UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE,

Plaintiff,

v.

STEPHANIE POLLACK, in her official capacity as Acting Administrator of the Federal Highway Administration, *et al.*,

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,

Civil Action No. 20-0576 (RC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 56(a) and Local Rule 7(h), Plaintiffs in the above-captioned matter have moved the Court for Summary Judgment on the ground that Defendants' actions were arbitrary and capricious and not in accordance with law pursuant to the Administrative Procedures Act (APA) 5 U.S.C. § 706 (2)(A) and the National Historic Preservation Act (NHPA) 54 U.S.C. §§ 300101 *et seq*. This Court in a Memorandum Opinion filed July 22, 2020, denied Defendant the Federal Highway Administration (FHWA) Motion to Dismiss Plaintiffs complaint that was properly removed to the U.S. District Court of D.C., and found that, the Agency action of terminating a programmatic agreement to comply with the National Historic Preservation Act, Section 106 process, was final agency action, ripe for review, and held "Plaintiff has alleged sufficient facts to state a claim under the APA….the Court denies Defendant's motion and will await motions for summary judgment with citations to the full administrative record". Mem. Opinion, at page 2.

In support of this Motion for Summary Judgment, Plaintiffs will address this Court's reasoning, that "termination [of the programmatic agreement] specifically contemplated by the regulations does not necessarily insulate such termination from judicial review…it does not follow that termination will always be appropriate and cannot be considered violative of the APA as arbitrary and capricious." *Id.* at 9. In cases against the government under the APA, the Courts rely on the administrative record. The general summary judgment standard does not apply to the Court's review of an administrative decision under the APA. When the review is based on an administrative record the Court's decision is not based on whether

there is a genuine issue of material fact, but rather to test the agency action against the administrative record. See Comment to LCvR 7(h).[1] This standard "requires courts to hold unlawful and set aside agency action, findings and conclusions' that are 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Ridgley v. Lew*, 55 F. sup. 3d 89,93 (D.D.C. 2014) (quoting 5 U.S.C. § 706(2)(C). This Court must review the decision of an agency through an examination of the administrative record of the proceedings before the agency, rather than a de novo review of Plaintiffs' claims. *McDougal v. Widnall*, 20 F. Supp.2d 78, 82 (D.D.C. 1998). And, significantly, the APA requires that a reviewing court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see, e.ge., Coburn v. McHugh, 77 F. Supp.3d 24, 29 (D.D.C. 2014, aff'd No. 15-5009, 2016 3648546 (D.C. Cir. July 8, 2016). "But like any other agency, "[t]o survive review under the arbitrary and capricious standard**,** an agency must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"*PPl Wallingford Energy LLC v. FERC*, 368 U.S. App. D.C. 97,419 F.3d 1194,1198 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). *See*, *Sierra Club v. Marinella*, 459 F. Supp.2d 76, 99 (D.D.C 2006).

The Plaintiffs will highlight the key facts found in the administrative record (AR) that meet the standard for a finding by this court of arbitrary and capricious or poorly reasoned

[1] The administrative record Index was filed on October 5, 2020, and citations to the record use the pagination containing the prefix "AR." See Notice of Filing of Administrative Record, ECF Docket No. 37 (filed Oct. 5, 2020). Plaintiffs have found duplicative documents in the AR submitted by defendants and missing documents and have asked that missing documents be added to the record. For, example missing emails dated 09/19, 27 and 29/2016, between the FHWA Chief Counsel and Claire Richards in the RI Governor's offices, where FHWA is disagreeing with the State's position that a waiver of sovereign immunity is required to protect the properties if transferred to the Tribe. Defendants did not agree to prepare appendix at this time, but to wait until after their reply to motion for summary judgment. See, attached Exhibit A.

decision making by FHWA when it terminated the Programmatic Agreement of 2011 (and subsequent amendment of 2013) and failed to follow the Advisory Council of Historic Preservation (ACHP) recommendations to mitigate the Viaduct Highway Project of Rhode Island capitulating instead to the discriminatory demands of the State of Rhode Island. The FHWA as the agency funding the state highway project had both the obligation and the authority to withhold funding, or take other legal action, to insure compliance with the PA if the state failed to honor its commitments relied on by the Tribe. AR AR001216-1239(fully executed PA dated 10/03/2011 and Amendment 01/17/2013, AR000486-000487 (06/28/2018 notice from the FHWA that the PA was terminated and new PA would not transfer mitigation properties to Tribe). AR000499-501 (Letter dated 12/12/2018 Tribe's attorney informing FHWA of objections to proposed new PA).

The PA took time and effort to develop by the parties and was fully executed in 2011 and amended in 2013. The PA as executed by the FHWA, the State of Rhode Island and the Narragansett Indian Tribe under the Section 106 process (36 C.F.R. §800.14(b) programmatic agreements as program alternative to full Section 106 process) was to mitigate the Viaduct Highway Project of Rhode Island (the Providence Covelands Archaeological District -RI 935 "Covelands Properties"), had specific terms, and rationally did not require the Narragansett Indian Tribe, a Federally Recognized Tribe, to relinquish its sovereign status as a tribe or to publicly acknowledge the State of RI as a superior sovereign, to mitigate the project that had adverse effects on land culturally significant to the Tribe. AR001216 to 001239(PA), *see* also AR000172-177 (describing historic significance of properties and need for mitigation). *See* also, 36 C.F.R. §800.2(c)(ii)(C)[2] The demand by

[2] "Consultation with an Indian tribe must recognize the government-to-government relationship between the federal Government and Indian tribes…and ..should be conducted in a manner sensitive to the concerns and needs of the India tribe.."

the State many years after the negotiated PA, seeking a waiver of sovereign immunity before properties would be transferred under the terms of the PA, was both discriminatory and acknowledged by the FHWA and the ACPH, ("ACHP" the Administrating Agency of the NHPA) as unnecessary to mitigate the project. AR000172-177 (at 174 "The ACHP and the FHWA concluded that the requirement by RIDOT that the tribe waive its sovereign immunity in order to receive these properties was not a requirement of the PA.")

The record will further show, that ACHP strongly advise the FHWA to go forward with the PA that was agreed on by all the Parties, and to transfer the mitigating properties to the Tribe, without limiting the sovereign rights of the tribe that included sovereign immunity. ("The pursuit of preservation covenants for these two properties [Providence Boys Club-Camp Davis and Chief Sachem Night Hawk properties] under the PA, and the related state requirement for a waiver of immunity by the tribe, appears to be an unnecessary stumbling block. The ACHP understands the need to be able to enforce a covenant in order for it to properly function but disagrees with the continued demand for such covenants in this case…. the ACHP therefore recommends that FHWA encourage the state to forego the requirement for a protective covenant on these two properties and its related demand for a waiver of tribal sovereign immunity." AR at 000176.

The ACHP further commented: "The decision not to recover archaeological data from within the area of potential effects of the undertaking and instead to preserve the Salt Pond Archaeological Preserve (SPAP), the Providence Boys Club-Camp Davis property, and the Chief Sachem Night Hawk property was appropriate, reasonable, and in the public interest…The impasse regarding state retention of jurisdiction over the lands and tribal waiver of sovereign immunity should have been foreseen and addressed before execution of the PA….The tribe has a legitimate role and is appropriately positioned to be a long-term

caretaker of the SPAP (with the state), Providence boys Club-Camp Davis, and Chief Sachem Night Hawk Properties." AR000175.

In sum, the Tribe was misled by the FHWA by trusting in the Section 106 process that occurred over a period of years. AR000139-140(09/01/2016 FHWA informing RIDOT it will not continue funding if State does not comply with PA and transfer properties.) It is no doubt in the public interest that procedures established under NHPA and administered by the ACHP are followed, ensuring credibility in the process. The record reflects that in reliance on the process, a Tribal member sold historic properties (A tribal elders home long held in his family) to the state on the assurance the properties would be transferred to the Tribe as part of these mitigation measures (Chief Sachem Night Hawk Properties). The Tribe also agreed as evidenced in the amendment of 2013 to the PA, and the AR to allow for the reallocation of funding for its Crandall Farm Transportation Enhancement Project ($450,000.00) to go towards the acquisition costs for the SPAP properties. In addition, monies for the Tribe from a U.S. Fish and Wildlife Congressional grant ($446,250.00) were also allocated - a total close to $900,000.00 for the acquisition of the other mitigation properties. AR001237-1239 (amendment to PA with acknowledge of funds allocation from Crandall Farm). *See*, AR000900-904 (July 11, 2019 email from FHWA to Tribe addressing allocation of monies, and those monies going back to agencies, but properties never transferred by the state.) AR000834-839 (07/11/2019 email FHWA to Tribe's attorney, questions about monies paid, complaints from Tribe.)

Thus, the FHWA failed to maintain integrity in the process and breached the Tribe's trust and reliance on an executed agreement. After disagreeing with the position of the Rhode Island Defendants to require a waiver of immunity and insisting the state transfer the properties, the FHWA without just cause or reason changed its position and terminated the

PA. AR000486-000487(06/28/2018 notice from FHWA that the PA is terminated and new PA would not transfer mitigation properties to Tribe) Compounding its beach of public trust the FHWA executed a subsequent PA without the consent of the Tribe that failed miserably to address the impact to Historic Tribal properties by ignoring the recommendations of the ACHP the administrating agency and capitulating to the discriminatory demands of the state. Under these facts found in the Administrative Record, the FHWA deserves a rigorous review into its decision making and a ruling by the court that the termination of the PA was a poorly reasoned decision, failed to mitigate the project, contrary to law and thereby arbitrary and capricious under the APA and a waiver of the agency's immunity.

STATEMENT OF FACTS

A. Summary of Memorandum Opinion decided by this Court, July 22, 2020

This court denied the Federal Defendant's, FHWA's Motion to Dismiss the Complaint filed in this Court on March 29, 2019. EFC Document No. 1. In the opinion the Court recounted the procedural history and the facts alleged in the Complaint and found the Termination of the PA was final agency ripe for review under the APA. EFC Document No. 30. Those facts are relied on in this Memorandum of Points and Authorities and supported in the Administrative Record (AR).

Summarizing the statutory and regulatory framework, the highlights of the memorandum opinion are as follows:

- The NHPA requires that any federal agency "having direct or indirect or indirect jurisdiction of a proposed Federal or federally assisted undertaking…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." 54 U.S.C. § 306108. This is referred to as the "Section 106: process. The ACHP is the agency responsible for issuing regulations that implement the Section 106 process. 36 C.F.R. §800.2(b). See 36 C.F.R. § 800 *et seq* for steps an agency must take to comply with NHPA's requirement to "take into account the effect of the undertaking on any historic property" Subpart B of this chapter of the Code lays out in detail the normal Section 106 process. 36 C.F.R. §§ 800.3-800.13. Subpart C discusses program alternatives, 36 C.F.R. §§ 800.14-800.16. One type of alternative is the development of Programmatic Agreements. *Id.* §800.14(b). Before implementing a programmatic agreement, the federal agency must consult with the appropriate stake holders, including state historic preservation offices and Indian tribes. *Id.* § 800.14(b)(2)(i). "Compliance with the procedures established by an approved Programmatic Agreement satisfies the agency's section 106 responsibilities for all individual undertakings…covered by the agreement" *Id.* If the ACHP "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"…*Id.* §800.14(b)(2)(v). Memorandum Opinion pages 2-3.

- Because federal regulations state that compliance with programmatic agreements fulfills an agency's Section 106 responsibilities, courts analyze programmatic agreements to determine whether agency action is compliant with their terms. *See Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 847 (10th Cir. 2019) (stating that the issue to resolve is whether agency violated requirements of a programmatic agreement); *Colo. River Indian Tribes v. Dep't of Interior*, N. ED CV-1402504 JAK (SPx), 2015 WL

12661945, at *13 (C.D. Cal. June 11, 2015) (explaining that obligations under a programmatic agreement serve as a substitute to compliance with Section 106). Holding an agency to the terms of a programmatic agreement follows from the regulatory language; if "[c]ompliance with the procedures established by an approved programmatic agreement" can satisfy an agency's Section 106 obligations, 36 C.F.R. § 800.14(b)(2)(iii), noncompliance with the terms would not satisfy those obligations. Memorandum Opinion pages 3-4.

- The Court found that Plaintiffs alleged sufficient facts to survive a motion to dismiss. "That termination [of the PA] is specifically contemplated by the regulations does not necessarily insulate such termination from judicial review." The Court concluded: 'Without reviewing the terms of the programmatic agreement, the agency's actions subsequent to termination pursuant to the Section 106 process and the full administrative record, the Court cannot state definitively whether FHWA's actions conformed with the procedural requirements of the approved programmatic agreement or Section 106. *See Vargus b McHugh*, 87 F. Supp.3d 298,301 (D.D.C. 2015)." Memorandum Opinion pages 9-10.

B. Historical Properties impacted by Highway Project and significance of the Historical Properties subject to the Programmatic Agreement

This case is about a highway project in Rhode Island where the state received substantial funding from FHWA for the replacement of the I-95 Providence Viaduct Bridge. (Viaduct project). *See*, Memorandum Opinion ECF Doc. 30. FHWA determined that the bridge replacement would have adverse effects on the Providence Covelands Archaeological District. AR001216-1239 PA and amendment) AR000113-119 (Letter to ACPH dated 10/16/2014 from RI Historic Preservation and Heritage Commission evaluating impacts on

Covelands properties and historical significance of mitigation properties.) To address the adverse effects a programmatic agreement pursuant to the Section 106 process under the NHPA was developed primarily between the State of Rhode Island Transportation Department (RIDOT), and the State's Historic Preservation office (RISHPO) and FHWA as the undertaking partners. This programmatic agreement that called for the transfer of culturally significant properties was presented to the Plaintiffs by the FHWA and was ultimately finalized and executed by all the stakeholders FHWA, RIDOT and the Plaintiff Tribe, through the Narragansett Indian Tribal Historic Preservation Office (NITHPO). As alleged in the Complaint and clear from the AR, the Tribe attaches religious and cultural significance to the Providence Covelands Archaeological District (RI 935).

To mitigate the adverse effect to this property of Tribal historical significance, the FHWA and the RIDOT consented to transfer ownership of three parcels of land to the Tribe. AR001216-1239(PA). The parcels are identified in the PA and its amendment of 2013, as the Salt Pond Archaeological Preserve (SPAP) (providing for joint ownership with State and Tribe), Providence Boys Club-Camp Davis property and the Chief Sachem Night Hawk property (sole owner by Tribe). As the AR record describes, all three properties have inherently historic, cultural, and religious significance to the Tribe. The transfer of ownership was a reasonable and appropriate means to mitigating the negative effects of a highway project impacting the Covelands Archaeological District described as historically significant property to the Tribe. AR000172-177(04/03/2017 Comments by ACPH) Mitigation of the Covelands properties was required because it was determined that further archaeological data collection was not feasible due to environmental, logistical and cost factors, therefore the FHWA developed the PA with the RISHPO and the RIDOT and consulted with the Tribe. And upon the belief that the actual cost of conducting a Phase III archaeological data recovery program would have exceed thirty million, then pursuant to 36

C.F.R. Part 800, governing Section 106 of the NHPA the PA was executed by all parties and effective October 3, 2011 and amended January 17 2013. 36 C.F.R. § 800.14(b)(2)(iii).

After thorough study of the adverse effects to the Tribe's historical and culturally significant properties it was inconsistent with law and logic for the FHWA to allow for the construction of the highway without transferring the properties subject to the PA. In short, the FHWA failure to comply with the PA and terminate was a direct violation of the Section 106 process (the PA was an alternative process to meet the more expensive Section 106 process). The Plaintiff as the appropriate party to maintain and preserve these properties, it follows that termination of the PA failed to apply the facts of this case, namely the reason for mitigation of adverse effects to the Covelands properties, without the transfer of other historically significant properties to the tribe. The FHWA by terminating the PA, ignored the reason for the PA agreement to address the adverse effects caused by the Viaduct Bridge project and the recommendations of the ACHP. AR000113-119, AR000172-177, AR000486-487(06/28/2018 letter to ACHP noticing termination of PA and decision not to transfer properties in new PA). The FHWA also ignore and failed to follow the purpose and intent of the NHPA and its regulations in relation to consultation with Indian tribes. 36 C.F.R. § 800.2(c)(ii)(B) ("The Federal Government has a unique relationship with Indian tribes set forth in the Constitution of the United States, treaties, statues, and court…")

C. Development of Programmatic Agreement (PA) and Contents

The PA executed October 3, 2011, including attachments and as amended January 17, 2013, is a clear unambiguous application of the NHPA and its regulations codified at 36 C.F.R. § 800 *et seq.* that requires a Federal Agency, prior to the approval of the expenditure of any Federal Funds on an undertaking to take into account the effect of the undertaking on any history property. 54 U.S.C. § 306108, 36 C.F.R. §800.1(c) ("The agency official must

complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.") The implementation of a PA as an alternative to the full Section 106 process, fully explained in its recitals, the need for mitigation measures, to avoid high cost of further phases of archeological data recovery. The PA was developed by the FHWA and the State of RI in consultation with the Tribe and NITHPO. AR 001215-1239. As the ACPH comments on the termination of the PA explained in detail, the importance of avoiding delays to failing infrastructure of the Viaduct Project, necessitate a PA to begin badly needed construction and to avoid higher costs. AR000172-177. As a result of this finding, the PA's language was clear the agreement was necessary to avoid further costly data recovery so that construction on the project (undertaking) could begin immediately:

> "**WHEREAS**, FHWA has determined that a Phase III archaeological data recovery program to mitigate the effects of the Undertaking on the Providence Covelands Archaeological District (RI 935) is not feasible due to environmental , logistical and costs factors;…**NOW, THEREFORE,** FHWA, NITHPO, RISHPO AND RIDOT agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the foreseen and unforeseen future effects of the Undertaking on historic properties." PA at page 2. AR001217. AR000113-115(RI Historical Preservation & Heritage Commission review of the Covelands and Salt Ponds sites and the unique cultural connection to the Narragansett Indian Tribe)

And indeed, upon the signing of the January 17, 2013 Amendment construction began on the Viaduct project by June 2013. It seems beginning construction was a priority of the FHWA, but after construction began the FHWA did not prioritize the transfer of the properties to the Tribe to comply with the terms of the PA as required by NHPA's Section 106 process. The record supports however, the FHWA, over a period of years asked the State in correspondence emails and consultations to move forward with the transfer of properties, informing the State that after execution of the agreement adding new requirements of waiver of sovereign immunity and acknowledgment of State jurisdiction, "[u]nderstandably, the

Tribe has not agreed to those demands". AR000139-149(Letter 09/01/2016 FWHA to RIDOT informing the State that funds would be withheld if the State did not comply with the PA and transfer the properties.) But as the impasse continued the FHWA, instead of using its authority to withhold funds for the Viaduct project until compliance with the Section 106 process, or seek assistance of the ACPA to resolve the dispute, or take legal action, it then withdrew its previous support for the transfer of properties and terminated the PA. AR000486-487. This action was a policy reversal not based on new archeological facts, nor did it lead to the transfer of alternative properties or have the Tribe's agreement, but was an arbitrary and poorly reasoned decision violating of the goals NHPA that requires mitigation of projects like the Viaduct undertaking before funding can begin. 54 U.S.C. § 306108.

The PA and later amendment, signed a full two years later, were clear and had achieved the consent of all parties in compliance with the rules. The State of RI executed the agreement, was active in acquiring the properties, and benefited from the federal funding (some allocated by the Tribe) and highway construction. They then refused to comply with the PA unless new terms where added. The State never negotiated for a waiver of the Tribe's sovereign immunity for the transfer of the properties prior to the execution of the PA. And, Plaintiff believes the State was well aware the new terms would be rejected by the Tribe and intentionally waited till after the agreement was executed and funding began before proposing additional restrictions. AR000060-96(09/17/2013 RIDOT decision not to transfer properties without waiver of sovereign immunity)[3] The State signed the PA but showed bad faith by refusing to transfer the properties to the tribe. In other words, the State, by seeking limitations on the Tribe's sovereignty benefited by retaining ownership of the properties and thus refused

[3] This document reveals the RIDOT wanted full waiver of immunity, seeking resolution in State Court, and waiver of all Treaty rights. A counter offer was made by the tribe for a limited waiver, but this was rejected by RIDOT. See, AR000659-663 and AR000658(RIDOT (declining Tribe's offer of limited waiver in covenants if resolved through Tribal Court or appealed to Federal Court instead of State Court.)

to mitigate the damage to the historic Covelands properties. And, as stated the FHWA refusal to force compliance of the PA and support the rights of the Tribal Stakeholder to the transfer of the mitigation properties, was a clear violation of the PA and the Section 106 process under NHPA and the FHWA should be held accountable. The FHWA should not be allowed to reward the State with federal funding, when it ignored the public interest under the NHPA, to preserve and mitigate damage to eligible historic properties.

The following argument sections will describe the FHWA's unilateral decision to terminate the PA and capitulate to the State's demands not to transfer the mitigation properties to the Tribe. The record will further show that termination of the PA was inconsistent with the FHWA initial position pushing the state to move forward with the PA. Then after years of construction on the Viaduct project "as if" the project was in compliance with Section 106, the FHWA arbitrarily changed its position, terminated the PA and proposed an alternative PA (new PA) in a flawed attempt to satisfy the Section 106 process.

The FHWA knew of the State's hostile relationship with it's only Federally Recognized Indian Tribe and has no excuse for not taking the necessary steps to ensure the State would comply. AR000175(ACPH comments that the history between Tribe and State should have been foreseen and addressed by FHWA) Therefore, the FHWA should be held accountable for a poorly reasoned decision to terminate the PA, when it knew the State position to withhold the transfer of properties was politically motivated and dishonoring of a Federally Recognized Indian Tribe and contrary to the NHPA's intent in consultation with Tribes. 36 C.F.R. §800.2(c)(2). And needless to say, the Tribe would not have consented to the reallocation of its Tribal Grant and Transportation funding, for the acquisition of the mitigation properties if the properties were not to be transferred to the Tribe. Instead, the FHWA, in bad faith, ignored the recommendations of the ACHP, took the State's position

against its only Federally Recognized Indian Tribe and triggered a lawsuit. AR001216-1239, AR000172-177.

ARGUMENT

I. Plaintiffs are entitled to Summary Judgment because the termination of the Programmatic Agreement (PA) by FHWA was arbitrary and capricious and in Violation of the APA and Federal Law.

A. The decision to terminate the PA was unsupported by fact and poorly reasoned.

To begin, it is important to examine the definition of an Indian Tribe and Historic Properties, under NHPA and its regulations.

> Indian Tribe.—An Indian Tribe, band, nation, or other organized group or community, including a Native village, regional corporation, or village corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. Sec. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians 36 CFR Sec. 800.16(m), 54 U.S.C. Sec. 300309).
>
> [Indian Tribes are commonly referred to as a "federally recognized Indian Tribes. The Plaintiff is a federally recognized Indian Tribe eligible for services provided by the United States. 85 F.R. 5462 (Jan. 30, 2020). https://www.federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of]
>
> **Historic property** means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria. 36 C.F.R. § 800.16(i)(l)

Under NEPA and the regulations for addressing adverse impacts to historic properties it is acknowledged, by these definitions that properties of historic significance to Federally Recognized Indian Tribes, are "historic properties" eligible for the Section 106 process. https://www.achp.gov/program_alternatives/pa. *See,* 36 CFR §800.14(b)(2). And, when

Tribal historic properties are involved, Tribes and their Tribal Historic Preservation Offices are invited to participate in the consultation process as stakeholders. And, when it is decided that due to the difficulties of completing full reviews of the adverse impacts, then a "programmatic agreement" can be develop under alternatives to the process. It is a process that encourages agreement of the consulting parties or primary stakeholders. And nowhere in the regulations, are Federal Recognized Tribal stakeholders required to relinquish sovereign rights or provide "waivers" of immunity to participate in the process. 36 C.F.R. §800.2(c)(2). The regulations will allow nonfederal partners to be invited, but the status of Federally Recognized Indian Tribes is acknowledged and distinguished in the definitions. The NHPA did not limit the sovereign status or powers of Recognized Indian Tribes in the Section 106 process.

As an overview from NHPA online guidance: "NHPA was signed into law in 1966, and Section 106 of the NHPA requires federal agencies to take into account the effect of undertakings they carry out, license, approve, or fund on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment before making decisions. Using the Section 106 process, agencies identify historic properties, assess effects to historic properties, consider alternatives to avoid, minimize, or mitigate any adverse effects, and document their resolution. Agencies are required to facilitate a stakeholder engagement process known as consultation – discussing and considering the views of consulting parties, including State Historic Preservation Officers (SHPOs) and/or Tribal Historic Preservation Officers (THPOs), Indian tribes, Native Hawaiian organizations, and others, while also providing opportunities for public input. The ACHP, an independent federal agency established by the NHPA, oversees the implementation of the Section 106 process, issues its implementing regulations (36 CFR Part 800), and may participate in consultation to

resolve adverse effects to historic properties." Quoting the ACHP guidance: https://www.achp.gov/integrating_nepa_106.

It follows that the historical and culturally significant properties of Indian Tribes, are the type of properties that NHPA was designed to review for adverse effects and apply the Section 106 process to address and mitigate those adverse effects. In this process the Tribe and/or a Tribal Historic Preservation Office would be considered a significant stakeholder and an important and necessary part of the consultation. Here, the importance of the Tribe's participation was apparent, because of the adverse effects the Viaduct Bridge undertaking had on significant historic properties of the Tribe. And as the ACPH commented in its review of the termination of the PA: "The tribe has a legitimate role and is appropriately positioned to be a long-term caretaker of the SPAP (with the state), Providence Boys Club-Camp Davis, and Chief Sachem Night Hawk properties…These properties are of cultural and religious significance to the tribe and play an important roles in evidencing the long history of the tribe and others in the region. Given this connection and the Tribe's ancestral ties to these properties, the tribe is uniquely positioned to interpret these properties and ensure they are maintained and protected in a way that ensures their long-term preservation." AR000175. The ACPA then encouraged the State to transfer the properties to the Tribe, and concurs with the joint ownership of the SPAP, but recommends the other two properties be transferred to the sole ownership of the Tribe so it can preserve the properties as it sees fit, without interference of the state regarding such preservation through covenants, and its related demand for sovereign immunity. AR000176. (May 3, 2017 Comments of the ACHP on the Viaduct Project).

What the record reflects, is after the PA and its 2013 amendment were fully executed by all parties, and the properties part of the PA were purchased (with allocated

funding from Federal programs and Grants award to the Tribe), the State demanded that the covenants transferring the properties to the Tribe add additional requirements for the waiver of the Tribe's sovereign immunity and jurisdiction[4] . The tribe objected, and a long series of negotiations ensured, including the assistance of the Institute for Environmental Conflict Resolution to performing a mediation but it was unsuccessful. Ultimately both the ACPA and the FHWA concluded that the requirement of RIDOT lead by the communications with the RI Governor's Office, Claire Richards, demanding the tribe waive its sovereign immunity in order to receive these properties was **not** a requirement of the PA. "However, efforts to convince the state to reconsider that condition were unsuccessful." AR000174 (May 3, 2017 Comments of ACHP and follow up concerns about new PA without consent of Tribe (12/6/2018 AR000496-497, AR000172-177**.)**

After years of disagreeing with the State of RI's stubborn refusal to comply with the PA and transfer the properties, on Jan. 19, 2017, the FHWA reversed its position, deciding to capitulate to the State's demands, and noticed the parties it was terminating the PA. Then on June 28 2018, the FHWA reinitiated the Section 106 process after reviewing the ACHP comments of May 2017 but failed to adhere to their recommendations.[5] AR000486-487, AR000120-121(ACPH urging FHWA to consult to resolve impasse) AR000520-521(FHWA acknowledges 10/19/2017 it cannot require waiver of sovereign immunity of Tribe) AR000496-497. The FHWA reversed its position on the PA after opening the southbound lane of the Viaduct Project to traffic in the Fall

[4] Land transferred in fee to the stakeholder Tribe as a mitigation measure is permitted under the NHPA to comply with the ACPH Section 106 process, as enacted by Congress. State sovereignty is not in question. This state was requiring an unnecessary and inappropriate jurisdictional statement that was not included in the executed PA. *See*, AR001216-1239(PA 10/03/2011 and Amendment 01/17/2013, AR000175(ACHP Comments to termination of PA 05/03/2017).

[5] The FHWA has agreed this action later commemorated in December 2019 was a final agency action. ECF no.27 Dated 4/15/2020.

of 2016. Thus, FHWA continued to fund the project without compliance with the PA, making no attempt to pursue the failure of the State to comply with the PA through administrative or legal action. Instead without agreement of the Tribe,[6] FHWA, identified new mitigation measured, based on the State of RI recommendations, that allow only joint ownership of the SPAP, and providing the state full ownership of the other historical properties, Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties. AR000840 (06/11/2019 RIDOT to FWHA referencing Claire Richards and Governor's office that agreement provide state ownership)

The new agreement offered the Tribe, a token - providing as mitigation, "academic-level historic context document about the Tribe; Section 106 Training; a video documentary about the Tribe; and a teaching curriculum for Rhode Island public schools about the Tribe." AR000361-367 (2018 draft agreements) These offers of video's, trainings, and teaching curriculums are woefully inadequate mitigation measures, and far behind what other states have done to support Tribal history education without receiving millions in funding for Federal Highway undertakings adversely effecting historic tribal properties.[7]

As stated in the introduction herein, the APA requires that a reviewing court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see, e.ge., Coburn v. McHugh, 77 F. Supp.3d 24, 29 (D.D.C. 2014, aff'd No. 15-5009, 2016 3648546 (D.C. Cir. July 8, 2016. "But like any other agency, "[t]o survive review under the arbitrary and capricious standard**,** an

[6] AR 000153(10/07/2016 FHWA states to RIDOT, the compromise must have agreement of all signatories to comply with Section 106 regulations--later "new" PA did not have that agreement)

[7] See for example: https://www.dhr.virginia.gov/first-people-the-early-indians-of-virginia/ https://encyclopediavirginia.org/category/indians/ https://www.doe.virginia.gov/instruction/history/virginias-first-people/index.shtml

agency must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"*PPl Wallingford Energy LLC v. FERC*, 368 U.S. App. D.C. 97,419 F.3d 1194,1198 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). *See*, *Sierra Club v. Marinella*, 459 F. Supp.2d 76, 99 (D.D.C 2006).

The arbitrary and capricious review of agency action is often called the "reasoned decision-making requirement". The leading case is *State Farm*, the famous airbag case, describing the test as more than an evaluation of the data but requires the agency articulate a rational connection between the facts found and choice made (here termination of a long existing PA). The FHWA did not met that test. The rational connection to the termination of the agreement was only the stubborn position of the state to not transfer the properties with unnecessary requirements for waiver of tribal sovereign rights and demanding the Tribe proclaim in the PA the sovereignty/jurisdiction of the state. AR000146-47(10/03/2016 FHWA was advised that they must show rationale for decision). NEPA's statutory purpose and definitions of historic properties and Indian Tribes, places significance on consultation with Indian tribes and their connection to Tribal historic properties. The FHWA did not attempt to justify why it would not follow the recommendations of the ACPH that recommended the transfer of the properties to the Tribe as the appropriate caretaker of historically and culturally historic tribal properties.

The FHWA instead, reversed its position for purely political reasons, capitulating to the demands of the State by supporting the choice of leaving Tribal historic properties in the State's full ownership. No reason was given why the State should control the historic preservation of the Tribal historic locations. All parties including the RIDOT executed the PA and its later amendments. Reversing its long-standing position supporting the terms of

the PA without facts that sufficiently support termination, thus breaching the of trust of a federally recognized Tribe a significant stakeholder, was in violation of the Section 106 process under NHPA, and as such, arbitrary and capricious as a poorly reasoned decision, and a waiver of sovereign immunity under the APA. 5 U.S.C. 706(2)(A).

B. The FHWA acted unilaterally in terminating the PA by failing to adhere to comments by the Advisory Council on Historic Preservation (ACHP) the administering agency. And, the decision cannot be ascribed to the product of agency expertise.

The statutory scheme of NHPA, is unique, in its role advising agencies on all stages of the historic preservation process. As described above, using the NHPA Section 106 process, agencies identify historic properties, assess effects to historic properties, consider alternatives to avoid, minimize, or mitigate any adverse effects, and document their resolution. Agencies are required to facilitate a stakeholder engagement process known as consultation – discussing and considering the views of consulting parties, including State Historic Preservation Officers (SHPOs) and/or Tribal Historic Preservation Officers (THPOs), Indian tribes, Native Hawaiian organizations, and others, while also providing opportunities for public input. The ACHP, an independent federal agency established by the NHPA, oversees the implementation of the Section 106 process, issues its implementing regulations (36 CFR Part 800), and may participate in consultation to resolve adverse effects to historic properties." Quoting the ACHP guidance: https://www.achp.gov/integrating_nepa_106.

As recited in this Court's Memorandum Opinion, denying the FHWA motion to dismiss, NHPA requires that any federal agency "having direct or indirect jurisdiction of a proposed Federal or federally assisted undertaking…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." 54 U.S.C. § 306108. "Compliance with the procedures established

by an approved Programmatic Agreement satisfies the agency's section 106 responsibilities for all individual undertakings…covered by the agreement" *Id.* If the ACHP "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"…Id, 36 C.F.R. §800.14(b)(2)(v). Memorandum Opinion pages 2-3.

Under the statutory scheme for NHPA the ACPH is the administering agency. In that role, it develops rules, assist in trainings, and issues formal comments. When the FWHA terminated the PA, the ACPH provided formal comments of the termination. In these comments it pointed out that the FHWA should have involved the ACPH earlier in the process and use its expertise to assist with the resolution of the impasse with the State of RI. It advised the FHWA in the future to seek the ACPH advice and assistance on Section 106 situations prior to entering into other mediations on projects. AR000177. The ACPH, as mentioned above, also commented that FHWA, should have anticipated the potential for an impasse with this particular state considering the past history with the Tribe. AR000175. And, the ACPH reinforced that the terms of the PA were appropriate, disagreeing with the State's position. AR000175. In short, ACPH in its comments implied FHWA while involving the ACPA to a degree in the process, it acted unilaterally in its decision terminating the PA, and should have used ACPH expertise in resolving the impasse or before mediating PA disputes with other entities. The comments suggested that the termination could have and should have been avoided. AR000120-121 (10/20/2014 encouraging more consultation with ACPA before terminating) AR000162-164(03/03/2017 recounting history of impasse noting termination will require comments from ACHP) AR000172-177(05/03/2017 the ACHP comments supporting transfer of properties to Tribe).

C. The Court should not leniently defer to the FHWA's decision to terminate the PA, because the National Historic Preservation ACT (NHPA) rules are not ambiguous

and FHWA is not the administering agency of the NHPA.[8]

The ACPH is the agency with the Section 106 process and PA development expertise. FHWA failed to fully utilize that expertise, and as a result, the agency decision to terminate, reversing its decision to transfer the properties to the tribe, failed to properly mitigate the adverse effect on historic properties as required by NEPA. In analyzing agency decisions courts hesitate to substitute its judgement for that of the agency especially in the areas of agency expertise. *State Farm* at 43. However, when reviewing whether an agency decision was reasonably made, agencies are only entitled to difference when interpreting the statues they administer. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). In this case, NHPA is administered by the ACPH, therefore, FHWA is not entitled to the same deference, or leniency in its decision making as when applying its own rules. As ACPH pointed out, the impasse with the State and the Tribe could have been anticipated by FHWA, and perhaps better addressed if the expertise of the ACPH had been employed earlier and at more crucial stages.

Furthermore, as referenced in this Court's Memorandum Opinion, (ECF doc. 30) NHPA (using the Section 106 process) requires that prior to approval of the expenditure of any Federal funds on the undertaking the agency shall take into account the effect of the undertaking on any historic property. 54 U.S.C. § 306108. The rules implementing the Section 106 process that agencies must follow to address adverse effects on historic properties are not ambiguous. Compliance with the process is required to satisfy the agency's Section 106 obligations. It follows that compliance cannot be left to inconsistent application of the PA by the agency. 36 C.F.R. §800,14(b)(2)(iii).

The FHWA had like all other agencies the obligation to follow the NHPA regulations

[8] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

and the Section 106 process. If difficulties arose in the compliance of the PA, the FHWA had access to the expertise of the ACPH and was required to receive their comments if the PA was terminated. 36 C.F.R § 800.7. Unfortunately, despite the effort of the ACPH to guide FHWA, their recommendations were not taken into account or applied to mitigation of adverse impacts of the undertaking. *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752,755 (D.C.Cir 2003). The consequence for this failure should be a rigorous review of the decision to terminate, and not leniently defer to the Agency decision making. Here the decision to ignore the well-reasoned comments of the ACPH, underscores the arbitrary and poorly reasoned decision by the FHWA to terminate the PA instead of using its funding authority to force the State's compliance.

D. Plaintiffs relied on the Section 106 process and assisted the agency with the goal to acquire and transfer properties of historic significance to the Tribe. The FHWA's failure to transfer the properties, without a reasoned decision, undermines the trust in the Section 106 process and national policy of significant public interest.

The statutory scheme of the NHPA requires a mutual goal by all agencies to strive for Preservation of historic properties. This is a process that takes time, and various levels of archaeological expertise. When historic properties are identified that require the Section 106 process, it is logical that the stakeholders in this case the Tribe, NITHPO, the FWHA, RIDOT and RISHPO, all must make best efforts to follow the goal to preserve historic sites and mitigate adverse effects. Following this significant public interest goal, it is important the process have credibility and not take advantage of a stakeholder's trust. The decision by the FHWA to terminate the PA violated the Plaintiffs trust. The AR establishes that the Plaintiff objected immediately to the State's requirement for changes to the PA that would require they waive sovereign immunity and acknowledge instead the state's sovereignty/jurisdiction. AR00042 (2013 email of John Brown Tribe's Historic Preservation Officer to RIDOT) AR00045-47(2013 email of John Brown to FWHA) AR000178(John Brown to ACHP). The

AR reflects that changes to the PA proposed by the RI Defendants came after the agreement was executed and only when it came time to transfer the properties. AR00060-96. The State sought ownership of the properties, even after the Tribe offered versions of the deed covenants that could address the State's concerns. AR000659-663, AR000658 (RIDOT rejecting Tribal offer to provide limited waiver of immunity in Covenants to properties.) This implies the State acted in bad faith in its negotiations on the PA and never intended to Transfer the properties to the Tribe. AR000841(John Brown complaining about fraud for taking monies allocated to tribe and not transferring properties.) AR000882-883(Tribe's attorney referring to documents showing Governor's office objecting for political reasons to PA, attachments not in the AR submitted by Defendant.)

The FHWA relied on the PA and began funding the Viaduct project. AR000278-303(Report by RIDOT on Viaduct Project, with timelines, and noting PA of 2011 and construction of South bound lanes between 2009-2016). The Plaintiffs relied on the process, by allocated funding from grants and other government awards to go towards the acquisition of the properties. A tribal member who owned one of the properties, agreed to sell the property to the State on the promise the property would be transferred back to the tribe as part of the mitigation process. These facts are in the AR and cannot be denied by the Defendants.

While impasses in negotiations are sometimes blamed on both parties for not finding a compromise, that is not appropriate here. Federally Recognized Indian Tribes have inherent sovereign rights. Sovereign Immunity is one of those rights. It should not be negotiated away without cause. The PA provides that the PA may only be terminated for cause. AR001220. The FHWA never revealed a cause that will overcome a finding that the waiver of sovereign rights was necessary or appropriate. The only cause underlying the decision to terminate was the insistence by the State to insert a political motivated restriction into the PA and limit the

Tribe's Sovereign rights and Treaty rights. That is not cause as contemplated by the PA, rather that is capitulation by the FHWA to the political influence of the State that sought to undermine the Federal Recognition Status of the Plaintiffs. It is discriminatory on its face. And under the standards of APA review, that basis for terminating the PA is the type of poorly reasoned decision making that provides no rational connection between the facts and the choice made. *State Farm*, at 30. And more important interferes with a significant public interest to protect historic properties. AR000765-767(ACPH raising issue of how would covenants be enforced against State if they have sovereign immunity).

Therefore, combining the factors of the reliance by both the FHWA (funding the undertaking) and the Plaintiffs (providing funds for acquisition, and commitments to sell properties to the State) to the mitigation measures negotiated and agreed to, Plaintiffs seek a finding by the Court that FHWA decision to terminate the PA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Law." 5 U.S.C. § 706(2)(A).

II. In Conclusion - The Administrative Record supports the finding on Summary Judgment that the FHWA violated Section 106 process by failing to address the adverse effects of the Viaduct Project to historic properties and should be declared in violation NHPA and APA.

Review of the AR supports that the Plaintiffs are entitled to Summary Judgment for an arbitrary and capricious agency decision making, and the plaintiffs ask this Court to declare the Viaduct Project in violation of the NHPA, APA, and grant a waiver sovereign immunity. Plaintiffs specifically request that the FHWA decision to terminate the PA be set aside, and the agency ordered to comply with the mitigation measures transferring the historic properties to the Plaintiffs per the executed agreement. In addition to ensure compliance the FHWA

should be enjoined from transferring or facilitating the transfer of the Mitigation Properties Contrary to the PA. *See*, 5 U.S.C. §§ 703, 706(2)(A).

Plaintiffs further seek an award of compensatory damages of 30 million dollars for the destruction to the properties within the Providence Covelands Archaeological District (RI-935), resulting from the agencies violation of NHPA by failing to mitigate the adverse effects on these significant historic properties in compliance with the NHPA Section 106 process. Plaintiffs Complaint 9-10 (filed Mar.29, 2019).

And lastly, the Plaintiffs seek an award of attorney's fees, costs and expenses pursuant to the Equal Access to Justice Act and the NHPA, and such further relief as the Court may deem just and proper. *Id.*

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Respectfully submitted,

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