NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 24-5193

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
No. 1:22-cv-02299 (Hon. Rudolph Contreras)

REPLY BRIEF OF PLAINTIFF-APPELLANT NARRAGANSETT INDIAN TRIBE

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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

SUMMARY OF ARGUMENT

The Appellant the Narragansett Indian Tribe ("NIT or Tribe") pursued this claim because of the failure of the Appellee the Federal Highways Administration ("FHWA") to follow federal law and mitigate an undertaking that adversely effected the Covelands Architectural District, ("Viaduct Project"), by a proposed expansion of an existing Interstate highway bridge in Providence, Rhode Island. Damages from a Ramp access project that was adjacent to the Viaduct Project had been mitigated by FHWA in 2009 by construction of a roof to the Tribe's longhouse. This ramp improvement project is part of the same Interstate highway that was the subject of the current litigation. That project and the current Viaduct project fell under the National Historic Preservation Act, that requires under the Section 106 process adverse effects to Tribal historic properties caused by the undertaking be mitigated by the Agency, before any federal money is spent on the Project. 54 U.S.C. § 306108. Both FHWA undertakings to improve the ramp and then later expand the highway, impacted the same significant historical property of Narragansett Indian Tribe that was outside its reservation. The Tribe was a party on the Ramp access project as they were on the first programmatic agreement subject to this appeal. Under another similar agreement executed in 2023 between the Federal Environmental

Protection Agency ("EPA"), the Rhode Island City of Warwick Sewer Authority, The Rhode Island Historical Preservation & Heritage Commission, and the NIT Tribal Historic Preservation office- required all parties as signatories. The harms to historic properties of the Tribe under that agreement were mitigated by the transfer of Wetlands within the City of Warwick to the NIT to be held in conservation, giving the Tribe access for traditional and cultural purposes and stewardship. The City of Warwick RI did not condition the transfer of property to the tribe, for the waiver of the Tribe's sovereign immunity. *See* Exhibit A.

Both highway improvement projects and the EPA, Sewer Authority project, required the Tribe as a consulting party signatory, because of the adverse effects causing harm to significant Narragansett historical properties. When it is agreed that adverse effects are found to harm significant historical properties either on or off reservation land, the tribe is then a required consulting party and signatory to agreements to mitigate the harms. Advisory Council on Historic Preservation, Consultation with Indian Tribes in the 106 Review Process: The Handbook (2021) ("ACHP Handbook"). The FHWA's legal obligation under the National Historic Preservation Act ("NHPA"), is to finalize mitigation of these harms prior to obligating federal funding. 54 U.S.C. § 306108. In this case, the harms have remained unmitigated, well after the

Viaduct Highway expansion project was completed. The Tribe is seeking redress for this violation of federal law that required the Tribe as a signatory to mitigate adverse effects causing harm to historic tribal properties.[1] The lower court committed error, by finding the NHPA regulations only allow Tribe's to be signatories on MOA's or Programmatic Agreements if on reservation land. That position is contrary to the Advisory Council of Historic Preservation guidelines and the law. ACHP Handbook. It is also arbitrary and capricious agency action to have the Tribe in a consulting party role on the first programmatic agreement ("1st PA") and then instead of amending the agreement, terminated it, for the purpose of excluding the Tribe on the second programmatic agreement ("2nd PA").

The FHWA, in their Reply Brief misrepresented the procedural history of the case. The lower court dismissed without prejudice, the Plaintiff, Appellant here, the tribe, to pursue their claim under the 2nd PA. The Court found because the State had prevented the FHWA from complying with the mitigation agreement, then the Tribe, did not have standing to pursue the 1st PA, against FHWA, because third party interference was a valid defense. *See Narragansett Indian Tribe v. Pollack*, No. 20-576 (RC), 2022 U.S. Dist. LEXIS 45880

[1] These prior agreements are mentioned only as references, to highlight, the inconsistency of the Agency's position, that Tribes are not required signatories for harms to their historic properties off trust lands. See Exhibit A.

(D.D.C. Mar. 15, 2022). The court found it did not have personal jurisdiction over the State of RI and even if the Court had personal jurisdiction over the State, the interference of the state was a valid defense for the Agency. The Tribe filed their amended complaint as a related case, alleging standing, under the theory of procedural injury, against FHWA, for failing to mitigate the harm, under the 2nd PA. *See* Mem. Op., JA 455. The Tribe also pled that the state of RI was prematurely dismissed because they were dismissed before the record was complete. On this claim, the lower court again dismissed the State of RI but found the Tribe had standing to pursue claims against FHWA on the 2nd PA as a procedural injury. On the merits of the claim, after finding standing, the lower court ruled, that the FHWA, had no obligation to include the tribe as a signatory, and thus, was not required to secure the tribe's agreement on the 2nd PA. The Court found the NHPA regulations governing the section 106 process for the mitigation of harms to historic properties, did not require the tribe as a consulting party signatory because the historic properties adversely effected was off reservation land. *Id.* A position the Tribe opposes and has the support of USET/SPF (United South Eastern Tribe's/Sovereignty Protection Fund) representing on the Amicus, 33 Federally recognized tribes. The FHWA misrepresents that the lower court did not find standing. That argument is contrary to the lower court opinion. *Id*. The Tribe, did seek reconsideration of

the dismissal of the state as a party, in this appeal because of the collusion with the FHWA to exclude the Tribe from the process, and the agency's affirmance of the mitigation measures proposed by the state under the 1st PA. But the opinion of the court below was clear, that the tribe met standing alleging a procedural injury that was both traceable and redressable, because of the violations of the Section 106 process, that failed to mitigate harm caused to its historic properties. *Id*.

Thus, FHWA has misrepresented the lower court's holding. Apparently attempting to alleged that if there was no standing on the claims under the 1st PA there should be no standing found for claims brought under the implementation of the second PA. In the minute order of the Court of Appeals, the state's motion to be dismiss as a party was granted. ROA #2077179-2. The claim, now proceeds on appeal against the FHWA for its failure to mitigate the harms to the Tribe's historic properties, by excluding the tribe as a signatory to the 2nd PA, that forced the tribe to accept mitigation measures the FHWA negotiated with the state without the Tribe's agreement.

ARGUMENT

I. NIT has Article III Standing to Challenge the FHWA Failure to Mitigate the Adverse Effects of the Undertaking on its Significant Historic Properties off reservation lands. Issue Preclusion does not bar the Court of Appeals from reviewing this issue.

The FHWA raises the theory of issue preclusion, also known as collateral

estoppel as a bar to NIT's claims, filed in the amended complaint, as a related case. The amended complaint, or complaint involving the same parties, and heard before the same juris, revised the standing provisions, and narrowed the focus of the claims, to the 2nd PA and whether the tribe had the right to be included as a consulting party signatory as it had been in the 1st PA. The lower court had as stated above found in its decision, granting FHWA summary judgment, that the Tribe had standing for a procedural injury both traceable and redressable, for the alleged harm of failing to mitigate adverse effects of harm caused by the federal highway undertaking, on significant tribal historic properties. The FHWA misrepresents that the court below did not find standing for the Tribe to pursue its claim, under the 2nd PA. For the same reason, issue preclusion would not apply. The doctrine of issue preclusion" precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 411(2020). However, issue preclusion is not intended to prevent appeals of issues raised in the same action. Relitigation of issues in the same action are governed by the "law of the case" doctrine. *United States v. Reyes-Romero*, 959 F.3d 80, 93 (3d Cir. 2020) (citation omitted). The law of the case doctrine generally asserts that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the

same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citation omitted). This doctrine applies to appeals of issues in the same case. 3 Moore's Manual--Federal Practice and Procedure § 30.70 (2025).

The case filed involving the same parties and claims as a related case, fit the new complaint, because of the long record in the prior case, and need to focus on the documents newly produced, that implicated the conclusion between the State of RI and the FHWA to exclude the tribe as a consulting party to achieve the mitigation measures that were proposed by the State in the 2nd PA. But it was not relitigating an issue at law decided in the lower courts. The court dismissed the State as a party, for failure to establish the State had sufficient contacts with the District of Columbia for personal jurisdiction. And the court found the State had interfered with the FHWA's ability to comply with the NHPA. The court, however, did not decide if the Agency was arbitrary and capricious, in failing to amend the 1st PA, and propose alternative mitigation measures. Nor did the court rule on whether the FHWA was arbitrary and capricious in failing to follow the section 106 process when it terminated the 1st PA, and then excluded the Tribe as a consulting party on the 2nd PA to mitigate adverse effects of Tribal historic properties.

The lower court decision dismissed the State of RI but clearly held the Tribe had standing to pursue claims against FHWA on the 2nd PA as a

procedural injury. *See* Mem. Op., JA 455. On the merits of the claim, after finding standing, the lower court ruled that the FHWA had no obligation to include the tribe as a signatory, and thus, was not required to secure the tribe's agreement on the 2nd PA. These are the issues the Tribe has the right to appeal. Issue preclusion is not intended to prevent appeals.

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 Reverse.

The FHWA in their reply, argue while "the APA authorizes a court to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) [t]he new programmatic agreement [2nd PA] easily clears this low bar. The Agency amply satisfied Section 106's minimal procedural obligations by consulting extensively with the Tribe over the course of nearly fifteen months prior to adopting the new agreement. And contrary to the Tribes' argument, the Agency did not require the Tribe's signature in order to take effect because the I-95 Viaduct project is not on tribal lands." ROA #218362 at 37. The key definitions, of consultation and consulting party, under the NHPA and its regulations have been misinterpreted by the lower court and further confused by the FHWA in its arguments supporting the court's opinion.

The Agency specifically asserts that consultation with the tribe is all the regulations require when addressing adverse effects of an undertaking that harm significant Tribal historic properties. They refer to documents that describe mitigation measures they developed with the State of RI, both on the 1st PA and later when developing mitigation measures on the 2nd PA.[2] They claim, because the Tribe had no "active" role in the mitigation measure they had no obligation to include the Tribe as a consulting party signatory in the 2nd PA. They cite to the regulation 36 CFR § 800.6(c)(2)(iii), that reads, "The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory". This section concerns who could be included as an additional "invited signatory", not a consulting party signatory that is defined in *Id*. § 800.2 (c), who has consulting "roles" in the section 106 process.

In the Section 106 process, "responsibility" for consulting parties refers to their duty to participate meaningfully in the consultation, share their perspectives, and contribute to the process of identifying, assessing, and mitigating potential

[2] FHWA cites to the Eagle case for support of it argument that the tribe was fully consulted. The application of *Eagle Cnty v. Surface Transp. Bd.* to this case is improper. In *Eagle Cnty*, the court considered whether the Board had sufficiently consulted with the county regarding any historic properties that may be damaged by the Board's proposed project. *Eagle Cnty*, 82 F.4th 1152, 1188-89 (D.C. Cir. 2023). The county failed to identify any historic properties over the course of its consultation with the board regarding the Environmental Impact Statement (EIS). *Id.* at 1189. Here, it is undisputed that a historically significant site would be damaged as a result of the FHWA's project because the purpose of the programmatic agreement was to mitigate the damages that would be caused. Furthermore, the court acknowledges the nebulous nature of the requirements of an agency to comply with its consultation requirements. *Id.* at 1189. An EIS is different from a Programmatic Agreement. The EIS from *Eagle Cnty* was used to determine historic sites that would potentially be damaged as a result of the project. The Programmatic Agreement involving the historically significant sites here was not made to determine sites that could be damaged, but specifically to account for the sites that would actually be damaged.

adverse effects on historic properties. It's about being an active participant, not just a passive observer, in ensuring that the project's impact on cultural resources are considered and addressed." See, *ACHP Handbook at IV General Questions and Answers,* ¶ 6[3].

The § 800.6 (c) does not apply to who is a required consulting party if adverse effects are found to harm significant Tribal historic properties, but addresses the responsibility of **invited** consulting parties, or those in addition that could be considered consulting parties. The FHWA uses this section as its explanation for excluding the Tribe as a consulting party in the 2nd PA because the tribe had no "active" role, without properties to conserve as found in the mitigation measures of the 1st PA. This totally misinterprets the rules.[4]

"Federal agencies are required to consult with Indian tribes at specific steps in the Section 106 review process and regardless of whether the undertaking is located on or off tribal lands. Tribal consultation for projects off tribal lands is required because the NHPA does not restrict tribal consultation to tribal lands alone and those off tribal lands may be the ancestral homelands of an Indian tribe or Indian tribes and thus may contain historic properties of religious and cultural

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

[4] In their reply brief the Agency claims, the tribe did not raise whether the agency provided an explanation for their decision to include the Tribe as a consulting party in the 2nd PA. The complaint filed raised the issue in the lower court, and it was raised in the opening brief on appeal. Opening Brief pages 21-22, 48-49. JA 12, Complaint ¶ 9, Civ Act No. 22-2299 Doc. 1, filed Aug 3, 2023.

significance to them." *Id*. *ACPH Handbook, III. General Information about Consultation with Indian Tribes in the Section 106 Process*.

As reviewed in the *ACPH Handbook on Consultation with Tribes*, there are various stages to the Section 106 process. To summarize, the beginning steps, the Agency is required to identify the properties, in the Area of Potential Effect, ("APE") and initiate the consulting process. Tribes are a part of this initial process both on and off tribal lands. The Agency, misapplies the concepts of consultation required in initial stages of the section 106 process with consultation with consulting parties required when it is agreed among initial parties, that the significant tribal property has been harmed by adverse effects of the Project.

Here, the harm caused by the Viaduct project to the Coveland's Architectural District, is undisputed. FHWA brief ROA # 2118362 at page 7. The typical process that requires extensive evaluation of harm to the historic properties was bypassed on the Viaduct Project, and the Subpart C of the Section 106 process was applied. The FHWA then, initiated the 1st PA, that included the required signatories, as consulting parties, and the NIT was included. The consultation with NIT, on the evaluation of the extent of the harm, was a different form of consultation. JA 20 (Comp. ¶ 36). What the regulations did require is that mitigation measures to address the harms be negotiated through the programmatic agreement process that includes the Tribe in the consulting party role. This role is

distinguished from consultation the Agency is required to perform when evaluating the APE and assessing whether the adverse effects were caused by the undertaking. The Tribe agrees, that consultation on the evaluation of the harms may only require the sharing of information. But after adverse effects to the historic tribal properties are found, then the Tribe is a required signatory whether the harm is found on or off Tribal lands**.** *ACHP Handbook, D. Resolution of Adverse Effects 1) Which parties does the federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?*

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. §800.2 defines roles of participants as consulting parties:

> 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**. [emphasis added]

In defining the tribe's role as a consulting party, § 800 (2)(c)(2) defines, in subsection (i) on tribal lands, and in subsection (ii) on historical properties of significance to the tribe, and clearly states this section applies regardless of the location of the property. This is the section that defines the role of the Tribe as a consulting party. Then, upon the finding of Adverse Effects that harm historic tribal properties, 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)(ii) the regulations define consultation for off reservations lands as lands of significance to the tribes and mandates that such tribe shall be a consulting party. The Tribes' consulting party role for both on and off reservation lands, is consistent with the purpose and intent of the NHPA. *See, ACHP Handbook*.

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**…. 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." But as discussed above, this section does not mean, that the tribe

may be invited or not at the discretion of the agency. The invited signatories' section of the regulations is referring to additional parties. It is logical that the tribe associated with the historic property, harmed, is the appropriate party to negotiate the mitigation measures under the PA. The definition of consulting party is a role in the process of developing the appropriate mitigation measures. Not just as a participant in a consultation process, with no input on what will be included in the mitigation agreement.

It is also incorrect interpretation of the regulations to say if a backslash is used between SHPO and THPO it means the Agency must pick one but not both. Instead, it means in some circumstances, the harm may not impact tribal property and the SHPO is the consulting party and not the Tribe. In other circumstances where significant Tribal historic property is harmed, the appropriate party would be the tribe, and depending on the extent of the harm, both may be required because the harm impacts both tribal historic property and other properties not historic to the tribe.

The court when it ruled that the Tribe has no role off reservation lands, missed that **Section 800.14(b)(3),** explaining the development of PA's require the Federal Tribe as a consulting party because it requires §**800.6(c)** process be followed.

Section 800.6 (c) Memorandum Agreements 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.

Section (2) of this section applies to invited signatories as additional parties, but does not exclude the consulting party tribe. MOA's and PA's are interchangeable in this context. In the ACHP guidance on 'when you need agreements', they clarify:

> MOA or PA?
> MOAs are appropriate to record the agreed upon resolution for a specific undertaking with a defined beginning and conclusion, where adverse effects are understood. PAs, on the other hand, are appropriate for multiple or complex federal undertakings where 1) effects to historic properties cannot be fully determined in advance, 2) for federal agency programs, 3) for routine management activities by an agency, or 4) to tailor the standard Section 106 process to better fit in with agency management or decision making.
>
> PAs generally fall into two types: "project PAs" and "program PAs." There are occasions where completing the Section 106 process prior to making a final decision on a particular undertaking is not practical. The regulations allow an agency to pursue a "project PA" (36 CFR § 800.14(b)(3)), rather than an MOA under certain circumstances. The most common situation where a project PA may be appropriate is when, prior to approving the undertaking, the

> federal agency cannot fully determine how a particular undertaking may affect historic properties or the location of historic properties and their significance and character. For instance, the agency may be required by law to make a final decision on an undertaking within a timeframe that simply cannot accommodate the standard Section 106 process, particularly when the undertaking's area of potential effects encompasses large areas of land or when the undertaking may consist of multiple activities that could adversely affect historic properties.

https://www.achp.gov/do_you_need_a_Section_106_agreement

A PA was the appropriate agreement type for the complex Viaduct project that caused extensive harm to the NIT significant historical properties. The lower court erred in not finding the PA was the appropriate agreement requiring the Tribe as a consulting party. JA 477 (Civ. Act. No 22-2299, Memo Opinion).

When NHPA was amended in 2001, in the final regulations ACPH commented, under *Supplementary Information, Background***,** that among other things, the 1992 amendments,

> 2. Required that "[i]n carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described" above. 16 U.S.C. 470a(d)(6)(B). Also see 36 CFR 800.2(c)(3) (granting such tribes and Native Hawaiian organizations, "consulting party" status in the section 106 process). Implementation of this statutory consultation requirement is found throughout the proposed rule. See, for example, 36 CFR 800.3(f)(2), 800.4(a)(4), 800.4(b), 800.4(c)(1), 800.5(a), 800.6(a)-(b)."

Protection of Historic Properties, 65 Fed. Reg. 77698 (December 12, 2000) (to be codified at 36 C.F.R. pt. 800).

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's significant role as a consulting party in the mitigation process. As addressed in the *ACHP Handbook D. Resolution of Adverse Effects*:

> 2) What happens if agreement is reached on how to resolve adverse effects?
>
> a) Off Tribal Lands: If agreement is reached, the agency, SHPO and consulting parties, including Indian tribes, develop a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) outlining how the adverse effects will be addressed.

CONCLUSION

For the reason's state above, the Court should reverse and remand the district court's decision to comply with the NHPA regulations, and the guidance provided by ACHP.

Dated: June 30, 2025 *Respectfully submitted*,

By: */s/Elizabeth T. Walker*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 4,716 words, excluding parts of the brief exempted by Federal Rule Appellate Procedure 32(a)(7(B)(iii) and D.C. Circuit Rule 32(a)(1). This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Elizabeth *T. Walker*
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Certificate of Service

I certify that on June 30, 2025, I caused a copy of the foregoing Appellant's Reply Brief 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.

/s/ Elizabeth *T. Walker*
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