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)

STEPHANIE POLLACK, Acting 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' RESPONSE TO DEFENDANT FEDERAL HIGHWAYS ADMINISTRATION OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT
AND

PLANTIFF'S REQUEST TO CORRECT/COMPLETE OR SUPPLEMENT RECORD

INTRODUCTION

The Defendant, the Federal Highway Administration ("FHWA"), incorrectly argues, that this court has no subject matter jurisdiction over the Plaintiffs Administrative Procedure Claims and fails to state a claim. This is the argument the Defendant FHWA made in its Motion to Dismiss filed in this case in U.S. District Court of Rhode Island (ECF Doc. No. 12) that was removed to this Court on July 7, 2020 (EFC Doc. No. 23).

In its Memorandum Opinion of July 22, 2020 (ECF Doc. No. 30) this Court denied the Defendant's FHWA Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) noting the Defendant's withdrawal of its argument of no final agency action (ECF Doc. No. 27) and found that Plaintiffs had alleged sufficient facts to survive a Motion to Dismiss. The Memorandum Opinion found Plaintiffs (stakeholders in the programmatic agreement) are entitled to a review of the administrative record ("AR") to determine if the agency's action terminating the PA was arbitrary and capricious. The Court's subject matter jurisdiction, to adjudicate final agency action under federal laws and Plaintiff's standing as stakeholders and signatories of the PA are no longer issues upon the finding of final agency action impacting the stakeholder's historic tribal properties.[1]

The FHWA and the Rhode Island State's attorneys in collaboration with the State's Department of Transportation, prepared the mitigation agreement (and choose the

[1] APA itself does not provide subject matter jurisdiction, however, 28 U.S.C. 1331 bestows upon federal district courts original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States, 28 U.S.C. § 1362 (Jurisdiction Over Indian Tribes), and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment and Injunctive Relief). Plaintiff's have standing as the historic tribe that suffered harm to its historic tribal properties. 5 U.S.C. § 702. The agencies failure to follow the section 106 process and mitigate harm to Tribal historic properties thus protecting the Tribal stakeholders historic properties, is within the protected zone of interest the NHPA and regulations anticipated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,560 (1992); *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

mitigation properties), also referred to as the Programmatic Agreement, ("PA") required under the National Historic Preservation Act ("NHPA") for projects impacting historic properties. See, Exhibit A (Letter not in AR from RIDOT to FHWA dated Oct. 3, 2011 and other emails and correspondence not included in AR) (AR001216-1239) This process is referred to as the "section 106" process. 54 U.S.C. ¶ 306108. To comply with these regulations, the State of RI in collaboration with the Federal Defendants choose the properties and purchased them for the purpose of mitigation. The Tribe relied on these promises, and contributed to the funding, and one property that had long been held in fee by a tribal member sold the property to the state on the "promise" it would come back to the Tribe. (EFC Doc. No. 53 at pages 23-25) The FHWA admits it made promises to the Tribe that the land was purchased for the purpose of mitigation and on that promise they finalized and executed the agreement (PA) and proceeded to act on the agreement by beginning construction of the Viaduct Project that impacted historic properties. (EFC Doc. No. 64 pages 3-4) Then without consent of the Plaintiff, a stakeholder and signatory to the PA, FHWA terminated the PA without cause stating no reason related to the mitigation of the harm to historic properties. (AR000486-487) The FHWA admits they changed their position to transfer the historic properties identified in the PA because the State of RI failed to comply with the executed PA. (ECF Doc. No. 64 at page 6). The FHWA terminated the PA over the strenuous objection of the Tribe a stakeholder and signatory rather than use their authority over funding to gain the State of RI's compliance with the PA as recommended by the administrating agency ACPH. (AR000175-176) This was an act of bad faith that violated federal laws to protect historic properties, and took a racially discriminatory stance by removing the Tribe as a historic stakeholder and signatory to the

PA, to allow the adoption of a New PA without the Federal Tribe's participation, consent or signature. The New PA, fail to apply any reasonable measure to mitigate the damage to historic tribal party, fail to apply the recommendations of ACHP the administering agency, (AR000968-983) and thus fail to comply with the Section 106 process.[2] In short the termination of the PA continued the Defendants noncompliance with the section 106 process and failed to follow ACHP guidance and regulations on consultation with Federal Indian Tribes as stakeholders. 36 CFR ¶ 800.14(b)(2).

The Federal Defendants by their own admissions have failed to implement mitigations measures since 2013. And, as of this date the Federal Defendants have continued the harm by failing to comply with the terms of the new PA to create a management plan of the properties that would allow the tribe access, and preserve and protect the properties and the structures on the property that have continued to deteriorate. (AR001025-1028 draft management plan with comments.) No executed management plan has been submitted as part of the Administrative Record. (AR000968-983) (Appendix C of the executed New PA, page two that says the signatories "will complete a management plan for this property. The Management Plan will include (but not be limited to) provisions for tribal access and use and RIDOT's responsibilities for maintaining the properties

[2] The Plaintiff, was offered an insulting mitigation measure, of allowing the State to prepare a video of the Tribe's history and provide the Tribe training in the 106 process. As the FHWA Defendant well knows, the Tribe has a Tribal Historic Preservation Office, and has worked for many years on projects with the agency and the section 106 process. Defendant admits the PA was terminated because the State of RI was in noncompliance with its terms by failing to transfer properties. See Defendant's answer at ¶39 of amended complaint. Defendant offered no other rationale for applying the new token mitigations measures over the Tribal stakeholder's strong objection, as appropriate to address harms to historic tribal properties. Under the new PA a management plan was required that would allow the tribe unimpeded access to the mitigation properties. To date no management plan has been executed and the tribe has not been given access to the properties.

inclusive of the structures on them. The management plan will spell out the specific details on preservation, use, alterations, and any other related actions for all three properties.")

The new PA executed without the consent or signature of the Tribal stakeholder, to this day has not been implemented while the FHWA continues to fund the Viaduct Project. Thus, Plaintiff's seek relief from this Court denying Defendants Motion to Dismiss and Cross Motions for Summary judgment, applying the waiver of sovereign immunity and finding that the Federal Defendant arbitrary terminated the PA and is in violation of the federal statute and regulations to mitigate harm to historic tribal properties.

The FHWA in their memorandum of points and authorities opposing Plaintiff's summary judgment argues inconsistently, that Plaintiff's do not have standing because injury traces to the State of RI that failed to transfer the properties violating the section 106 process. This position is in opposition to the Defendants answer to the Amended Complaint that claimed the section 106 process had been fulfilled by the FHWA with the execution of the new PA by the signatories, RIDOT, FHWA, RISHPO and ACHP. See Answer to First Amended Complaint ¶ ¶ 39, 44 and 49 (EFC Doc. No. 45). Thus, admitting there was no harm to the Plaintiff's by either FHWA or the State of RI because the Section 106 process was completed by the new PA. FHWA does not admit in its answers the State of RI by refusing to transfer properties required by the original PA harmed the Plaintiff or violated the section 106 process.

Plaintiff's amended complaint was to expose the failure of FHWA to compel compliance with the PA and to prevent the FHWA from using the State as an excuse not to comply with the PA and section 106 process. As ACPH recommended in its comments on the new PA, the Agency "should use all its tool to ensure compliance, which includes

withholding funding on State projects". (AR0000969). The FHWA had the authority to require compliance by the State with the Section 106 process. Termination of the original PA by FHWA, cannot be blamed on the State, as a convenient excuse for the Federal Agency's failure to mitigate harm to historic properties of a stakeholder tribe. The amended complaint was to expose the collaboration between the FHWA and the state to arbitrarily terminate the original PA because the state would not transfer the properties, allowing FHWA to eliminate the Tribal Stakeholder as a signatory and implement a new PA that denies Tribal access to historic properties and fails to sufficiently protect historic tribal properties. [3]

The Federal Defendants, under these facts and circumstances have therefore waived their immunity by their actions in violation of federal law. Therefore, the appropriate path to ensure remedy, is for the Court to assert its jurisdiction and review Plaintiffs claims.[4]

THE ACHP'S RECOMMENDATIONS SHOULD BE GIVEN SUBSTANTIAL JUDICIAL DEFERENCE

Unfortunately, despite the effort of the ACPH to guide the FHWA, their recommendations were not applied to mitigation of adverse impacts of the undertaking.

[3] For example, if the State of RI were held in as a party, documents among others could be part of the record to demonstrate the state has not required the waiver of the Plaintiff's sovereignty immunity in the transfer of the Great Swamp historic tribal properties by a non profit to the tribe. Exhibit B. The Great Swamp property was in the original PA executed in 2011. (AR001216-1239) And the tribe owns lands in fee simple within the State that are not burdened by waivers of the Tribe's sovereign immunity. Furthermore, the FHWA decision to terminate the PA and not transfer historic properties here to mitigate the harm to the Providence Covelands property, was political in that it caved to the state's demand, but it does not violate the non-justiciable political question rule. It does not require the Court to make an initial policy determination of a kind not suitable for judicial discretion. It requires the Court instead to decide if the record supports a rationale to justify, the FHWA's failure to follow the recommendations of the ACHP, and is in compliance with the Section 106 process that allows funding of the viaduct project. *Baker v. Carr*, 369 U.S. 186 (1962).

[4] These claims under the APA are timely, and didn't begin to run until final agency action occurred with a June 28, 2018 notice by the Acting Administrator of FHWA.

(AR000259-60, June 28, 2018, Letter from Defendants Acting Administrator to Signatories of PA, stating it consider ACHP's comments and will terminate and draft new PA without transfer of properties) The consequence for this failure requires a thorough review of the decision to terminate under the Administrative Record, and requires substantial judicial deference to the ACPH's expertise and recommendations. 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 or other remedies to ensure the State of RI's compliance. *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752,757-758 (D.C.Cir 2003), *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982), *McMillian Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992), *Ctia-Wireless Ass'n v. F.C.C.,* 466 F.3d 105, 115 (D.C. Cir. 2006), citing *McMillian*, Id. at 1288 ("the Advisory Council regulations command substantial judicial deference.")

The ACHP in its May 3, 2017 comments on the FHWA termination of the PA concluded "that the requirement by RIDOT [Rhode Island Department of Transportation] that the Tribe waive its sovereign immunity in order to receive these properties was not a requirement of the PA." (AR000174). Based on this finding, the ACHP recommended because "the state also does not provide any evidence to support its apparent belief that the tribe, which attaches significance to them and has an inherent interest in the preservation, might choose not to preserve them [historic properties] absent the covenants. 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." (AR000176). The ACHP concluded, [t]he

ACHP urges FHWA to adopt the ACHP's recommendations on resolving the unfortunate impasse that led to the termination of that agreement and to take steps to ensure these properties receive the long-term protection they are due." (AR000177). The ACHP did not support the decision of the FHWA to terminate the PA as the Defendant implied in its Motion to Dismiss and Cross Motion for Summary Judgment memorandum (EFC doc. No 64 at pages 6-7). And, in the ACHP's comments reviewing the new Programmatic Agreement, (AR000968-969 dated, September 18, 2019) ACHP again noted, that FHWA instead of formally responding to their recommendations notified the signatories that it was reinitiating the Section 106 process and develop a new PA. The ACHP had concerns about the FHWA failure to ensure the state would sufficiently protect the properties, considering the significant lack of trust between the critical parties. And "RIDOT has provided no assurances that it would waive its sovereign immunity regarding such enforcement under the new PA." (AR0000969). The ACHP advised that the FHWA "[s]hould consider all the tools at its disposal to enforce the terms of the PA. We note, for example, that FHWA has the ability to withhold funds for future projects if States have not complied with previous environmental commitments. We believe that the properties in question and their importance to the NIT [Narragansett Indian Tribe] would warrant taking such a step should the provision of the PA not be carried out." Id.

Importantly, the ACHP noted it "is sympathetic to the concerns and frustrations of the NIT in the reversal of these commitments [transfer of properties] and urges FHWA to work with RIDOT and NIT to ensure that the NIT is given maximum opportunity to participate in the long term protection of these historic properties. ….We are particularly interested in the upcoming discussions regarding the development of the management

plan for each of these properties, which will ensure their long-term preservation and tribal access." Id.

In the administrative record is a draft management plan (dated 9/19/2019), that has not been executed. (AR10025-28 with comments, and AR1002-1007) The stipulations to the new PA state in paragraph IV. Preservation Covenants: that the NIT would have continued access to the properties and defined continued access as: "The phrase 'continued access' shall be taken to mean legally unimpeded entry into the three properties on the part of one or more members of the Narragansett tribe." (AR000972-73). It further stated "Within one (1) year of the execution of this PA, FHWA, in consultation with the signatories and the NITHPO will complete a management plan for all three properties.[5] The Management plan will include (but not limited to) provision for tribal access and use and RIDOT's responsibilities for maintaining the properties inclusive of the structures on them." (AR000973). The comments to the draft management plan by the Rhode Island State Historic Preservation Office noted, the management plan requires NIT "to not only get a permit to use the property, but to do so 30 days ahead of the proposed cultural use, is contrary to the purpose, intent and definition of providing the tribe with "LEGALLY UNIMPEDED ENTRY" (my emphasis) into the three properties on the part of one or [more] members of the Narragansett tribe" as phrased is used in both this section and the PMOA."(AR001025-1028 comments). (The new PA was executed on 9/19/2019). (AR000968-975). This is

[5] Letter to Patrick McBurney from FHWA dated 4/27/2020, that noted ACHP has paused consultation on section 106 process, and that this was not an attempt by FHWA administration to re-engage in settlement negotiations but gave no date on when a management plan would be executed. Once ACHP signed the new PA then it was complete. There is little excuse for FHWA's continued noncompliance. As they noted in their letter to Mr. McBurney, even during Covid-19 the FHWA continues in an uninterrupted fashion. (AR001059-60)

evidence, the FHWA's decision to allow the property to stay under the control and ownership of the State of RI fails to mitigate damage to the Coveland properties with significant tribal history. The ACHP recommendations and comments on the original PA and the new PA highlight this failure. Plaintiff's speculate that the issue of tribal access and use of property, ha created a similar impasse on the management plan, between the FHWA and the State of Rhode. The State does not want to provide unimpeded access to the properties or work with the Tribe on protecting the culture significance of the properties. The concerns expressed by the ACHP in its review of the new PA, apparently have materialized. The State does not share the concerns of the Tribal stakeholders and are not willing to work with the Tribal stakeholders and continues to deny access to the mitigation properties.

For more than two years after executing the new PA, the FHWA has not executed a management plan. No executed plan is in the administrative record, and the Plaintiff has had no access to the mitigation properties that were part of both the new or original PA. The FHWA thus, continues to be in noncompliance with the section 106 process to mitigate the harms to tribal historic properties. Furthermore, the FHWA again, did not take the recommendations of the ACHP to ensure protection of the properties subject to the PA or create a management plan required under the new PA to protect the mitigation properties. The failure of the FHWA to follow the recommendations of the ACHP in the section 106 process, deserves thorough review. The ACHP is the administering agency of the NHPA regulations with expertise on compliance with the section 106 processes. 36 CFR Part 800. Thus, there is no executed management plan and the new PA fails to

mitigate the harm to Tribal historic properties and the FHWA remains in noncompliance with the section 106 process.

To ensure the purpose of the NHPA to protect and preserve historic properties this judicial Circuit has found the ACHP's recommendations should command substantial judicial deference. *McMillan,* Id. at 1288, *Ctia-Wireless Ass'n,* Id. at 115. As alleged in the complaint, and the facts in the administrative record, if under the original PA, the Tribe failed to protect the historic nature of the mitigation properties, the properties would have reverted to the Federal Government for protection and compliance with covenants ensuring historic preservation. The State objected to this provision and insisted the properties remain under state ownership and control. (see email train between FHWA Counsel Erikson to Claire Richards, where FHWA Council objects to the state retaining ownership as a mitigation measure. This document was attached as Exh. G, to Plaintiffs Memo in support of Summary Judgment ECF Doc. No. 55 at page 10) On September 27, 2016, the Chief Counsel of the FHWA in an email exchange with the Executive Counsel of the State of RI Office of the Governor, Claire Richards, wrote, that "[t]ermination of the PA would create significant risks for both the State and the FHWA and would do nothing to move the project in question forward in a timely fashion.". And in conclusion he wrote "[w]hile the State maintains that the only means to achieve this is through a waiver of sovereign immunity, we do not believe that is the case….I also further point out that the Tribe is a signatory to the PA, and the PA itself contains mechanisms to ensure compliance by all signatories, including the Tribe. FHWA is committed to making this mitigation work." He confirms the FHWA stands by the steps spelled out in its letter of September 1, 2016 to require compliance with the PA or the

agency will not continue to fund the project. The FHWA in that correspondence told the state "[t]he transfer of property may contain appropriate covenants to limit use of property…. but it may not require the Tribe to waive its sovereign immunity. (AR000139-140). And, this position was reiterated in a letter dated January 19, 2017 to the ACHP and copied to the PA signatories including RIDOT that stated FHWA was "terminating consultation" of the Viaduct Project "[t]he FHWA has placed the northbound section of the project on hold pending completion of the Section 106 mitigation requirement in the PA to transfer the properties acquired by RIDOT to the Tribe. As FHWA has previously explained to RIDOT, while the land transfer can include covenants that limit use of the property to ensure any potential archaeological features are maintained in perpetuity, it cannot include a requirement for the Tribe to waive its sovereign immunity rights."(AR000520-521). So at this time, the FHWA was still objecting to covenants requiring the waiver of the Tribe's sovereign immunity.

The FHWA Defendants without providing a rationale related to mitigation of the historic tribal properties, by June 28, 2018, after the ACPH comments were reviewed, reversed this decision to require the State's compliance with the PA and the transfer of properties, and reinitiated the Section 106 process without the Tribe as a signatory stakeholder. (AR000262-263) (See letter sent to ACHP by FHWA on February 15, 2017 providing supporting documentation for decision to terminate. None of these documents gave a rationale for termination other than the state's refusal to transfer properties. (AR000159-161) The FHWA was well aware, they were required to seek comments from the ACHP, take into account the Council's comment, prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the

Council's comments and provide it to the Council. (see email from David Clark of FHWA preservation officer dated 10/3/2016 informing the Agency of the ACHP process. (AR000146-147). The letter the FHWA sent to the ACHP and signatories as required, contained no rationale for terminating the PA and later gave no rationale why the new PA, adequately mitigated the harm to the Coveland property with significant Tribal history. (AR000159-161).

The FHWA by failing to require compliance with the PA, and at the same time allowing continued funding of the Viaduct project, did not heed the recommendations of the ACHP, and made a contrary and arbitrary decision. There is no evidence in the Administrative record that provides a rationale for the termination of the PA. The FHWA decision was a complete reversal that ignored the ACHP recommendations, and was completely inconsistent with its prior positions. The ACHP guidance emphasizes the importance of working with Tribal Stakeholders. The FHWA reversal of it previous position, failed to honor the role of Tribal stakeholders, and inconsistently terminated the PA and removed the tribe as a signatory.

In short the state of RI got its way. On June 11, 2019, RIDOT wrote to Carlos Machado of the FHWA saying "[t}he time has come for us to take action that will protect the health and safety of our citizens [state citizens]." RIDOT announced it would retain exclusive ownership of all three properties. These are the exact terms adopted by FHWA in the new PA, without the Tribal stakeholder's agreement or signature. (AR000970-983 dated 9/19/2019). Those terms show the Defendants did not consider the ACHP recommendations. Those terms, do not ensure the protection of the tribal historic properties, nor ensure the Tribe's ability to use these properties for cultural purposes.

The properties remain in the ownership of the State, without Tribal or Federal involvement. Allowing state ownership and control, of the mitigation properties, was the opposite intent of the original PA to transfer mitigation properties to the tribal stakeholder for culture use and preservation. Continued State ownership defeated this original intention of using tribal historic properties for mitigation of harm to the Coveland properties with tribal historic significance.

The Defendant has confused the cases applying the leniency standard to agency decisions. Agencies interpreting their own governing statutes are generally given deference applying the Chevron deference analysis. (*Chevron U.S.A Inc. v NRDC*, 467 U.S. 837, 844 (1984)) And Agencies informally interrupting their own regulations are allow deference applying an *Auer* deference standard. (*Auer v Robbins*, 519 U.S. 452,461 (1997) Here, Defendants use the Citizen's case, *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (3rd Cir.1999) to support deference to an agency decision over ACHP recommendation. Defendants argue, the Agency's decision, deserves a lenient deference standard "as if" the agency had ACPH's expertise on mitigation of harm to historic properties or was interrupting its own regulations. The Citizen's case, reviewed the Department of Transportation's decision to use an alternative highway route through an historic district. The case hinged on the thoroughness of the Agency's Environment Impact Statement process that calculated the impact of the alternative route applying in large part the National Environmental Policy Act (NEPA), where the recommendations of ACHP were not as central. The comments of the ACHP in *Citizens*, suggested another alternate route than the one chosen by the Agency. The Agency was able to demonstrate, through numerous consulting contacts, an analysis and study that made the

choice of the route, well documented and explained. They provided a documented rationale for their decision.

In this case, the ACHP recommendations, carry greater weight, because under the NHPA regulations the FHWA was to complete the section 106 process mitigating harm to the undertaking before the Agency could expending funding. 54 U.S.C. ¶ 306108, 36 C.F.R. ¶ 800.2(b). The ACHP as the administrator of the regulations in question, has more expertise than the agency on how to apply the section 106 process to Tribal historic properties and the development of programmatic agreements to mitigate harms to those properties. The ACHP comments were consistent with the Agency's original PA and commitment to transfer the mitigation properties, to the Tribal Stakeholder. This recommendation did not change, and should be given substantial judicial deference.

The FHWA may have reviewed the ACHP comments, but they did not demonstrate they weigh them in a decision, to reverse their position, and remove the tribe as a stakeholder, and leave mitigation properties in the ownership of the State. Instead the opposite is true. The FHWA ignored the comments, and without stating a rationale, left preservation of significant historic tribal properties with the State. A State that challenges the Tribe's sovereignty and unlikely to take the Tribe's culture sensitivities in account. The FHWA did not provide a rationale from removing the Tribal Stakeholder as even a joint owner of the mitigation properties. The only rationale is the FHWA decided not to "use tools" it has available to enforce the State's compliance and instead capitulated to pressure from the State. The FHWA decision disregarded the cultural importance of the properties to the Tribe, thus completely disregarding the recommendations of the ACHP. This was an arbitrary and inconsistent decision.

In the *McMillian Park Com. V. National Capital Plan. Com'n*, 968 F.2d 1298 (D.C. Cir. 1992) the Circuit Court upheld the ACHP interpretation of regulations that allowed a Comprehensive Plan to be reviewed by the Planning commission without reinitiating the Section 106 process. The Court distinguished a *Chevron* deference standard applied to "an executive department's construction of a statutory scheme it is entrusted to administer… we nevertheless believe the Advisory Council regulations command substantial judicial deference." Id. at 1288. And went on to explain, that regulations issued by the Council on Environmental Quality interpreting the National Environmental Policy Act ("NEPA") were entitled to substantial deference" citing to *Andrus v. Sierra Club*, 442 U.S. 347, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979). Id. See, *CTIA-Wireless Ass'n v. FCC*, 466 F3rd 105, 115-116 (D.C. Cir. 2006) "Given the Supreme Court's reasoning in *Andrus*, we see no basis for extending the Advisory Council's NHPA regulations any less deference than is traditionally afforded the NEPA regulations of the Council of Environmental Quality….Thus, we concluded in *McMillian Park*, 'the Advisory Council regulations command substantial judicial deference.'" Id.

In contrast to the facts here, the Court in *Citizens*, Id. (the case relied on by the Defendant, EFC Doc. No. 64 at page 20), found that the FHWA took the ACHP comments into consideration, and the comments were taken very seriously. As a result the ACHP was heavily involved in the project, and evidence supported that the Defendant's choice of alternative route would minimize harm to the historic district. "The defendant's performed a large number of studies on the various ways in which the alternative would impact the Historic District and adequately weighed the results of the studies in selecting the preferred alternative." Id. at 702. While, the agency was found not

arbitrary for choosing an alternative route, distinct from the recommendation of the ACHP, the opinion noted Id. at 696 fn 6, that a "court has suggested that judgments of historical significance made by [ACHP], the expert regulatory body concerned with preserving, restoring, and maintaining the historic and cultural environment of the Nation, … deserve "great weight". *Preservation Coalition, In. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982).

Here, the ACHP reviewing the Defendant's decision to terminate the PA consistently objected to naming the state as the appropriate preservation office to protect the cultural significance of historic tribal properties. The ACHP reiterated this concern in its review of the new PA. (AR000968-969). There is evidence in the AR that the FHWA ignored the recommendation of the ACHP and capitulated to the State of RI's attitudes about Tribal sovereignty. And no evidence that supports FHWA, had a justified rationale for excluding the tribal stakeholder, and agreeing to leave the mitigation properties under the control and ownership of the state, with no means to ensure the Tribe's access or involvement in the preservation of these properties. This decision terminating the PA and thus reversing a long standing position to transfer the properties to the Tribe, was unjustified or explained. The decision to terminate the PA requires a waiver of sovereign immunity under the APA and a thorough review of the administrative record applying the appropriate judicial deference to the ACHP recommendations that were ignored by the FHWA.

REQUEST FOR ADDITIONAL DOCUMENTATION BE ADDED TO THE ADMINISTRATED RECORD FOR USE IN APPENDIX

Plaintiffs, discovered that the Defendants had withheld documents, unfavorable to their defense in this case, and relevant to the reversal of the agency's decision to transfer historic properties to the Plaintiff as tribal stakeholders to mitigate harm to the Coveland properties. (ECF Doc. No.s, 53, 55, 59). A few of these documents were found in Plaintiff's own records, and other were discovered through a document request to the State of Rhode Island. The records discovered fall into the categories; 1) evidence of the negotiations between the State and FHWA that supported the intent of both parties to the transfer to the Tribe specific mitigation properties; 2) evidence of dates and correspondence confirming the State failure to comply with the fully executed PA; and, 3) evidence that the Defendant changed its position, capitulated to the States demands by termination of the executed PA and re- initiated the Section 106 process, and further supported the state position by excluding the Plaintiff as signatories. All categories relate to the Defendants arbitrary and inconsistent decision terminating the PA and creating a new programmatic agreement that without a rationale allowed State ownership of the tribal historic properties to mitigate the harm to the Coveland properties.

Request to supplement or correct the administrative record was made to the Defendants repeatedly after Plaintiff's discovered additional documentation was withheld. Plaintiff's requests and formal motions resulted in only three documents being added to the record. Despite the fact the documents were unfavorable, Defendants claim they were inadvertently withheld. A key document, an email to Claire Richards by the Chief Counsel to the FHWA states it would pose a risk to both if the properties were not

transfer. Plaintiffs requested the document be included in the record prior to filing their Motion for Summary Judgment.(EFC Doc. No. 53) It is hard to believe the withholding of that document was inadvertent.

The Defendants have also refused to provide explanations for redacting documents in the record. Without restating the arguments made in the Motion to Compel, Plaintiffs, on review of the AR found limited documentation during relevant periods of time the Agency was either strongly supporting compliance with the PA or reversing its position and refusing to transfer the mitigation properties to the Tribe as recommended by the ACHP. As noted in the above section, the Defendant in late 2016 on the one hand was notifying the State of RI it intended to withhold funding on the North Bound Highway part of the Viaduct undertaking, if the State did not comply with the PA. Then on the other hand, after the Defendant refused over a three year period to transfer of the mitigation properties, Defendant went to the extreme of reinitiating the section 106 process, excluding the Tribal Stakeholder and allowing all three properties to remain in the ownership of the State. The AR reflects from 2012 to 2017 there were only 46 primary documents in the AR during that five year period. Then from 2018 to 2019 there are barely 23 documents relating to the initiated section 106 process on the new PA. On its face, the AR is bare on documentation between the State of RI and FHWA and the ultimate agreement to keep the ownership of the mitigation properties with the State. (ECF Doc. No.s 55 and 59).

The Defendants in their Motion to Dismiss want it both ways. They argue that it was the State of RI that failed to comply by refusing to transfer properties, and then insist the FHWA followed all procedures while at the same time they admit they agreed with

the State's position refusing to transfer the mitigation properties to the State's only federal tribe with significant history connected to Coveland property harmed by the Viaduct undertaking. (EFC doc no. 64 pages 13-14.) The documents withheld by the FHWA expose this inconsistency. The FHWA, in their partial opposition to the Motion to Compel (EFC Doc. No.62) takes issue with the Plaintiffs timing on requesting completion or correction of the record, and claims Plaintiffs were not specific with their request as an excuse for not producing missing records. In the Motion to Compel, Plaintiff noted at the early part of the year it had made a Document request to the State of RI and did not receive documents from the state until July 13, 2021. An exhibit was attached to the Motion to Compel with the documents discovered and requested. (EFC doc no. 55 Exh. F at page 8). After the Plaintiff's thorough review of the AR and detailed written communications to the Defendant with the flaws and missing documents, the Defendant FHWA has exhibited a pattern of resistance and delay. At their risk, the FHWA change its position by not enforcing compliance with the PA and allowing the State to retain ownership of all three mitigation properties.

When the State of RI's Governor's office changed its position and refused to transfer the properties, the Defendants, did the same, and executed a new PA without the Tribal Stakeholder as signatory keeping all properties in state ownership. Documents that support the inconsistent positions of the Defendant should be included in the Administrative Record. Attached in an exhibit are documents discovered recently that were not part of the AR that were a FOIA request for documents made by Plaintiffs that demonstrate the early negotiations on the mitigation of the Viaduct project. Plaintiffs request these documents be part of the AR and appendix. See Exhibit C. One of these

documents was a response by the FHWA to FOIA dated August 13, 2018. Defendants have failed to offer any explanation for redacted documents, (what privilege is claimed or why material is sensitive) claiming the FOIA does not apply. Review of this FOIA request it is hard to see how most documents in the AR would fall under this request.

It goes without saying, it is to the Defendants advantage to withhold documents that should be included in the AR. Plaintiff has had the burden of discovering documents from the State of Rhode, and the disadvantage of filing motions and responses without a complete AR. The documents Plaintiff discovered demonstrate that the Defendant supported the Tribe as a stakeholder and signatory to the PA, and agreed with the ACHP recommendations that a waiver of the Tribe's sovereign immunity was not required to mitigate the harm to the Coveland properties or to protect and preserve the mitigation properties. The documents support that the Defendant colluded with the State of RI, ignoring the recommendations of the ACHP and adopted the State's position, even to the extent they removed the provision allowing the tribe shared ownership with the State on the Salt Pond property (a known a Narragansett burial ground), leaving all three properties in the ownership and control of the State. And worse, the Defendant adopted the token mitigation measures of a video of Tribal history produced by the state, and Section 106 training. [cite new pa] The Defendant apparently felt no obligation to its rationale for its change in position that clearly was an inadequate effort to mitigate harm to historic tribal properties.

Attached is an index of the documents that the Plaintiff requests be part of the Administrative Record and to be included in the appendix. Also attached is a proposed order, allowing Plaintiff to add the documents to their appendix regardless of the

Defendants consent. Plaintiff will request a list of documents the Defendants wants added to the Appendix but base on their response to the Motion to Compel, it is unlikely they will consent to any of the additional documents. Plaintiff have argued that withholding documents unfavorable to the Defendants position, and delaying the production of a complete AR should be sanctioned. It is important to maintain trust and fairness in the judicial system.[6]

The facts in the record show the Narragansett Indian Tribe, in good faith trusted and relied on the FHWA to fulfill its promises. As shown for example, the Tribe relied that property owned by a tribal member (Chief Night Hawk property) was sold to the state on the promise it would be transferred to the tribe for preservation as part of the PA. The Tribe also contributed to the cost of the purchase of the mitigation properties through tribal program and grant funding. (EFC Doc. No. 53). Plaintiff's reliance on these promises that resulted in an executed PA has exposed, terminating the PA, and reversing its position that the Tribe was the appropriate stakeholder and custodian to preserve and protect tribal historic properties, was an arbitrary and capricious decision showing bad faith by the Defendants.

CONCLUSION

Plaintiff seeks injunctive and declaratory relief, as pled in the complaint. They also seek special damages that flow from the Defendants noncompliance with section 106 process that continues to cause harm to the Coveland properties. They also seek special damages from the harm to historic structures on the mitigation properties that have

[6] Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, 48 U.S. Att'y's Bull. 1, 8 (2000).

deteriorated (from 2013 to date), by failing to transfer the properties to the Plaintiff for preservation.

An Order is attach requesting the Court deny Defendant's Motion to Dismiss and Cross Motion for Summary Judgment. Plaintiff will submit a separate Order seeking correction or completion of the AR with the documents attached as exhibits to this response and prior Motions submitted to the Court. Plaintiffs ask the Court to request of Defendant all documents relating to their decision to support the original PA and its termination, and all documents relating to their decision to develop a new PA and their change in position to transfer mitigating properties.

Dated: November 24, 2021

Respectfully submitted,

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FPROPOSED ORDER

Defendant's Motion to Dismiss and for Cross Summary Judgement Motion are DENIED, and it is hereby ORDERED, on the finding that the Defendants decision terminating the Programmatic Agreement, was an arbitrary and Capricious Agency action, GRANTS Plaintiff's Motion for Summary Judgment and award declaratory and injunction relief. Plaintiff's will be allowed to present further evidence special damages flowing for the harms to the Coveland and mitigation properties.

It is so Order,

Dated _____

By:_____

U.S District Court Judge

For the District of Columbia

PROPOSED ORDER

Plaintiff's Motion to Compel completion of the Administrative Record is GRANTED. It is so ORDERED that the Defendant complete the Administrative record, to include all documents pertaining to the formation and termination of the Programmatic Agreement that was executed to comply with the Section 106 process for the Viaduct project subject to this case, including documents discovered by the Plaintiff and attached to Plaintiff's Motion to Compel and Motion for Sanction.

It is so Order:

Dated:_____ By:_____

U. S. District Court Judge

For the District of Columbia