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)

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Shailen Bhatt, Administrator of the Federal Highway Administration ("Agency"), by and through the undersigned counsel, respectfully replies in support of his cross-motion for summary judgment, ECF No. 43.

ARGUMENT

As noted in the Agency's moving papers, 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 parties' prior agreement, but denied the Agency's motion to dismiss as to the Agency's execution of a new agreement.

In its moving papers, the Agency demonstrated how the undisputed facts in the record fail to support the Tribe's standing as to the remaining claim. Specifically, the Tribe lacks standing because it fails to establish that the Agency (1) could have taken a different action that would (not just could) have resulted in further mitigation of the undertaking's harm to the historic properties, or (2) could still take any such action. On the merits, the Agency amply satisfied its consultation obligation under Section 106, thoroughly seeking, considering, and discussing the Tribe's views regarding proper mitigation terms over the course of more than fifteen months. If anything, the Tribe's response only confirms that its true grievance is simply that the Agency did not adopt its preferred mitigation terms, but Section 106 did not oblige the Agency to do so—its requirements are entirely procedural, not substantive.

Finally, the Tribe fails to establish that it can recover the $30 million in damages that it demands. Sovereign immunity bars a damages award, and the Tribe has no cause of action for such an award; offers no basis for the $30 million sum it demanded; raised no claim regarding the harm for which it demands compensation; and had no property interest in the funds of which the Agency allegedly deprived it. Accordingly, this Court should grant the Agency summary judgment and deny the Tribe's summary judgment motion.

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

In a procedural injury case, traceability entails two distinct analytic steps. *See Hawkins v. Haaland*, 991 F.3d 216, 224 (D.C. Cir. 2021). First, a plaintiff must show that an alleged procedural error could have affected the agency's action, not that it actually did so. *See id.* at 224-25. That is a fairly low bar. *Id.* Second, however, the plaintiff must then show that the agency's action actually "was the cause of [the alleged] injury," not just that it could have been. *Id.* at 225. That is a higher bar. *Id.* While courts can "assume a causal relationship between the procedural defect and the final agency action," a plaintiff "must still demonstrate a causal connection between the agency action and the alleged injury." *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007).

The same basic two-step analysis governs redressability analysis in procedural injury cases. First, a plaintiff must show only that "correcting the alleged procedural violation *could* still change [the agency's decision], not that it *would* effect such a change." *Hawkins*, 991 F.3d at 225 (cleaned up). But next, it must show that a different agency decision actually would, not just could, redress the injury. *Id.* In other words, "a wholly speculative prospect of redress still does not pass muster." *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020). Thus, to summarize, the "relaxed standards" that govern standing in procedural injury cases apply only to the link between an alleged procedural error and the agency's decision—they "do not apply to the link between the government's decision and the plaintiff's injury." *Hawkins*, 991 F.3d at 225.

The Tribe's claim fails at the second step of this analysis. Even assuming that the Agency erred in carrying out its Section 106 obligations and that such error affected its final decision, the Tribe fails to show that there was anything else that the Agency could have done (or still could do) to further mitigate the undertaking's harm to historic properties. *See* Def.'s Mem. at 15-29. In other words, even assuming that there are different actions that the Agency could have taken (and/or still could take), the Tribe fails to show that these other actions actually would—not just could—have further mitigated harm to the historic properties, and/or still would (not could) do so. Even now, in its response, the Tribe fails to identify a single action that the Agency could have taken (and/or could still take) that would have mitigated (and still would mitigate) harm to the historic properties. All it offers is a nebulous assertion that even more "negotiations could have resulted in alternative mitigation measures that would adequately address harm to the historic tribal properties." Pl.'s Resp. at 13. But tellingly, it does not even attempt to specify what these measures could have been. This generic, speculative, and conclusory assertion is not enough to satisfy the burden to show that a different agency decision would have, not just could have, further mitigated harm to the historic properties (and/or would still, not just could still, do so). *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 v. Lynch*, 845 F.3d 1228, 1238 (D.C. Cir. 2017) ("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"); Def.'s Mem. at 18.

The only concrete agency action that the Tribe proposes is conveying the disputed parcels to it, but that does not suffice to establish traceability or redressability, as explained previously, for

three independent reasons. *See* Def.'s Mem. at 17-18. *First*, even if Agency could have included terms requiring Rhode Island to convey the disputed parcels to the Tribe, it had no way to enforce such terms as a practical manner. *Id.* at 18. The first programmatic agreement had actually included such terms, but Rhode Island refused to honor them, and the Agency was unable to force it to do so, despite the Agency's best efforts. *Id.* Indeed, this Court previously dismissed for lack of standing the Tribe's challenge to the first agreement's termination, recognizing that the Agency's inability to force Rhode Island to the convey disputed parcels to the Tribe meant the Tribe's injury was neither traceable to nor redressable by any action of the Agency. *See* Mem. Op. at 17-18, ECF No. 39. *Second*, the Tribe fails to show that, or even explain how, conveying the disputed parcels to it would mitigate harm to entirely different properties. *See* Def.'s Mem. at 18. And *third*, the Tribe fails to establish that, or even explain how, it would do a better job preserving the disputed parcels than Rhode Island currently is doing. *Id.* at 17-18. There is no reason to think that it would.

Finally, any notion that there are other parcels that the Agency could have caused to be transferred to the Tribe, which the Tribe does not identify, and that transferring such parcels to the Tribe would have mitigated harm to the historic properties, in ways that the Tribe does not specify, is speculative and conclusory, and thus insufficient to establish standing. *See id.* at 18; *Racing Enthusiasts*, 45 F.4th at 357; *Kareem*, 986 F.3d at 865-66; *West*, 845 F.3d at 1238; *Williams*, 819 F.3d at 472. For all these reasons, the Tribe fails to "show that the agency action was the cause of some redressable injury to" it. *Hawkins*, 991 F.3d at 225. At the summary judgment stage, the Tribe cannot "rest on such mere allegations, but must set forth by affidavit or other evidence specific facts," *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted), to establish traceability and redressability. The Tribe's bald assertion that there are other, unspecified

parcels that the Agency could have caused it to receive fails to satisfy this requirement. If anything, the Tribe's seeming inability to identify even one such property makes its claim all the less likely.

The Tribe responds by mischaracterizing the Agency's position. The Agency does not argue that "a violation of the [Section] 106 process was not a 'procedural injury,'" as the Tribe incorrectly asserts. Pl.'s Resp. at 3. To the contrary, its position is that the Tribe fails to establish traceability and redressability, not injury in fact. *See* Def.'s Mem. at 15-19; *see also Newdow v. Roberts*, 603 F.3d 1002, 1010 (D.C. Cir. 2010) ("The absence of any one of these three elements defeats standing."). Nor does the Agency dispute that "procedural injury standards appl[y]," as the Tribe wrongly puts it. Pl.'s Resp. at 4. The Agency agrees that procedural injury standards apply, but the Tribe fails to satisfy them. *See* Def.'s Mem. at 15-19. Lastly, the Agency does not (and need not) go quite so far as to assert that "no alternative mitigation . . . could possibly mitigate damage to a property. Pl.'s Resp. at 15. The Agency's position is more modest—only that the Tribe fails to identify any such measure here, as is its burden, and the Agency knows of no such measure.

The Tribe also attempts, unpersuasively, to distinguish cases on which the Agency relies. It argues that *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996), is inapposite as that decision involved "future harm, rather than harm that has already occurred," Pl.'s Resp. at 14, but that is a distinction without a difference—whether an injury occurs in the past or future, what matters, for standing purposes, is whether agency action actually caused the injury, not just whether it could have caused the injury, and that a different action would redress that injury, not just that it could redress the injury. *See Haaland*, 991 F.3d at 224-25; *Bentsen*, 94 F.3d at 664-65. The Tribe also argues that the *Bentsen* plaintiffs' theory of traceability failed because it presupposed certain actions by third parties, *see* Pl.'s Resp. at 14-15, but the Tribe offers no theory of traceability at all—only the conclusory assertion that the Agency could have taken a different, unspecified action

that would have further mitigated harm to the historic properties in some unspecified way. Next, the Tribe argues that "[t]he cases upon which [the Agency relies] only failed to find causation when there was not a reasonable connection to the agency action and the alleged harm," and that "[w]hen the harm was directly flowing from the challenged agency decision, as in this case, the court found that there was traceability from the agency decision to the injury-in-fact." *Id.* at 13-14. But this argument is circular, as the Tribe has not shown that its alleged injury is traceable to the challenged action, as explained. And conspicuously, the Tribe does not address *Haaland* at all.

Finally, the Tribe argues that the Agency can "mitigate damage to one historic property by preserving other historic properties," Pl.'s Resp. at 15, but fails to demonstrate standing under such a such a theory, either. According to the Advisory Council, one permissible Section 106 mitigation "alternative" is "acquisition and preservation of archaeological sites away from the project area in return for doing little or no direct mitigation on sites within the area of potential [project] effects." *Questions and Answers: Reaching Agreement on Appropriate Treatment*, Advisory Council, https://www.achp.gov/Section_106_Archaeology_Guidance/Questions%20and%20Answers/Reaching%20agreement%20on%20Appropriate%20Treatment. But even if that sufficed to establish traceability or redressability—a dubious proposition that this Court need not ultimately address—the Tribe cannot establish traceability and/or redressability under such a theory under the facts of this case, as it fails to show that the Agency could have done anything to preserve other properties.

As an initial matter, it is doubtful that a plaintiff alleging that a Section 106 undertaking has harmed a historic property can ever establish traceability and/or redressability based solely on the notion of preserving a different property, as that conflates the requirements of Section 106 with those of constitutional standing analysis. *See Tax Analysts & Advocs. v. Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977) ("a primary theme in the law of standing [is] that the question of standing is

a matter apart and distinct from the merits of the substantive claims put forth"). Standing depends on actual facts "that 'exist' in the real world," not legal conclusions. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021); *see also Lujan*, 504 U.S. at 571 n.4 (standing "depends on the facts as they exist" (cleaned up)). Injury in fact, for instance, "must be *de facto*; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (cleaned up). So too with traceability and redressability. "Like the injury question," the "inquiry" as to traceability and redressability "refers to facts about the real world," not just legal labels. *Coubaly v. Cargill, Inc.*, 610 F. Supp. 3d 173, 182 (D.D.C. 2022) (internal quotation marks omitted). The only injury that the Tribe asserts is the Viaduct Project's harm to the historic properties. Compl. ¶ 6. But the project's harm to the historic properties is factually untraceable to the Agency's failure to preserve different properties, as it would have occurred even if the Agency had preserved other properties. Nor, by definition, would preserving other properties factually redress any harm to the actually at-issue historic properties.

The notion that preserving a different property can constitute "mitigation," for Section 106 purposes, under the Advisory Council's guidance, does not alter this analysis. Even if preserving a different property can constitute "mitigation" of an undertaking's harm to a particular historic property in a purely legal sense, it does not establish traceability or redressability as to such harm in the factual sense standing analysis requires. Just as Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is," *TransUnion*, 141 S. Ct. at 2205, nor can Congress (or the Advisory Council) enact traceability and/or redressability into existence simply by affixing the label "mitigation" onto something that does not otherwise establish those elements. *See Coubaly*, 610 F. Supp. 3d at 182 (Congress "cannot eliminate the constitutional causation requirement any more than it can relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete

harm under Article III's injury-in-fact requirement." (cleaned up, citing *TransUnion*, 141 S. Ct. at 2205)); *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843, 874 (D.C. Cir. 1988) (Buckley, J., joining in part) (Congress cannot "abrogate the Art. III minima simply by making 'findings' concerning causation and redressability . . . We are aware of no case premising a finding of redressability on congressional intent alone"). It thus is unlikely that preserving a different property can ever suffice to establish traceability and/or redressability when the asserted injury is harm to a historic property.

But this Court need not wade into that thicket, because the Tribe fails to establish that the Agency could have done anything to preserve different historic properties under the facts of this case. The only such properties that the Tribe identifies are the disputed parcels, but as explained earlier, the Agency had no way to force Rhode Island convey those parcels to the Tribe—indeed, its earlier efforts to do so had already proven unsuccessful. *See supra*; Def.'s Mem. at 18; Mem. Op. at 17-18. And even if the Agency could have compelled Rhode Island to convey the parcels to the Tribe, the Tribe offers no reason to conclude that it would have done a better job preserving them than Rhode Island was doing. *See supra*; Def.'s Mem. at 17. As such, even assuming that a Section 106 plaintiff ever can establish traceability or redressability based on the idea of preserving entirely different properties, the Tribe fails to establish that the Agency could have done so here.

For all these reasons, the Tribe lacks standing.

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

"Section 106 of the Historic Preservation Act is a 'stop, look, and listen' provision; it requires federal agencies to take into account the effect of their actions." *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1189 (D.C. Cir. 2023) (cleaned up). "An essentially procedural statute, [S]ection 106 imposes no substantive standards on agencies," requiring only that they "solicit [stakeholders'] comments and [ ] 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)); *see also Davis v. Latschar*,

202 F.3d 359, 370 (D.C. Cir. 2000) ("The requirements of Section 106, however, do not require the [agency] to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult [relevant stakeholders] and consider the impacts of its undertaking."). In moving for summary judgment, the Agency explained that it satisfied its duty to consult with the Tribe in formulating the new agreement. It engaged in a thorough "process of seeking, discussing, and considering the [Tribe's] views," which it took "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 drafts of the new agreement, solicited the Tribe's input regarding the draft's proposed terms, and addressed the concerns and questions that the Tribe had raised. *See* Def.'s Mem. at 20-22, ECF No. 43-1. Notably, the Tribe disputes none of this. *See* Pl.'s Resp. at 2 (acknowledging Agency's "conversations, meetings, [and] letters with the Tribe").

The Agency thus amply satisfied Section 106's requirements. *See Eagle Cnty.*, 82 F.4th at 1189 (agency "contacted [stakeholder] entities . . . and invited the public to provide feedback . . . . [Its] process of seeking, discussing, and considering the views of others . . . was sufficient here, especially since the [stakeholder entity] participated and could have raised its concerns" (cleaned up)); *Oglala Sioux Tribe v. Nuclear Regul. Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022) ("The Commission invited the Tribe's participation . . . and engaged with the Tribe over a two-year period . . . . The Tribe's refusal to participate . . . and its challenges to the agency's methodology do not vitiate the reasonable opportunity the Tribe was, in fact, afforded. The Commission satisfied its consultation obligations under [Section 106].").

Indeed, while the Tribe continues to cast its argument in procedural terms, its true grievance plainly is that the Agency declined to adopt its preferred mitigation terms, which Section 106 did not require the Agency to do. The Tribe complains that the Agency adopted "mitigation measures

[that it] had long objected to," and did not defer to its "position on the mitigation measures" or let it "negotiate alternative measures and reject or modify proposals submitted by the Agency." Pl.'s Resp. at 5, 7. And it insists that "the properties to serve as mitigation for the Viaduct Project" ought to have been the disputed parcels, suggesting that no other mitigation measure would have sufficed. *Id.* at 7. But as this Court has now explained repeatedly, "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 Narragansett Indian Tribe v. Pollack*, Civ. A. No. 20-0576 (RC), 2022 WL 782410, at *2 (D.D.C. Mar. 15, 2022) (same); *Narragansett Indian Tribe v. Nason*, Civ. A. No. 20-0576 (RC), 2020 WL 4201633, at *2 (D.D.C. July 22, 2020) (same). While the Tribe may be disappointed with the mitigation terms that the Agency ultimately selected, the Agency simply was not obliged to adopt the terms that the Tribe preferred.

The Tribe's contention that the Agency erred by putting on the table for discussion potential mitigation terms that it had not pre-approved, *see* Pl.'s Resp. at 12 ("The Federal Tribe should have been included at the beginning of the New PA negotiations, in meetings with the state, and Federal Highways to develop alternative mitigation measures. Instead, the Plaintiff was presented with drafts that included mitigation measures unacceptable to the Tribe and only ones the State suggested."), is equally meritless. Discussions about appropriate mitigation measures had to start somewhere, and nothing in the Section 106 regulations forbade the Agency from kicking off the conversation by merely putting certain terms on the table for consideration, without waiting to hear the Tribe's preference. By "seeking, discussing, and considering the [Tribe's] views" and "tak[ing] those views into account in reaching a final decision," the Agency did everything the Section 106 required. 36 C.F.R. §§ 800.14(f)(2), 800.16(f). The Tribe's argument that the Agency presented it

with potential mitigation terms that the Tribe had not pre-approved is, in substance, just another complaint that the Agency did not select its preferred terms, which fails for the reasons explained.

Equally unavailing is the Tribe's apparent assertion that it was not a "signatory" to the new agreement because it had the status of a "concurring" party. *See* Pl.'s Resp. at 7 ("Defendants . . . had the Tribe in a concurring party role and not as a signatory"), 9 ("the Tribe was a 'concurring party' and not a signatory party"), 12 ("The Agency had a vested interest in keeping the tribe in a concurring party role and not a signatory role."). While the Section 106 regulations refer to both signatory and concurring parties, these terms are not mutually exclusive. *See* 36 C.F.R. § 800.6(c). As explained previously, the Agency invited the Tribe to sign the agreement, but the Tribe refused to do so. *See* AR 976 (blank signature line for Tribe); Def.'s Mem. at 12. Regardless, the Agency was not required to invite the Tribe to sign the agreement at all—it did so solely as a matter of grace. *See* 36 C.F.R. § 800.6(c)(2)(ii) (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"); Def.'s Mem. at 21 n.3.

The Tribe's affidavit, meanwhile, is not properly before this Court. Judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, "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). As such, courts "generally do not consider information that was not before the agency when making its decision." *NYC C.L.A.S.H., Inc. v. Fudge*, 47 F.4th 757, 765 (D.C. Cir. 2022). The Tribe's assertion that its affidavit conforms to the requirements of Federal Rule of Civil Procedure 56(c)(4), *see* Pl.'s Resp. at 8-9, is beside the point. "In a case involving a challenge to a final agency action under the APA, the standards for general summary judgment set forth in Rule 56(c) do not apply because of the limited role of a court in reviewing the administrative record." *Kinsley v.*

Blinken, Civ. A. No. 21-0962 (JEB), 2021 WL 4551907, at *4 (D.D.C. Oct. 5, 2021); *accord Fla. Health Scis. Ctr., Inc. v. Becerra*, Civ. A. No. 19-3487 (RC), 2021 WL 2823104, at *3 (D.D.C. July 7, 2021) ("In cases involving review of agency action under the APA, however, Rule 56 does not apply because of the limited role of a court in reviewing the administrative record." (internal quotation marks omitted)). And by its own terms, the rule only sets a floor for supporting affidavits, setting standards that they "must" satisfy to be admissible. Fed. R. Civ. P. 56(c)(4). It does not purport to require the admission of any affidavit that satisfies its terms, even where a different legal rule—such as that APA judicial review is limited to the administrative record—independently forecloses the affidavit's admission. *Id.* The Tribe's observation that the Agency filed a declaration of its own in opposing the Tribe's motion to supplement the administrative record is irrelevant. In passing upon that motion, the Court was not reviewing agency action under the APA. Here, it is.

Finally, even were the Tribe's affidavit properly before the Court, it does nothing to support the Tribe's position. The affiant complains that the Agency did not defer to the Tribe's preferences as much as he would have liked, but his assertions merely duplicate record evidence and arguments in the Tribe's briefing, and thus contributes nothing to this Court's understanding of the facts and/or issues in this case. For example, the Tribe argues that the affiant "verifies that it is disingenuous for the Agency to expect the Tribe or his Offices to execute an agreement with the mitigation terms presented," Pl.'s Resp. at 8, but the Agency has never claimed that it expected the Tribe to accept its proposed terms. Rather, as explained, Section 106 did not require the Tribe's acquiescence to the proposed mitigation terms. If anything, the affidavit only confirms that the Agency diligently sought out, discussed, and considered the Tribe's views, and thus amply carried out its Section 106 duties. The affiant also argues, in conclusory fashion, that the Agency did not satisfy its Section 106 obligations, but a party cannot press legal arguments through affidavits, much less conclusory

arguments. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (courts will not credit "conclusory allegations [in] an affidavit"); *Camara v. Mastro's Rests. LLC*, 952 F.3d 372, 375 (D.C. Cir. 2020) ("conclusory allegations [in] an affidavit . . . render it inadequate" (cleaned up)).

III. The Tribe Cannot Recover Damages

In moving to dismiss, the Agency explained that sovereign immunity bars the Tribe's claim for damages of $30 million. *See* Def.'s Mem. at 22-23; 5 U.S.C. § 702 (sovereign immunity waiver for claims "seeking relief other than money damages"). In response, the Tribe concedes the point. *See* Pl.'s Resp. at 16 ("this statutory waiver does not authorize money damages as a remedy"). The Tribe argues that equitable relief is available, *see id.*, but that is a non-sequitur, as money damages are a legal remedy, not an equitable remedy. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) ("We have recognized the general rule that monetary relief is legal" (internal quotation marks omitted)). And the Tribe specifically seeks $30 million in "damages," Compl. at 20—it did not raise any equitable claim for such a sum, and "[i]t is well-established that a party may not amend its complaint or broaden its claims through summary judgment briefing," *Pinson v. Dep't of Just.*, 61 F. Supp. 3d 164, 179 n.10 (D.D.C. 2015); *see also Metroil, Inc. v. Exxonmobil Oil Corp.*, 672 F.3d 1108, 1117 (D.C. Cir. 2012) (plaintiff "did not assert that claim in its complaint, and we therefore do not consider it"). Nor does the Tribe engage with the Agency's observations that it (1) lacks a cause of action for damages, an inquiry that is "analytically distinct" from whether sovereign immunity applies, *FDIC v. Meyer*, 510 U.S. 471, 484 (1994); (2) offers no basis for how it calculated the $30 million figure; and (3) did not raise any claim to relief regarding money that it ostensibly contributed to acquiring the disputed parcels. *See* Def.'s Mem. at 23-26.

The Tribe also fails to show that it had a legally protected interest in the $30 million at issue. A plaintiff has a property interest in a government benefit only if one has "a legitimate claim of entitlement to" the benefit. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The

Tribe offers no evidence that it had a legitimate claim of entitlement to the $30 million, which, as the Agency explained, were federal funds belonging to the Agency and Fish and Wildlife Service, respectively, not to the Tribe. *See* Def.'s Mem. at 26; AR 40, 835-36, 877. These agencies initially had intended to use those funds for certain purposes benefitting the Tribe, but, as a term of the first agreement, reallocated the funds toward acquiring the disputed parcels. *Id.* This plan eventually fell apart with the first agreement's termination, but nothing—no statute, regulation, rule, contract, or agreement—obligated the agencies to then resume their initial intent of using the funds in a way that benefitted the Tribe. The Tribe cites no contrary evidence—only conclusory allegations in its own pleadings, *see* Pl.'s Resp. at 17 (citing Compl. ¶¶ 39-46, 70, 73 and at 19-20), which warrant no weight, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of [its] pleading" (internal quotation marks omitted)). The Tribe's assertion that "[t]he Agency could not have taken or used those funds without the agreement and consent of the Tribe," Pl.'s Resp. at 17, is simply untrue, as the Agency already explained, *see* Def.'s Mem. at 26; AR 40, 835-36, 877, and the Tribe conspicuously offers no factual or legal support for this contention.

Finally, the Tribe's argument that "whether a protected property interest exists turns on the certainty of the plaintiff's expectation that it would receive the property," *UMC Dev., LLC v. District of Columbia*, 401 F. Supp. 3d 140, 152 (D.D.C. 2019) (cleaned up), fails because it did not have a certain expectation that it would receive the funds at issue. To the contrary, a so-called interest that is "wholly dependent on a particular exercise of [another entity's] discretion" is "too contingent to create an entitlement worthy of [ ] protection" *Id.* As explained, any interest that the Tribe had in the $30 million was wholly dependent on how federal agencies chose to exercise their discretion in disbursing the funds, and thus was too contingent to be a property right. At most, the

Tribe "had only a unilateral expectation that [it] would receive [the funds], and unfortunately for [it], a mere unilateral expectation is not a property interest entitled to protection." *Id.* (cleaned up).

CONCLUSION

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

Dated: December 11, 2023

Respectfully submitted,

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