997). The Court may consider matters of public record when adjudicating a Rule 12(b)(6) motion without converting the motion into a motion for summary judgment. See In re Colonial Mortgage Bankers Corp. v. Lopez-Stubbe, 324 F.3d 12, 15-16 (1st Cir. 2003). In deciding

a motion to dismiss under Rule 12(b)(6), the court may consider the challenged pleading, together with any documents incorporated by reference in that pleading, and matters subject to judicial notice. This category of documents may be considered without converting the motion to one for summary judgment, and includes documents annexed to the complaint, as well as documents referenced in, or integral to, the pleading. Trans-Spec Truck Service, Inc. v. Caterpillar, Inc., 524 F.3d 315, 321 (1st Cir. 2008) (internal citations omitted). Where Plaintiff's allegations contradict the contents of such documents, the terms of the documents (and not Plaintiff's characterizations) control. See Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 32 (1st Cir. 2000) (citing Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 454 (7th Cir. 1998).

ARGUMENT

A. There Has Been No Final Agency Action.

Plaintiff's claim under the APA is barred because there is no final agency action to review. Where claims are based on agency action or inaction, the United States' waiver of sovereign immunity is limited by the APA's final agency action requirement. See Baillargeon v. DEA, 637 F.Supp.2d 235, 242 (D.R.I. 2009) (citing 5 U.S.C. § 702); Cohen v. Riche, 992 F.2d 376, 380 (1st Cir. 1993) ("[T]he APA authorizes judicial review only of '*final* agency action.'") (emphasis in original). In determining whether final agency action has occurred, "[f]irst, the action must make the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-178 (1997).

In this case, FHWA's decisionmaking process is not complete. While a new proposed programmatic agreement has been drafted, consultation is ongoing and there is no executed

programmatic agreement in effect. (Exh. 1, ¶¶ 11-13, 16.) The June 28, 2018 decision to reinitiate Section 106 consultation for the Viaduct Project and draft a new programmatic agreement did not mark the consummation of the agency's decisionmaking process because the FHWA has not reached a final decision on the Viaduct. See 36 C.F.R. § 800.7(c)(4) ("The head of the agency shall take into account the Council's comments in reaching a *final decision on the undertaking.*") (emphasis added). Instead, on June 28, 2018, the agency merely explained that the "FHWA and RIDOT will work collectively with all parties and begin to draft a new PA with language that is consistent with the regulation at Title 36, Code of Federal Regulations, Part 800, and that reflects FHWA's national stance on these types of agreement documents." (Exh. 1, Att. A). And five months later, on November 28, 2018, the FHWA sent a *draft* Programmatic Agreement to ACHP, requesting comments. (Id. Att. B.) No agreement has been signed, and thus there has been no final decision on the undertaking. (Id. ¶¶ 15-16.) See 36 C.F.R. § 800.7(c)(4).

As explained above, because the process is incomplete, the FHWA's decision to engage in consultation of a new programmatic agreement, which is presently ongoing, did "not create any legal repercussions" of its own for the Tribe, and so it is not a reviewable final order for that reason as well. Helicopters, Inc. v. NTSB, 803 F.3d 844, 846 (7th Cir. 2015). Thus, this matter is not ripe for judicial review, and Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction.

B. Plaintiff Cannot Show that FHWA's Actions Were Arbitrary and Capricious.

Even if Plaintiff was able to show final agency action that is subject to judicial review under the APA, a district court will uphold an agency's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706(2)(A). An agency's decision is not arbitrary or capricious if "the agency decision was based on a consideration of the relevant factors, and there has not been 'a clear error of judgment . . ."

Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1285 (1st Cir. 1996) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). The Court's review under this standard is highly deferential, in that the agency action is presumed valid. See Associated Fisheries of Maine Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997).

The crux of Plaintiff's claim is that FHWA violated the APA by deciding to terminate the 2013 programmatic agreement and then reinitiate Section 106 consultation. (Compl. ¶ 49.) However, Plaintiff's disagreement with FHWA's decisionmaking process is not sufficient to support a viable claim that FHWA violated the APA. The NHPA does not require federal agencies to enter into programmatic agreements, nor prevents agencies from terminating such agreements. See Narr. Ind. Tribe, 903 F.3d at 30. The NHPA requires only that federal agencies take certain procedural steps to identify cultural resources, take those resources into account, and attempt to mitigate the same. See 16 U.S.C. § 460f; 37 C.F.R. § 800.6(a). See also, San Juan Citizens All. V. Norton, 586 F.Supp.2d 1270, 1294 (D.N.M. 2008) ("[T]he NHPA only requires that an agency take procedural steps to identify cultural resources; it does not impose a substantive mandate on the agency to protect the resources."); Nat'l Indian Youth Council v. Andrus, 501 F. Supp. 649, (D.N.M. 1980) ("NHPA is essentially a 'procedural tool', 36 C.F.R. Part 60.2(c), whose function culminates during the planning stage and terminates, as to each phase of a project, upon the commencement of construction." (citing 36 C.F.R. Part 800.7(a)).

In affirming the dismissal of Plaintiff's earlier suit against FHWA and other federal defendants, the First Circuit noted that, in light of Alexander v. Sandoval, 532 U.S. 275, 289 (2001),

> "[W]e see no basis to stretch further to find that the NHPA creates causes of action that go beyond enforcing the terms of the Act. The NHPA itself says nothing about programmatic agreements. The implementing regulations merely describe the concept of programmatic agreements and sketch out bare procedural requirements. Nothing in the regulations

> requires a federal agency to enter into such an agreement. And nothing in the regulations prevents the agency from terminating such an agreement."

Narr. Ind. Tribe, 903 F.3d at 30. See Sandoval, 532 U.S. at 289 (holding that statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on the protected class of individuals). In this case, Plaintiff cannot offer any evidence to support a viable claim that FHWA failed to act "in accordance with" or "without observance of procedure required by" the NHPA. 5 U.S.C. § 706(2)(A).

Plaintiff alleges that FHWA failed "to provide a rationale for the final decision or provide any evidence of consideration of the ACHP's comments before issuing its final decision," see Compl. ¶ 50(b), but, as explained above, FHWA has not yet issued a final decision on the undertaking. And even if its decision to re-initiate Section 106 consultation and draft a new programmatic agreement were to be considered a final decision, which it is not, the agency clearly articulated the rationale for its decision and consideration of the ACHP's comments in doing so. (See Exh. 1, Att. B) ("As required upon the termination of a Programmatic Agreement, the ACHP provided comments to FHWA regarding the project. The ACHP recommended that 'Recognizing the broad public interest, the construction of this project should not be delayed by the resolution of these issues.' The ACHP further stated, 'The importance of this transportation project, as part of the I-95 corridor, one of the most heavily used transportation corridors in the eastern United States, transcends any obstacles in implementing the remedies utilized to resolve this dispute.' ***To that end***, enclosed for your review is a new *draft* Programmatic Agreement.") (emphasis added).) See also, Clorox Co. P.R, 228 F.3d at 32 (the terms of documents, not Plaintiff's characterization of such documents, control).

Since FHWA documented its rationale for re-initiating Section 106 consultation, and included consideration of ACHP's comments, it has fulfilled its obligations required by the

NHPA, and its actions were neither arbitrary nor capricious. See 36 C.F.R. § 800.7(c).

C. This Court Has Already Concluded That There is No Jurisdiction to Review Challenges to the Termination of the Programmatic Agreement.

To the extent the Tribe is challenging FHWA's January 2017 termination of the Programmatic Agreement, see Compl. ¶ ¶ 46, 49, this Court's ruling in Narragansett I, affirmed by the First Circuit, Narr. Indian Tribe, 903 F.3d at 30, precludes Plaintiff's claim. Collateral estoppel or issue preclusion bars a party from re-litigating an issue of fact or law. Parklane Hoisry Co., Inc. v. Shore, 439 U.S. 322, 326 (1979). Collateral estoppel refers to the doctrine that "a right question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties . . ." Montana v. United States, 440 U.S. 147, 153 (1979) (quoting Southern Pac. R. Co. v. United States, 168 U.S. 1, 48-49 (1897)). As the First Circuit explained, collateral estoppel "bars relitigation of any issue that, 1) a party had a 'full and fair opportunity to litigate' in an earlier action, and that, 2) was finally decided in that action, 3) against that party, and that 4) was essential to the earlier judgment." DeCosta v. Viacom International, Inc., 981 F.2d 602, 605 (1st Cir. 1992).

In this case, this Court has already determined that it has no jurisdiction to review the Tribe's challenges to the termination of the 2013 Programmatic Agreement, and thus any challenges to relitigate jurisdiction of the Programmatic Agreement are precluded. See In re Watson, 910 F.Supp.2d 142, 146 (D.D.C. 2012) ("[I]f a court makes a substantive determination in order to arrive at a jurisdictional holding, the substantive determination can have issue preclusive effect so long as it was actually litigated and determined in the prior action.")). In Narragansett I, Plaintiff challenged FHWA's 2017 termination of the programmatic agreement. ECF No. 1. This Court entered a judgment in favor of FHWA, and the First Circuit affirmed that

ruling. Id., ECF No. 33, Narr. Indian Tribe, 903 F.3d at 30. In affirming this Court's judgment granting the federal defendants' motion to dismiss, the First Circuit found "no basis to stretch further to find that the NHPA creates causes of action that go beyond enforcing the terms of the Act," and it specifically found that "[t]he NHPA itself says nothing about programmatic agreements," and that "*[n]othing in the regulations requires a federal agency to enter into such an agreement. And nothing in the regulations prevents the agency from terminating such an agreement.*" Id. (internal citations omitted) (emphasis added). In sum, as in Narragansett I, any claim in this case based on the termination of the Programmatic Agreement "is not an action to enforce the [NHPA], nor is it even an action to enforce a regulation," but instead an attempt to hold the federal government liable for RIDOT's alleged breach of contract. Id. "Nothing in the [NHPA], either expressly or implicitly, waives the federal government's sovereign immunity" to such a claim. Id.

Because this Court has previously determined that it has no jurisdiction to review the Tribe's challenge to FHWA's January 2017 termination of the Programmatic Agreement, the Tribe is precluded from relitigating the issue in this complaint.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Plaintiff's complaint.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 9th day of July, 2019, I electronically filed the within Notice of Appearance with the Clerk of the United States District Court for the District of Rhode Island using the CM/ECF System. The following participants have received notice electronically:

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