UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE,

*Plaintiff*,

v.

STEPHANIE POLLACK,
Acting Administrator, Federal Highway Administration *et al.*,

*Defendants*.

Civil Action No. 20-576 (RC)

**STEPHANIE POLLACK'S REPLY IN SUPPORT OF HER MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I**

Stephanie Pollack, Acting Administrator of the Federal Highway Administration (the "Administrator"), by and through undersigned counsel files this reply in support of her Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Cross-Motion for Summary Judgment on Count I. *See* Def.'s Mot. Dismiss & Cross-Mot. Summ. J. ("MTD/Cross-MSJ"), ECF No. 63.

**ARGUMENT**

The Administrator moved both to dismiss and for summary judgment on Count I of the Amended Complaint, which challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, the recission of a Programmatic Agreement between the agency, the Narragansett Indian Tribe, and two components of the government of Rhode Island, requiring Rhode Island to convey certain properties to the Tribe as part of a broader project to construct the Providence I-95 Viaduct. *See* Def.'s MTD/Cross-MSJ; Amend. Compl. ¶¶ 43-50, ECF No. 1. The Administrator demonstrated that the Tribe lacks standing to challenge the Programmatic Agreement's recission, which was lawful in any event. In its response, the Tribe asserted two theories of standing in a threadbare and conclusory fashion such that the Court should consider them waived, and which fail on the merits. The Tribe also argued that the Programmatic Agreement's recission violated the APA because the agency did not withhold funds to compel Rhode Island to transfer the Tribe the properties without requiring it to waive its tribal sovereign immunity. But the agency in fact did exactly that—it withheld funds on the project from Rhode Island for years to induce it to transfer the properties to the Tribe free and clear. Finally, the Tribe sought to supplement the Administrative Record with documents that are not relevant to any disputed issue in this case, and without any evidence that the agency deliberately or negligently withheld them, as the Tribe insinuates. This Court thus should grant the Administrator's motion to dismiss and cross-motion for summary judgment, and deny the Tribe's request to supplement the Administrative Record.

## I. This Court Should Dismiss Count I For Lack Of Jurisdiction

A federal court's subject-matter jurisdiction is limited to "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. A justiciable case or controversy exists only when a plaintiff has standing to bring its claims. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing requires (1) "an invasion of a legally protected interest," (2) "a causal connection between the injury and the conduct complained of," and (3) that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (quotation marks omitted). The case-or-controversy requirement also "prevents [federal courts from] passing on moot questions—ones where intervening events make it impossible to grant the prevailing party effective relief." *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996). As explained below, the Tribe's only asserted injuries are not cognizable or redressable, and Count I is moot.

### A. While the Court Has An Independent Obligation to Determine Jurisdiction, The Tribe Waived Arguments on Standing By Failing to Respond to Them

In moving to dismiss, the Administrator explained why the Tribe lacks standing to sue them, identifying flaws in each theory of standing alleged in the complaint. *See* Def.'s MTD/Cross-MSJ at 11-15, ECF No. 63. In responding to that motion, the Tribe addressed only two interrelated bases for one of the elements of standing, injury, claiming that the (1) "agenc[y's] failure to follow the section 106 process" and (2) programmatic agreement's recission would cause "harm to Tribal historic properties," injuring the Tribe as a "stakeholder[r]" in the properties. Pl.'s Resp. Opp'n Fed. Def.'s MTD/Cross-MSJ at 2 & n.1, ECF No. 66. By failing to address any of the Administrator's remaining arguments concerning standing, the Tribe has waived arguments concerning the absence of causation and redressability. *See Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016) ("Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction."); *Penkoski v. Bowser*, Civ. A. No.

20-1519 (TNM), 2021 WL 2913132, at *21 (D.D.C. July 12, 2021) (plaintiffs "forfeit this standing argument" by not mentioning it "anywhere in their briefs"); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012) ("GSS Group could have made all three of the arguments identified above in its opposition to the Port Authority's motion to dismiss, but elected not to do so. The arguments therefore are waived." (citation omitted)); *Greer v. Bd. of Trs. of Univ. of D.C.*, 113 F. Supp. 3d 297, 305 (D.D.C. 2015) ("In this Circuit, failure to adequately respond to arguments raised in a motion to dismiss may be deemed a concession of those arguments." (collecting cases)).

Moreover, the Tribe presented its two theories of standing in such a threadbare and cursory a fashion that the Court should deem them conceded. The entirety of the Tribe's standing argument is as follows: "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. . . . 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." Pl.'s Resp. Opp'n at 2 (citing *Lujan*, 504 U.S. at 560, and *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984)).[1] These conclusory assertions make no attempt whatsoever to explain how the Administrator's behavior harmed the Tribe as a stakeholder in the properties. Naked allegations of harm such as these do not suffice to establish standing or avoid waiver. *See Allen v. District of Columbia*, 969 F.3d 397, 405 (D.C. Cir. 2020) (plaintiffs waived argument by "fail[ing] to identify any such sources or otherwise to develop this theory beyond bald assertion"); *United States v. TDC Mgmt. Corp.*, 827 F.3d 1127,

[1] The Tribe also asserts that Rhode Island harmed it "by refusing to transfer properties," Pl.'s Resp. Opp'n at 5, but such an allegation does not establish standing as to the Acting Administrator. *See Cierco v. Mnuchin*, 857 F.3d 407, 416 (D.C. Cir. 2017) ("A plaintiff must demonstrate standing separately for each form of relief sought." (cleaned up)).

1130 (D.C. Cir. 2016) ("This argument is forfeit because WDG does not further develop it (or even mention it again) after this single, conclusory statement." (quotation marks omitted)); *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013) ("[I]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (alterations omitted)). As such, the Tribe has waived any theory of standing that it may have had. *See Scenic Am., Inc.*, 836 F.3d at 53 n.4. And because standing "is an essential and unchanging" predicate to any exercise of federal jurisdiction, *Lujan*, 504 U.S. at 560, this Court should dismiss Count I.

### B. An Alleged Failure To Follow The Section 106 Process Alone Causes No Cognizable Injury

In any event, even had the Tribe properly raised these two theories of standing, they would fail on the merits. The Court should quickly dispense with the first theory—that the Administrator allegedly disregarded the Section 106 process. A plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). Any alleged violation of the Section 106 process confers standing only if accompanied by some other, concrete harm. An alleged Section 106 violation alone, which is procedural in nature, does not create standing. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 970 (D.C. Cir. 2021) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009))).

### C. Judicial Relief Can No Longer Redress Harm To The Historical Properties Because The Tribe Has Allowed The New Programmatic Agreement For The Providence I-95 Viaduct Project To Be Nearly Fully Completed

The Tribe's injury-to-historical-properties theory fails as well. Assuming that harm to the properties constitutes an injury-in-fact attributable to the Administrator's actions or omissions, the

Tribe fails to show that a favorable ruling "likely" would redress its injury, as required to show standing, *Lujan*, 504 U.S. at 560, or that this Court can grant "effective relief," as required to avoid mootness, *Burlington N.*, 75 F.3d at 688. That is because construction of the I-95 Providence Viaduct has already begun, is underway, and is nearing completion. *See Providence I-95 Viaduct Northbound*, R.I. Dep't of Transp., https://www.dot.ri.gov/projects/I-95ViaductNorth/index.php (last visited Jan. 13, 2022) (project construction began in 2020); Melanie DaSilva, *Additional Lane Shifts Coming to I-95 for Providence Viaduct Construction*, WPRI (Nov. 18, 2021), https://www.wpri.com/traffic/pinpoint-traffic/additional-lane-shifts-on-i-95-for-providence-viaduct-construction/ (noting "continued construction" on "the Viaduct project"); *see also Jerome Stevens Pharms. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (courts "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.").

Given that the project is well underway and has been for years now, the Tribe cannot show a likelihood that the harms to the properties that they fear the project construction will cause has not already come to pass. Nor will additional processes in planning a mostly-completed massive infrastructure be either meaningfully effective or feasible because the historical lands have already been altered or not by the project. As such, the Tribe has failed to identify any prospective relief that this Court can give that would redress their alleged injury.[2] The construction that has occurred already cannot practically be undone, nor can any attendant harm to properties the construction has caused. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) ("[E]nvironmental challenges to the Corps filling wetlands to construct a sports complex were

[2] Because the Tribe cannot show that any harm to the properties caused by the construction has not already come to pass, its prayer for declaratory relief cannot confer standing either. *See Newdow v. Roberts*, 603 F.3d 1002, 1011 (D.C. Cir. 2010) ("The second redressability problem is that declaratory [relief] . . . would not prevent the claimed injury.").

moot once the construction was fully completed because it was undisputed that the wetlands could not be restored, and the wetlands were the only resource in which the plaintiffs claimed an interest," thus "eliminat[ing] the opportunity for any meaningful relief to Plaintiffs' alleged injuries." (cleaned up)); *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000) ("When a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is completed."); *Native Ecosystems Council v. Krueger*, 649 F. App'x 614, 615 (9th Cir. 2016) (case moot "[b]ecause we can order no effective relief to remedy Plaintiffs' alleged injuries" given that removal of trees plaintiff sought to prevent had already happened); *Weiss v. Sec'y of Interior*, 459 F. App'x 497, 500 (6th Cir. 2012) (case moot because "any effects on the Park's historic character have already occurred," as "construction . . . has been substantially completed" (quotation marks omitted)); *E. Band of Cherokee Indians v. Dep't of Interior*, Civ. A. No. 20-757 (JEB), 2020 WL 2079443, at *13 (D.D.C. Apr. 30, 2020) (injunction cannot stop irreparable harm because "the land has already been substantially disturbed by state construction activities"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 63 (D.D.C. 2018) (challenge to alleged Section 106 violation moot because "construction-related activities have now occurred, and, accordingly, the potential for the preservation of historic or cultural sites no longer exists"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 35 (D.D.C. 2016) (denying injunction because "[t]he risk that construction may damage or destroy cultural resources is now moot for [that part] of the pipeline that has already been completed. . . . the Tribe has not shown for this substantial segment of the pipeline that any additional harm is likely to occur to cultural sites.").

At most, the Tribe can assert only that transferring the properties to them at this point might prevent some additional harm to the properties that otherwise would occur. But that assertion is

"merely speculative"—the Tribe cannot show, as it must, that such redress is "likely." *Lujan*, 504 U.S. at 560-61. The Tribe thus lacks standing to bring Count I. And for essentially the same reason, Count I is moot. This Court should dismiss Count I for lack of jurisdiction.

## II. After Doing Exactly As the Tribe Urged, The Administrator's Decision to Modify the Programmatic Agreement Was Not Arbitrary, Capricious, Or An Abuse of Discretion

In the alternative, this Court should grant the Administrator summary judgment on Count I. The APA empowers federal courts to "hold unlawful and 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). "The scope of review under [this] standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quotation marks omitted). An agency's action fails this standard "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The essence of the Tribe's grievance against the Administrator is her recission of the Programmatic Agreement. But as the Administrator explained in cross-moving for summary judgment, she had no power to compel Rhode Island to convey the properties to the Tribe without demanding that it waive tribal sovereign immunity, and nothing prevented her from rescinding the Programmatic Agreement once the Tribe and Rhode Island's dispute—which she did not instigate

or encourage—reached an insurmountable impasse precluding the Agreement's implementation. *See* Def.'s MTD/Cross-MSJ at 16-28. In their response, the Tribe never disputed that if the Administrator could not compel Rhode Island to convey the properties, then the Programmatic Agreement's recission would have been lawful. It instead contends that the Administrator could have tried, and thus was legally required, to compel Rhode Island to convey the properties without demanding a waiver of tribal sovereign immunity by threatening to withhold federal funding until Rhode Island did so. *See* Pl.'s Resp. Opp'n at 3, 5-8.

Put aside the dubiousness of the Tribe's claim that that the Administrator was legally required to withhold federal funds from Rhode Island if it refused to convey the properties without demanding a waiver of tribal sovereign immunity. The more fundamental defect with the Tribe's argument is that the Administrator did withhold funds from Rhode Island on this project to induce it to transfer the properties without a waiver of tribal sovereign immunity. On September 1, 2016, the agency informed the Rhode Island Department of Transportation that it "will not proceed with any Federal approval action related to the northbound Providence Viaduct bridge, including but not limited to approval of bridge construction or approval of a toll gantry, unless [the Rhode Island Department of Transportation] first satisfies its [Section] 106 mitigation requirement to transfer the properties in question or the parties agree to an alternative mitigation plan." Administrative Record ("AR") 000139 (attached here as Attach. A). In a January 19, 2017 letter to the Advisory Council on Historic Preservation, the agency confirmed that it "has placed the northbound section of the project on hold pending completion of the Section 106 mitigation requirement in the [Programmatic Agreement] to transfer the properties acquired by [the Rhode Island Department of Transportation] to the Tribe." AR 000155 (attached here as Attach. B). Indeed, the Tribe itself concedes that the agency informed Rhode Island that it would "withhold funding on the North

Bound Highway part of the Viaduct undertaking, if the State did not comply with the [Programmatic Agreement]." Pl.'s Resp. Opp'n at 19.

Work on the northbound part of the project ultimately did not begin for another four years, until 2020. *See Providence I-95 Viaduct Northbound*, *supra*. Even after the Administrator withheld the project funds, Rhode Island still refused to convey the properties absent a waiver of tribal sovereign immunity.[3] But the Administrator did exactly what the Tribe says she should have done. The mind struggles to comprehend how that could have been arbitrary, capricious, and/or an abuse of discretion. That the strategy proved unfruitful is disappointing but not in violation of the APA.

The Tribe says that beyond just withholding funds on this project, the Administrator also should have threatened "to withhold funds for future projects" unless Rhode Island conveyed the properties to the Tribe without a waiver of tribal sovereign immunity. *See* Pl.'s Resp. Opp'n at 8. The Tribe identifies no legal authority for the Administrator to do this, nor does it say (1) whether the Administrator should have withheld funds for all federal projects in the state or only some; (2) if the latter, for which particular projects she should have withheld federal funds; (3) whether she should have withheld funds indefinitely until Rhode Island relented; and (4) if not, how long they should have attempted to force Rhode Island's hand before throwing in the towel. Regardless, given that the Administrator already withheld funds on this project to induce Rhode Island to convey the properties to the Tribe without a waiver of tribal sovereign immunity, she was not then required to consider withholding federal funds on some or all other projects in the state until Rhode Island finally conveyed the properties—which may well never have happened—a course of action

[3] Rhode Island's infamous cussedness predates the Constitution itself. *See* Akhil Reed Amar, America's Constitution: A Biography 32 (2005) (recounting how "the tiny, ill-governed, and obstreperous state of Rhode Island . . . had first thwarted needed reforms of the [Articles of] Confederation and then boycotted the Philadelphia Convention").

that is infeasible, unviable, and unreasonable on its face. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 97 (D.C. Cir. 2014) ("[A]n agency must consider only significant and viable and obvious alternatives." (quotation marks omitted)); *Nat'l Tel. Co-Op. Ass'n v. FCC*, 563 F.3d 536, 542 (D.C. Cir. 2009) ("Courts may not broadly require an agency to consider all policy alternatives in reaching a decision." (cleaned up)); *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (agency must consider "all feasible or reasonable alternatives" (quotation marks omitted)); *Allison v. Dep't of Transp.*, 908 F.2d 1024, 1031 (D.C. Cir. 1990) ("The FAA need not examine an infinite number of alternatives in infinite detail."); *Off. of Comm. of United Church v. FCC*, 779 F.2d 702, 714 (D.C. Cir. 1985) ("This court does not insist that the agency consider every conceivable option.").

As such, the Programmatic Agreement's recission was not arbitrary, capricious, or an abuse of discretion. This Court should grant the Administrator summary judgment on Count I.

## III. The Tribe Has Demonstrated No Circumstance Warranting Supplementation Of The Administrative Record

Finally, the Tribe requests to supplement the Administrative Record with certain documents that it alleges the Administrator withheld. Pl.'s Resp. Opp'n at 18. For the most part, the Tribe's filing does not identify the particular documents that it wishes to add to the Administrative Record, save for a few examples, instead referring the Court to a separate index of documents that it requests be added to the record. *See id.* at 21. The Tribe broadly characterizes these documents as falling into three categories: evidence (1) "of the negotiations between the State and [agency] that supported the intent of both parties to the transfer to the Tribe specific mitigation properties;" (2) "of dates and correspondence confirming the State failure to comply with the fully executed [Programmatic Agreement];" and (3) "that the Defendant changed its position, capitulated to the States demands by termination of the executed [Programmatic

Agreement] and re- initiated the Section 106 process, and further supported the state position by excluding the Plaintiff as signatories." *Id*. at 18. For the reasons explained below, this Court should deny the Tribe's motion.

Courts "do not allow parties to supplement the record unless they can demonstrate unusual circumstances justifying a departure from this general rule." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015) (quotation marks omitted). The D.C. Circuit has identified three such circumstances: "(1) the agency deliberately or negligently excluded documents that may have been adverse to its decision; (2) the district court needed to supplement the record with background information in order to determine whether the agency considered all of the relevant factors; or (3) the agency failed to explain administrative action so as to frustrate judicial review." *Id*. The Tribe fails to show any circumstance warranting supplementation of the Administrative Record here. It does not argue that the documents it seeks to add to the record provide background information necessary to consider whether the Administrator considered all relevant factors, or that she failed to explain her action to frustrate judicial review. The Tribe instead focuses on the first circumstance, alleging that the Administrator "withheld documents" that were "unfavorable to [its] defense in this case." Pl.'s Resp. Opp'n at 18.

As an initial matter, the requirement that a party "demonstrate" a circumstance warranting supplementation of the Administrative Record, *Dist. Hosp. Partners*, 786 F.3d at 55, connotes a need for evidence in support of the party's argument, not merely unsupported allegations. *See Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("The term 'demonstrates' means to prove by a preponderance of the evidence." (citing *Dysert v. Sec'y of Labor*, 105 F.3d 607, 610 (11th Cir. 1997))); *cf. Potter v. District of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009) ("The statute makes clear that 'the term "demonstrates" means meets the burdens of going forward with the

evidence and of persuasion.'" (quoting 42 U.S.C. § 2000bb-2(3))); *Pierce v. Atchison Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 438 (7th Cir. 1997) ("More equivalent to a burden of proof or persuasion is a requirement that a party 'demonstrate' . . . a proposition."). The Tribe's insinuation that the Administrator deliberately withheld documents to gain a litigation advantage, *see, e.g.*, Pl.'s Resp. Opp'n at 19 ("It is hard to believe the withholding of that document was inadvertent."), lacks any evidentiary support.

Perhaps the surest indication that the Administrator's omission of these documents from the Administrative Record was neither deliberate nor negligent is that she does not actually dispute any of the basic factual points that the Tribe alleges these documents demonstrate. She does not dispute, for example, either that she supported "the transfer to the Tribe" of "specific mitigation properties," or Rhode Island's "failure to comply with the fully executed [Programmatic Agreement]." *Id.* at 18. She does take issue with the Tribe's tendentious characterization that the agency later "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." *Id.* But the basic factual points underlying this statement, stripped of the Tribe's rhetorical gloss, are wholly undisputed. The Administrator rescinded the Programmatic Agreement once it became clear that the impasse between Rhode Island and the Tribe would not be resolved, thus preventing the Agreement's implementation. She then re-initiated the Section 106 process, and the Tribe refused to sign the new Programmatic Agreement.

None of this is a secret. The Tribe recites these allegations in conspiratorial overtones, but they are simply part of the background of this litigation that all parties acknowledge. The Administrator disagrees that she "capitulated" to Rhode Island, *id.*, but that is the Tribe's own subjective characterization, not a factual claim that it supports with evidence. The Administrator

also disputes that she changed her position—she continues to maintain that it would be ideal for Rhode Island to convey the properties to the Tribe without insisting on a waiver of its sovereign immunity. The Administrator's termination of the Programmatic Agreement simply reflects her concession to reality that such an outcome likely will not happen. But the Tribe does not actually contend otherwise—its assertion that the Administrator "changed [her] position," *id.*, appears to refer only to the fact that she entered into the Programmatic Agreement and then terminated it, which, again, is undisputed.

The Tribe cannot explain why the Administrator would deliberately exclude documents from the record that show only facts she does not dispute, or that is there any reason to think that she did so negligently. *See Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1209-10 (D.C. Cir. 2021) (affirming denial of motion to supplement the Administrative Record where "there is no reason to think that [the agency] deliberately excluded evidence from the record"). As such, this Court should deny the Tribe's request to supplement the Administrative Record.

* * *

## CONCLUSION

This Court should dismiss and/or grant the Administrator summary judgment on Count I and deny the Tribe's request to supplement the Administrative Record.

Dated: January 17, 2022

Respectfully submitted,

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