UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

v. C.A. No. 1:19-cv-00158

BRANDYE L. HENDRICKSON in her
official capacity as Deputy Administrator of the
FEDERAL HIGHWAY ADMINISTRATION
Defendant.

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

Plaintiff, Narragansett Indian Tribe, by and through the Narragansett Indian Tribal Historic Preservation Office (the "Tribe" or "NIT"), brings this Administrative Procedures Appeal ("APA") action to challenge the final agency action of the Federal Highway Administration ("FHWA") as it relates to the termination of a Section 106 Programmatic Agreement and the decision to affirm its termination and re-initiate Section 106 consultation. While this may be the second time that the Tribe is before this Court seeking relief as it relates to FHWA's management of the Section 106 process, this is the first time that the Tribe has asserted an APA action.

FHWA alleges that the complaint should be dismissed for three primary reasons:[1] (1) there is no final agency action and thus the matter is not ripe for review; (2) the Tribe cannot

[1] FHWA submitted the Declaration of David S. Clarke in support of its motion to dismiss. Plaintiff objects to the consideration of the Declaration as it relies on matters outside the pleadings. Moreover, the Declaration contains more than "official" records and/or documents and thus, is not proper for consideration at the motion to dismiss stage. See Jefferson v. Gates, No. CA 09-537 ML, 2010 U.S. Dist. LEXIS 75010, at *2 n.2 (D.R.I. July 2, 2010). If the Court

show that the actions of the FHWA were arbitrary or capricious and thus the complaint fails to state a claim; and (3) the doctrine of collateral estoppel bars consideration of the claim. In fact, there has been a final agency action and the Tribe has alleged facts sufficient to state a claim. Moreover, the doctrine of collateral estoppel is not applicable. Accordingly, dismissal of this complaint is not warranted.

BACKGROUND

On October 3, 2011, the FHWA, NIT, Rhode Island Department of Transportation ("RIDOT"), and the Rhode Island State Historic Preservation Officer ("RISHPO") executed a Section 106 Programmatic Agreement (the "PA") governing the replacement of the I-95 Providence Viaduct Bridge No. 578 (the "Viaduct Project"). Approximately a year and a half later the PA was amended by the parties. Importantly, the PA provided that as mitigation for adverse effects on the Providence Covelands Archaeological District (RI 935) (land of religious and cultural significance to the Tribe), RIDOT would acquire title to three parcels of land: (1) the Salt Pond Archaeological Preserve (RI 110); (2) the Providence Boys Club – Camp Davis property; and (3) the Chief Sachem Night Hawk property. The Salt Pond Archaeological Preserve was to be jointly owned by the State of Rhode Island and the NIT, while the other two mitigation properties were to be transferred solely to the Tribe with "[a]ppropiate covenants that preserve the property and its cultural resources in perpetuity[.]" The PA contains no mention or reference to any requirement that the Tribe waive its sovereign immunity or agree specifically in writing that the mitigation properties would be subject to the civil and criminal jurisdiction of the State of Rhode Island.

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does consider the Declaration, Plaintiff is entitled to a review of the full administrative record and perhaps other documents pursuant to Rule 56(d).

Construction of the Viaduct Project began in June of 2013. It was not until after RIDOT received federal funding and commenced construction activities, that RIDOT informed NIT and FHWA that it would not honor the terms of the PA, but instead insisted that the NIT both waive its sovereign immunity and subject the mitigation properties to the civil and criminal jurisdiction of the State of Rhode Island. The various parties, FHWA, NIT, RIDOT, and the Advisory Council on Historic Preservation ("ACHP"), engaged in discussions in an attempt to overcome the roadblock presented by RIDOT. Despite both the ACHP and FHWA imploring RIDOT to relent on its post-execution demands, RIDOT refused. All the while, FHWA continued to fund the Viaduct Project to the point that the southbound lanes were completed and opened to traffic in the Fall of 2016. Thus, while approximately half of the Viaduct Project has been completed, there has been zero mitigation for the adverse effects of the project.

FHWA terminated the PA on January 19, 2017 and referred the matter to ACHP for comments. On March 31, 2017, NIT brought suit against FHWA, RIDOT, ACHP, and RISHPO requesting declaratory and injunctive relief to enforce the terms of the PA and alleging breach of contract; this suit did not allege any APA appeal. On May 3, 2017, the ACHP forwarded its comments on the termination of the PA to FHWA. On September 11, 207, this Court dismissed the Tribe's earlier complaint. It was not until June 28, 2018, that the FHWA responded to ACHP's comments with its final decision regarding the termination of the PA. 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."). The June 28, 2018 letter makes clear that it was a final decision of the FHWA with respect to the termination of the PA, stating:

> "The Federal Highway Administration (FHWA) has taken into consideration the Advisory Council on Historic Preservation's (ACHP) comments dated March 3, 2017 (reference copy enclosed), **in regard to termination of the Section 106**

> **Programmatic Agreement (PA) for the I-95 Viaduct Project in Rhode Island. The FHWA has made a decision**[.]" (emphasis added).

Thereafter, the Court of Appeals for the First Circuit affirmed the decision of this Court on August 30, 2018. The Tribe then instituted this APA action on March 29, 2019.[2]

STANDARD OF REVIEW

"When subject matter jurisdiction is challenged, the plaintiff has the burden of establishing that jurisdiction exists." Smith v. O'Connell, 986 F. Supp. 73, 75 (D.R.I. 1997) (citing Bank One, Texas, N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992)). The court must treat all of plaintiff's well-pleaded facts as true and must draw all reasonable inferences favorable to the plaintiff. Id. "The pertinent inquiry is whether or not the challenged pleadings set forth allegations sufficient to demonstrate that the subject matter jurisdiction of the court is proper." Ducally v. R.I. Dep't of Corr., 160 F. Supp. 2d 220, 224 (D.R.I. 2001).

In order to survive a motion to dismiss based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" and "possess[] enough heft to sho[w] that the pleader is entitled to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007) (internal quotation marks omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." Id. at 570. A complaint presents a plausible claim "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Aschcroft v. Iqbal, 556 U.S. 662, 678 (2009). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Additionally, it is well established that in evaluating a Rule 12(b)(6) motion, the

[2] Additionally, presently pending before the Court is the Tribe's Motion to Transfer Venue, ECF #14.

Court must accept all well-pleaded facts alleged in the complaint as true. See Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 53 (1st Cir. 2013).

ANALYSIS

A. FHWA's June 28, 2018 Decision Was Final Agency Action

The Tribe is challenging the FHWA's June 28, 2018 decision which concluded FHWA's statutory responsibilities as it relates to the termination of the PA. This decision represented final agency action as it relates to the termination of the PA.

Agency action is "final" when it meets two requirements: "First, the action must mark the consummation of the agency's decisionmaking process" and "[s]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). Generally, a final agency action "marks the consummation of the agency's decisionmaking process" when it "[i]s not subject to further agency review." Sackett v. EPA, 520 U.S. 120, 127 (2012).

The June 28, 2018 decision of FHWA without a doubt marks the "consummation of the agency's decisionmaking process." In fact, the regulations are clear that an agency's "final decision" after termination of a programmatic agreement must "take into account the [ACHP's] comments." See 36 C.F.R. § 800.7(c)(4). Here, the June 28, 2018 decision of FHWA states that it "has taken into consideration the [ACHP's] comments dated March 3, 2017 . . . in regard to termination of the Section 106 Programmatic Agreement (PA) for the I-95 Viaduct Project in Rhode Island." It is unmistakable that the June 28, 2018 decision of the FHWA was not only the "decision" of FHWA with respect to the termination of the PA, but was also the "final decision" as characterized in 36 C.F.R. § 800.7(c)(4).

As if the June 28, 2018 correspondence were not enough to evidence the consummation of the FHWA's decisionmaking process, when viewed against the backdrop of FHWA's prior actions, it is clear that this was a final decision. When effective, the PA resolved the adverse effects of the Undertaking, i.e. the Viaduct Project. Accordingly, the PA satisfied FHWA's compliance with 54 U.S.C. § 306108, which requires that "[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . prior to the approval of the expenditure of any Federal funds on the undertaking . . . shall take into account the effect of the undertaking on any historic property." As the Viaduct Project progressed, the southbound lanes were constructed with the PA in effect, but its terms still unsatisfied. Conveniently, it was not until the southbound lanes were completely constructed that FHWA terminated the PA (upon request from RIDOT). Accordingly, at this moment there is a half completed Undertaking, which was funded by FHWA, no adverse effects have been addressed despite the clear mandate of 54 U.S.C. § 306108, and the very agreement that did address said effects was terminated. Thereafter, ACHP issued comments on said termination in accordance with the Code of Federal Regulations, and FHWA issued its final decision on the termination as required by the Code of Federal Regulations.

FHWA's position that the June 28, 2018 final decision was not the consummation of the decisionmaking process misses the mark. FHWA decision to affirm the termination of the PA and engage in further consultation in order to draft a new programmatic agreement, is the epitome of completing the decisionmaking process. It marks the exact moment in time when FHWA made a final determination regarding the termination of the PA and the decision to then pivot to a new course of action, i.e. attempt to draft a new programmatic agreement. FHWA's decision to terminate the PA is subject to no further agency review as of June 28, 2018, and

therefore marks the end of the agency decisionmaking process with respect to the wrongful termination.

Furthermore, the June 28, 2018 decision creates legal repercussions for both FHWA and the Tribe. With respect to FHWA, the decision to affirm the termination and attempt to draft a new programmatic agreement creates legal consequences because it inherently means that FHWA violated the NHPA when it funded the Viaduct Project and permitted construction of the southbound lanes without addressing the adverse effects of the Viaduct Project. See 54 U.S.C. § 306108 (requiring adverse effects to be addressed before funding an undertaking). An undertaking that is half-completed without any effective programmatic agreement and without adverse effects being addressed is an undertaking that is in direct contravention of the NHPA. Turning to the legal consequences that the final decision had on the Tribe, it is clear that the Tribe was entitled to receive two parcels of land in fee simple and one parcel of land as joint owner with the State of Rhode Island. After FHWA affirmed the termination of the PA, the Tribe's rights to those ownership interests were also extinguished. Clearly these are legal consequences to the Tribe that arose out of the FHWA June 28, 2018 decision.

Additionally, the single case cited by FHWA as support that its June 28, 2018 decision does not create any legal repercussions is wholly inapplicable. As an initial matter, Helicopters, Inc. v. NTSB, 803 F.3d 844 (7th Cir. 2015) is not an Administrative Procedures Act case, but rather, jurisdiction was provided pursuant to 49 U.S.C. § 1153. Accordingly, the Seventh Circuit did not analyze "legal repercussions" under the well-developed body of APA case law, but rather as that term is applicable pursuant to the NTSB. The determination of the Seventh Circuit that the "Board's reports do not constitute final orders under the statute because 'no legal consequences of any kind result' from the reports[,]" id. at 846, is completely reliant on the fact

that the NTSB's investigations "are not conducted for the purpose of determining the rights or liabilities of any person" see 49 C.F.R. § 831.4, and "[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." See 49 U.S.C. § 1154(b). There is no such similar provision within the NHPA. Accordingly, Helicopters, Inc. is completely inapplicable to the current issue before the Court.

B. The Tribe has Alleged Sufficient Facts to Show that FHWA's Actions Were Arbitrary and Capricious

FHWA attempts to short circuit any consideration by this Court of its actions because of the "highly deferential" standard that is applied in APA actions. The problem with this argument is that it puts the cart before the horse. The highly deferential standard is applied by the Court upon review of the facts and administrative record presented. By relying on the "highly deferential" standard at the motion to dismiss stage, FHWA is trying to cut out the step where the Court is presented with a full record, at which point it may then apply the FHWA's "highly deferential" standard. Rather, at this 12(b)(6) stage, the Tribe only needs to allege a plausible claim, and all well-pleaded facts in the complaint must be accepted as true. See United Student Aid Funds, Inc. v. King, 200 F. Supp. 3d 163, 166 (D.D.C. 2016) ("Unlike most Administrative Procedure Act cases, this matter comes to the court on a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). As a result, also unlike most Administrative Procedure Act cases, the court does not have the benefit of an administrative record that evidences the agency's decision-making process. . . . A second consequence of the case's present posture is the lens through which the court must view Plaintiff's Complaint. The court must accept Plaintiff's

factual allegations as true and grant Plaintiff the benefit of all inferences that can be derived from those allegations.").

The Tribe has alleged that the final agency action was arbitrary and capricious for several reasons. First and foremost, the final decision affirmed the termination of the PA, which is the very document that evidenced FHWA compliance with NHPA. By terminating the PA, the funds provided by FHWA for construction of the southbound lanes were provided without addressing effects to historic properties and therefore, was in direct violation of the NHPA procedures. The NHPA is explicit that effects must be taken into account prior to expenditure of any federal funds. Not only were funds expended, but those funds were used to complete half the undertaking. The Tribe's well-pleaded allegations that the undertaking has resulted in destruction of historic lands; part of the undertaking has been completed without adverse effects being addressed; and the determination to affirm the termination of the PA resulted in a complete failure to address and mitigate the adverse effects of the Viaduct Project, must all be accepted as true, and are sufficient to make out a plausible claim, at this stage of the proceeding, against the FHWA, that its actions were arbitrary and capricious.

Additionally, in determining whether FHWA's actions in affirming the termination of the PA were arbitrary and capricious, the review of the actions must be guided by the fact that the PA provides that a party may only terminate the PA "for cause." A determination of whether termination of an agreement is for cause will necessarily involve a fact intensive inquiry that is not appropriate to be summarily resolved on a motion to dismiss. See e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985) (stating, in public employment context, that "[d]ismissals for cause will often involve factual disputes.").

Furthermore, the June 28, 2018 decision merely referenced the comments from the ACHP and did not provide a rationale for its decision to affirm the termination. It also did not provide any rationale regarding the newly proposed mitigation items (which are now outdated and are not currently at issue in this matter). In an attempt to prove that it did consider ACHP comments and did provide a rationale, FHWA directs the Court's attention to a November 28, 2018 correspondence. What FHWA does not explain, nor can it, is how it can assert that any rationale provided in the November 28, 2018 letter should be considered as substantive rationale provided in its June 28, 2018 decision. FHWA cannot issue a decision that fails to comport with the requirements of 36 C.F.R. § 800.7(c) and then attempt to incorporate later correspondence to fill in its shortcomings.

C. The Prior Legal Action Did Not Address the Final Agency Action at Issue in this Matter

Finally, FHWA asserts that the Tribe cannot challenge the January 2017 termination of the PA due to collateral estoppel. As an initial matter, the Tribe is challenging the June 28, 2018 final decision of the FHWA, which affirmed the January 2017 termination. The June 28, 2018 final decision could not have been challenged in the Tribe's earlier suit, as that earlier suit was filed prior to issuance of the of the FHWA's final decision.

Even putting aside that the January 2017 termination and the June 28, 2018 final decision are two different events, the holdings of both this Court and the First Circuit did not determine that no jurisdiction existed to review the termination of the PA, but rather the Court was without jurisdiction to consider the claims as brought by the Tribe at the time of the filing because there was no waiver of sovereign immunity. This is because the prior suit did not allege an APA action, but rather alleged a breach of contract and declaratory judgment action. While FHWA is

correct that the First Circuit stated "nothing in the regulations prevents the agency from terminating such an agreement" Narr. Indian Tribe v. RI Dep't of Trans., 903 F.3d 26, 30 (1st Cir. 2018), this statement does not stand for the same proposition that an agency is free to terminate an agreement even when such termination will result in a violation of the NHPA.

Neither this Court nor the First Circuit ever reach substantive issues with respect to the termination of the PA. Rather, the rulings were both premised on the fact that because the action was not brought as an APA suit, there had been no waiver of the federal agency's sovereign immunity, and thus, there was no subject matter jurisdiction. However, just because the Court was without subject matter jurisdiction back in March 2017, does not mean that it does not have jurisdiction over the claim now that it has been brought as an APA claim. And certainly the doctrine of collateral estoppel does not bar such a conclusion.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendant's motion to dismiss.

In accordance with LR Cv 7(c), Plaintiff requests a hearing on this motion. It is expected that a hearing will last less than one hour.

Respectfully submitted,

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

By its Attorneys,

/s/ Patrick J. McBurney

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CERTIFICATION

I hereby certify that on this 6th day of September, 2019, this document was filed electronically and is available for reviewing and downloading by the ECF registered counsel of record.

/s/ Patrick J. McBurney