UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE,

Plaintiff,

v.

SHAILEN BHATT, Administrator,
Federal Highway Administration,

Defendant.

Civil Action No. 22-2299 (RC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, Shailen Bhatt, Administrator of the Federal Highway Administration ("Agency"), by and through the undersigned counsel, respectfully files this memorandum of points and authorities in support of its cross-motion for summary judgment, and in opposition to Plaintiff Narragansett Indian Tribe's summary judgment motion, ECF No. 42.

BACKGROUND

This is the Tribe's third lawsuit against the Agency arising from the same underlying facts, which concern the termination and subsequent replacement of a programmatic agreement under Section 106 of the National Historic Preservation Act ("Preservation Act"), 54 U.S.C. § 306108. *See Narragansett Indian Tribe v. Pollack*, Civ. A. No. 20-0576 (RC), 2022 WL 782410 (D.D.C. Mar. 15, 2022) (dismissing Tribe's claim for lack of standing); *Narragansett Indian Tribe v. R.I. Dep't of Transp.*, 903 F.3d 26, 30 (1st Cir. 2018) (affirming dismissal Tribe's claim due to sovereign immunity). In this action, this Court previously dismissed for lack of standing the Tribe's claim against the Agency as to the Agency's termination of the prior agreement, but denied the Agency's motion to dismiss as to the Agency's execution of a new agreement. An overview of Section 106's requirements, as well as of this case's factual and procedural background, follows.

I. The Section 106 Process

Section 106 requires a federal agency "having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking . . . prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license," to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. The Advisory Council on Historic Preservation ("Advisory Council") issues regulations that implement this process, *see* 36 C.F.R. pt. 800, which "is often referred to as the 'Section 106' process," *Pollack*, 2022 WL 782410, at *1. This "process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in

the effects of the undertaking on historic properties, commencing at the early stages of project planning," 36 C.F.R. § 800.1(a). The term "consultation," as used here, "means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the [S]ection 106 process." *Id.* § 800.16(f).

"Indian tribes" are among those that "have consultative rules in the [S]ection 106 process." 36 C.F.R. § 800.2(c)(2). An agency must "consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking," even those that are "off tribal lands." *Id.* § 800.2(c)(2)(ii), (ii)(D). The agency "shall make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties," *id.* § 800.3(f)(2), and "ensure that consultation in the [S]ection 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects," *id.* § 800.2(c)(2)(ii)(A). "Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties." *Id.*

Rather than undertake "the normal Section 106 process," an agency may elect to satisfy its Section 106 obligations by availing itself of one of several "program alternatives." *Pollack*, 2022 WL 782410, at *1. One such type of program alternative "is the development of programmatic agreements," *id.*, which "govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings," 36 C.F.R. § 800.14(b). An agency may elect to execute a programmatic agreement when, as relevant here,

an undertaking's "effects on historic properties cannot be fully determined prior to approval of an undertaking," or "other circumstances warrant a departure from the normal [S]ection 106 process." *Id.* § 800.14(b)(1)(ii). If an agency develops a programmatic agreement, "[t]he consultation shall involve, as appropriate, [state and/or tribal historic preservation officers], the National Conference of State Historic Preservation Officers [ ], Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public." *Id.* § 800.14(b)(2)(i). "A programmatic agreement shall take effect on tribal lands only when the [tribal historic preservation officer], Indian tribe, or a designated representative of the tribe is a signatory to the agreement." *Id.* § 800.14(b)(2)(iii).

"Compliance with the procedures established by an approved programmatic agreement satisfies the agency's [S]ection 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated." 36 C.F.R. § 800.14(b)(3). "If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe," the agency "shall ensure that development of the [agreement] includes appropriate government-to-government consultation with affected Indian tribes." *Id.* § 800.14(b)(2)(i), (f). If the properties "are located off tribal lands," an agency "shall identify those Indian tribes . . . that might attach religious and cultural significance to such properties and consult with them." *Id.* § 800.14(f)(1). The agency shall "take [the tribe's] views into account in reaching a final decision on [a programmatic agreement]." *Id.* § 800.14(f)(2).

II. The Prior Programmatic Agreement

The Agency has provided federal funds for a project to replace the I-95 Providence Viaduct (Bridge No. 578) in Providence, Rhode Island. Compl. ¶ 31, ECF No. 1. The Agency determined that the project would result in adverse effects to the Providence Covelands Archaeological District (RI 935) ("historic properties"), land that is religiously and culturally significant to the Tribe. *Id.* ¶¶ 34-35. To satisfy its Section 106's obligations, the Agency executed a programmatic agreement

with the Rhode Island Department of Transportation, the Rhode Island State Historic Preservation Office (collectively "Rhode Island"), and the Tribe on October 3, 2011. *Id.* ¶¶ 36, 38.

The programmatic agreement required the Agency, in coordination with Rhode Island, to acquire and convey to the Tribe three parcels of land ("the disputed parcels"), known as the (1) Salt Pond Archaeological Preserve, (2) Providence Boys Club – Camp Davis parcel, and (3) Chief Sachem Night Hawk parcel. *Id.* ¶ 40. All three parcels are of religious and cultural significance to the Tribe. *Id.* ¶ 45. The agreement provided for Rhode Island and the Tribe to jointly own the Salt Pond Archeological Preserve, and for the Tribe alone to own the other parcels, with "[a]ppropriate covenants that preserve the property and its cultural resources in perpetuity." *Id.* ¶¶ 41-42. The agreement did not require the Tribe to waive its sovereign immunity as to the parcels. *Id.* ¶ 47.

The Agency, Rhode Island, and the Tribe executed the programmatic agreement, and work on the Viaduct project began. Compl. ¶ 49. Eventually, however, Rhode Island announced that it would not transfer the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk parcels to the Tribe unless the Tribe first agreed to waive its sovereign immunity as to the parcels and enter a covenant to subject these parcels to Rhode Island's laws and jurisdiction. *Id.* The Agency advised Rhode Island that requiring the Tribe to waive its sovereign immunity as a condition to conveying the parcels would violate the agreement, but Rhode Island disregarded this advice. *Id.* ¶¶ 50-52. On September 1, 2016, the Agency notified Rhode Island that it would withhold all project funds to the state due to the state's ongoing defiance of the agreement's terms. Compl. ¶ 13; AR 139-40, 155-56. Construction of the Viaduct's southbound lane was completed, and the lane opened to traffic, in the fall of 2016. Compl. ¶ 53. The Tribe alleges that this construction "has resulted in damage to and despoliation of sites of historical, cultural, and religious significance to the Tribe without any appropriate archaeological investigation being conducted." *Id.* ¶ 54. On January 19,

2017, the Agency terminated the agreement, citing the "impasse" between Rhode Island and the Tribe over Rhode Island's demand that the Tribe waive sovereign immunity prior to the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk parcels' conveyance. AR 155-56.

III. The New Programmatic Agreement

On June 28, 2018, the Agency announced that it was reinitiating the Section 106 process, and invited the Tribe and other "consulting parties" to participate. AR 262. The Agency proposed that Rhode Island and the Tribe jointly own the Salt Pond Archaeological Preserve, as the prior programmatic agreement had contemplated, but that Rhode Island not convey the Providence Boys Club – Camp Davis or Chief Sachem Nighthawk parcels to the Tribe. *Id.* Instead, the Agency proposed that "the following items will be implemented: an academic-level historic context document about the Tribe; Section 106 training provided to the Tribe; a video documentary about the Tribe; and a teaching curriculum for Rhode Island public schools about the Tribe." *Id.* The Agency concluded by noting that it "will work collectively with all parties," and was "committed to working with all parties to conclude the Section 106 consultation." *Id.*

On September 10, 2018, the Tribe acknowledged receipt of the Agency's letter, and voiced dissatisfaction with the Agency's proposed mitigation terms. AR 270. On October 15, 2018, the Agency sent the Tribe a letter acknowledging that the Tribe "generally objects" to the proposed mitigation terms; explaining that it was currently developing a draft of the new agreement; and assuring the Tribe that it would make the draft available to the Tribe and other parties for review and comment, and carefully consider all comments received, before finalizing the new agreement. AR 267. On October 19, 2018, the Tribe sent the Agency another letter, once again expressing its dissatisfaction with the Agency's handling of the Section 106 process. AR 492-94.

On November 28, 2018, the Agency sent the Tribe a draft of the new agreement. AR 445. The draft provided for Rhode Island and the Tribe to own the Salt Pond Archaeological Preserve

jointly, but did not address the other two disputed parcels. AR 448. The draft required Rhode Island to "operate and maintain the Salt Pond Preserve," and "consult with the Signatories and Concurring Parties to develop and implement a reasonable and feasible operations and maintenance plan that preserves the property and its cultural resources and[ ] provides reasonable and controlled public access in perpetuity." It also required Rhode Island to (1) "develop a professional publication [ ] that compiles and summarizes the available ethnographic, archaeological, scientific and other literature, accounts, and studies regarding the history of the Narragansett Tribe in Rhode Island," (2) "develop and produce a full-length documentary film about the Narragansett Indian Tribe in Rhode Island and provide the documentary for public dissemination," (3) "develop an educational curriculum [ ] regarding the history of the Narragansett Tribe in Rhode Island," and (4) "work with [the Agency] to provide Section 106 training to the [Tribe] through the [Agency] Resource Center, the [Advisory Council], or the National Preservation Institute." AR 449-50. The draft identified the Agency, Rhode Island's State Historic Preservation Officer and Department of Transportation, and the Advisory Council as "Signatories," and the Tribe as a "Concurring Part[y]." AR 452.

On December 6, 2018, the Agency responded to the Tribe's October 19 letter, recognizing the Tribe's "concerns" over the prior agreement's termination, and reiterating that it is "considering all points of view and all information provided, including the information you provided." AR 371. On December 12, 2018, the Tribe sent the Agency a letter acknowledging its receipt of the draft agreement, expressing dissatisfaction with the draft's proposed mitigation measures, and accusing the Agency of failing to consult with it to a proper degree. AR 499-500. The Tribe also objected to the draft's designation of it as a concurring party rather than a signatory. AR 500.

On December 19, 2018, the Agency sent the Tribe a draft bargain and sale deed for the Salt Pond Archaeological Preserve, requesting that the Tribe review it and provide comments within

30 days. AR 502. On January 28, 2019, the Agency responded to the Tribe's December 12 letter, explaining that it "has duly noted [the Tribe's] position with respect to the terms of the new [agreement]," and that it "will schedule a meeting with all consulting and concurring parties to discuss the draft [agreement]." AR 506. The Agency "reiterate[d] that the [Tribe] can convey [its] concerns through participation in the new Section 106 consultation process and by providing comments to the draft [agreement] as well." *Id.* Finally, the Agency expressed its "continued commitment to comply with the requirements set forth in the Section 106 process while providing opportunities to all consulting parties to consider their comments in drafting the new [agreement] final version," thus "allowing the I-96 Providence Viaduct Project to move forward." AR 507.

On February 7, 2019, the Agency sent the Tribe a revised draft of the agreement, and invited it to participate in a meeting "to provide an opportunity to all the parties consulted under Section 106 to present any concerns regarding the" new draft. AR 443-44. The Tribe responded that same day, acknowledging that it had "provide[d] comments by way of correspondence" on the proposed terms, and arguing that a meeting was "premature and flies in the face of Section 106." AR 441. Later that day, the Tribe sent the Agency another email, once again characterizing the meeting as "premature." AR 509. On February 11, 2019, the Agency responded to the Tribe, describing the meeting as "an additional step provided to all the consulting parties, including the [Tribe], to make sure that we can address collectively any concerns regarding [ ] the [agreement]." AR 508. The Tribe informed the Agency that it would attend the meeting but "reserves all of its rights." AR 507.

On February 13, 2019, the Tribe sent the Agency a letter acknowledging that it had received the proposed terms and participated in the meeting, and expressing five "glaring concerns" with the Section 106 process. AR 631. The Tribe stated that it "also has stated concerns regarding other matters, including the proposed mitigation terms themselves," but "for the time being . . . will put

those issues aside with the understanding that they will be addressed through consultation." AR 632. The Agency responded to the Tribe's letter on March 5, 2019, addressing each of the concerns:

1. Why were mitigation terms developed with [Rhode Island] without consulting the Tribe to determine if the Tribe would consider them to be adequate? Along the same lines, on the call it was mentioned that two alternative mitigation plans were presented to [Rhode Island]. Obviously one of those alternatives must be the mitigation proposed in the "draft" Programmatic Agreement. What was the alternative proposal discussed with [Rhode Island]? Why are other consulting parties not involved in the process?

   [Agency] Response: All parties designated as consulting parties, as required by 36 CFR 800.2(c), were invited in the consultation process.

2. What authority does [the Agency] have to re-initiate consultation "for the limited purpose of drafting a new Programmatic Agreement"?

   [Agency] Response: See 36 CFR 800.14(a).

3. Does the [Agency] intend to assert that the consultation under the terminated Programmatic Agreement satisfies its consultation requirements under the new draft Programmatic Agreement? If so, under what authority?

   [Agency] Response: [The Agency] has initiated consultation under the new Programmatic Agreement as required by 36 CFR 800.14(b)(2). The issue of termination of the prior [agreement] was settled, *see* 903 F.3d 26 (1st Cir. 2018).

4. Why has the Tribe been transformed into a "Concurring Party" when under the terminated Programmatic Agreement it was a "Signatory Party."

   [Agency] Response: The project's adverse effects to historic properties are not on Tribal land, thus the Rhode Island State Historic Preservation Office [ ] is the official with jurisdiction over the historic resource. Also, the mitigation commitments in the [draft agreement] do not require any action or responsibility on the Tribe. Therefore, [the Agency] is granting the Tribe concurring party status in the [draft agreement] as recommended by 36 CFR 800.6(c)(3).

5. We have still yet to receive any draft agreement or [memorandum of understanding] regarding the roles and responsibilities of [Rhode Island] and [the Tribe] with respect to the Salt Pond site. While your January 28th letter directs me to the Draft Bargain and Sale Deed, this draft deed provides no details of a potential relationship between the parties for management of the Salt Pond site.

   [Agency] Response: The [Agency]-Rhode Island Division Office provided a copy of the Draft Bargain and Sale Deed to the [Tribe] on December 19, 2018 for

> comments. The Draft Bargain and Sale Deed among other things includes, in Exhibit B—Historic Preservation Covenant, the conditions, restrictions, and limitations that both [Rhode Island] and the [Tribe] agree to observe in perpetuity upon the transfer of the Property. In addition, the new [agreement in Stipulation 4(b) will indicate the following:
>
> "[Rhode Island] shall operate and maintain the Salt Pond Preserve (RI 110). [Rhode Island] shall consult with the Signatories, Concurring Parties, and Consulting Parties to develop and implement a reasonable and feasible operations and maintenance plan that preserves the property and its cultural resources and, provides reasonable and controlled public access in perpetuity.

AR 643-44. The Agency concluded by emphasizing its "continued commitment to comply with the requirements set forth in the Section 106 process pertaining to finalizing and executing the new [agreement] . . . so that the I-95 Providence Viaduct Project can move forward." AR 644.

On April 25, 2019, the Tribe sent the Agency a letter acknowledging that it had participated in a "consultation meeting" with the Agency about a week earlier, and offering various "proposals for consideration" concerning mitigation. AR 649. On June 11, 2019, the Agency sent the Tribe a new draft of the agreement, and requested comments within thirty days. AR 705. The new draft proposed transferring the Salt Pond Archaeological Preserve to Rhode Island alone, rather than jointly to Rhode Island and the Tribe. AR 834. That same day, the Agency invited the Tribe to participate in a conference call on June 26, 2019, to discuss the new draft agreement. AR 838-39. The day before the conference call, the Tribe sent the Agency an email expressing in detail its "primary concerns" with respect to the draft's proposed mitigation terms and Section 106 process. AR 835. On July 11, 2029, the Agency responded to the Tribe's email, addressing each point that the Tribe raised. AR 834-35. The Agency explained that it had "taken into consideration all the proposals presented for evaluation, including the [Tribe's,] . . . to provide commensurate mitigation proportional to the [project's] adverse effects;" emphasized that it had "provided an opportunity to the Tribe on June 26, 2019, during Nation-to-Nation consultation, to communicate its concerns

regarding to the new proposed [agreement];" and explained that it had revised the draft agreement to propose transferring the Salt Pond Archaeological Preserve to Rhode Island alone as "a result of the Tribe not accepting the conditions stipulated in the Draft Bargain and Sales Deed transmitted to the Tribe on December 19, 2018 for review and comments." AR 834. The Agency explained that the Tribe "will be given an opportunity to provide [its] input" on a "Management Plan . . . describing how [the disputed] properties would be preserved in perpetuity." AR 835.

On July 8, 2019, the Agency invited the Tribe to participate in a discussion with "the other Section 106 consulting parties" regarding the draft agreement later that month, or else discuss the draft agreement with the Agency separately. AR 775. On July 11, 2019, the Tribe sent the Agency an email accusing the Agency of playing "a supporting role of the conspiracy and fraud we have asserted relating to the State of Rhode Island and it's Agencies." AR 879. On August 2, 2019, the Agency responded to the Tribe's email, explaining that it "has taken into consideration the contents of that email" and "continued to engage in Nation to Nation consultation on the project and has been working with" the Tribe and others "to come to resolution on a Programmatic Agreement [ ] for the [ ] Viaduct Project." AR 877. The Agency explained that it "has addressed the adverse impacts to the Covelands Archaeological District via the [draft] and believes the mitigation outlined in [it] is commensurate with the adverse effects to the site by the proposed project." *Id.*

The Agency explained that it "is moving forward with the mitigation agreed to in writing by [Rhode Island] that details the commitment to preserve and protect the three parcels in question. AR 877. It further explained that it is "committing to further mitigation measures outlined in the forthcoming [agreement,] such as a jointly negotiated management plan for each parcel, future commitment to revisit the ownership of the parcels, monitoring and use of the parcels by all parties, etc." *Id.* The Agency noted that its "decision-making lens is unbiased and independent from the

State of Rhode Island." *Id.* It concluded by noting that it "hope[s] to continue consultation on the management plans for each parcel and will continue to address all concerns brought forth on behalf of the [ ] Tribe." AR 878. Later that day, the Tribe sent the Agency an email acknowledging that the Agency had "answer[ed] our [earlier] inquiry," and asserting that it had "provided a brief reply and will be addressing our immediate concerns more fully through our attorneys." AR 875.

On September 19, 2019, the Agency executed a new programmatic agreement. AR 970. The new agreement noted, in a recital, that "the Narragansett Indian Tribal Historic Preservation Officer [ ] has participated in the consultation and has been invited to sign this [agreement] as an invited signatory." AR 971. The agreement provided that Rhode Island would own the disputed properties and would "sign and file preservation covenants for all three properties [ ] that ensure that they will be protected in perpetuity from any development except for any alterations agreed upon by all signatories to this agreement." AR 972. The agreement further required Rhode Island to "work to ensure that the properties are both protected, and that the [Tribe] has continued access to the properties for cultural use." *Id.* The agreement defined "continued access" as "legally unimpeded entry into the three properties on the part of one or more members of the Narragansett [T]ribe," and "cultural use" as "those cultural practices[,] traditions, beliefs, lifeways, arts, crafts, or social institutions of the Narragansett [T]ribe that are rooted in the [T]ribe's history and that are important in maintaining the continuing cultural identity of the [T]ribe." AR 972-73.

The agreement further provided that "[t]he properties will remain in state ownership and protection until another federal or non-profit entity comes forward that all signatories to this agreement concur ownership of the properties can change out of [Rhode Island]." AR 973. It also provided that "[t]he signatories will meet annually to discuss the status of the three properties and continue to solicit any federal or nonprofit entities to take ownership of the properties." *Id.* The

agreement provided that "[w]ithin one [ ] year of execution of this [agreement]," the Agency, "in consultation with the signatories and [the Tribe] will complete a management plan for all three properties," which "will include (but not be limited to) provisions for tribal access and use and [Rhode Island's] responsibilities for maintaining the properties inclusive of the structures on them." *Id.* Finally, the agreement provided that "[e]xecution of this [agreement] shall evidence that the [Agency] has taken into account the effects of the Undertaking on historic properties and afforded the [Advisory Council] an opportunity to comment." AR 975.

The programmatic agreement designated the Agency, the Rhode Island State Historic Preservation Officer, and the Advisory Council as "signatories." AR 976. It designated the Rhode Island Department of Transportation and the Tribe as "invited signatories." *Id.* Specifically, with respect to the Tribe's status, the agreement said:

> **INVITED SIGNATORY**
> **NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICER**
>
> By:_____ Date:_____
> John Brown
> Narragansett Indian Tribal Historic Preservation Officer

Id. The Tribe did not sign the agreement. *Id.* The other parties each signed the agreement between August 13, 2019 and September 19, 2019. *Id.*

IV. Procedural Background

The Tribe sued the Agency and Rhode Island in the U.S. District Court for the District of Rhode Island. The district court dismissed the Tribe's claims against the Agency, concluding that the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, did not apply because the Tribe did not challenge final agency action, and that no other statute that the Tribe invoked waived the

Agency's sovereign immunity. *Narragansett Indian Tribe v. R.I. Dep't of Transp.*, Civ. A. No. 17-0125, 2017 WL 4011149, at *3 (D.R.I. Sept. 11, 2017). As this Court previously put it, "[t]he [district] court reasoned that the Tribe's claims were generally premised on [Rhode Island's] refusal to transfer the land, not any action taken by [the Agency], and therefore the court lacked subject-matter jurisdiction with respect to the claims against the federal agency." *Narragansett Indian Tribe v. Nason*, Civ. A. No. 20-0576 (RC), 2020 WL 4201633, at *3 (D.D.C. July 22, 2020). The First Circuit affirmed, *see R.I. Dep't of Transp.*, 903 F.3d 26, viewing "the complaint as an attempt to compel [the Agency] to participate as parties in a suit arising out of [Rhode Island's] alleged breach of contract," *Nason*, 2020 WL 4201633, at *3.

The Tribe then sued the Agency and Rhode Island in this District. The Agency moved to dismiss for failure to state a claim, which motion this Court denied. *See Nason*, 2020 WL 4201633. The Agency later moved both to dismiss for lack of subject-matter jurisdiction and for summary judgment. *See Pollack*, 2022 WL 782410. This time, the Court granted the Agency's motion to dismiss, determining that it could not "clearly discern how the [Tribe's] alleged harm would be redressed by a determination that the Agency acted arbitrarily and capriciously as required to show constitutional standing." *Id.* at *8. This Court explained that to accept the Tribe's arguments for standing would "requir[e] an uncomfortable level of speculation," as the Tribe had "laid out too few breadcrumbs about standing for the Court to follow them with confidence, which in turn left too many questions unanswered." *Id.* The Court denied the Agency's motion for summary judgment as moot. *Id.* at *9. The Court dismissed the Tribe's claims against the Agency without prejudice, but admonished the Tribe that if it "decides to try again, the Court strongly encourages [it] to address—separately and clearly—each of the Agency's arguments." *Id.*

Rather than amend its complaint, the Tribe filed this suit. The Agency moved to dismiss for lack of subject-matter jurisdiction, arguing that the Tribe had pleaded no facts to support a plausible inference as to two elements of standing—traceability and redressability—with respect to either the prior programmatic agreement's termination or the new agreement's execution. ECF No. 31. The Tribe opposed that motion, and moved to supplement the administrative record. ECF Nos. 32, 33. This Court dismissed the Tribe's claims as to the prior agreement's termination, but denied the Agency's motion as to the new agreement's execution, concluding that the Tribe had "plead[ed] enough" to allege traceability and redressability "adequately." Mem. Op. at 16-21, ECF No. 39. The Court denied the Tribe's motion to supplement the administrative record. *Id.* at 21-25.

LEGAL STANDARDS

Summary judgment is proper if a movant (1) "shows that there is no genuine dispute as to any material fact," and (2) "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Lack of subject-matter jurisdiction is grounds for summary judgment, and "[i]n response to a summary judgment motion" made on that basis, a plaintiff cannot rely on "mere allegations, but must set forth by affidavit or other evidence specific facts." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Under the APA, a court "review[s] the administrative record to determine whether the agency's decision was arbitrary and capricious, and whether its findings were based on substantial evidence." *New LifeCare Hosps. of N.C., LLC v. Becerra*, 7 F.4th 1215, 1222 (D.C. Cir. 2021).

ARGUMENT

The Tribe lacks standing because it fails to show that the Agency could take any additional actions that would mitigate harm to the historic properties. Regardless, the Agency amply satisfied its obligation to consult with the Tribe in formulating the new programmatic agreement. While the Tribe couches its argument in procedural terms, the gist of its grievance is that the Agency did not adopt its preferred mitigation terms. But the Section 106 process imposes procedural requirements

only, without dictating substantive outcomes, so the Tribe's dissatisfaction with the agreement's terms is irrelevant to the Agency's satisfaction of its Section 106 obligations. The Tribe's argument that the Agency failed to designate it as a signatory to the new agreement is incorrect, as the new agreement plainly designates the Tribe as a signatory, and any argument that the Agency needed to label it a signatory in earlier drafts of the agreement is meritless. Finally, the Tribe's claims for damages fail because sovereign immunity bars them, the Tribe has no cause of action to raise them, and the Tribe is not entitled to damages in any event. For all these reasons, this Court should grant the Agency summary judgment, and deny the Tribe's motion for summary judgment.

I. The Tribe Lacks Standing Because it Fails to Establish Traceability or Redressability

A federal court's jurisdiction is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. A case or controversy exists only where a plaintiff can satisfy "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. "First, the plaintiff must have suffered an injury in fact." *Id.* (internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (cleaned up). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. (cleaned up). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

"To establish traceability in a procedural-injury case, an adequate causal chain must contain at least two links: (1) a connection between the omitted procedure and a government decision and (2) a connection between the government decision and the plaintiff's particularized injury."

Hawkins v. Haaland, 991 F.3d 216, 224 (D.C. Cir. 2021) (internal quotation marks omitted). "The plaintiff is not required to show that but for the alleged procedural deficiency the agency would have reached a different substantive result. All that is necessary is to show that the procedural step was connected to the substantive result." *Id.* at 224-25 (internal quotation marks omitted). "Claims for procedural violations also receive a relaxed redressability requirement in which the plaintiff need only show that correcting the alleged procedural violation *could* still change the substantive outcome in the plaintiff's favor[,] not that it *would* effect such a change." *Id.* at 225 (cleaned up).

But "[t]hese relaxed standards do not apply to the link between the government decision and the plaintiff's injury." *Hawkins*, 991 F.3d at 225. "Although the plaintiff in a procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action, [it] must still show that the agency action was the cause of some redressable injury." *Id.* (cleaned up). Thus, even if one "assume[s] a causal relationship between the procedural defect and the final agency action, the [plaintiff] must still demonstrate a causal connection between the agency action and the alleged injury"—i.e., that (1) its injury is traceable to the agency's failure to take that action, and (2) taking that action would (not just could) redress its injury. *City of Dania Beach v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007); *accord WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (same); *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017) (a procedural injury "plaintiff is not absolved . . . from pleading and proving a causal connection between the substantive agency action and the alleged injury." (cleaned up)); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) ("the Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest"). As such, a plaintiff "must show not only that the defendant's

acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to [its] own interest." *Bentsen*, 94 F.3d at 664-65.

The Tribe fails to demonstrate traceability or redressability because it fails to show that the Agency could have done anything else to further mitigate harm to the historic properties. As to traceability, even assuming that the Agency would have adopted the Tribe's preferred mitigation measures but for the ostensible inadequacy of its consultation, the Tribe fails to establish that (or even explain how) such measures actually would (not just could) have further mitigated harm to the historic properties. And as to redressability, the Tribe fails to show that adopting its preferred mitigation measures now would (not just could) result in further mitigation of harm to the historic properties. The Tribe proposed (and even now, in its briefing, discusses) only a single so-called mitigation measure for the new agreement—giving it the disputed parcels—but fails to show "that it is substantially probable" that adopting this measure would have mitigated harm to the historic parcels, *Bentsen*, 94 F.3d at 665, for three reasons. First, the Tribe fails to explain how giving it certain parcels of land would mitigate harm to other, entirely different lands.[1] Any assertion that giving the Tribe the disputed parcels somehow would mitigate harm to the historic properties is conclusory. Second, even assuming that preserving the disputed parcels would mitigate harm to

[1] Indeed, the Tribe's focus on the monetary value of any mitigation measures, and insistence that it equal or exceed the disputed parcels' monetary value, suggest that its true interest is not in mitigating harm to the historic properties, but rather, acquiring property for or otherwise enriching itself. *See, e.g.*, Pl.'s Resp. at 4, ECF No. 32 (demanding that mitigation measures be "of value, to the 'critical stakeholder', the federally recognized tribe," and insisting that mitigation focus on "compensating the Tribe"); *id.* at 5 (demanding "a mitigation measure of value to the Tribal stakeholder," and that the Agency "negotiate alternative mitigation measure of appropriate value to the Tribal stakeholder"); *id.* at 6 (insisting that mitigation focus on "compensating the Tribe"); *id.* at 8 (arguing that Agency should "use its available tools to require transfer of the properties that had appropriate value to mitigate the adverse effects," and faulting it for "remov[ing] the mitigation measure of value to the Tribe, of transferring historic properties, in fee"); *id.* at 10 (demanding that any mitigation measures be "equivalent in value to the money contributed to the purchase of the [disputed parcels]"); *id.* at 17 (seeking "mitigation measures of value to the tribe").

the historic properties, the Tribe fails to show that it would do better at preserving these parcels than Rhode Island—any such claim is speculative and conclusory. And third, even assuming that conveying the disputed parcels to the Tribe would mitigate harm to the historic properties, the Agency had no practical ability to compel Rhode Island to do so, as this Court previously explained. *See* Mem. Op. at 17-18. Indeed, the Agency had already tried to do so, to no avail. *Id.* Including this mitigation term in the new agreement thus would have been futile.

Nor does the nebulous possibility that the Agency could have adopted some other, more effective mitigation measures suffice to establish standing. Speculative or conclusory assertions are insufficient to show standing. *See Racing Enthusiasts & Suppliers Coal. v. EPA*, 45 F.4th 353, 357 (D.C. Cir. 2022) ("conclusory assertions are not evidence of standing" (cleaned up)); *Kareem v. Haspel*, 986 F.3d 859, 865-66 (D.C. Cir. 2021) ("threadbare recitals of the elements of standing, supported by mere conclusory statements, do not suffice" (cleaned up)); *West*, 845 F.3d at 1238 ("speculation cannot establish redressability" or "causation"); *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) ("conclusory statements . . . are insufficient to state a plausible basis for standing"). For the same reason, the Tribe's bald assertion that "failure to adequately consult with [it] resulted in unmitigated damage to the Viaduct properties," and vague reference to "alternative mitigation measures," without further elaboration, Compl. ¶¶ 11-12, do not suffice, either. While "general factual allegations of injury resulting from the [Agency's] conduct" may have sufficed at the motion to dismiss stage, the Tribe "can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts" to show standing on summary judgment. *Lujan*, 504 U.S. at 561; *see also Osborn v. Visa Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015) ("A plaintiff's burden to demonstrate standing grows heavier at each stage of the litigation"). Lastly, the Tribe

cannot rely on the "relaxed standards" that govern procedural injury claims, as they "do not apply to the link between the government decision and the plaintiff's injury." *Hawkins*, 991 F.3d at 225.

For this reason, the Court's earlier conclusion, in denying the Agency's motion to dismiss as to the new agreement's execution, that "the Tribe need not show that consultation *would* result in a better outcome, only that it *could*," Mem. Op. at 21 n.8, respectfully, was in error. While the Tribe need show only that better consultation could (not would) result in different mitigation terms, it must show that those different mitigation terms actually would (not just could) result in a better mitigation outcome. *See Hawkins*, 991 F.3d at 224; *WildEarth Guardians*, 738 F.3d at 306; *West*, 845 F.3d at 1237; *City of Dania Beach*, 485 F.3d at 1186*; Bentsen*, 94 F.3d at 664-65. To the extent necessary, the Agency respectfully requests reconsideration of this aspect of the Court's ruling. *See* Fed. R. Civ. P. 54(b) (a ruling "may be revised at any time before the entry of a judgment"); *Nat'l Ctr. for Mfg. v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000) (reconsideration "correctly granted based upon what the court found to be clear errors of law"); *Pfeiffer v. Dep't of Energy*, Civ. A. No. 20-2924 (RBW), 2023 WL 4405158, at *2 (D.D.C. July 7, 2023) (reconsideration proper to account for "controlling decisions"); *Williams v. Walsh*, 619 F. Supp. 3d 48, 57 (D.D.C. 2022) (reconsideration proper "as justice requires," such as where a conclusion on the issue of standing was "clearly erroneous"); *WildEarth Guardians v. Bernhardt*, Civ. A. No. 16-1724 (RC), 2019 WL 3253685, at *2 (D.D.C. July 19, 2019) (reconsideration proper to correct "a clear error in the first order"). Reconsideration is especially merited given the issue's jurisdictional nature, as a court has an "affirmative obligation to ensure that it has subject matter jurisdiction." *Taitt v. Islamic Rep. of Iran*, Civ. A. No. 20-1557 (RC), 2023 WL 2536518, at *4 (D.D.C. Mar. 16, 2023) (cleaned up).

II. The Agency Consulted With the Tribe in Formulating the New Agreement

The Agency amply satisfied its obligation to consult with the Tribe in formulating the new programmatic agreement.[2] The Agency undoubtedly "s[ought], discuss[ed], and consider[ed]" the Tribe's views in formulating the new agreement, and took them "into account in reaching a final decision" on the new agreement's terms. 36 C.F.R. §§ 800.14(f)(2), 800.16(f). Over the course of nearly fifteen months, the Agency repeatedly sent the Tribe successive drafts of the new agreement, solicited the Tribe's input on the draft agreement's proposed terms, and addressed the questions and concerns that the Tribe raised. *See supra* pp. 5-12. The Tribe all but acknowledges as much, laying out a detailed timeline of the Agency's consultation with it. *See* Pl.'s Mem. at 16-25. The record thus flatly belies the Tribe's claim that the Agency did not adequately consult with it.

Indeed, while the Tribe couches its argument in procedural terms, the gist of its grievance seems to be simply that the Agency did not adopt the Tribe's preferred mitigation terms in the new programmatic agreement. The Tribe complains that it did not "give its consent" to the Agency's chosen mitigation terms, and decries those terms as "woefully inadequate," "unacceptable," "not appropriate," and "far behind what other states have done." Pl.'s Mem. at 7 n.4, 13, 15; *accord id.* at 33, 37 (asserting that it did not "consent" to the mitigation terms). But the Tribe's dissatisfaction with the Agency's chosen mitigation terms is irrelevant to the Agency's compliance with Section 106's obligations. Section 106 did not require the Agency to adopt the Tribe's preferred terms—

[2] Attached to the Tribe's motion for summary judgment is an affidavit by one of its members, ECF No. 42-2, which it cites throughout its memorandum, *see generally* Pl.'s Mem. Because judicial review of agency action "is limited to the administrative record before the agency at the time of its decision," *Earthreports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016); *see also NYC C.L.A.S.H., Inc. v. Fudge*, 47 F.4th 757, 765 (D.C. Cir. 2022) (courts "generally do not consider information that was not before the agency when making its decision"), this Court should disregard the affidavit in adjudicating the Tribe's APA claim. Notably, the Tribe did not seek to supplement the administrative record with this affidavit when it moved to supplement the record. ECF No. 33.

only to consider them. "An essentially procedural statute, [S]ection 106 imposes no substantive standards on agencies," requiring them only "to take into account the effect of their undertakings." *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (cleaned up). Thus, as this Court has explained several times, "Section 106 does not dictate substantive results. Instead, Section 106 is a procedural statute requiring a federal agency to take certain steps prior to beginning a project." Mem. Op. at 4; *accord Pollack*, 2022 WL 782410, at *2 (same); *Nason*, 2020 WL 4201633, at *2 (same). Because the Agency considered the Tribe's preferred mitigation terms in formulating the new agreement, its failure to adopt those terms in the final agreement does not offend Section 106.

The Tribe's argument that the Agency "exclud[ed] [it] as a signatory" to the new agreement, meanwhile, Pl.'s Mem. at 39, is confusing, but meritless. Even assuming, for the sake of argument, that the Agency was required to designate the Tribe as a signatory to the new agreement, it plainly did so, but the Tribe refused to sign the agreement.[3] AR 976 (designating the Tribe as an "Invited Signatory"). Indeed, the Tribe concedes as much. *See* Pl.'s Mem. at 15 ("the Tribe received another draft [agreement], that . . . had the tribe as an invited signatory," but "the Tribe would not sign"). Although the Tribe's argument is somewhat unclear, as best the Agency can tell, the Tribe seems

[3] Although not ultimately necessary to this Court's resolution of the pending motions, the Agency was not required to designate the Tribe as a signatory to the agreement. An agency must designate a "representative of the tribe [as] a signatory to [a programmatic] agreement" only if the agreement covers "tribal lands," 36 C.F.R. § 800.14(b)(2)(iii), but the Viaduct project did not cover tribal lands—only non-tribal lands of religious and cultural significance to the Tribe. AR 644. The Tribe's reliance on 36 C.F.R. § 800.6(c) is misplaced, as that provision covers a "memorandum of agreement," which is distinct from a "programmatic agreement," *id.* § 800.14(b). Even if Section 800.6(c) applied here, it provides only that an agency "*may* invite an Indian tribe . . . that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties," *id.*, § 800.6(c)(2)(ii), not that it must do so. *See Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) ("'may' does not just suggest discretion, it clearly connotes it" (cleaned up)); *Quechan Indian Tribe v. Dep't of the Interior*, 547 F. Supp. 2d 1033, 1049 (D. Ariz. 2008) ("Plaintiff has no [ ] responsibilities" under memorandum of agreement "and its invitation to sign is a matter of discretion vested in [an agency]"). In sum, while the Agency elected to designate the Tribe as a signatory as a matter of grace, it had no obligation to do so.

to contend that the Agency was required to label it a signatory in drafts of the agreement, not just in the final version, which the Tribe seems to think would have enhanced its leverage in the Section 106 process to advocate for its preferred mitigation terms. *See id.* at 7, 15, 34.

This argument fails for two reasons. First, even assuming that the Section 106 regulations required the Agency to designate the Tribe as a signatory to the final agreement, *but see supra* n.4, nothing in them required the Agency to label the Tribe a signatory in drafts of the agreement. *See generally* 36 C.F.R. pt. 800. The Tribe just fabricates this so-called requirement from whole cloth. Second, the Tribe's assumption that being labeled a signatory in drafts of the agreement would have enhanced its leverage throughout the Section 106 process is speculative and dubious. Under Section 800.6(c)—which the Tribe argues (and the Agency assumes arguendo) applies here, *see* Pl.'s Mem. at 16 n.13—"[t]he refusal of any party invited to become a signatory to a memorandum of agreement . . . does not invalidate the memorandum of agreement," 36 C.F.R. § 800.6(c)(2)(iv). Thus, contrary to its apparent belief, the Tribe could not have forced the Agency to adopt its preferred mitigation terms during the Section 106 process by threatening to withhold its signature from the eventual final agreement—had it tried to do so, the Agency and the other signatories could have simply executed the agreement without the Tribe's signature.

III. The Tribe Cannot Recover Damages

Finally, the Tribe cannot recover damages for three reasons: (1) Congress has not waived the Agency's sovereign immunity to the Tribe's damages claim, (2) the Tribe has no cause of action for a damages claim, and (3) the Tribe is not entitled to damages.

A. Congress Has Not Waived the Agency's Sovereign Immunity to Damages

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). "Monetary claims against the government [thus] are barred by sovereign immunity unless

the government has expressly waived its immunity." *Consol. Edison Co. v. Bodman*, 445 F.3d 438, 446 (D.C. Cir. 2006). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane v. Peña*, 518 U.S. 187, 192 (1996) (citation omitted); *see also Crowley Gov't Servs. v. GSA*, 38 F.4th 1099, 1106 (D.C. Cir. 2022) (federal government is "generally immune from suit in federal court absent a clear and unequivocal waiver of sovereign immunity").

The Tribe raises a single claim, under the APA. *See* Compl. ¶¶ 66-74. The APA waives an agency's sovereign immunity only to claims "seeking relief other than money damages," 5 U.S.C. § 702, and thus does not waive sovereign immunity insofar as a plaintiff has "requested damages," *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 895 (D.C. Cir. 1985); *see also Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009) ("The APA waives the government's sovereign immunity, and thus permits the exercise of jurisdiction, in actions seeking non-monetary relief with respect to agency action."); *Scanwell Labs., Inc. v. Thomas*, 521 F.2d 941, 948 (D.C. Cir. 1975) ("The [APA], by itself, is not a waiver of sovereign immunity in suits seeking money damages against the United States."). And the Tribe identifies no other statute that waives the Agency's sovereign immunity to damages. Sovereign immunity thus bars any such award.

B. The Tribe Has No Cause of Action for Damages

Even setting sovereign immunity aside, the Tribe lacks a cause of action for damages, given that the APA does not create one. *See* 5 U.S.C. §§ 702, 706; *see also FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994) (whether a statute creates (1) "a cause of action for damages" or (2) "a waiver of sovereign immunity" are "analytically distinct inquiries" (internal quotation marks omitted)).

C. The Tribe is Not Entitled to Damages

Because the Agency adequately consulted with the Tribe in formulating the new agreement, the Tribe's damages claims fail on the merits, too. *See supra* § II. Regardless, they also fail for

another reason—even assuming that the Agency's consultation with the Tribe was inadequate, and that this caused harm to the historic properties, the Tribe still would not be entitled to damages.

1. The Tribe Offers No Basis for its Demand for Damages of $30 Million

Even when liability already is established, a "court must ensure that the record adequately supports all items of damages claimed and establishes a causal link between the damages and the defendant's conduct, lest the award become speculative." *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 969 (D.C. Cir. 1990); *see also Parham v. CIH Props., Inc.*, 208 F. Supp. 3d 116, 129 (D.D.C. 2016) (plaintiff "must provide some reasonable basis" for damages sought); *Ventura v. L.A. Howard Constr. Co.*, 134 F. Supp. 3d 99, 104 (D.D.C. 2015) ("Plaintiffs must prove these damages to a reasonable certainty"); *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 213 (D.D.C. 2012) (plaintiff "must prove the amount of damages by a reasonable estimate").

While the Tribe demands "30 million dollars for the destruction to the properties within the Providence Covelands Archaeological District," Pl.'s Mem. at 39, it offers no basis for this amount. The Tribe appears to base this figure on the notion that undergoing the normal Section 106 process, rather than executing a programmatic agreement, would have cost the Agency $30 million, *see* Pl.'s Mem. at 5 n.3, but its only support for this assertion seems to be an "information and belief" allegation, Compl. ¶ 37, which does not suffice even to state a plausible claim, let alone obtain summary judgment, *see Doe v. Lee*, Civ. A. No. 19-0085 (DLF), 2020 WL 759177, at *6 (D.D.C. Feb. 14, 2020) ("It is well-settled that such conclusory allegations supported by information and belief are insufficient to survive a motion to dismiss." (quoting *Niedermeier v. Off. of Max S. Baucus*, 153 F. Supp. 2d 23, 31 (D.D.C. 2001))); *see also United States v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) ("'on information and belief' can mean as little as 'rumor has it that'"); *Donald J. Trump for Pres., Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 387 (3d Cir. 2020) ("'Upon information and belief' is a lawyerly way of saying that [someone] does not know that

something is a fact but just suspects it or has heard it."). And even assuming that the normal Section 106 process would have cost the Agency $30 million, it simply does not follow that $30 million is an accurate quantification of the harm that the Viaduct project has caused to the historic properties. Because the Tribe offers no sound basis for this claim, it cannot recover $30 million in damages.

2. The Tribe Cannot Recover the Money that it Claims to Have Contributed to Acquiring the Disputed Parcels

The Tribe cannot recover the money that it claims to have contributed to acquiring the disputed parcels for two reasons: (1) it did not raise this claim in its complaint, and (2) the money at issue belonged to the federal government, not the Tribe.

a. The Tribe Did Not Raise a Claim Concerning the Money that it Ostensibly Contributed to Acquiring the Disputed Parcels

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought." Fed. R. Civ. P. 8(a)(2)-(3). These requirements form "the keystone of the system of pleading in federal procedure, and the functioning of all the procedures in the federal rules are intertwined inextricably with [this] pleading philosophy." *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15-16 (D.C. Cir. 2008) (cleaned up). Because the Tribe did not raise in its complaint a claim about the money that it ostensibly contributed to acquiring the disputed parcels or else seek damages for such contributions in its prayer for relief, *see generally* Compl., it cannot recover such damages. *See Metroil, Inc. v. Exxonmobil Oil Corp.*, 672 F.3d 1108, 1117 (D.C. Cir. 2012) ("Metroil did not assert that claim in its complaint, and we therefore do not consider it."); *Oryszak v. Sullivan*, 576 F.3d 522, 524 n.1 (D.C. Cir. 2009) (plaintiff "did not sufficiently raise that claim in her complaint or otherwise give the district court notice thereof"). Notably, the Tribe expressly requested $30 million in damages for the harm to the historic properties in its prayer for relief, but did not request damages for its supposed contributions to acquiring the disputed parcels. *See* Compl. at 20. At

most, the Tribe briefly alludes in passing to these so-called contributions, *see id.* ¶¶ 7, 43-44, but such "fleeting, ambiguous reference[s], in contrast to the specific, repeated allegations elsewhere in the Complaint, [are] insufficient." *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 31 F. Supp. 3d 237, 274 (D.D.C. 2014); *see also Oryszak*, 576 F.3d at 524 n.1 ("that allegation . . . [was] too obscure a hint to have put the court on notice of [the] claim"); *Woodson v. Smith*, Civ. A. No. 20-2668 (TNM), 2021 WL 4169357, at *6 (D.D.C. Sept. 14, 2021) ("passing references are not enough to put [defendant] on notice as to the substance of [plaintiff's] claims"); *Lee v. Nat'l Elec. Contractor Ass'n*, 322 F. Supp. 3d 43, 45 (D.D.C. 2018) ("The ambiguous and rambling allegations comprising the complaint fail to provide adequate notice of a claim.").

b. The Money that the Tribe Claims to Have Contributed to Acquiring the Disputed Parcels Belonged to the Government, Not the Tribe

Finally, the money that the Tribe claims to have "contributed to the mitigation properties," Pl.'s Mem. at 39, actually belonged to the federal government, not the Tribe. "To have a property interest in a benefit, a [plaintiff] clearly must have more than an abstract need or desire for it. [It] must have more than a unilateral expectation of it. [It] must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The money at issue consisted of federal funds that belonged to the Agency and the Fish and Wildlife Service, respectively, not the Tribe. AR 40, 835-36, 877. These agencies had intended to use the funds for certain purposes benefitting the Tribe, but instead reallocated them toward acquiring the disputed parcels as a term of the first programmatic agreement. *Id.* While the Tribe's disappointment in not benefitting from these contemplated expenditures of federal funds is understandable, those funds never belonged to the Tribe, and the Tribe has no legal interest in them. The Tribe's claim that it "reallocated" these funds from other projects and "authorized [their] release" to obtain the disputed properties, Compl. ¶¶ 8, 43, is inaccurate, as the funds were not the Tribe's to reallocate or release.

CONCLUSION

This Court should grant the Agency summary judgment, and deny the Tribe's motion for summary judgment.

Dated: October 23, 2023

Respectfully submitted,

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