

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE,  
ACTING BY AND THROUGH THE  
NARRAGANSETT INDIAN TRIBAL  
HISTORIC PRESERVATION OFFICE

v.

C.A. No.

RHODE ISLAND DEPARTMENT OF  
TRANSPORTATION; FEDERAL HIGHWAY  
ADMINISTRATION; ADVISORY  
COUNCIL ON HISTORIC PRESERVATION;  
RHODE ISLAND HISTORICAL PRESERVATION  
& HERITAGE COMMISSION

**PLAINTIFF'S VERIFIED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

1. This is an action for injunctive and declaratory relief brought by the Narragansett Indian Tribe, by and through the Narragansett Indian Tribe Historic Preservation Office (NITHPO) to enjoin further construction of the I-95 Providence Viaduct Bridge replacement project and to enforce the terms of a Programmatic Agreement in relation to the project among NITHPO and Defendants, pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. 300101 *et seq.*

2. This action arises under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, the National Historic Preservation Act, 54 U.S.C. § 301101 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

**JURISDICTION**

3. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 1362 (Jurisdiction Over Indian Tribes) and 28 U.S.C. §§ 2201-2202

(Declaratory Judgment and Injunctive Relief). There is a present and actual controversy between the parties.

### PARTIES

4. Plaintiff, the Narragansett Indian Tribe, by and through NITHPO, is the duly created political entity responsible for assumption of historic preservation pursuant to the National Historic Preservation Act, § 101(d)(2) Agreement between the National Park Service, U.S. Department of Interior and the Narragansett Indian Tribe, dated August 7, 1996.

5. Defendant Rhode Island Department of Transportation (RIDOT) is an executive department of the State of Rhode Island.

6. Defendant Federal Highway Administration (FHWA) is an executive agency of the United States within the United States Department of Administration.

7. Defendant Advisory Council on Historic Preservation (ACHP) is a council created in accordance with the National Historic Preservation Act, 54 U.S.C. § 301101 *et seq.*

8. Defendant the Rhode Island Historical Preservation & Heritage Commission is the duly created State Historic Preservation Office (RISHPO), created pursuant to the National Historic Preservation Act, 54 U.S.C. § 306101 *et seq.*

### GENERAL ALLEGATIONS

9. Defendant RIDOT is undertaking the replacement of I-95 Providence Viaduct Bridge No. 578 project in Providence, Rhode Island (the Viaduct Project).

10. Pursuant to 36 C.F.R. Part 800 governing Section 106 of the National Historic Preservation Act of 1966, as amended, Plaintiff and Defendants RIDOT, FHWA, RISHPO executed a Programmatic Agreement, effective October 3, 2011, to govern the implementation of

the Viaduct Project and to take into account the foreseen and unforeseen future effects of the Viaduct Project on historic properties. Exhibit A

11. Pursuant to the PA, 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 PA. Exhibit B.

12. Stipulation 3 of the amended PA requires RIDOT to acquire and transfer ownership land to Plaintiff, 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" (a 105+/- acre parcel), Town of Charlestown Tax Assessor's Plat 19, Lot 75; and (c.) the so called "Chief Sachem Night Hawk property (a.k.a. Philip Peckham property)", located at 4553 South County Trail (Tax Assessor's Plat 22, Lot 9-1) in the Town of Charlestown, Rhode Island (hereinafter, "Tribal Historic Properties").

13. In furtherance of its obligations under PA, the RIDOT has acquired title to all of the Tribal Historic Properties.

14. On September 16, 2013, the RIDOT forwarded a correspondence to NITHPO stipulating that it would not transfer the Tribal Historic Properties unless the Tribe passed a resolution authorizing the NITHPO waive the Tribe's sovereign immunity. Exhibit C.

15. Furthermore, that the NITHPO be authorized by Tribal resolution to execute "a covenant within the deed that the Tribal Historic Properties [Property] shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Exhibit C.

16. The NITHPO and the Tribe refused to execute any deed or agreement waiving its sovereign immunity or consenting to the laws and jurisdiction of the State of Rhode Island.

17. Neither the PA nor any amendment provide that the NITHPO or the Tribe waive immunity or consent jurisdiction as required by RIDOT as a condition for transfer of the Tribal Historic Properties pursuant to the terms of the PA.

18. The parties have since September 2013, pursuant to Paragraph 7 – Dispute Resolution of the PA, made significant efforts to resolve the waiver and jurisdiction issues.

19. FHWA and ACHP, participated in efforts to resolve the conflict between the NITHPO and RIDOT pursuant to their respective consultation requirements in accordance with Section 106 of the NHPA. *See*, 36 C.F.R. Part 800. Exhibit D.

20. “Both the FHWA and the ACHP concluded that the requirement by RIDOT that the tribe waive its sovereign immunity in order to receive this land was not a requirement of the PA; however efforts to urge the state to reconsider that condition have been unsuccessful.” Exhibit D.

21. On or about February 15, 2017, FHWA and/or RIDOT requested to terminate “the agreement reached under Section 106 of the National Historic Preservation Act.” Exhibit D.

22. FHWA pursuant to Paragraph 7 – Dispute Resolution of the PA, requested review by ACHP in accordance with 36 C.F.R. § 800.7, which is inconsistent with Paragraphs 8 and 9 of the PA.

23. “In accordance with the Section 106 regulations, the ACHP must now provide its formal written comments to the Secretary of Transportation on or before March 31, 2017. Once the Secretary personally considers the ACHP comments and responds to them, FHWA will have concluded the Section 106 process in accordance with the regulations and Section 101(1) of the NHPA.” Exhibit D.

24. Upon information and belief, RIDOT not only holds title to the Tribal Historic Properties but has in its possession or controls FHWA funds allocated to fulfill its agreements under the PA.

25. Upon information and belief, FHWA has in its possession or controls funds allocated to fulfill its agreements under the PA.

**COUNT I  
DECLARATORY JUDGMENT**

26. Plaintiff incorporates herein Paragraphs 1 – 25 of its Complaint.

27. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* an actual controversy exists between Plaintiff and Defendants.

28. That Plaintiff requests pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* the Court declare the PA valid and enforceable according to its terms.

29. That Plaintiff requests pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* the Court declare the that title to the Tribal Historic Properties be transferred to the NITHPO/Tribe in accordance with the PA.

30. That Plaintiff requests pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* the Court declare that any funds due or payable to NITHPO/Tribe in accordance with the PA.

WHEREFORE, Plaintiff requests pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* the Court grant to the Plaintiff any and all other relief, including its costs and reasonable attorneys fees.

**COUNT II  
INJUNCTIVE RELIEF**

31. Plaintiff incorporates herein Paragraphs 1 - 30 of its Complaint.

32. Plaintiff has and will continue to suffer irreparable harm absent an injunction the transfer of the Tribal Historic Properties to NITHPO/Tribe.

33. Plaintiff is without an adequate remedy at law.

WHEREFORE, Plaintiff lacks an adequate remedy at law and thus prays this Court enter injunctive relief prohibiting any transfer of the Tribal Historic Properties except to the NITHPO/Tribe in accord with the PA.

**COUNT III  
BREACH OF CONTRACT**

34. Plaintiff incorporates herein Paragraphs 1 - 34 of its Complaint.

35. The PA is a valid enforceable contract executed with due and valuable consideration amongst the parties.

36. The PA has been breached by RIDOT.

WHEREFORE, Plaintiff prays that the PA be enforced according to its terms, that the Tribal Historic Properties be transferred to NITHPO/Tribe and that any funds due or payable to NITHPO/Tribe is done so accordance with the PA, and any and all other relief, including its costs and reasonable attorneys fees.

**VERIFICATION**

I, John B. Brown III, Narragansett Indian Tribe Historic Preservation Officer, hereby swear and affirm under the penalties of perjury that I have read the foregoing Verified Complaint and that the facts set forth therein are true and correct to the best of my knowledge. Where facts are alleged upon information and belief, I believe those facts to be true.

*/s/ John B. Brown III*

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John B. Brown III

Respectfully submitted,

*/s/ John F. Killoy, Jr.*

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Date: March 31, 2017