UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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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,

and

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

and

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

Defendants.
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<td>Civil Action No. 1:20-cv-576 (RC)</td>
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STATE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants State of Rhode Island ("State"), Rhode Island Department of Transportation ("RIDOT"), and Claire Richards, individually and in her official capacity, (collectively, "State Defendants") file this Reply Memorandum in support of their Motion to Dismiss. Plaintiff's Opposition does not even attempt to refute most of the arguments for dismissal maintained by the

State Defendants. Rather, the Opposition focuses on asserting that the State Defendants do not have sovereign immunity. Assuming *arguendo* that were true, it does not remedy the jurisdictional barriers to this case proceeding or cure Plaintiff's fundamental failure to identify a valid cause of action that states a claim for the relief Plaintiff seeks against the State Defendants. For the reasons set forth in the State Defendants' Memorandum in Support of Their Motion to Dismiss ("Memorandum," ECF 47-1) and largely unrebutted by Plaintiff, this action against the State Defendants must be dismissed both because this Court lacks jurisdiction to proceed and because the Amended Complaint fails to state a claim as a matter of law.[1]

A. Plaintiff Does Not Rebut the Undisputed Facts and Caselaw Demonstrating that This Court Lacks Personal Jurisdiction over the State Defendants and that Venue is Improper

As a threshold matter, Plaintiff's Opposition does not contest that the State Defendants lack contacts with the District of Columbia and that this Court lacks personal jurisdiction over the State Defendants.[2] Plaintiff also does not dispute that this venue is improper and that service of the Amended Complaint did not comply with Rule 4(k) of the Federal Rules of Civil Procedure. Plaintiff offered no substantive rebuttal to the State Defendants' arguments on these issues, each of which provides an independent basis for this Court to dismiss this lawsuit against the State

[1] This Reply will use the same abbreviations and shorthand identified in the State Defendants' Memorandum.

[2] To the extent Plaintiff's Opposition mentions personal jurisdiction at all, Plaintiff admits that "Plaintiff's [sic] have the burden to establish jurisdiction," and then seemingly confuses sovereign immunity and personal jurisdiction. *See* Opposition, p.9. Plaintiff argues that this Court has personal jurisdiction because the Plaintiff believes the State does not have sovereign immunity. *See* Opposition, p.2 ("The waiver of sovereign immunity by the State's [sic] Defendants, gives this court . . . personal jurisdiction over all State Defendants"). However, sovereign immunity is different from personal jurisdiction. Regardless of whether the State Defendants have sovereign immunity, this Court lacks personal jurisdiction over them for the reasons explained in the State Defendants' Memorandum.

Defendants apart from even considering the other deficiencies in the Amended Complaint. *See* ECF 47-1, p.11-21.[3]

Additionally, Plaintiff's Opposition does not contest that justice and practicality require dismissing this case against the State Defendants rather than re-transferring the case back to Rhode Island. *See* ECF 47-1, p. 14-17. Indeed, Plaintiff's Opposition confirms that its lawsuit is primarily an action under the APA and the NHPA. *See* Opposition, p.9 (Plaintiff explaining that its lawsuit pertains to "violations of the Administrative Procedure Act" and that the "NHPA and its regulations, are at the center of Plaintiffs claims"); Opposition, p.10 (Plaintiff asserting its "remedy lies in federal court under the APA"). While the APA may permit an appeal of an FHWA decision, neither the APA nor the NHPA provide a cause of action against the State Defendants. *See infra* Section B (discussing caselaw holding that the APA and NHPA do not provide a cause of action against state actors). This reinforces that it would be inappropriate to re-transfer the case to a different court due to this Court's lack of personal jurisdiction over the State Defendants because the claims against the State Defendants cannot proceed in any court. Moreover, Plaintiff's Opposition confirms that the Tribe's lawsuit is primarily focused on appealing the FHWA's administrative decision and the Tribe has previously argued that its APA appeal against the FHWA should proceed in the District of Columbia. As such, the State Defendants should be dismissed from the action.

[3] Plaintiff's Opposition describes the Rule 12(b)(6) standard and states that "[t]hese basic principles apply to the other defenses in the Motions to Dismiss under 12(b) 1 to 6." Opposition, p.8. In actuality, there are distinct legal standards for each defense, as described in the State Defendants' Memorandum. *See* ECF 47-1, p. 8-10. The Tribe also contends that "[t]he question of Federal subject matter jurisdiction, can be raised again, at a hearing to review the record if so order [sic] by the Court." Opposition, p. 8. However, the law is clear that it is Plaintiff's burden to first establish jurisdiction that would permit this Court to proceed.

B. <u>Plaintiff Does Not Rebut that Its Lawsuit is Based on Statutes That Do Not Provide a Cause of Action Against the State Actors</u>

Plaintiff argues that the Amended Complaint should not be dismissed because it pled adequate allegations to "justify holding the State Defendants accountable for violations of the Administrative Procedure Act." Opposition, p.9. However, the First Circuit in the prior case brought by the Tribe, and other federal courts, have broadly recognized that "[t]he APA provides no federal footing for a cause of action against state actors." *NIT v. Rhode Island Dep't of Transportation*, 903 F.3d 26, 31 (1st Cir. 2018); *see* ECF 47-1, p.23-24 (citing cases holding same); *see also* 5 U.S.C. § 701 (APA applies to "each authority of the Government of the United States"). Plaintiff offers no rebuttal to this caselaw and there is none. As such, the Tribe's APA claim against the State Defendants fails as a matter of law.

The Amended Complaint did not plead a claim pursuant to the NHPA, but Plaintiff nonetheless expresses that the "NHPA and its regulations, are at the center of Plaintiffs claims." Opposition, p. 9. However, in dismissing the Tribe's prior case, the First Circuit rejected the notion that the NHPA provided a basis to sue the State and held that "[t]he NHPA is a procedural statute directed at federal agencies; it provides no toehold to seek redress against a state agency, as it requires nothing of state actors except in limited circumstances not applicable here." *NIT*, 903 F.3d at 31.[4] Moreover, the D.C. Circuit Court of Appeals has held that the NHPA does not provide any private cause of action at all. *Karst Envtl. Educ. & Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). The NHPA simply required the FHWA to "take into account" the impact of the Viaduct Project, consult with the Tribe, and develop mitigation strategies. *See* Compl. ¶¶ 11-13; *see also NIT*, 903 F.3d at 28 ("One way a federal agency can meet its NHPA

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[4] Plaintiff's Opposition, including footnote 5, demonstrates that the NHPA obligations at issue are directed to the federal agency.

obligations is by following the so-called 'section 106' process, which requires federal agencies to consult with key stakeholders in what we have described as a 'stop, look, and listen' process"). The Tribe takes issue with the way the FHWA decided it would effectuate the Section 106 process in FHWA's June 28, 2018 administrative decision, but that does not present a cause of action against the State Defendants.

As such, the two statutory grounds invoked as a basis for Plaintiff's lawsuit, the APA and the NHPA, as a matter of law do not state a claim against the State Defendants (or, alternatively, do not provide subject matter jurisdiction).

Plaintiff's citation to the rarely used "federal ingredient" doctrine is inapposite. In a case cited by Plaintiff, the First Circuit discussed how "[t]he federal ingredient doctrine applies in a special and small category of cases where a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.*, 716 F.3d 218, 224 (1st Cir. 2013). Here, the Tribe is not bringing a claim under a state law cause of action such that the federal ingredient doctrine might be implicated, but is instead attempting to bring a claim under the APA and NHPA, as well as the Fourteenth Amendment. The problem is not that the Plaintiff has failed to cite a federal law as its cause of action, the problem is that the federal claims Plaintiff asserts patently lack merit. As the First Circuit already ruled, the federal claims asserted by the Tribe against the State pursuant to the APA and NHPA fail as a matter of law. *See NIT*, 903 F.3d at 31. Likewise, the Tribe's Fourteenth Amendment count also fails to state a claim, as discussed *infra* and in the State Defendants' Memorandum.

C. Plaintiff's Opposition Confirms that Its Lawsuit Is Barred by Issue and Claim Preclusion

Plaintiff's Opposition also does not contest that its lawsuit against the State Defendants is barred by both issue and claim preclusion. *See* ECF 47-1, p. 27-34. Indeed, Plaintiff's Opposition makes it even more apparent that its current case against the State Defendants is based on the same legal claims and same set of operative facts that were the subject matter of the prior case it already lost against the State in the First Circuit. As noted above, the Tribe's Opposition confirms that its claims are based on the APA and NHPA, which were the same federal statutes cited as causes of action in the Tribe's prior lawsuit, and which the First Circuit expressly ruled did not provide a valid cause of action against the State. *See NIT*, 903 F.3d at 31.

Plaintiff's Opposition also confirms that this current lawsuit is based on the same factual allegations as the prior lawsuit, namely that the State Defendants entered into the PA but that the PA was terminated when the Tribe was required and refused to agree that any land transferred to the Tribe would be subject to Rhode Island law. *See NIT*, 903 F.3d at 28 (describing how prior lawsuit pertained to allegation that "the state insisted that the Tribe waive any claim of sovereign immunity on those lands and agree that Rhode Island civil and criminal laws apply. The Tribe refused. After unsuccessful efforts to resolve the dispute in accordance with the terms of the agreement, the Federal Highway Administration and RIDOT terminated the agreement in its entirety."). The First Circuit described how in the prior case, "[a]t base, the Tribe contends that the state of Rhode Island broke a promise made to the Tribe." *Id.* Here, the Tribe once again alleges the State "broke its promises to the Tribe" by the termination of the PA. Opposition, p.3. This allegation has already been considered by the First Circuit, which determined that it did not present a valid federal claim. Plaintiff fails to identify any conduct by the State Defendants that is the subject of this lawsuit that is different from or happened subsequent to the conduct that was

the subject of the First Circuit case.

As such, issue preclusion applies to bar the Tribe from seeking to relitigate the First Circuit's express decision that the Tribe cannot bring a claim against the State related to the termination of the PA based on the APA or NHPA. Additionally, because Plaintiff's current lawsuit is based on the same operative facts as its prior lawsuit, claim preclusion prevents the Tribe from raising any claims that it *could have* brought in the prior lawsuit.

Although Plaintiff did not bring a Fourteenth Amendment claim in the prior lawsuit, its current Fourteenth Amendment claim is clearly based on the same nucleus of operative facts that were before the First Circuit and Plaintiff does not argue otherwise. "[A] particular legal theory not pressed in the original suit will nonetheless be precluded in the subsequent one if it prescinds from the same set of operative facts." *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1166 (1st Cir. 1991) (determining plaintiff was required in first case to assert any basis he had for federal court jurisdiction and subsequent case asserting different jurisdictional basis was barred). It was incumbent upon Plaintiff to raise any federal claims it had related to the termination of the PA in its first federal court lawsuit. Principles of preclusion and equity prevent Plaintiff from engaging in piecemeal litigation and filing a separate lawsuit for every different federal claim it contends it might have related to the same circumstances.

D. Plaintiff Fails to Identify a Basis for a Fourteenth Amendment Claim or Waiver of Sovereign Immunity

1. The Amended Complaint Fails to State a Fourteenth Amendment Claim

As discussed in the State Defendants' Memorandum, the Tribe asserts a Fourteenth Amendment claim but fails to adequately plead any basis for it in law or fact. *See* ECF 47-1, p. 21-23, 25-26. The Amended Complaint does not provide any notice regarding what, if any, rights protected by the Fourteenth Amendment are implicated in this case. Plaintiff's Opposition for the

first time vaguely asserts that the "Tribe's sovereign status is a property right," Opposition, p. 3, that the Tribe somehow was required to "forfeit its sovereign immunity in violation of due process of law," Opposition, p. 17, and that the State took a "took a racially discriminatory stance." Opposition, p. 3. Although the Opposition mentions Fourteenth Amendment buzz words like "due process," "property right," and "racially discriminatory," these allegations are absent from the Amended Complaint and are entirely conclusory and unsupported by any alleged facts or law.

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). Although the pleading standard does not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (internal citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 556). The Court's application of the Rule 8 pleading standard "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678–79. "[T]he price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research,*

Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999).

Applying these principles, the Supreme Court determined in *Iqbal* that a series of bald, conclusory allegations made by the plaintiff in that case were not entitled to the presumption of truth and did not suffice to state a claim. *See Iqbal*, 556 U.S. at 680-81 (rejecting allegations baldly alleging that "petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as matter of policy'" and that Ashcroft was the "principal architect" of this invidious policy, and that Mueller was "instrumental" in adopting and executing it).

Similarly, the First Circuit has held that "in order to survive a motion to dismiss, a civil rights plaintiff must point, with at least some minimal specificity, to the rudimentary facts supporting his claim. Mere conclusory allegations, standing alone, are not enough; and it is only after stating a valid claim that a plaintiff can insist upon a right to discovery. If this were not so, a party entirely lacking in a cause of action could sue first and then 'fish' to see if he could discover a cause of action." *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 39 (1st Cir. 1992) (internal citations omitted).

Here, the Tribe alleges that its status as a sovereign Tribe is a property right under the Fourteenth Amendment, but does not cite any legal authority for that proposition. The United States Court of Appeals for the Eighth Circuit has directly rejected this proposition and held that a tribe's "sovereign immunity itself is not a property right." *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 979 n.8 (8th Cir. 2001). As the Eighth Circuit noted, "[o]ne does not acquire immunity by purchasing land, nor may it be alienated to another by selling the land. Sovereign immunity is a function of federal law, not state law." *Id.* (citing *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 759 (1998)).

Additionally, even if the Tribe's sovereign status could be considered a "property right" under the Fourteenth Amendment, the Amended Complaint does not allege that the State Defendants took away the Tribe's sovereign status, or even that the State was legally capable of doing so. Rather, the Amended Complaint simply alleges that the State conditioned a transfer of land on the Tribe agreeing that the particular land being transferred to the Tribe would be subject to Rhode Island law so that the covenants on the land could be enforced, as set forth in the PA. There are no allegations or caselaw to support a federal constitutional claim against the State based on conditioning a transfer of land on the land being subject to state law.

The Tribe generally alleges that the State violated due process, but does not actually identify any process that the State was legally obligated to provide in connection with potentially transferring land to the Tribe. The Tribe asserts the State Defendants "violated federal laws to protect historic properties," Opposition, p.3, but does not identify any such federal law except for the NHPA, which the First Circuit already explained imposes obligations on *federal* agencies and does not present a cause of action against the State. *NIT*, 903 F.3d at 31.

Neither does the Tribe plead any more than a highly generalized, conclusory assertion that the State's conduct was somehow racially discriminatory. Certainly, the Tribe's pleading does not identify any evidence of racial animus or any other parties in the same situation that the State has treated differently due to race.[5]

Additionally, the Tribe has entirely failed to identify any legal authority for suing a State employee in her individual capacity for millions of dollars in damages for legal advice that she allegedly gave in her capacity as legal counsel to the Governor of Rhode Island. *See* Opposition,

[5] Indeed, an Indian Tribe is not a racial classification at all but is, instead, a political classification. *See Morton v. Mancari*, 417 U.S. 535, 552-53 (1974) (discussing tribal employment preference as a political preference, not a racial one).

p. 6 (indicating Attorney Richards is being sued for $30 million dollars in her personal capacity "based on her belief that . . . waiver of Tribal sovereign immunity [with regard to the transferred land] was necessary for the enforcement of the covenants in the mitigation contract").[6]

The Tribe curiously argues that "[m]any of the facts alleged in the Amended Complaint ('AC') against the State Defendants are the same or similar" as its claims against the FHWA and "were admitted to by the FHWA." Opposition p.2, 5. However, FHWA's admissions do not constitute a "record" as Plaintiff suggests and have no bearing on the State Defendants.[7] Moreover, at base, even if the factual allegations pled in the Amended Complaint were true, they do not state a viable legal claim against the State Defendants. The State Defendants' Motion to Dismiss is based on different arguments than FHWA's prior Motion to Dismiss and the state and federal defendants are not in the same legal posture. The conduct alleged and the applicability of the federal statutes cited in the Amended Complaint is different for the different defendants. Additionally, the Tribe asserts that the FHWA somehow relied on the State, but it is unclear what that means or how that constitutes a legal claim, especially where the Tribe is taking issue with the June 28, 2018 administrative decision that FHWA made long after the PA was terminated and with full knowledge of the circumstances alleged in the Amended Complaint.

In *Neitzke v. Williams*, the Supreme Court recognized that "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law":

> This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and

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[6] Plaintiff's Opposition confirms that Attorney Richards (assuming she in fact took the stance alleged by the Tribe) was correct and that requiring the transferred land to be subject to state law was necessary to enforce the covenants provided for in the PA. The Tribe notes that "[o]ne definitive aspect of a tribe's sovereignty is its immunity from suit." Opposition, p. 9 n.7. As such, if the transferred land was not subject to state law, there would be no way for the state to enforce the covenants mentioned in the PA and such covenants would essentially be meaningless.

[7] Review of FHWA's Answer also shows that it did not admit all the allegations Plaintiff claims.

> factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."

490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Such a dismissal is appropriate here where the Tribe has failed to plead any legally viable basis for its claims.

2. The Amended Complaint Fails to Demonstrate a Waiver of the State's Sovereign Immunity

The Tribe also asserts that the State Defendants waived their sovereign immunity, but admits that waiver is generally only found if it is expressly provided for in a statute, which it is not in this case. *See* Opposition, p.4 n.2 (citing C*oll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) and recognizing that "express waiver of sovereign immunity [must] be unequivocal and could not arise constructively from the state's mere participation in federally regulated activity"); *see also Stevens v. Bd. of Educ. of Kent Cty.*, 70 F. Supp. 3d 566, 571 (D.D.C. 2014) ("waiver of sovereign immunity must be 'unequivocally expressed in the statutory text' and 'strictly construed, in terms of its scope, in favor of the sovereign'" (quoting *Tri–State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir.2003))).

The Tribe's argument that the State Defendants waived immunity by simply accepting federal funds and entering the PA has been rejected by caselaw.[8] In *Slack v. Washington Metropolitan Area Transit Authority*, the Court rejected the plaintiff's argument that the state had

[8] The Tribe ironically seems to assert that the State Defendants somehow waived sovereign immunity by entering the PA while simultaneously asserting that the Tribe has sovereign immunity despite entering the PA. *See* Opposition, p.9 n.7.

"waived its sovereign immunity . . . by receiving federal funds" and determined that the plaintiff had failed to "show that Congress used its spending power to condition funding on a waiver of sovereign immunity." 325 F. Supp. 3d 146, 154 (D.D.C. 2018). Similarly, here Plaintiff does not identify any specific statutory provisions relevant to this case indicating clear Congressional intent to condition any receipt of federal funds on a state waiving sovereign immunity. *See id.* (plaintiff "cites no precedent to show that Congress can use its spending power to demand that a state waive its Eleventh Amendment rights without the type of clear congressional statement required by *Barbour* [*v. WMATA*, 374 F.3d 1161, 1163 (D.C. Cir. 2004)]"); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) ("the mere receipt of federal funds cannot establish that a State has consented to suit in federal court"). Plaintiff's suggestion that the NHPA somehow effectuates a waiver of Eleventh Amendment immunity is also contradicted by the caselaw holding that the NHPA does not even provide for a private cause of action and generally does not apply to state actors. *See Karst Envtl. Educ. & Prot., Inc*, 475 F.3d at 1295; *NIT*, 903 F.3d at 31.

3. Plaintiff Chiefly Relies on Inapposite Caselaw

Plaintiff relies heavily on *Hatmaker v. Georgia DOT by & through Shackelford*, 973 F. Supp. 1047 (M.D.G.A.1995), which is a non-binding, extra-jurisdictional case that is distinguishable on multiple grounds. Plaintiff admits that its current lawsuit pertains to a different law with "very different requirements" than the law at issue in *Hatmaker*. Opposition, p. 11 n.8. Plaintiff acknowledges that whereas the law at issue in *Hatmaker* was a substantive law that precluded project approval if there was a use of a historic site when a prudent and feasible avoidance alternative was available, the Section 106 process at issue in this case simply is a "consultative procedural requirement." *Id.* Additionally, *Hatmaker* only dealt with granting preliminary injunctive relief to prevent the destruction of a historical tree and did not involve a

request for millions of dollars in damages as Plaintiff seeks here. Despite Plaintiff's assertion that the state official in *Hatmaker* was sued "individually," Opposition, p. 11, there is nothing in the decision indicating that Commissioner Shackelford was sued in his personal capacity as the Tribe is now suing Attorney Richards. The *Hatmaker* decision, including the fact that the relief sought was injunctive in nature, indicates that the state official was sued in his official capacity. Moreover, the Court granted relief in that case because the state allegedly withheld information from the federal entity that potentially impacted the federal entity's decision, whereas here Plaintiff takes issue with the federal agency's June 28, 2018 decision that was made with full knowledge that the State had conditioned any transfer of land on it being subject to state law and that the PA had been terminated. The *Hatmaker* case, which was apparently decided on an emergency basis to preserve a historic tree from imminent destruction, also did not discuss or address the caselaw holding that the APA does not apply to state actors. *See* ECF 47-1, p. 23-24. In sum, the case on which Plaintiff chiefly relies is non-binding and readily distinguishable on multiple grounds.

E. Plaintiff Does Not Contest that Its Claims Are Barred by the Statute of Limitations

Plaintiff's Opposition offers no disagreement with the State Defendants' assertion that the Amended Complaint fails to identify any conduct on the part of the State Defendants that occurred within the three-year statute of limitations. *See* ECF 47, p. 26-27. At most, the Tribe's Opposition asserts that this lawsuit is timely because it is based on a June 28, 2018 agency action, but that was the action of the *federal* agency. *See* Opposition, p. 3 n.1. It is clearer now than ever that the Tribe's lawsuit against the State Defendants only pertains to alleged actions taken by the State leading up to January 19, 2017 when the PA was terminated. As explained in the State Defendants' Memorandum, those claims are time barred.

CONCLUSION

For the reasons stated herein and in the State Defendants' Memorandum, the State Defendants should be dismissed and final judgment should enter in favor of the State Defendants pursuant to Rule 54(b).

Respectfully submitted,

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

By:

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<u>/s/ Katherine Connolly Sadeck</u>

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CERTIFICATE OF SERVICE

I certify that on February 16, 2021, I caused a copy of the foregoing Motion to Dismiss 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.

/s/ Katherine Connolly Sadeck