ORAL ARGUMENT NOT YET SCHEDULED

No. 24-5193

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NARRAGANSETT INDIAN TRIBE,
Plaintiff/Appellant,

v.

KRISTIN WHITE, Acting Administrator,
Federal Highway Administration, et al,
Defendant/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF OF PLAINTIFF-APPELLANT NARRAGANSETT INDIAN TRIBE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant Narragansett Indian Tribe ("NIT") hereby certifies as follows:

I. Parties and Amici

A. NIT is plaintiff in the district court and appellant in this Court.

B. The Federal Highway Administration ("FHWA") is the defendant in the district court and the appellee in this Court.

C. The United South and Eastern Tribes Sovereignty Protection Fund ("USET SPF") is Amici in this Court. They supported NIT's Motion for Summary Refusal and will file a brief supporting NIT's opening brief. USET SPF is a non-profit, inter-Tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF was formed in 2014 as an affiliate of the United South and Eastern Tribes, Inc. to advocate on behalf of USET SPF's Tribal Nation members by upholding, protecting, and advancing inherent sovereign authorities and rights. The Narragansett Indian Tribe (NIT) is a federally recognized Tribal Nation and a member of USET SPF.

RULE 26.1 DISCLOSURE STATEMENT

Circuit Rule 26.1, does not apply because NIT is not a corporation but a Federally Recognized sovereign Native American Tribal Nation. The Tribal Chief

Sachem and members of the Tribal Council operate under a Tribal Constitution and Tribal Law. The Tribe is in the State of Rhode Island, in a rural area known as Charlestown. In this area, they have a reservation of land held in Trust by the United States Government of approximately 2000 acres. The Narragansett Reservation is mostly undeveloped lands with very sensitive water resources (91 percent wetlands and 2.5 percent open water). Currently, only about 2 percent of the reservation is used for Tribal administration or agricultural purposes.

II. Ruling Under Review

Plaintiff-Appellant NIT appeals the July 23, 2024, final order and judgement of the United States District Court of the District of Columbia (Contreras, R.), which granted defendant-appellee FHWA's motion to dismiss. The opinion is unreported and was filed on this Court's docket. It is also found on the lower courts Docket for 1:22-cv-02299, ECF Doc. 51 and 52 (Order and Memorandum Opinion).

III. Related Cases

a. Resolved in the D.C. Circuit: *Narragansett v. Hendrickson*, No. 1:20-cv-00576 (D.C.C. Mar. 15, 2022) (J. Rudolph Contreras) (dismissed without prejudice).

b. Resolved in the First Circuit: *Narragansett Indian Tribe v. Rhode Island Dept't of Transp*., 903 F. 3d 26 (1st Cir. 2018) (affirming dismissal for lack of subject matter jurisdiction).

c. Resolved in the U.S. District Court for the District of Columbia: *Narragansett Indian Tribe v. Pollack*, No. 1:22-cv-02299-RC, 2023 WL 4824733 (D.D.C. 2023) (disposing various motions).

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GLOSSARY OF ABBREVIATIONS

NIT or Tribe	Narragansett Indian Tribe (Appellant)
APA	Administrative Procedure Act
FHWA	Federal Highway Administration (Appellees)
AR	Administrative Record (district court)
NHPA	National Historic Preservation Act
1st PA	First Programmatic Agreement (Section 106 Process)
2nd PA	Second Programmatic Agreement (Section 106 Process)
ACHP	Advisory Council of Historic Preservation
RISHPO	Rhode Island State Historic Preservation Office
RIDOT	Rhode Island Department of Transportation
THPO	Tribal Historic Preservation Office
SHPO	State Historic Preservation Office

INTRODUCTION

The Plaintiff-Appellant, the Narragansett Indian Tribe ("NIT" or "Tribe"), seeks reversal of the district Court decision entered July 23, 2024 (Civ. A. No. 22-2299, R.51). The NIT filed their claim against the Federal Highway Administration ("FHWA") under the Administrative Procedure Act ("APA") for a final agency action that failed to observe procedure required by law and was "arbitrary, capricious, an abuse of the agency's discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) and (D); *See, e.g.*, *Coburn v. McHugh*, 77 F. Supp.3d 24, 29 (D.D.C. 2014, aff'd No. 15-5009, 2016 3648546 (D.C. Cir. July 8, 2016). (Civ.A.No. 22-2299, R.1).

The key facts found in the administrative record ("AR" R. 49, 50) that meet the standard for a finding of arbitrary and capricious or poorly reasoned decision making was when the FHWA failed to include NIT as a consulting party from the Section 106 process (of the National Historic Preservation Act ("NHPA")) to mitigate the adverse effects of harms to significant historic properties of the Tribe (known as "the Coveland properties"), when it terminated the first Programmatic Agreement ("1st PA") of 2013 and then developed the second Programmatic Agreement ("2nd PA"). The District court dismissed on the ground the inclusion of the Tribe as a consulting party was not required, because the properties were not part of the Tribe's Federal reservation. This was clear error and should be

reversed. The Court lacked understanding of the NHPA and its regulations to create a significant role for Tribes to ensure the Tribe's views were part of the Section 106 process. To limit the Tribe's role to only historically significant properties on Tribal reservation lands fails to apply the regulations and undermines this intent and the broader purpose of NHPA to protect Tribal sacred places. The district court's decision gave undue deference to the Agency's interpretation of the NHPA rules administered by the Advisory Council of Historic Preservation. ("ACHP")

The NHPA Section 106 process regulations are intended to acknowledge Tribal sovereignty and the role of the Tribes to protect from harm culturally significant properties. 54 U.S.C. § 306108, 36 C.F.R. § 800 *et seq*, 36 C.F.R. § 800.1(a). Subpart B of this chapter of the Code of Federal Regulations lays out in detail the normal Section 106 process. *See* 36 C.F.R. §§ 800.3–800.13. Subpart C discusses program alternatives. *See id.* §§ 800.14– 800.16.

The termination of the 1st PA violated tribal sovereignty by requiring the tribe to waive its sovereign immunity after the agreement was fully executed. Then instead of amending the mitigation agreement, and continuing consultation to find alternative measures, the Agency disguised the amendment by termination and created a new PA that excluded the Tribe as a consulting party. This was arbitrary and capricious agency action and clear error of the court to not require the agency

to follow the law, i.e., the NHPA Section 106 process regulations. The district court's decision should be reversed and remanded back to the agency for compliance with the Section 106 process.

JURISDICTIONAL STATEMENT

Appeal was timely taken on August 23, 2024, within sixty days of the district court's memorandum opinion and order, entered July 23, 2024, granting defendants' motion to dismiss and disposing of all claims in this action. This Court has jurisdiction over this timely appeal from a final judgment in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291. The district court exercised jurisdiction over the case under 28 U.S,C. § 1331 (Federal Question), and 28 U.S.C. § 1362 (Jurisdiction Over Indian Tribes) and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment and Injunctive Relief). The Administrative Procedure Act ("APA") provides a waiver of sovereign immunity as well as a cause of action against the FHWA, 5 U.S.C. § 702.

ISSUES PRESENTED

I. Whether the District Court erred in applying the rules of the NHPA and what is known as the Section 106 process, when it found that NIT did not have the right to be a consulting party (and thus a signatory) to the 2nd PA after termination of the 1st PA by the FHWA.

II. Whether the District Court erred in giving undue deference to the Agency's

interpretation of the regulation that the NIT had no rights to be a signatory on the 2nd PA, even though the Tribe was a consulting party signatory on the 1st PA.

III. Whether the District Court erred in failing to remand for the purpose of requiring restitution to the NIT for federal program monies it had contributed as part of the executed 1st PA to assist with the acquisition of certain historic properties within the NIT reservation boundaries that were to be transferred in fee to the NIT for conservation.

IV. Whether the District Court erred in failing to find the decision of the FHWA was arbitrary and capricious, when it terminated the 1st PA, that was executed by all consulting parties, that included the NIT, and then failed to include the NIT as a consulting party signatory on the 2nd PA, for the purpose of accepting the same mitigation measures proposed by the State of Rhode Island in consultations under the 1st PA that would allow the highway undertaking to be completed without the NIT as a signatory to the 2nd PA.

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions are printed in the Addendum to this Brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. Congress enacted the NHPA, 54 U.S.C. §§300101 et seq., to preserve America's historic and cultural heritage. Congress declared that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people" and that "the preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

2. Section 106 of the NHPA requires all federal agencies to "take into account" the impact of federal undertakings on historic properties including Tribal historic properties. 54 U.S.C. § 306108, 36 C.F.R. § 800 *et seq*.

3. Federal agencies are required to consult with Indian Tribes on a government-to-government basis. Moreover, federal regulations provide that "the Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty." 36 C.F.R. § 800.2(c).

4. When an undertaking will adversely affect one or more Tribal historic properties, the federal agency must engage in consultation with Tribe's to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate [those] adverse effects." 36 C.F.R. § 800.6. This requirement is for historic tribal properties both on or off tribal lands. *Id.* § 800.2(c). PA's developed to mitigate the adverse effects to Tribal Historic Properties require the Tribe as a signatory, even when the historic property is off reservation lands. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii), 800.3(f)(2).

5. Decisions made regarding comments from the ACHP require that the agency making the decision prepare "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments" as well as provide "a copy of the summary to all consulting parties." 36 C.F.R. § 800.7(c)(4). FHWA did not provide when developing a 2nd PA, an explanation for its decision to exclude the Tribe as a Consulting party signature, as it had done in the 1st PA.

II. Factual Backgroun

1. FHWA has provided substantial funding for the replacement of the I-95 Providence Viaduct Bridge No. 578 project in Providence, Rhode Island ("the Viaduct Project"), including funding under Title 23 of the United States Code.

2. As a recipient of federal funds, including Title 23 funds, the Viaduct

Project qualifies as an "undertaking" pursuant to the NHPA.

3. Section 106 of the NHPA requires federal agencies to account for the effect of any federal undertaking on any historic property protected by the NHPA before licensing or expending funds for such undertaking. 54 U.S.C. § 306108.

4. FHWA determined that implementation of the Viaduct Project would result in adverse effects on the Providence Covelands Archaeological District (RI 935).

5. The Tribe/NIT attaches religious and cultural significance to the Providence Covelands Archaeological District (RI 935).

6. Instead of undergoing a Phase III archaeological data recovery program to mitigate the effects of the Viaduct Project—because such a program would not have been feasible due to environmental, logistical, and cost factors—the FHWA developed the PA amongst itself, the Tribe/NIT, the Rhode Island State Historic Preservation Office ("RISHPO"), and the Rhode Island Department of Transportation ("RIDOT").

7. Upon information and belief, the actual costs of conducting a Phase III archaeological data recovery program would have exceeded thirty million ($30,000,000) dollars.

8. Pursuant to 36 C.F.R. Part 800, governing Section 106 of the National Historic Preservation Act of 1966, as amended, Plaintiff, Defendant in the district

court, the RIDOT, and the RISHPO executed the 1st PA, effective October 3, 2011, to govern the implementation of the Viaduct Project and to account for the foreseen and unforeseen future effects of the Viaduct Project on historic properties.

9. Pursuant to the 1st PA, the FHWA, in coordination with the RIDOT, agreed, *inter alia*, to certain stipulations requiring the acquisition and transfer of land to Plaintiff, which stipulations were amended on January 17, 2013, in Amendment No. 1 to the 1st PA.

10. Stipulation 3 of the amended 1st PA requires "the FHWA in coordination with RIDOT" to acquire and transfer ownership of certain parcels of land to the Tribe, including: (a) the Salt Pond Archaeological Preserve (RI 110), Town of Narragansett Tax Assessor's Plat W, Lot 81, Lot 82/Subdivision Lots 27-79 and Lot 82/Subdivision Lots A (portion), B, C, E (portion), F, G, H, I, J and K; (b) the so-called "Providence Boys Club - Camp Davis" property (a 105+/-acre parcel), Town of Charlestown Tax Assessor's Plat 19, Lot 75; and (c) the so called "Chief Sachem Night Hawk" property, located at 4553 South County Trail (Tax Assessor's Plat 22, Lot 9-1) in the Town of Charlestown, Rhode Island (all three properties collectively referred to as the "Mitigation Properties").

11. The 1st PA provided that the Salt Pond Archaeological Preserve was to be transferred to the Tribe as a joint owner with the State of Rhode Island.

12. Ownership of the Providence Boys Club – Camp Davis and Chief

Sachem Night Hawk properties was to be transferred solely to the Tribe with "[a]ppropiate covenants that preserve the property and its cultural resources in perpetuity[.]"

13. To help facilitate the acquisition of the Salt Pond Archaeological Preserve, the Tribe authorized the release of $446,250 to the FHWA which was being held pursuant to an escrow agreement with U.S. Fish and Wildlife and the Tribe.

14. An additional $450,000 was re-allocated by the FHWA and the RIDOT from the Tribe's Crandall Farm Transportation Enhancement Project towards the costs of acquisition of the Mitigation Properties.

15. The Mitigation Properties have inherently historic, cultural, and religious significance to the Tribe.

16. The Chief Sachem Night Hawk property was acquired by the RIDOT from a Tribal member of NIT with the express understanding that the property would then be transferred back to the Tribe as part of the 1st PA.

17. The 1st PA never required the Tribe to waive its sovereign immunity with respect to the transfer of the Mitigation Properties. AR001216 to 001239(1st PA).

18. Construction of the Viaduct Project began in June 2013.

19. Despite ongoing and continuous construction of the Viaduct Project,

and in violation of the executed 1st PA, the RIDOT announced that it would not transfer the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties to the Tribe unless the Tribe specifically waived its sovereign immunity with respect to those two properties and entered into a covenant to subject the properties to the civil and criminal laws and jurisdiction of the State of Rhode Island. AR 000175-6. (ACHP recommendation against the waiver of sovereign immunity.)

20. The RIDOT's decision to seek a waiver of the Tribe's sovereign immunity was at the request of Claire Richards, the Executive Counsel to the Rhode Island Governor, and was contrary to legal advice given by the General Counsel of the FHWA that failure to implement the 1st PA would be a violation of the NHPA. AR000496-497.

21. On September 1, 2016, the FHWA advised the RIDOT that the failure to satisfy the "section 106 commitment to transfer these properties to the Tribe . . . stems from RIDOT's insistence that the Tribe waive its sovereign immunity as a prerequisite to transferring the property, a requirement not included in the programmatic agreement[.]"*Id.*

22. Claire Richards in correspondence with the FHWA disagreed with its opinion and insisted that the State of Rhode Island would not agree to 1st PA without a waiver of the Tribe's sovereign immunity, thus insisting the Tribe

disavow its status and federally recognized sovereign Indian Nation.

23. The southbound lane of the Viaduct Project was completed and opened to traffic in the Fall of 2016.

24. The construction of the southbound lane of the Viaduct Project through the Providence Coveland District 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.

25. The despoliation of historically, culturally, and religiously significant sites is in violation of the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

26. The FHWA, reversed its prior position that the State of Rhode Island was required to transfer properties (Providence Boys Club – Camp Davis and Chief Sachem Night Hawk) without a waiver of the Tribes Sovereign immunity and terminated the 1st PA on January 19, 2017, rather than amend the 1st PA and consider alternative mitigation measures acceptable to all parties.

27. On May 3, 2017, the Advisory Council on Historic Preservation ("ACHP") issued comments to the FHWA regarding the termination of the 1st PA.

28. The FHWA was required to account for the ACHP's comments in making a final decision on how to proceed with the undertaking.

29. The ACHP's comments recommended that: (a) the Viaduct Project

should not be delayed; (b) the Salt Pond Archaeological Preserve should be preserved as agreed to in the first PA; and (c) the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties should be transferred to the Tribe as sole owners, without covenants, without waiver of sovereign immunity, but with the state retaining jurisdiction. AR000176.

30. On June 28, 2018, the FHWA, "tak[ing] into consideration the [ACHP's] comments dated May 3, 2017" determined that it would "reinitiate Section 106 consultation for the project and draft a new PA committing to the below mitigation items to address the known and potential adverse effects to historic properties on the I-95 Viaduct Project in Rhode Island." AR000486-487, AR000120-121.

31. The new mitigation items identified by the FHWA were as follows: (a) transfer of the Salt Pond Archaeological Preserve as contemplated by the 1st PA; and (b) in lieu of the land transfers of the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties, implementation of 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." AR000361-367

32. The 2nd PA, executed on September 18, 2019, was negotiated without the Tribe's consultation in violation of 36 C.F.R. § 800.14(f). *Id*.

33. The June 28, 2018, determination by the FHWA constitutes final agency action from the FHWA regarding the termination of the 1st PA. Civ Act. No 20-576 (R.27) April 15. 2020.

34. The execution of the 2nd PA on September 18, 2019, constitutes final agency action from the FHWA regarding the creation of the 2nd PA. The final action of the FHWA has resulted in a complete failure to address and mitigate the adverse effects of the Viaduct Project, including the destruction of the site that has resulted from completion of the southbound lane of the Viaduct Project.

III. District Court Proceedings

The procedural history of this case is complex in that it was transferred to U.S, District Court in D.C. on February 27, 2020, from the District of Rhode Island and assigned to Judge Rudolph Contreras, Civ. Action. No. 20-576. The Order NIT is appealing, of Judge Contreras, is dated July 23, 2024, in the later related case, Civ. Action No. 22-2299 (R. 51), as correctly stated by Appellee, FHWA in its certificate as to Parties, filed on September 29, 2024. Document #2075991. The FHWA named as other Defendant-Appellees, in its Certificate as to Parties, the State of Rhode Island; Claire Richards, the executive Counsel at the Rhode Island Office of the Governor; and the Rhode Island Department of Transportation. And Appellant NIT, in its Certificate as to Parties, listed the same Appellee-Defendants, because they were the named defendants in the

Compliant filed in Civ, Action No. 22-2299. (R. 1) August 3, 2022.

NIT in its Notice of Underlying Decisions, attached the Order enter July 23, 2024 (R. 51) and the Order entered March 15, 2022 in the related case No. 20-576, (R. 75) that granted the State of Rhode Island's Motion to Dismiss, but dismissed the Plaintiff's NIT complaint without prejudice, which allowed the Plaintiff NIT to amend its complaint moving forward against the same parties and argue it had standing. Prior to this decision allowing NIT to amend its pleadings, it filed a motion to compel and a motion for sanctions that were later dismissed. (R. 55, 59 and 66). On August 3, 2022, Plaintiff NIT filed the related case between the original parties and heard before the same judge, Civ. Action No. 22-2299 (R. 1). Judge Contreras, again Dismissed the State of Rhode, and the other state defendants from the case on July 27, 2023, but allowed Plaintiff NIT to move forward with its claims against the FHWA under the 2nd PA for failure to consult and mitigate harms to Tribal historic properties. (R. 38-39). The district court found NIT had standing to pursue its claims, but as stated above on July 23, 2024, the Court denied Plaintiff NIT's Motion for Summary Judgment and granted Defendant the FHWA's cross Motions for Summary Judgment. (R. 51)

Because of the long record in this case over many years, NIT moves the Court to take Judicial Notice of the Record of both cases. The appeal of NIT is

for the reversal of the July 23, 2024, final court decision. This Court has dismissed the State of Rhode in its Order of February 11, 2025. However, NIT the Appellant is entitled to *de novo* review as to matters of law, for its claims against Appellees-Defendants the FHWA. This Court has the discretion to review the entire record, without deference to decisions of the district court.

NIT believes the record shows that RI and the FHWA together agreed the completion the federal undertaking in RI depended on the exclusion of the Tribe as a consulting party. For this reason the entire record in both 22-2299 and 20-576 should be under review.

SUMMARY OF ARGUMENT

NIT identified two primary issues for reversal of the district on *de novo* review in its statement of issues. The first is the district court's misinterpretation of the Rules governing the implementation of programmatic agreements. The district court dismissed NIT's summary judgment motion on the primary finding that the significant Tribal historic properties subject to the Section 106 process were not on Tribal Lands and the FHWA had no requirement to include the Tribe as a consulting party signatory. The court defined Tribal lands as the Tribe's Federal Reservation Land. And second, the district court erred in finding the exclusion of the tribe as a consulting party signatory in the 2nd PA was not arbitrary and capricious decision making and failed to observe

procedures required by federal law. Document #2076126, filed 09/20/2024. The district court should have required the FHWA to follow the Section 106 process regulations, and not defer to the agency's, convenient misinterpretation of the NHPA and the ACHP's regulations that give Federally Recognized Sovereign Native Nations a signatory role in developing PAs to mitigate the adverse effects of Federal undertakings both on and off Tribal lands. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii), 800.3(f)(2).

STANDARD OF REVIEW

The district court's decision to grant the FHWA's motion to dismiss is reviewed *de novo*. *See Cierco v. Mnuchin*, 857 F.3d 407, 414 (D.C. Cir. 2017). Allegations in a complaint are "taken as true for purposes of a motion to dismiss." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (*per curiam*). Questions of Law are reviewed *de novo* by the Court of Appeals without deference to the lower court's decision. *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002) (quoting *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993)). "We review the district court's APA ruling *de novo*, "as if the agency's decision had been appealed to this court directly.'"

ARGUMENT

I. NIT has Article III Standing to Challenge the FHWA Failure to Mitigate the Adverse Effects of the Undertaking on its Historic Properties.

It is significant that the district court found NIT had suffered a procedural injury and had standing at both the Motion to Dismiss stage as well as in review of NIT's Motion for Summary Judgment. "The Court must ensure that the Tribe has standing at the summary judgment stage even if the Court previously concluded that the Tribe had standing at the motion to dismiss stage. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In other words, at the summary judgment stage "the plaintiff can no longer rest on . . . 'mere allegations,' but must instead point to specific facts that are acceptable as evidence at this stage of the litigation to prove it has standing. *Id.* (quotation marks and citation omitted)." Memorandum Opinion, July 23, 2024, R. 52, page 9. And, "the Court concludes once again that the Tribe has a concrete injury—"namely, harm from improper mitigation to 'historic, tribal properties.'" 2023 WL 4824733, at *9; *c.f. WildEarth Guardians v. Jewell*, 738 F.3d 298, 305–06 (D.C. Cir. 2013)." *Id*. at page 11 fn 4.

In its analysis the court found, the Tribe, had established the procedural injury, traceability and redressability based on the facts. The court determined the "Tribe sufficiently demonstrates that the Agency's substantive decision is connected to its concrete injury. In particular, the Agency's substantive decision to

adopt the mitigation items in the 2nd PA resulted in the allegedly inadequate mitigation of the harm to the Tribe's interest in the historic properties affected by the construction of the I-95 Viaduct Bridge. *See* AR at 000270, 000970. Throughout the administrative record, the Tribe informed the Agency that the mitigation measures adopted by the agency in the 2nd PA do not mitigate the harm caused by the bridge's construction. *See, e.g.*, AR at 000273 ("To say these proposed mitigation items do not respond to the severity of the adverse effects that the Viaduct Project has already had on and will have on the culturally and religiously significant Providence Coveland sites is an understatement."); AR at 000875, 000882. "The [Tribe] therefore demonstrates the second causal link [traceability], because there is a substantial probability that" the bridge's construction without appropriate mitigation due to the insufficient consultation negatively affected the Tribe's interest in the preservation of its historical, cultural, and religious "resources and historic properties." *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1171. *Id*. at page 13.

The court further explained that the injury was redressable because the tribe did not have to prove which type of mitigation measure would address the injury. "The Tribe adequately demonstrates that correcting the alleged failure to consult with the Tribe *could* lead the Agency to "reach a different conclusion." *Id.*;

Narragansett 2023, 2023 WL 4824733, at *9 (holding that redressability requires that "correcting the alleged failure to consult with the Tribe *could* change the substance of the second [programmatic agreement's] mitigation measures"); *see also Havasupai Tribe*, 906 F.3d at 1162 (concluding that tribe's injury could be redressed by setting aside agency approval that harmed tribe's religious and cultural interest in property); *Mattis*, 868 F.3d at 818……. For instance, the Agency could decide that alternative properties should be managed by the Tribe as mitigation, that the Tribe should receive funding to develop its own mitigation measures, or that some other form of mitigation is appropriate. After all, the administrative record reveals that the Agency previously considered alternative mitigation, such as providing the Tribe with funds so that the Tribe could "develop their own methods of mitigation for the impacts of the Providence Viaduct construction." AR at 000136. And the fact that the State refused to transfer the Mitigation Properties does not indicate that other properties could not be managed by the Tribe or that alternative mitigation strategies are not possible." *Id*. R. 52 at 13-14.

The finding by the district court of standing at the summary judgment stage was significant, because it establishes, the evidence, in the record that demonstrated, the Tribe was excluded as a consulting party signatory in the 2nd PA and had continuously complained of the lack of consultation required by the

Section 106 process regulations. The record shows, the tribe specifically requested to be a consulting (not a concurring party) to be able to have a say it what alternative measures would address the harms to their significant historical properties. If the tribe was not in the same status as they were in negotiations under the 1st PA their signature would not be required. The facts established that the Tribe was excluded as a consulting party and only informed of the mitigation measures agreed to between the State of Rhode Island and the FHWA. As the record reflects those mitigation measures were the same as the State and the FHWA had agreed to under the 1st PA that the tribe did not accept. In other words no alternative measures were presented to the tribe as the court described that could have redressed the harm to the properties. R. 42, 43, containing timeline of key documents that describe Tribe excluded from considering alternative mitigation measures.

As will be address in the next section, the court erred in dismissing NIT's Motion for Summary Judgment, because it was determined that "despite" the lack of consultation or the failure of the agency to include the Tribe as a consulting party, it didn't matter because the adverse effects of the project did not occur on the tribe's reservation land. *Id.* at 18. This conclusion was a misinterpretation of the regulations governing the Tribal Historic Preservation program. *See* Document #2080267 filed October 16, 2025, USET SPF Amicus brief in support of NIT. The

court accepted the FHWA interpretation of the rules, rather than honor the tribe's sovereignty and right to protect its sacred places. The State and the FHWA, valued the completion of the highway project over the right of the tribe to manage the conservation of their historical site. As the district court explained, "the administrative record reflects that there is a substantive difference between the State's management of those properties and the Tribe's management. As explained by the Advisory Council (ACHP), "[g]iven . . . the tribe's ancestral ties to these properties, the tribe is uniquely positioned to interpret these properties and ensure they are maintained and protected in a way that ensures their long-term preservation." *See* AR at 000175. *Id*. R. 52 at 16. Thus, the court acknowledged the Tribe's interest in being the conservators of the properties and that other alternatives should have been considered, but dismissed the NIT claims, acknowledging the result maybe galling to the tribe. "Ultimately—galling to the Tribe as it may be, and as explained above—the Agency was not required to obtain the Tribe's consent to the mitigation terms before executing the second programmatic agreement." *Id.* at 23. The decision was galling to the tribe and would be galling to any tribe that understands the intent to the Tribal Historic Preservation Program. It was error for the lower court to defer to the agency's interpretation of the rules establishing the role of Federal Tribes to protect their sacred sites.

II. The District Court's misinterpretation of the Rules governing the implementation of Section 106 Process for Properties of Historical Significance to Federal Tribes was Error and should be Reversed.

NIT in its statement of issues, identified two primary issues for reversal on *de novo* review. The first is the district court's misinterpretation of the Rules governing the implementation of programmatic agreements. The district court dismissed NIT's summary judgment on the primary finding because the significant Tribal historic properties, subject to the 106 process **were not on Tribal Lands**. The court defined Tribal lands as the Tribe's Federal Reservation Land. And second, the district court erred in finding the exclusion of the tribe as a consulting party in the 2nd PA was not arbitrary and capricious decision making and failed to observe procedures required by federal law. Document #2076126, filed 09/20/2024.

ACPH has produced a Handbook on the Section 106 process and the consultation of Indian Tribes. This 2013 Handbook and the revised Handbook of 2021 is in the record,[1] and was referred to by NIT in its memorandum in support of summary judgment to help clarify, the NHPA regulations. It is apparent that the lower court, in its attempt to apply the regulations, got lost in the intent and purpose of the provision of the NHPA and its Tribal Consultation regulations. The

[1] https://www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final_0.pdf

ACHP handbook is a guide to understanding the regulations. In numerous sections, the handbook makes clear, tribal consultation is required for all federal undertakings, regardless of whether the undertaking's Area of Potential Effect includes federal, tribal, state, or private lands so long as the undertaking may affect historic properties of religions and cultural significance to an Indian Tribe. (ACPH Handbook, Section V. Consultation with Indian Tribes for Proposed Undertakings Off-and-On Tribal Lands). The role of Tribal Historic Preservation Offices or THPO's is to use their Tribal and cultural expertise for identifying historic properties, determining if an undertaking will adversely affect historic tribal properties, and if there is an agreement that the undertaking will cause harm, the THPO has the role, of participating in MOU's or PA's that mitigate those harms, regardless if the property is on or off tribal lands. *Id*. at Section III. General Information about the consultations with Indian Tribes in the Section 106 Process.

The fundamental error the district court made is interpreting the rules to mean the Tribe has no significant role for historic tribal properties off tribal land. Review of the ACPH Handbook, reveals tremendous effort has been made in the development of the regulations to provide a role for Tribes to protect historic tribal property, especially Federal Tribes in the 106 process. It is only a threshold role for the THPO to protect historic tribal properties that are within their reservation boundaries. But that is where the Court stopped. When in fact the regulations

provide a significant role for Tribes, that acknowledges their sovereign nation status, and the reality that historic properties are located both on and off tribal lands. The regulations highlight the importance of the Tribal view in how to protect these properties and mitigate harm caused by federal undertakings. An example of the court's misinterpretation of the rules is when the opinion construed the regulations use of a slash (/) between SHPO (State Historic Preservation Office and THPO to mean only one and not both could participate in the process. And the agency was not to choose the THPO under any circumstance for off reservation land. "[w]hat the Tribe fails to recognize is that § 800.6(c)(1)—by using a virgule (forward slash) to separate "State Historic Preservation Officers" from "Tribal Historic Preservation Officer"—appears to contemplate that *either* a State Historic Preservation Officer *or* a Tribal Historic Preservation Officer must be a signatory; not both." And the Court clearly found that if historic property was off reservation land, then the SHPO not the THPO was the signatory. Document # 2080131 filed September 20, 2024, Memorandum Opinion (R. 54 at page 24)

The role of THPO's or Tribes, in the 106 process is guided by three major sections of the regulations; §800.2 Participants in the 106 Process; §800.6 Resolution of Adverse Effects; §800.14 Federal Agency Program Alternatives. In this case, there was no dispute between the parties, that the undertaking would have adverse effects on significant tribal historic properties. And it was

determined that because of the cost of performing the in-depth analysis of the harm to the Coveland properties, the agency, would develop a PA to mitigate the significant harm, to the location with significant historical and cultural meaning to NIT. That decision was made in consultation with the NIT, as a consulting party and NIT was appropriately included as a signatory to the 1st PA pursuant, to §800.2 that defines roles of participants:

36 CFR § 800.2(a): "Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part."

36 CFR § 800.2(a)(4) "Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes . . . "

36 CFR § 800.2(c): "Consulting parties. The following parties have consultative roles in the section 106 process."

(2) *Indian tribes and Native Hawaiian organizations.*

(i) ***Consultation on tribal lands.***

(A) ***Tribal historic preservation officer.*** For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) ***Tribes that have not assumed SHPO functions.*** When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) ***Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*** Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the

location of the historic property. **Such Indian tribe or Native Hawaiian organization shall be a consulting party**. [This section is referring to off reservation lands of significance to the tribe.]

Therefore, the regulations, first require an analysis of the historic property, to determine whether there are adverse effects caused by the undertaking. Then affirmatively require the agency to include the appropriate consulting parties as participants in this process. The Tribe or the THPO is the appropriate consulting party for significant historic tribal properties that are off Tribal reservation lands. Then a PA is developed among the consulting parties to mitigate the adverse effects. In this case the PA was an alternative procedure allowed under §800.14. This section of the regulations requires the appropriate consulting parties, and in this case again, the NIT's THPO is the appropriate party. Pursuant to §800.2(c)(2)(i) the regulations define consultation with tribes, on Tribal lands as the THPO. And for off reservations lands, §800.2(c)(2)(ii) defines other lands of significance to the tribes (**meaning off reservation lands**), and mandates that such tribe shall be a consulting party. Section 800.2(c) provides Tribes a consulting party role for both on and off reservation lands, consistent with the purpose and intent of the NHPA.

Then applying §800.6 Resolution of Adverse Effects, the regulations require the agency to identify the appropriate consulting parties which includes the THPO

for significant Tribal properties to develop mitigations measures, and these consulting are parties are signatories. See, 36 CFR § 800.6(a): "The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." The agency official has an affirmative duty to involve consulting parties. (*See* 36 CFR § 800.6(a)(2) "Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council (ACHP), if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party."

The court in its denial of NIT's summary judgment motion, misapplied these regulations, construing the language of §800.6(c)(2)(ii) defining signatories, to mean **only** that the agency **may** invite additional consulting parties, and therefore this section is inconsistent with sections in the regulations that prevent the Tribe from participating when mitigating harm off tribal lands. The court reasoned "[T]he regulation explains that an "agency official *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). The court concluded "if § 800.6(c)(1) required a tribal signatory regardless of where a historic site was located, as the Tribe contends, § 800.6(c)(2) would be superfluous because tribes would already be required signatories." (R. 52, Memorandum Opinion 9/23/2024 at page 24). The court missed that **Section 800.14(b)(3),** explains the development of PA's require the Federal Tribe as a consulting party because it requires §**800.6** process be followed.

Section 800.6 (c)states:

> **(c)** ***Memorandum of agreement.*** A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.
>
> **(1)** ***Signatories.*** The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.
>
> **(i)** The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.
>
> **(ii)** The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.
>
> **(iii)** The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

The court summarily dismissed the Tribe's role as a consulting party

signatory to a PA to mitigate harm to significant Tribal sacred places also without regard to §800.2(c)(2)(ii) that provides Tribes shall be consulting parties on other lands significant to the tribe. Failure to apply §§ 800.2(c)(2)(ii) and 800.6 to the development of the programmatic agreement was an error and should be reversed. As stated above, the Memorandum Opinion made numerous references to the regulations, but the court's fundamental error was its failure to grasp the intention of the NHPA and its regulations to create a significant role for Tribes to ensure the Tribe's views were part of the Section 106 process. To limit the Tribe's role to only historically significant properties on Tribal reservation lands, undermines this intent, and does not correctly apply the regulations to the FHWA decision under these facts to exclude the Tribe as a consulting party on the 2nd PA and thereby failed to mitigate the adverse effects of the undertaking in violation of law.

The regulations are intended to acknowledge Tribal sovereignty and the role of the Tribes to protect from harm culturally significant properties. The termination of the 1st PA violated tribal sovereignty by requiring, the tribe after the agreement was fully executed to waive its sovereign immunity. Then instead of proposing amendments to the 1st PA, the Agency terminated the 1st PA and developed a new PA excluding the Tribe as a consulting party. This action was a complete reversal of the agency's prior decision making and obviously intended to benefit the state and ignore NIT significant role in the consulting/mitigation

process.

The United South and Eastern Tribes Sovereignty Protection Fund USET SPF, has agreed to file an Amicus Curiae in this case. This organization was formed in 2014 as an affiliate of the United South and Eastern Tribes, Inc. to advocate on behalf of USET SPF's Tribal Nation members by upholding, protecting, and advancing inherent sovereign authorities and rights. The Narragansett Indian Tribe (NIT) is a federally recognized Tribal Nation and a member of USET SPF. Over many the years in the development of the NHPA and its regulations, the member tribes (including NIT) of USET have fought consistently, for their role in this process. The regulations make clear the intent to honor the sovereignty of Tribal Nations by ensuring their inclusion. Therefore, it is important to the Tribal Historic Preservation Program and THPO's at every Tribe that the lower court's interpretation and application of these rules be reversed and corrected. USET SPF underscores the importance of the Tribal Historic Preservation program under NHPA to protect Tribal sacred places. As USET SPF stated so well in its Amicus Curiae brief (filed in support of NIT's earlier Motion for Summary Reversal), "[t]he Agency's [FHWA's] ratification of Rhode Island's breach of its obligations under the 1st PA, the Agency's disguised amendment of the PA without Narragansett's signature, and the Agency's failure to provide a sufficient explanation for treating Narragansett differently across the

two PA's are arbitrary and capricious actions that violate the law. The Agency unjustly trampled on Narragansett's governmental right to protect and steward its sacred places on behalf of its people." Doc.# 2080267 page 12. Amicus filed by USET SPF

As USET accurately described in its Amicus Curiae, "Congress embedded within the statutory language of the NHPA the recognition that places of "traditional religious and cultural importance" to Tribal Nations are historic properties deserving of NHPA protection, 54 U.S.C. § 302706(a). And the NHPA recognizes that Tribal Nations have the right to be consulted---and indeed, are required to be consulted---when the federal government makes decisions affecting not just our current tribal landholdings, 54 U.S.C. § 302702; 36 C.F.R. §§ 800.2(c)(2)(i)(A), 800.3(c)(1), but also lands no longer under our control but that hold historic properties to which we attach religious or cultural significance, 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(c)(2)(ii), 800.3(f)(2)….In some circumstances, the NHPA makes clear that neither an MOA nor a PA may be executed under the normal protocols until the Tribal Nation signs the agreement. See, e.g. 36 C.F.R. § 800.6(c)(1)(i),(ii) (MOA); *id*. § 800.14(b)(2)(iii) (PA). Additionally, when a Tribal Nation assumes a specific role or responsibility in an MOA, the federal agency must invite the Tribal Nation to the table. *Id.* § 800.6(a)(2), (c)(2)(iii)….Requiring signature rather than consultation alone gives

Tribal Nations more leverage to secure protections on behalf of our people." Doc.#2080267 pages 17-19.

III. The District Court erred when it Deferred to the FHWA's Interpretation of the Section 106 process and the role of Tribes in mitigating adverse effects to Historical Tribal Properties.

Loper Bright Enterprises v. Raimondo, 144 S.Ct. 2244 (2024) struck down the *Chevron* doctrine that allowed deference to agency interpretation of law. *Chevron USA v. National Resources Defense Council* 467 U.S. 837 (1984) "was a judicial invention that required judges to disregard their statutory duties. And the only way to ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion is for us to leave Chevron behind." The APA's judicial review provision states that courts "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Loper*,144 S.Ct at 2252-3.

The *Loper* doctrine should be applied in this case. The NHPA and its Section 106 process, respect Indian Sovereignty and creates a significant role for Tribes to protect historically significant properties. The FHWA, when it reversed course, terminated the 1st PA, and initiated a 2nd PA was required under the regulations to consult with the Tribe whose historical property had adverse effects from the federal undertaking. No party here disputes that the Coveland Properties

are significant historical properties of the NIT and that these properties were harmed by the federal undertaking. Therefore, as with the consultation process for the 1st PA, the NIT was the appropriate tribal consulting party, with the legal right to be a signatory to the mitigation agreement. The district court deferred to the FHWA decision to exclude the tribe from consultation on the 2nd PA, and instead, over the tribe's objection, reduced the tribe's role to that of a concurring party with no power over the mitigation measures. And to add further harm, the FHWA adopted the same terms the State of Rhode Island insisted upon when they terminated the 1st PA. The Tribe never agreed to the terms adopted under the 2nd PA, and we argue no tribe would have accepted those terms. The mitigation measures adopted under the 2nd PA did not comply with the Section 106 process for the development of PAs and thus failed to mitigate the project. This amounted to arbitrary and capricious agency action and should be reversed.

CONCLUSION

The district court's dismissal of NIT's Motion for Summary Judgment hinged of the finding that the FHWA did not require NIT as a consulting party signatory to the 2nd PA, because the historic properties were not on Tribal reservation land. This was a clear error and should be reversed and the case remanded to the Agency. NIT's request for attorney fees costs, and restitution (for the monies it contributed to the transfer of the mitigation properties) should be

granted. The Court's fundamental error was its lack of understanding of the NHPA and its regulations to create a significant role for Tribes to ensure the Tribe's views were part of the Section 106 process. The district court in violation of the *Loper* doctrine unreasonably deferred to the FHWA decision to limit the Tribe's role to only historically significant properties on Tribal reservation lands. The Agency's decision undermines the intent and the broader purpose of NHPA to protect Tribal sacred places. The regulations require acknowledgement of Tribal sovereignty and the role of the Tribes to protect culturally significant properties from harm. The agency's exclusion of the Tribe in the 2nd PA was arbitrary and capricious agency action.

Thus, the FHWA failed to maintain integrity in the Section 106 process and breached the Tribe's trust and reliance interest when it terminated the 1st PA well after the funding of the Viaduct project began and then negotiated a 2nd PA without making restitution to the Tribe for its contribution to the Agency for the transfer in fee of the properties. Therefore, it is important to the NHPA's Tribal Historic Preservation Program and to all Tribal Historic Preservation Offices ("THPO") under that program that the lower court's interpretation and application of these rules be immediately reversed and corrected and the case remanded to the Agency for appropriate mitigation of the adverse effects of the FHWA project.

Dated: February 28, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 28 day of February, 2025, that:

1. This document complies with the word limit of FRAP 32(a)(7)(B) because, excluding the parts of the document exempted by FRAP 32(f)), and Cir.R.32(a)(7) this document contains 8068 words and.
2. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6), because this document

was prepared in a proportionally spaced typeface using Microsoft Word in a 14-point New Times Roman font.

February 28, 2025

By: */s/Elizabeth T. Walker*
ELIZABETH T. WALKER

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on February 28, 2025, I caused a copy of the foregoing Motion to be filed electronically and that this document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

February 28, 2025

By: */s/Elizabeth T. Walker*
ELIZABETH T. WALKER

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ADDENDUM

STATUTES AND REGULATIONS

STATUTES

42 U.S.C. § 1996. Protection and preservation of traditional religions of Native Americans

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

54 U.S.C. § 300101. National Preservation Programs Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to-

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

54 U.S.C. § 302702. Indian tribe to assume functions of State Historic Preservation Officer

An Indian tribe may assume all or any part of the functions of a State Historic Preservation Officer in accordance with sections 302302 and 302303 of this title, with respect to tribal land, as those responsibilities may be modified for tribal programs through regulations issued by the Secretary, if—

(1) the Indian tribe's chief governing authority so requests;

(2) the Indian tribe designates a tribal preservation official to administer the tribal historic preservation program, through appointment by the Indian tribe's chief governing authority or as a tribal ordinance may otherwise provide;

(3) the tribal preservation official provides the Secretary with a plan describing how the functions the tribal preservation official proposes to assume will be carried out;

(4) the Secretary determines, after consulting with the Indian tribe, the appropriate State Historic Preservation Officer, the Council (if the Indian tribe proposes to assume the functions of the State Historic Preservation Officer with respect to review of undertakings under section 306108 of this title), and other Indian tribes, if any, whose tribal or aboriginal land may be affected by conduct of the tribal preservation program, that—

(A) the tribal preservation program is fully capable of carrying out the functions specified in the plan provided under paragraph (3);

(B) the plan defines the remaining responsibilities of the Secretary and the State Historic Preservation Officer; and

(C) the plan provides, with respect to properties neither owned by a member of the Indian tribe nor held in trust by the Secretary for the benefit of the Indian tribe, at the request of the owner of the properties, that the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities in accordance with sections 302302 and 302303 of this title; and

(5) based on satisfaction of the conditions stated in paragraphs (1), (2), (3), and (4), the Secretary approves the plan.

54 U.S.C. § 302706. Eligibility for inclusion on National Register

(a) In General.-Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) Consultation.-In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

54 U.S.C. § 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

REGULATIONS

NHPA Rules Governing Section 106 Process:

54 U.S.C. § 306108, 36 C.F.R. § 800 *et seq*, 36 C.F.R. § 800.1(a). Subpart B of this chapter of the Code of Federal Regulations lays out in detail the normal Section 106 process. *See* 36 C.F.R. §§ 800.3–800.13. Subpart C discusses program alternatives. *See id.* §§ 800.14– 800.16.

Section 106 Process rule that determines Tribes have role both on and off reservation Land

36 C.F.R. §§ 800.2(c)(2)(ii)

2(c)Consulting parties. The following parties have consultative roles in the section 106 process.

(1) ***State historic preservation officer.***

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) ***Indian tribes and Native Hawaiian organizations.***

(i) ***Consultation on tribal lands.***

(A) ***Tribal historic preservation officer.*** For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) ***Tribes that have not assumed SHPO functions.*** When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) ***Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*** Section 101(d)(6)(B) of the act requires the

agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party. **[This is the section dealing with significant properties off reservation lands]**

(B)The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

800.3(f)(2)

3.(f)Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) ***Involving local governments and applicants.*** The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) ***Involving Indian tribes and Native Hawaiian organizations.*** The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) ***Requests to be consulting parties.*** The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

Identifying whether undertaking has adverse effects on tribal historic property, involving the appropriate parties, and developing Programmatic agreements.

§ 800.3 Initiation of the section 106 process.

(a) ***Establish undertaking.*** The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties…..

(2) ***Program alternatives.*** If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) ***Coordinate with other reviews.*** The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) ***Identify the appropriate SHPO and/or THPO.*** As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic

> properties on any **tribal lands** and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers…..

If undertaking has adverse effects on historic properties, then development of a Programmatic agreement, requires Tribe as signatory the same as MOU's because Programmatic agreement must comply with § 800.6(c)

Section 800.14(b)(3), explains the development of PA's require the Federal Tribe as a consulting party because it requires **800.6** process be followed.

Section 800.6 (c)states:

> **(c)** ***Memorandum of agreement.*** A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.
>
> **(1)** ***Signatories.*** The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.
>
> **(i)** The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.
>
> **(ii)** The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.
>
> **(iii)** The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

Section 800.14(b)(3) states;

Developing programmatic agreements for complex or multiple undertakings. Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the

parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

Section 800.14(b)(2)(i), states:

Developing programmatic agreements for agency programs.

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. 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 or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

Section 800.14(f) states:

Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives. Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.