UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiff,
v. C.A. No. 20-576 (RC)

NICOLE R. NASON in her
official capacity as Administrator of the
FEDERAL HIGHWAY ADMINISTRATION

and

STATE OF RHODE ISLAND
AND AGENCIES, INCLUDING THE
RHODE ISLAND DEPARTMENT
OF TRANSPORTATION

and

CLAIRE RICHARDS, individually
(Executive Counsel at Rhode Island
Office of the Governor)

Defendants,

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE STATE OF RHODE ISLAND DEFENDANT'S MOTION TO DISMISS

Introduction and Summary of Argument

The State of Rhode Island Defendants ("State Defendants"), incorrectly argue, that this court has no subject matter or personal jurisdiction over the State and venue is improper. They incorrectly argue service was improper because of the Plaintiff's failure to state claim in its

amended complaint. Significantly, the State Defendants failed to address the Amended Complaints claims that they waived their sovereign immunity, nor did they address the actions of a state employee that discriminated against Plaintiff's as a federally acknowledged sovereign Indian Tribe. The waiver of sovereign immunity by the State's Defendants, gives this court both subject matter and personal jurisdiction over all State Defendants, including Ms. Richards who failed to follow federal law by blatantly requiring the Plaintiff disavow its Federal sovereign status. And with the waiver of sovereign immunity, the State Defendants are subject to claims under the Administrative Procedure ACT and venue in this court is proper.

This Court in its Memorandum Opinion of July 22, 2020, denied the Defendants Federal Highways Administration ("FHWA") motion to dismiss and recounted the procedural history and key facts alleged. The Court found that Plaintiffs had alleged sufficient facts to survive a Motion to Dismiss. Many of the facts alleged in the Amended Complaint ("AC") against the State Defendants are the same or similar because the State was the dominant party to the mitigation agreement required by Federal Law. The State Defendants' actions as alleged where deliberate, voluntary, specific, and instrumental in the Defendant Federal Highways Administration ("FHWA") ability to comply with federal law to negotiate mitigation measures imposed under the Nation Historic Preservation Act ("NHPA") on the construction of Federal Highway project that expanded a bridge and highway near the city of Providence RI (the "Viaduct Project"). A mitigation agreement executed by all parties, allowed the FHWA and The State Defendants to avoid the delay of archeological review of the area so the Viaduct project could commence, and the construction completed at a faster rate. The Rhode Island State's attorneys in collaboration with the State's Department of Transportation, prepared the mitigation agreement, also referred to

as the Programmatic Agreement, ("PA") required under NHPA for projects impacting historic properties. This process is referred to as the "section 106" process. To comply with these regulations, it is alleged in the AC, the State Defendants purchased land for the purpose of mitigation, they made promises to the Tribe and Federal parties that the land was purchased for the purpose of mitigation and they finalized and executed the agreement ("mitigation agreement") and proceeded to act on the agreement by beginning construction of the Viaduct Project that impacted historic properties. Then it is alleged that without consent of the parties, the Governor's Executive Counsel Claire Richards withdrew the state's consent to the agreement and in violation of federal law broke its promises to the Tribe and its Federal partners. This was an act of bad faith that violated federal laws to protect historic properties and took a racially discriminatory stance by insisting the only Federal tribe in the State deny its rights to sovereign immunity without due process. The Tribe's sovereign status is a property right, and discrimination against them as a Federal Tribe violates their sacred inherent rights and is an abuse of the State's power.

The State Defendants, under these facts and circumstances have therefore waived their immunity by their actions and the actions of its employee Claire Richards in violation of federal law. Therefore, the appropriate path to ensure remedy, is for the Court to assert its jurisdiction and review Plaintiffs claims against the State Defendants.[1]

The Amended Complaint Alleges Sufficient Claims against State Defendants

The Amended Complaint ("AC") contained 43 paragraphs outlining the facts that support the claims raised in this case. The majority of these paragraphs referred to the State Defendants and made specific claims that the actions of the State Defendants justified the waiver of sovereign

[1] These claims under the APA are timely, and didn't begin to run until final agency action occurred June 28, 2018.

immunity by raising federal jurisdiction. Under Count I, for violations of the Administrative Procedure Act the Plaintiffs alleged that the specific facts raised in the AC support "the State of Rhode Island and its agencies including the RIDOT, by its voluntary actions to take a lead role, purchasing properties and otherwise participate in the negotiations of the PA and compliance with NHPA and NEPA regulations, waived its sovereign immunity and cannot now use the Eleventh Amendment protections to avoid compliance with federal law." (AC paragraph 55). Count II alleged violation of Plaintiff's 14th amendment protections and rights under Federal law. While Courts generally look to the underlying statute for express waivers of sovereign immunity,[2] there are facts and circumstances, that Courts have found require the waiver of a state's immunity, especially when contracts are involved and the risks of upsetting the balance of state and federal jurisdiction is limited. This is often referred to as "ingredient waiver".[3] The facts alleged here are those that highlight the bad actions of the State Defendants that broke its executed agreement to mitigate the impact to tribal historic properties of the Viaduct project. This agreement allowed the State Defendants to begin construction of the Viaduct project. Thus, it should be found that federal jurisdiction arises because of the actions of the State Defendants in executing the PA, the reliance on the FHWA that allowed construction to begin on the Viaduct Project and the impact of construction on historic tribal properties. For the state to mislead the Tribal Plaintiffs, and renege on the transfer of land that was essential to the agreement executed by all parties including the RI Department of Transportation, is now unjust, arbitrary and capricious and, lacks due process by the bad faith of State Defendants to stand behind sovereign immunity and deny their actions are

[2] *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). In *College Savings Bank*, the Supreme Court held that that "express waiver of sovereign immunity [must] be unequivocal" and could not arise constructively from the state's mere participation in federally regulated activity. *Coll. Sav. Bank* at 680.

[3] One & Ken Valley Hous. Grp v. Maine State Hous. Auth., 716 Fe.3d 218, 224 (1st Cir.2013) where dispute sufficiently arose under federal law because it involved federal contractor's implementation of a federal program.

accountable for violations of federal law. These unique facts and circumstances give "rise" to federal subject matter and personal jurisdiction.[4]

Many of Plaintiffs factual allegation were admitted to by the FHWA in its answer to the AC filed on January 26, 2021. For example, FHWA admitted to key facts alleged in Paragraphs 34, 36, 37, 39 and 49 that are sufficient to raise the claim of waiver of sovereign immunity, and to claim the state's action were in violation of their 14th amendment rights and protections. These facts show that the FHWA relied on the agreement to begin the Viaduct Project, and thus violated federal law, and caused real harm to the Plaintiff's historic properties without the requisite mitigation measures in place and avoided the required archeological review under the section 106 process.[5]

Facts admitted to by FHWA:

- On September 1, 2016, FHWA advised RIDOT that the failure to satisfy the "section 106 commitment to transfer these properties to the Tribe . . . stems from RIDOT's insistence that the Tribe waive its sovereign immunity as a prerequisite to transferring the property, a requirement not included in the programmatic agreement[.]"

---

[4] Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 313-314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005) the scope of federal ingredient jurisdiction is determined by the totality of the circumstances, not by a single-factor test.

[5] 36 CFR Subpart B of Part 800 lays out the Section 106 process and details the various duties of the parties involved. These processes are fairly lengthy, including procedures for identifying historic properties (36 CFR 800.4), assessing adverse effects (36 CFR 800.5), and resolving adverse effects (36 CFR 800.6). In lieu of working through the procedures laid out in Subpart B, the regulations allow for the parties to avoid the lengthy processes if the "review of the undertaking is governed by a Federal agency program alternative established under § 800.14." 36 CFR 800.3(a)(2). Pursuant to § 800.14, the Advisory Council on Historic Preservation and the agency official may negotiate 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, rather than use the procedures laid out in Subpart B. However, if the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement. 36 CFR 800.14(b)(2)(v).

- The southbound lane of the Viaduct Project was completed and opened to traffic in the fall of 2016.
- The construction of the southbound lane of the Viaduct Project through the Providence Coveland District has resulted in damage to and despoliation of sites of historical, cultural, and religious significance to the Tribe without any appropriate archaeological investigation being conducted.
- FHWA terminated the PA on January 19, 2017, after RIDOT unilaterally demanded that the Tribe waive its sovereign immunity in the deeds to the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties.
- The PA entered into amongst the various parties was meant to address and mitigate the adverse effects of the Viaduct Project.

The allegations under Count II against Claire Richards individually, rely on facts in the record and many were admitted by FHWA that state her involvement in withdrawing the consent of the State Defendants to the mitigation contract because of her insistence for complete waivers of Tribal sovereign immunity that had not been a condition of the PA. These actions were in violation of federal law and apparently based on her belief that complete waiver of Tribal sovereign immunity was necessary for the enforcement of the covenants in the mitigation contract… an opinion not shared by the Advisory Council of Historic Preservation.[6]

[6] See, the doctrine established in the landmark case *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), holding that the Eleventh Amendment does not bar suit against a state official acting in violation of federal law. Thus, an action by a state officer that violates federal law is not considered an action of the state and protected by the state's sovereign immunity. See also, *Natural Resources Defense Council v. California Department of Transportation*, 96 F. 3rd 420 (9th Cir. 1996).

Facts asserted in the AC relating to Count II:

- On September 1, 2016 FHWA advised RIDOT that the failure to satisfy the "section 106 commitment to transfer these properties to the Tribe . . . stems from RIDOT's insistence that the Tribe waive its sovereign immunity as a prerequisite to transferring the property, a requirement not included in the programmatic agreement[.]"
- Claire Richards in correspondence with FHWA disagree with their opinion and insisted that the State of Rhode Island would not agree to PA without a waiver of the Tribe's sovereign immunity, thus insisting the Tribe disavow its status [of an] and federally recognized sovereign Indian Nation.
- On May 3, 2017, the Advisory Council on Historic Preservation ("ACHP") issued comments to the FHWA regarding the termination of the PA.
- FHWA was required to take into account the ACHP's comments in making a final decision on how to proceed with the undertaking.
- The ACHP's comments recommended that: (a) the Viaduct Project should not be delayed; (b) the Salt Pond Archaeological Preserve should be preserved as agreed to in the PA; and (c) the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties should be transferred to the Tribe as sole owners, without covenants, without waiver of sovereign immunity, but with the state retaining jurisdiction.

The Federal Rules of Civil Procedure require that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief" so that the defendant has fair notice of the claim and the grounds upon which it rests. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per*

curiam). A motion to dismiss under Rule 12(b)(6) for failure to state a claim tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In considering a motion to dismiss under Rule 12(b)(6), the court "must accept as true all of the factual allegations contained in the complaint." *Act Now To Stop War & End Racism Coalition*, 798 F.Supp. 2d 134, 143 (2011) (citing *Atherton v. Dist. of Columbia*, 567 F.3d 672, 681 (D.C. Cir. 2009)). The plaintiff's factual allegations must rise "above the speculative level." *Twombly*, 550 U.S. at 570. While the court need not accept a plaintiff's legal conclusions as true, *Iqbal* at 678, the court grants the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). These basic principles apply to the other defenses in the Motions to Dismiss under 12(b) 1 to 6.

The Plaintiffs initial complaint against Defendants FHWA met this standard and the Motion to Dismiss was denied by this Court, on July 22, 2020. Similarly, the AC that added claims against State Defendants, based on facts admitted to by FHWA, contain sufficient factual mater above a speculative level and their Motion to Dismiss should also be denied. The question of Federal subject matter jurisdiction, can be raised again, at a hearing to review the record if so order by the Court, but the claims of waiver of sovereignty should be allowed to continue, based on the unique circumstances plead here: 1. The parties do not deny that a PA transferring specific properties to the Tribe was executed by the State Defendants and FHWA; 2. As a result of an executed agreement the federal rules regarding archeological research were avoided, and the construction began on the Viaduct project; 3. The State Defendants unilaterally broke the

agreement and that action violated federal law and the rights of the Tribe to mitigation, and 4. The State Defendants through the actions of Claire Richards justified the withdrawal of consent to the PA because the Plaintiff would not disavow its inherent sovereign rights to sovereign immunity, a condition that was not part of the PA and on its face violates federal law.[7]

Count I –State Defendants have Waived Sovereign Immunity and are in Violation of Administrative Procedure Act

As presented in the above summary, the Plaintiff's amended their original complaint in the action removed to this court to add the State Defendants as parties. These Defendants in their motion to dismiss raise multiple issues all pertaining to the claim failing due to subject matter and personal jurisdiction of the Court. While Plaintiff's have the burden to establish jurisdiction, Courts have allowed sovereigns such as the State Defendants here to be named as parties, on the totality of particular facts and circumstances that have been found to waive sovereign immunity. Under the *Grable* case that allowed for federal jurisdiction to arise, the issue involved an interpretation of a federal statute that was key to the dispute in the litigation and was so important that the U.S. Supreme Court found "sensibly belongs in federal court" *Grable*, *545* U.S. at 315. While, these cases that allow federal jurisdiction to arise depend on the totality of the circumstances, Plaintiffs have plead facts here, and largely admitted to by the Parties, that justify holding the State Defendants accountable for violations of the Administrative Procedure Act and other federal laws. The NHPA and its regulations, are at the center of Plaintiffs claims. The review of the PA that contained mitigation measures and the decision by the State

---

[7] See*, Cherokee Nation v. Babbit*, 944 F. Supp. 974 at 979 (U.S. Dist. Ct. DC) One definitive aspect of a tribe's sovereignty is its immunity from suit. *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. United States Fidelity & GuarantyCo.*, 309 U.S. 506, 512, 84 L. Ed. 894, 60 S. Ct. 653 (1940); As the Supreme Court noted in Santa Clara Pueblo: Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit."Santa Clara Pueblo, 436 U.S. at 58 (quoting United States Fidelity & Guaranty Co., 309 U.S. at 512) (citations omitted).

Defendants to withdraw consent to those measures after the highway project was underway because of the FHWA' reasonable reliance on the PA, belong in Federal Court. In other words, "but for" the State Defendants failure to comply with the agreement and carry out the intent and purpose of the Federal Statute, the claim here would not exist. And important to maintaining the balance between State and Federal Jurisdiction, the Plaintiffs, remedy lies in federal court under the APA rather than state claims to adjudicate the compliance with federal regulations. Without finding federal jurisdiction neither FHWA nor the Plaintiff have adequate recourse to address the State Defendants bad acts, and intentional violation of federal laws that showed no concern for protection of historic properties. The State Defendants knew the impact of their refusal to comply with a negotiated mitigation agreement. They should not now be allowed to hide behind sovereign immunity and receive the benefit of a highway project that is built on historic properties of the Plaintiff and protected by federal law.

In *Hatmaker v. Georgia DOT by & through Shackelford,* 973 F. Supp. 1074 (M.D. G.A. 1995) the court did not hesitate to hold the state accountable for the failure to protect properties covered under the National Transportation Act of 1966, 49 U.S.C.A § 303 (Supp. 1995). Plaintiff's here were citizens attempting to enjoin a Federal Highway Project to protect a tree "Friendship Oak". The process the State of Georgia participated in to receive federal funding was called the 4(f) process that identifies historic properties and whether they are eligible on the National Register of Historic Places. This differs from the Section 106 process applied in this case but involves similar review and consultation by FHWA with State and Tribal Partners.[8]

[8] Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which provided for consideration of park and recreation lands, wildlife and waterfowl refuges, and historic sites during transportation project development. The law, now codified in 49 U.S.C. §303 and 23 U.S.C. §138, applies only to the U.S. Department of Transportation (U.S. DOT) and is implemented by the Federal Highway Administration (FHWA) and the Federal Transit Administration through the regulation 23 Code of Federal Regulations (CFR) 774.

The Court reviewed whether the State of Georgia Department of Transportation (Ga.DOT) and Wayne Shackelford the Commissioner individually[9], could use State sovereign immunity or whether the Court had jurisdiction and could apply the APA. The Court reviewed the totally of the circumstances that included more than federal funding for a highway project. It looked at the harm to historic sites, the bad actions of the state in failing to disclose the research and data necessary for the federal agency to protect the property, and the ultimate failure of the state to properly apply and follow federal regulations that undermined the intent of the federal statutory scheme. "At the most fundamental level, to allow Ga.DOT to apply for and receive federal funding under Title 23 yet not be subject to federal jurisdiction, when necessary to ensure compliance with the statue, would be illogical…..To allow Ga.DOT to pursue its construction project unimpeded while a federal court determines whether the federal directive under which the state agency is acting is valid, would defeat the purpose of § 4(f), because once the Friendship Oak is removed it cannot be restored…Essentially, if a federal court is unable to extend its remedial power, which is unquestioned as to the Secretary, to a state agency acting pursuant to an illegal decision by the Secretary, the remedial power is empty." Id. at 1052.

The Court in *Hatmaker*, granted the preliminary injunction against the Ga.DOT to halt the highway project and remanded back to the Secretary of the Department of Transportation for a determination of the 4(f) protections or other regulatory actions. The Court concluded "[T]his

---

The NHPA and Section 4(f) are separate laws with very different requirements; however, there is some overlap when historic properties are involved. A key difference between the two laws is that Section 106 is essentially a consultative procedural requirement. In contrast, Section 4(f), which is a substantive law, precludes project approval if there is a use of a historic site when a prudent and feasible avoidance alternative is available. It should be noted that an adverse effect finding under Section 106 and a Section 4(f) "use" are not the same. *See*, Federal Highways Administration 4(f) tutorial, https://www.environment.fhwa.dot.gov/env_topics/4f_tutorial/overview.aspx?f=e#f.

[9] "Even if Ga.DOT itself was not subject to the jurisdiction of this Court pursuant to the Eleventh Amendment, Wayne Shackelford, the Commissioner of Ga.DOT and a named defendant in this action is subject to this Court's jurisdiction." (citations omitted).

case is not simply about a tree. This controversy is about the integrity of the legislative process. If a state is allowed to arbitrarily circumvent the procedures set forth by Congress to protect a policy of national interest, the public loses faith in our system of government, the nation suffers an injury to its most fundamental precepts." Id. at 1057-1058.[10]

The *Hatmaker* case, uses an analysis Plaintiff seeks here. A review of the totally of the circumstances, that as alleged in the AC show that the State Defendants including the actions of an employee, Claire Richards, violated the integrity of a statute of Congress of great public interest. Here, Plaintiffs have sought both Declaratory and Injunctive relief that logically require the decisions of the State Defendants be reviewed for compliance with federal regulations. The FHWA relied on its State Partner, to comply with these regulations, in order to complete and construct a Highway Project. For the State Defendants after accepting substantial federal funding for a major highway project, and after making promises to transfer lands to Tribe that were relied on by FHWA to mitigate the project, to then unilaterally withdraw consent to transfer those properties as required by the PA to commence construction, should prevent the State from the shield of sovereign immunity as found by the *Hatmaker* Court ruling against the Ga.DOT on similar defenses. Otherwise, to allow State's under these circumstance to escape federal jurisdiction "would invite state agencies to misrepresent potential trouble items in applications for federal funds, knowing that once funds disbursed only federal actors would be subject to suit…"Id. at 1052. With the State Defendants in Rhode Island, they will be allowed to break promises with their Federal and Tribal Partners to protect their historic properties, with no recourse. Plaintiff, the Narragansett Indian Tribe, has pursued this suit, because of the fundamental unfairness of the

---

[10] See also, *MCI Telecommunications Corp. v. Illinois Commerce Commission,* 183 F.3d 558 (7th Cir. 1999), held that state Commission had waived sovereign immunity by undertaking arbitration process and approving the agreement.

State of Rhode Island's broken promise to mitigate the Viaduct project. The State Defendants should be accountable for their illegal refusal to fairly mitigate the highway project as all parties agreed. And, as the regulations require and explained in f.n.5 within, if the PA or mitigation agreement was not fulfill or terminated, the agency is required to comply with the section 106 procedures of subpart B with regard to individual undertakings of the program covered by the agreement that involves extensive research and review of the historic properties that was never performed because of the executed PA. 36 CFR 800.14(b)(2)(v). As alleged in the AC: Instead of undergoing a Phase III archaeological data recovery program to mitigate the effects of the Viaduct Project—because such a program would not have been feasible due to environmental, logistical, and cost factors—FHWA developed the PA amongst itself, the Tribe, the Rhode Island State Historic Preservation Office ("RISHPO"), and the Rhode Island Department of Transportation ("RIDOT"). AC paragraph 19.

Compliance with these procedures was not and could not be properly perform after the termination of the PA, because one lane of the viaduct project had been completed. Therefore, the Viaduct construction project is in violation of federal law and regulations due to the actions of State Defendants terminating unilaterally the executed PA.

Count II- State Defendant Claire Richards actions discriminating against a Federal Tribe has waived the State's Sovereign immunity

The amended complaint alleges that after the PA had been negotiated and executed by the all Parties, FWHA, the Narragansett Indian Tribe and the RI Department of Transportation ("RIDOT), Claire Richards the Executive Counsel to Governor Raimondo of Rhode Island, withdrew unilaterally the State Defendants consent. The actions by Claire Richards, violated the Section 106 process as described above, and therefore was in violation of federal statutory and

regulatory law, and also a violation of the tribe's Constitionally protected sovereign and treaty rights.[11] Courts reviewing congressional actions affecting Indian tribes' accord great deference to the Constitution's commitment of Indian affairs. The Supreme Court expressly rejected the claim that the power of Congress over Indian property is so complete as to render federal legislation immune from judicial review and the due process clause. See, *Cohen's Handbook of Federal Indian Law*, §5.04[2][d]. Both the 5th and 14th amendments have been applied to ensure state's do not interfere with the constitutionally protected due process rights of tribes. Tribes rights to their inherent sovereignty and right to sovereign immunity from suits is protected.

The actions of Claire Richards plead in the AC, violated federal law and the inherent sovereign right of the Tribe. Under the line of cases following the *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908)[12] the State Defendants here can be found to have waived their sovereign immunity. In *Vann v. Kempthorne*, 534 F.3d 741, 749, 383 U.S. App. D.C. 14 (D.C. Cir. 2008) the D.C. Circuit held that the Cherokee Nation of Oklahoma was immune from suit by the Cherokee Freedmen in their long-running dispute, but that the elected officials of the Cherokee Nation were not. The Cherokee Nation was forced to defend its officers in federal court despite the court's recognition that the Nation was immune.[13]

---

[11] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515,559 (1832) "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immorial…"

[12] *Ex parte Young Doctrine* allows for a suit against officers of a sovereign government where the plaintiffs allege continuing unlawful conduct, and where the plaintiffs seek declaratory and injunctive relief only. The Eleventh Amendment bars suits against states absent the relevant state's consent to be sued. The United States Supreme Court holds that a federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land. The Supreme Court has directed that in determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.

[13] See also, *Thomas v. Wash. Metro. Area Transit Auth.*, 305 F. Supp. 3d 77, (D.C. 2018)

The Plaintiffs have made the following allegations against Claire Richards in the AC:

- Defendant State of Rhode Island and its Agencies including the RIDOT, agreed to cooperate with the FHWA and comply with both federal regulations and law when it received federal funding. They further accepted responsibility for compliance with federal law and regulations by voluntarily taking a lead role in drafting and negotiating the PA.
- Defendant Claire Richards, individually, as Executive Counsel to the Rhode Island Governor terminated the PA in violation of the Plaintiff's 14th amendment rights under the U.S. Constitution, thereby acting without state authority.
- Despite ongoing and continuous construction of the Viaduct Project, the RIDOT unilaterally announced that it would not transfer the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties to the Tribe unless the Tribe specifically waived its sovereign immunity with respect to those two properties and entered into a covenant to subject the properties to the civil and criminal laws and jurisdiction of the State of Rhode Island.
- The RIDOT's decision to terminate the PA was at the request of Claire Richards, the Executive Counsel to the Rhode Island Governor, and was contrary to legal advice given by other attorney's representing the RIDOT.
- On September 1, 2016 FHWA advised RIDOT that the failure to satisfy the "section 106 commitment to transfer these properties to the Tribe . . . stems from RIDOT's insistence that the Tribe waive its sovereign immunity as a prerequisite to transferring the property, a requirement not included in the programmatic agreement[.]"
- Claire Richards in correspondence with FHWA disagree with their opinion, and insisted that the State of Rhode Island would not agree to PA without a waiver of the Tribe's

sovereign immunity, thus insisting the Tribe disavow its status [as a] and federally recognized sovereign Indian Nation.

- The southbound lane of the Viaduct Project was completed and opened to traffic in the Fall of 2016.

- The construction of the southbound lane of the Viaduct Project through the Providence Coveland District has resulted in damage to and despoliation of sites of historical, cultural, and religious significance to the Tribe without any appropriate archaeological investigation being conducted.

- The despoliation of historically, culturally, and religiously significant sites is in violation of the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

- FHWA terminated the PA on January 19, 2017, after RIDOT unilaterally demanded that the Tribe waive its sovereign immunity in the deeds to the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties.

- On May 3, 2017, the Advisory Council on Historic Preservation ("ACHP") issued comments to the FHWA regarding the termination of the PA.

- FHWA was required to take into account the ACHP's comments in making a final decision on how to proceed with the undertaking.

- The ACHP's comments recommended that: (a) the Viaduct Project should not be delayed; (b) the Salt Pond Archaeological Preserve should be preserved as agreed to in the PA; and (c) the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties should be transferred to the Tribe as sole owners, without covenants, without waiver of sovereign immunity, but with the state retaining jurisdiction.

These allegations, show that the actions of the Governor's Executive Counsel, who was the individual employed by the State of Rhode, that withdrew the consent of the State to the PA, long after PA was initially executed by all parties. The allegations further show that the FHWA disagreed with the decision of Claire Richards, and her insistence that the Plaintiff, a federal Indian Tribe forfeit its sovereign immunity in violation of due process of law. The Tribe's inherent sovereignty is a property right and entitle to constitutional protection from abuses of power by the state. The termination of the PA after the construction of the Viaduct Project is in further violation of the federal statutes and regulations that require a PA if the full Section 106 process under the NHPA was to be avoided. Based on these allegations of facts, that are substantial and part of the Court's record, Plaintiffs seek an Order denying State Defendants Motion to Dismiss.

Respectfully submitted,

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

By its Attorneys,

*<u>/s/ Elizabeth T. Walker</u>*____________________
Elizabeth T. Walker (VA State Bar#22394)
Walker Law LLC
200 N. Washington Street, Suite 320621
Alexandria, VA 22320
(703) 838-6284 (phone and fax)
Liz@Liz-Walker.com
Dated: February 9, 2021

<u>Certificate of Service</u>

I certify that on February 9, 2021, I caused a copy of the foregoing response to be filed electronically and that this document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DEFENDANTS,
STATE OF RHODE ISLAND,
RHODE ISLAND DEPARTMENT OF TRANSPORTATION,
and CLAIRE RICHARDS, Individually and in Her Official Capacity
as Executive Counsel at the Rhode Island Office of the Governor

Katherine Connolly Sadeck, RI Bar No. 8637 Special Assistant Attorney General
150 South Main Street Providence, RI 02903
Tel: (401) 274-4400, Ext. 2480
Fax: (401) 222-3016
KSadeck@riag.ri.gov

DEFENDANT FHWA

Diana Viggiano Valdivia, Esq.
U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 Fourth Street, NW
Washington, DC 20530
Phone: (202) 252-2545
Email: diana.valdivia@usdoj.gov