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FEDERATED INDIANS OF GRATON RANCHERIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FEDERATED INDIANS OF GRATON RANCHERIA,

Plaintiff,

v.

DEB HAALAND, Secretary of the United States Department of the Interior; BRYAN NEWLAND, Assistant Secretary for Indian Affairs, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; BRYAN MERCIER, Director of the United States Bureau of Indian Affairs; AMY DUTSCHKE, Regional Director, Pacific Region, United States Bureau of Indian Affairs; UNITED STATES BUREAU OF INDIAN AFFAIRS,

Defendants.

Case No.

COMPLAINT FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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Plaintiff Federated Indians of Graton Rancheria, by this Complaint for a Declaratory Judgment and Injunctive Relief ("Complaint"), alleges as follows:

INTRODUCTION

1. By this Complaint, Plaintiff Federated Indians of Graton Rancheria ("FIGR" or "Tribe") challenges the failures of the U.S. Department of the Interior ("DOI") and its Bureau of Indian Affairs ("BIA") to initiate, pursue and complete a critical government-to-government consultation with FIGR that is required under Section 106 of the National Historic Preservation Act, 54 U.S.C. §§ 300101-307108 ("NHPA"), in connection with the proposed Koi Nation of Northern California ("Koi Nation") casino project ("Project") located in FIGR's historic homelands on a 68-acre parcel adjacent to the Town of Windsor, California ("Project Site"). These failures irreparably harm FIGR's tribal sovereignty, its rights over Southern Pomo ancestors and sacred objects located at the Project Site, and its control over FIGR's cultural resources. FIGR seeks a judicial declaration and injunctive relief to address these issues *before* the Project land is taken into federal trust.

2. The Tribe maintains a close connection to its ancestors and cultural resources throughout its ancestral territory, which includes Sonoma and Marin Counties, as recognized in the Graton Rancheria Restoration Act, 25 U.S.C. §§ 1300n-1(7), 1300n-3(a), 1300n-4(c). Many of FIGR's ancestors and irreplaceable cultural resources are located in Sonoma County. The proposed Project Site is outside of the Koi Nation's aboriginal territory and historic rancheria, which are located over 50 miles to the north. Through its Project, the Koi Nation is improperly attempting to establish trust lands for gaming outside of its ancestral territory and in the aboriginal homeland of the Tribe.

3. The claim for relief in this Complaint focuses on the failed and inadequate NHPA Section 106 consultation by DOI and BIA (collectively "Federal Agencies") with the Tribe, whose Southern Pomo cultural resources are present at the Project Site. This consultation is required because the Project qualifies as an "undertaking" for purposes of the NHPA. In brief, the Federal Agencies failed to make a reasonable or good faith effort to consult with FIGR, failed to properly evaluate the presence of historic properties, including properties of traditional religious and

cultural importance, located on the Project Site, and failed to establish in consultation with FIGR a valid Area of Potential Effects ("APE") to search for and identify historic properties, including cultural resources. These fundamental inadequacies caused the Federal Agencies to wrongly conclude that no qualifying historic properties, including religious or cultural resources, were present and that, even if they were, they would not be adversely affected by the Project.

4. The Federal Agencies' exclusion of FIGR from meaningful participation in these NHPA consultations prevented DOI and BIA from fulfilling their responsibilities under the NHPA. These collective BIA/DOI failures also caused California's State Historic Preservation Officer, the state officer responsible for advising and assisting federal agencies in meeting their NHPA responsibilities (commonly known as the "SHPO"), to send a July 10, 2024 letter to BIA which found BIA's "efforts to identify historic properties, including those of religious and cultural significance to the Tribes to be *insufficient, inadequate, and not reasonable*." (Emphasis added.)

5. The regulations implementing the NHPA require federal agencies to consult at an early time with federally recognized tribes (such as FIGR) that attach religious and cultural significance to a historic property. A tribe must be given a reasonable opportunity to identify its concerns, advise on the identification and evaluation of historic properties, help define the APE, explain its views on a project's effects to these resources, and participate in resolving adverse effects. In this case, and in their apparent rush to approve the Project, the Federal Agencies completely disregarded their important NHPA duties.

6. The Project has reached a critical juncture. Despite the Tribe's extensive efforts to participate in a valid Section 106 consultation (including its July 2024 statement that it welcomed reinitiation of meaningful, good faith consultation), its timely comments on the Draft Environmental Impact Statement demonstrating that the agencies failed to comply with their NHPA duties, and the SHPO's request that BIA reinitiate consultation with FIGR and the SHPO, the Federal Agencies have now issued the Final Environmental Impact Statement ("Final EIS") for the Project, which reflects that no further Section 106 consultations have occurred with FIGR or other tribes and that the BIA considers its NHPA Section 106 duties fulfilled. In about 30 days, a Record of Decision is expected to be issued approving the Project, with the Project Site being

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put immediately into federal trust, which will impermissibly permit the valuable Southern Pomo cultural resources within the Tribe's ancestral territory to become part of the Koi Nation's trust lands, giving the Koi Nation ownership over these resources.

7. The Tribe seeks the Court's intervention to declare that the Section 106 consultation process has been arbitrary and capricious and not in conformance with NHPA requirements, and to compel agency action unlawfully withheld and unreasonably delayed. If DOI and BIA proceed forward with taking this land into federal trust based on these Section 106 deficiencies, it will cause irreparable harm to the Tribe, as set forth in detail herein. Accordingly, the Tribe seeks a declaratory judgment and injunctive relief at this time to ensure that BIA and DOI complete a legally compliant Section 106 consultation before any land into trust decision is made.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction of this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"); National Historic Preservation Act, 54 U.S.C. §§ 300101-307108 ("NHPA"); 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1346 (United States as defendant); and 28 U.S.C. § 1362 (original jurisdiction of civil actions brought by a federally recognized Indian tribe which arise under the laws of the United States).

9. Since this civil action arises under the laws of the United States and names United States officers and departments as defendants, jurisdiction exists under 28 U.S.C. § 1331. There is an actual, justiciable controversy between the parties within the meaning of 28 U.S.C. § 2201(a). The Court may grant declaratory, injunctive and other relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district and a substantial part of property that is the subject of this action is situated in this judicial district. Venue is also appropriate in the San Francisco and Oakland Divisions of the Northern District of California pursuant to Civil Local Rule 3-2(c) because this case involves claims for relief arising in Sonoma County.

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PARTIES

11. Plaintiff Tribe is a federally recognized Indian tribe. It is composed of Southern Pomo and Coast Miwok people, and its reservation is located adjacent to the City of Rohnert Park in Sonoma County, California. Congress recognized the Tribe's historic and continued connections to its aboriginal territory within Sonoma and Marin Counties in the Graton Rancheria Restoration Act, 25 U.S.C. §§ 1300n-1(7), 1300n-3(a), 1300n-4(c).

12. Defendant Deb Haaland is the United States Secretary of the Interior and is sued in her official capacity. As Secretary, she is responsible for overseeing the implementation of "undertakings" within the United States Department of the Interior and its agencies, including the Bureau of Indian Affairs, as well as the Department's implementation and compliance with the NHPA. The Secretary is further charged with implementing statutes, regulations, and Executive Orders and is responsible for government-to-government consultations with Indian tribes pursuant to the NHPA. 54 U.S.C. §§ 306102, 302706; 36 C.F.R. § 800.2(c)(2)(ii); Executive Orders 13007 and 13175.

13. Defendant Bryan Newland is the Assistant Secretary for Indian Affairs for the U.S. Department of the Interior and is sued in his official capacity. As the Assistant Secretary, he discharges duties of the Secretary with the authority and direct responsibility to strengthen the government-to-government relationship with Indian tribes, exercises Secretarial discretion and leadership over the Bureau of Indian Affairs, and decides requests for off-reservation fee-to-trust acquisitions for gaming purposes. 109 DOI Departmental Manual ("DM") 8.1; Indian Affairs Manual ("IAM") Part 52, Chapter 15, § 1.7.

14. Defendant United States Department of the Interior is responsible for the administration of the NHPA in its undertakings and for compliance with all other laws applicable to agencies within the Department of the Interior, including the Bureau of Indian Affairs.

15. Defendant Bryan Mercier is the Director of the United States Bureau of Indian Affairs and is sued in his official capacity. As Director, he is responsible for overseeing the Bureau's implementation of the NHPA, the land into trust requirements and all other statutes, regulations and other laws applicable to the Bureau of Indian Affairs. 230 DM 1.1.

16. Defendant Amy Dutschke is the Regional Director of the Pacific Region of the Bureau of Indian Affairs, located in Sacramento, California and is sued in her official capacity. As the Regional Director of this office, she is responsible for complying with Department of the Interior and Bureau of Indian Affairs policy and procedures for fee-to-trust acquisitions, including records management and related responsibilities and processing discretionary off-reservation land-into-trust applications. IAM Part 52, Chapter 15, §§ 1.5, 1.7.

17. Defendant Bureau of Indian Affairs is a federal agency within the United States Department of the Interior. The Bureau of Indian Affairs is responsible for evaluating land into trust applications, conducting Tribal consultation under the NHPA, conducting environmental review, and effectuating any acquisition into trust relating to the Koi Nation application for acquisition in trust by the United States of the Project Site adjacent to the Town of Windsor, Sonoma County, California.

18. The Defendants described in paragraphs 12-17 herein are collectively referred to herein as "Defendants." All of these Defendants worked in concert with each other, and as agents of the other Defendants, in connection with the fatally deficient Section 106 consultation for the Koi Nation Project with FIGR and other tribes culturally affiliated with the Project Site. Due to this interrelationship, all of the actions taken by one or more Defendants set forth in this Complaint are attributable to all Defendants.

STANDING

19. As recognized by Congress and DOI, Plaintiff FIGR has historic and continued connections to its aboriginal territory within Sonoma and Marin Counties, including to the land for the proposed Project. The Tribe's ancestors lived in and near Graton, Marshall, Bodega, Tomales, and Sebastopol, California. 25 U.S.C. § 1300n-4(c). In February 2009, the National Indian Gaming Commission ("NIGC"), which, like BIA, is housed within DOI, found that the Tribe "is composed of Coast Miwok and Southern Pomo groups that in the early 1900s were present in the Tomales and Marshall areas of Marin County and the Bodega and Sebastopol areas of Sonoma County." NIGC, Final Environmental Impact Statement, Graton Rancheria Casino and Hotel Project, p. 1-1. The NIGC found that Sebastopol "was once the site of a large, permanently

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inhabited Southern Pomo village" and that Southern Pomo villages were located near Windsor, Healdsburg, and Guerneville. NIGC Restored Lands Opinion for Graton Rancheria (Feb. 10, 2009), p. 7.

20. The Tribe and other Southern Pomo tribes[1] in Sonoma County remain inextricably connected to and protective of their culture and history in the area of Windsor and the Project Site in Sonoma County. The Southern Pomo language and culture are distinct from that of other Pomo tribes, such as the Southeastern Pomo Koi Nation, and these linguistic, cultural, and territorial boundaries have persisted over millennia. FIGR, like many tribes in California, was decimated in place as a result of federal and state policies designed to terminate and erase tribes. The Tribe, however, continues to fight for its sovereignty, its citizens, its ancestors, and its cultural resources. These connections are foundational to the Tribe's identity and continued existence. They breathe life into FIGR's actions and provide meaning to its Tribal citizens, who have survived despite a history of genocide against California Indians. The Tribe each and every day is working to rebuild and revitalize its culture, through language programs, cultural resource protection, and environmental stewardship of its ancestral lands, in order to honor its ancestors and create a meaningful future for its generations to come.

21. The litany of Section 106 violations described in this Complaint have caused and will cause actual injury to FIGR. This injury includes procedural injury from Defendants' widespread failures to meaningfully consult with the Tribe, which have foreclosed its ability to have critical input into identifying and evaluating historic properties, including cultural resources, and in addressing and resolving issues regarding the resources in an appropriate and sensitive manner. Injury has further occurred because, based on this fatally flawed process, the Tribe's connection to Southern Pomo cultural resources will be severed, harmed and lost forever once land is taken into trust for the Koi Nation. This will occur because of Defendants' failure to conduct legally required consultation with the Tribe and because of the arbitrary and capricious conclusions

[1] Four federally recognized Southern Pomo tribes have a demonstrated, aboriginal connection to Sonomo County: FIGR, the Cloverdale Rancheria of Pomo Indians, the Dry Creek Rancheria Band of Pomo Indians, and the Lytton Band of Pomo Indians.

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in BIA's May 6, 2024 letter and in the Final EIS that no such recognized historic resources are present or will be adversely affected by the Project. This outcome fundamentally impairs the Tribe's sovereignty that is recognized and carefully protected by the NHPA.

22. It is beyond dispute that these harms are directly traceable to and being caused by Defendants' disregard of the central goals, prescribed procedures, and historic property and cultural resource protections embedded in Section 106 and the NHPA as a whole. In their rush to proceed with the land into trust decision, Defendants have excluded the Tribe from participating as required by law, which has directly put these cultural resources at risk. The actual land into trust acquisition for the Project would also nullify all of the cultural protections in California state law and transfer ownership of Southern Pomo resources discovered at the Project Site to the Koi Nation.

23. The injuries to FIGR and its members would be redressed by the relief sought in this Complaint, which would require Defendants to conduct a legally adequate Section 106 process prior to taking any action that would adversely affect the current land and cultural resource protection regulatory framework or the historic properties, particularly those of traditional religious and cultural importance which are at risk here.

STATUTORY BACKGROUND

A. National Historic Preservation Act

24. Section 106 of the NHPA requires federal agencies to take into account the effect of any "undertaking" on historic properties. The term "undertaking" is broadly defined to mean "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency," and includes activities "requiring a federal permit, license or approval." 54 U.S.C. § 300320. Section 106 requires federal agencies to evaluate the effects that their approvals may have on historic properties, which includes properties of traditional religious and cultural importance to tribes. 54 U.S.C. § 306108.

25. The NHPA also established the Advisory Council on Historic Preservation ("ACHP"), which is an independent agency with authority to issue binding regulations relating to the implementation of Section 106. 54 U.S.C. §§ 304101-304102. Federal agencies are required

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to comply with the NHPA and the implementing regulations adopted by the ACHP that are contained in 36 C.F.R. Part 800 ("NHPA Regulations").

26. The NHPA Regulations direct federal agencies to consult with federally recognized tribes that may attach religious and cultural significance to a historic property. 36 C.F.R. § 800.2(c)(2)(ii)(a). Federal agencies must "ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c). A tribe must be given a reasonable opportunity to identify its concerns, advise on the identification and evaluation of historic properties, explain its views on a project's effects on these resources, and participate in resolving adverse effects. 36 C.F.R. § 800.2(c)(2)(ii).

27. The NHPA Regulations recognize the "unique legal relationship" between the federal government and Indian tribes. 36 C.F.R. § 800.2.

28. Both the NHPA and the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq*. ("NEPA"), expressly direct that federal agencies conduct the Section 106 consultation process and NEPA review simultaneously. *See* 36 C.F.R. § 800.8(a) (encouraging agencies to coordinate NHPA and NEPA compliance and to consider their Section 106 responsibilities early in the NEPA process); *see also* Advisory Council on Historic Preservation, Section 106 Archaeology Guidance ("ACHP Section 106 Guidance") (Jan. 1, 2009) at 7 (encouraging federal agencies to use existing procedures to meet NHPA Section 106 requirements, but noting that reliance on NEPA efforts alone will not meet Section 106 regulatory requirements); 40 C.F.R. § 1502.24(a) (NEPA requires agencies to prepare a draft environmental impact statement "concurrent and integrated with" the analyses, surveys, and studies required by the NHPA).

B. Administrative Procedure Act

29. The APA provides a right of judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Plaintiff FIGR has suffered legal wrong and been adversely affected and aggrieved by reason of Defendants' actions described in this Complaint.

30. The APA provides that a reviewing court "shall . . . compel agency action

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unlawfully withheld or unreasonably delayed. . . .” 5 U.S.C. § 706(1).

31. The APA also directs that the reviewing court “shall” hold unlawful and set aside agency action[s], findings and conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or when they are adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) and (D). An agency action is arbitrary and capricious where “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co*., 463 U.S.29,43 (1983).

C. Declaratory Judgment Act

32. This Court has the power to declare the rights and other legal relations of any interested party in a case of actual controversy within its jurisdiction. 28 U.S.C. § 2201(a). A court may also provide “[f]urther necessary or proper relief based on a declaratory judgment….” 28 U.S.C. § 2202.

FACTUAL BACKGROUND

A. Koi Nation Project Context

33. The Koi Nation, formerly the Lower Lake Rancheria, is a federally recognized Indian tribe of Southeastern Pomo people. The Koi Nation is named for Koi, a village located on an island in the southeastern portion of Clear Lake in Lake County, California. *The Southern Pomo are a historically, linguistically and culturally distinct people from the Southeastern Pomo.*

34. Koi Nation has applied to Defendants for a fee-to-trust transfer (often referred to as a “land into trust” transaction) which is a NHPA “undertaking” whereby Defendants would take title to the land and hold it in trust for the Koi Nation for a casino gaming project on a 68.6-acre site located immediately adjacent to the Town of Windsor in Sonoma County, California. The development would include a casino with a capacity of over 10,000 people, a hotel, ballroom/meeting space, event center, spa, over 5,000 parking spaces, extensive water and wastewater facilities and pipelines, and other infrastructure, all in the ancestral territory of FIGR

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and other Southern Pomo Tribes. The Project Site is located in Southern Pomo territory and is approximately 50 miles from Koi Nation's ancestral territory.

35. The Koi Nation Project would be built in the midst of quiet residential neighborhoods near schools, a church and vineyards. The Project Site is located in unincorporated Sonoma County and is zoned for agriculture. It is part of the County's "Community Separator" areas, which are "voter-approved districts that were created to preserve open space, retain rural visual character, limit new development in scale and intensity, and specifically avoid commercial development." Under these current land use restrictions, the Koi Project would be prohibited in this location.

36. The Koi Nation Project requires three approvals by Defendants. The first approval, which has just occurred, is the issuance of a Final EIS under NEPA. The Final EIS, which formally concludes the environmental review process for the Project, identifies the proposed Project as the Preferred Alternative under NEPA. The Notice of Availability of the Final EIS was published by the U.S Environmental Protection Agency on November 22, 2024. 89 Fed. Reg. 92681, 92713 (November 22, 2024).

37. The remaining two approvals are expected imminently. The second needed approval is a decision by Defendants that the Project meets federal requirements for the United States to acquire title to the proposed Project Site into trust for the Koi Nation pursuant to the Indian Reorganization Act and its implementing regulations. 25 U.S.C. § 5108; 25 C.F.R. Part 151. The third required approval is that DOI must determine that the Koi Nation's request to conduct gaming on the Project Site satisfies the "restored lands exception" to the general prohibition of gaming on Indian lands contained in the Indian Gaming Regulatory Act ("IGRA") and its implementing regulations. 25 U.S.C. §§ 2701, *et seq*.; 25 C.F.R. Part 292. The second and third determinations are proceeding on parallel administrative tracks.

38. One critical component of the Final EIS is the analysis of the Project's anticipated impacts on cultural resources. This determination depends on satisfactory completion of the Section 106 consultation, as required by the NHPA, with FIGR and the other Southern Pomo tribes in whose ancestral territory the Project would be located and whose historic properties and cultural

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resources are present on the Project site. Now that the Final EIS has been issued and BIA has stated that its Section 106 responsibilities should be considered fulfilled, final agency action has occurred regarding the sufficiency of the tribal consultation process. It is now confirmed that Defendants have unlawfully withheld the meaningful, good faith consultation process required under Section 106 and have further conducted a process that is arbitrary and capricious and which should have been conducted concurrently with NEPA review.

B. The Failed Tribal Consultation Process

39. The Tribe first learned of this Project in a July 25, 2022 letter from BIA's consultant. To the Tribe's surprise, the consultant's letter noted that two field surveys had already been completed for the Project. It has since become clear that BIA also allowed test trenching and another field survey to collect obsidian samples for destructive testing before notifying the Tribe. It was improper for these four studies to occur because the ACHP directs agencies to initiate consultation with tribes *prior to conducting any fieldwork*. ACHP Section 106 Guidance at 9. Additionally BIA, not a consultant, is required to initiate the NHPA Section 106 process. 36 C.F.R. § 800.2(c)(4).

40. On August 10, 2022, FIGR sent a letter to BIA to protest the conduct of cultural studies outside of the Section 106 process and to request formal consultation when BIA initiated the Section 106 process. The Tribe stated that the Project is located within its ancestral territory, that religious and culturally significant resources are present, and that no further testing should be conducted without FIGR participation. The Tribe also requested copies of all cultural resource records already gathered or generated for the Project.

41. In a letter dated November 4, 2022, BIA notified the Tribe that it was affirming the Tribe's status as a consulting party under the NHPA Section 106 process. This was the first official notification from BIA of NHPA Section 106 consultation for this Project.

42. On December 19, 2022, the Tribe reiterated its prior request for copies of cultural resource reports for the Project Site, reaffirmed that this site has religious and cultural significance to FIGR, and requested a formal consultation meeting once it was provided the records. It again asked that no cultural resource testing be conducted without its participation and that of other

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culturally affiliated tribes. Unbeknownst to the Tribe, BIA had already conducted another study on August 3, 2022, this time collecting obsidian from the Project Site that was sent to a lab in Oregon for hydration testing, which requires cutting the artifact. In so doing, BIA authorized artifacts collected from a location with known religious and cultural significance to the Tribe to be sent out of state for destructive testing, all without notice to the Tribe. The Tribe to this day does not know what has become of those removed artifacts.

43. In July 2023, FIGR finally received the four cultural resource studies from BIA which BIA contends that it sent in March 2023. The Tribe requested a few weeks to review the studies. Despite this reasonable request, the BIA rushed ahead without consulting the Tribe and, on July 18, 2023, issued its determination that no historic properties would be affected by the Project and requested concurrence from the SHPO.

44. In an August 7, 2023 letter to BIA, the Tribe explained how BIA was not complying with the required Section 106 process for the Project and detailed the deficiencies in the four cultural resource studies. After reviewing BIA's concurrence request and the Tribe's letter, the SHPO requested that BIA consult with FIGR and other culturally affiliated tribes to assess changes to the APE, the identification and evaluation of historic properties, and the "effects" determination.

45. Finally, BIA belatedly agreed to have a consultation meeting with the Tribe on November 30, 2023. At that meeting, the Tribe reiterated the many concerns set forth in its prior letters, including inquiring why there were serious discrepancies between the two cultural studies conducted by two different BIA-retained Project archaeologists. The Tribe requested copies of all cultural resource studies relied on by the Project archaeologists and recommended that the Project archaeologists do more extensive archival research because it appeared that there were missing surveys and archaeological studies relevant to the Project Site that should be considered. The Tribe also recommended that the APE be broader than the Project site boundaries and should include the off-site utility and road infrastructure work contemplated by the Project design. The Tribe again requested that it be informed of and present at all testing and surveys for cultural resources.

46. Importantly, at this meeting, the Tribe asked about the whereabouts of all artifacts

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discovered by the Project archaeologists and requested that BIA and the Project proponent, the Koi Nation, enter into an agreement with the Tribe on the disposition and/or reburial of unearthed cultural resources. The Tribe also requested that BIA ensure that the other culturally affiliated Southern Pomo tribes be incorporated into monitoring and mitigation measures for the Project as memorialized in a final NEPA document. While BIA did not provide any conclusive real-time responses to the Tribe's questions and recommendations, BIA promised that it would very soon provide a written response to all of these concerns. However, no such written response was ever received.

47. Two months later, in direct contravention of the Tribe's request, BIA conducted a canine survey of the Project Site without notice to the Tribe and in deplorable weather conditions. BIA then told the Tribe that it planned to follow the canine survey with trench excavation work, but it did not have or did not share a testing plan with the Tribe. Despite wet and muddy conditions, the trenching went forward. FIGR's Tribal monitor, who is also an archaeologist, attended and objected, but was not able to enter the trenches for further investigation because the trench work was done in wet conditions, lacked shoring, and did not meet Occupational Safety and Health Administration regulations. Nevertheless, the trench work revealed the presence of cultural resources.

48. By letter dated May 6, 2024, BIA yet again sought concurrence from the SHPO with its finding that no historic properties would be affected by the Project. Contrary to BIA's request, the SHPO objected to BIA's finding, stating that BIA's efforts to identify historic properties, including those of religious and cultural significance to tribes, were "*insufficient, inadequate, and not reasonable*." (Emphasis added.) The SHPO requested that BIA reinitiate NHPA Section 106 consultation with the SHPO and culturally affiliated tribes, including FIGR, and to redefine the APE to account for the full geographic area that may result in alterations to historic properties because of the Project. As of the filing date of this Complaint, BIA has not reinitiated Section 106 consultation with FIGR.

49. Moreover, BIA's troubling pattern of excluding the Tribe from cultural surveys at the Project Site continued well after the Tribe requested notification of any surveys. The Draft

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Environmental Impact Statement ("Draft EIS") lists an Off-Site Traffic Mitigation Improvements Cultural Survey as Appendix H-8. This survey is only mentioned once in the Draft EIS when referencing indirect effects and appears to have been limited to an area along Shiloh Road and Old Redwood Highway. The Tribe was never notified of this testing or of the report and first learned of it when reviewing the Draft EIS. The Tribe finally received this February 2024 report on August 7, 2024. The report was factually and legally deficient. It is clear from this report that cultural impacts to the area, which is nearly one mile of roadway, should be assessed as direct effects of the Project due to traffic improvements and other necessary construction. Additionally, it is inappropriate for BIA to assume (as it did) the ineligibility of potential historic properties because they may be located in previously disturbed areas or existing rights of way.

50. Despite all of these testing and survey deficiencies, it is clear that the Project Site holds a significant number of cultural resources, and the presence of human remains, which should be properly evaluated under the National Register criteria. The first three surveys revealed the presence of a bowl mortar, chert and obsidian flakes, a chert core, a projectile point, bifacial tool fragments, and two dozen pieces of obsidian. During the trenching work, FIGR's archaeologist observed a culturally modified obsidian flake and obsidian pebbles and gravel, some with fractures, throughout the Project Site. In total, 45 cultural artifacts have already been identified on the Project Site, and several areas meet the threshold for an archaeological site.

51. On November 20, 2024, the Tribe provided BIA with peer-reviewed comments regarding deficiencies with its historic property surveys and identifying at least one historic property, a pre-contact archaeological site, as present on the Project Site.

52. It is critically important that a legally compliant Section 106 consultation occur with FIGR and the other culturally affiliated tribes before title is transferred and the land is taken into federal trust. The land is currently subject to California state law, but taking the land into trust would result in the parcel becoming tribal trust land, making state historical and cultural resource protection law inapplicable. If ancestral remains are discovered, state law establishes a process for disposition of remains. *See* California Public Resources Code § 5097.98. This law prioritizes tribes or individuals that trace ancestry to a particular village site, known as the Most Likely

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Descendant, which would be the Southern Pomo tribes in Sonoma County that possess the closest cultural affiliation to the Project Site. The Koi Nation, whose ancestral home is 50 miles away from the Project Site, does not meet this requirement. However, once the site is taken into trust for the Koi Nation, this California law is inapplicable. Instead, once the land is held in trust for the Koi Nation, the federal Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(a), dictates that the Koi Nation would receive priority for ownership and control of Southern Pomo ancestors and cultural resources on the land, dispossessing FIGR and other Southern Pomo tribes from these resources. Koi Nation, a Southeastern Pomo tribe from Lake County, would have total control over cultural objects and ancestral remains associated with Southern Pomo tribes from Sonoma County.

53. If the land into trust transaction occurred before a valid Section 106 consultation was accomplished with FIGR, this would cause irreparable damage to FIGR and the other Southern Pomo tribes that cannot be mitigated. Instead, the Koi Nation would control the artifacts, remains and other cultural resources that belong to FIGR and other Southern Pomo tribes. Thus, the tribes (including FIGR) with the closest cultural affiliation would be dispossessed of these profoundly sensitive cultural resources.

C. <u>The Environmental Impact Statement Process</u>

54. Despite the rampant inadequacies in the Tribal consultation process as required by Section 106 that directly informs the cultural resources analysis in the environmental documents, BIA proceeded forward prematurely with the required environmental review under NEPA.

55. In September 2023, BIA released an Environmental Assessment for the Project and requested public comment on this document. Many public comments correctly pointed out that, since the Project constituted a "major Federal action significantly affecting the quality of the human environment" pursuant to NEPA, BIA was required to instead prepare an Environmental Impact Statement ("EIS"). BIA thereafter agreed and began preparing an EIS.

56. On July 8, 2024, after conducting scoping, BIA published a Notice of Availability of a Draft Environmental Impact Statement ("Draft EIS") for the Koi Nation's application that DOI acquire the Project site into federal trust for the Koi Nation Project. 89 Fed. Reg. 55968 (July

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8, 2024). This notice started a public comment period that ended on August 26, 2024. The Tribe and many of its members timely submitted extensive sets of public comments, many of which addressed the inadequacies in the Section 106 tribal consultation process for the cultural resources section of the EIS.

57. On November 22, 2024, Defendants publicly released the Final EIS for the Project. A review of the Final EIS discloses that it has failed to remedy either the flawed process or the substantive findings based on the wholly inadequate Section 106 process. BIA now claims that its May 6, 2024 letter finding that "No Historic Properties Affected" for this Project fulfilled BIA's Section 106 consultation responsibilities ("the BIA's responsibilities under Section 106 should be considered to be fulfilled…."). BIA asserts that BIA and the SHPO were not able to resolve disagreement regarding SHPO's objection to BIA's finding and to BIA's insufficient, inadequate, and unreasonable efforts to identify historic properties.

58. In this Complaint, FIGR does not now challenge the sufficiency or adequacy of the Final EIS because DOI and BIA have not yet issued a Record of Decision with respect to the "land into trust" decision for which the Final EIS has been prepared, but FIGR reserves its right to do so at a future time. However, Defendants' failures to conduct a legally compliant Section 106 process have now become evident in the BIA's May 6, 2024 letter and the Final EIS and are ripe for adjudication at this time.

FIRST CLAIM FOR RELIEF

(Violations of the NHPA)

59. Plaintiff FIGR realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 58 of this Complaint.

60. Defendants failed abysmally in performing their Section 106 tribal consultation requirements under the NHPA. Defendants are required by NEPA and the NHPA to meaningfully consult with FIGR on historic properties, including properties of traditional religious and cultural importance to the Tribe. FIGR made extensive efforts for more than two years to meaningfully consult with Defendants on the identification and evaluation of historic properties and to directly participate in the resolution of adverse effects. Instead, Defendants ignored, deflected and rejected

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FIGR's efforts to participate and FIGR's reasonable requests for prior reports and timely notification of surveys. In so doing, Defendants are undermining the sovereignty of FIGR and effectively foreclosing FIGR's ability to protect historic properties, including its Southern Pomo cultural resources and ancestral remains.

61. Defendants failed to appropriately consult with FIGR pursuant to Section 106 during the NHPA and NEPA review processes. The NHPA Regulations specify that "[c]onsultation should commence early in the planning process, in order to identify and discuss relevant preservation issues. . . ." 36 C.F.R. § 800.2(c)(2)(ii)(A). Moreover, "[t]he consultation requirement is not an empty formality…." *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior,* 755 F. Supp. 2d 1104, 1108 (2010). In this case, Defendants failed to consult with FIGR at an early time and failed to consult meaningfully throughout the process. To the contrary, they rebuffed all such meaningful efforts by the Tribe.

62. A tribe must also be given a reasonable opportunity to identify its concerns, advise on the identification and evaluation of historic properties, explain its views on a project's effects to these resources, and participate in resolving adverse effects. 36 C.F.R. § 800.2(c)(2)(ii). Defendants failed to adequately provide FIGR with any of these opportunities.

63. A federal agency must make a "reasonable and good faith effort" to identify historic properties in consultation with any tribe that attaches religious and cultural significance to properties in the APE. 36 C.F.R. § 800.4(b). Tribes possess special expertise regarding eligibility for properties that have religious and cultural significance to them. 36 C.F.R. § 800.4(b). FIGR was not provided a reasonable opportunity to assist in defining the APE or in locating historic properties within the APE.

64. The ACHP, through its NHPA Guidance document, directs agencies to initiate consultation with tribes prior to conducting any fieldwork. FIGR has now learned that four studies, including those based on test trenching and a field survey, occurred prior to any consultation with FIGR, some under physical conditions that were known to minimize the discovery of artifacts and remains. Even after meeting with FIGR and without FIGR's knowledge, Defendants conducted further collection of obsidian and sent it out of state for destructive testing. All of these studies

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and activities, without the Tribe's knowledge, constitute violations of the NHPA.

65. On two occasions between July 2023 and May 2024, Defendants, based on their inadequate consultations with FIGR and other tribes, sent letters to the SHPO in which they incorrectly determined that no historic property would be affected by the Project and requested the SHPO's concurrence. In response, the SHPO has repeatedly informed Defendants that BIA must consult with FIGR and other culturally affiliated tribes to assess changes to the APE, the identification and evaluation of historic properties, and the effects determination. However, Defendants have failed to do so, which constitutes another violation of the NHPA.

66. Despite repeated efforts by FIGR and other Southern Pomo tribes to consult, and SHPO's determination that tribal consultation should be reinitiated, Defendants have failed to do so prior to the issuance of the Final EIS. Instead, Defendants have concluded that their Section 106 obligations have now been completely fulfilled, all in violation of the NHPA.

67. Defendants' failures to provide FIGR with the government-to-government Section 106 consultation process and protections that are required by the NHPA, and to unreasonably delay and fail in complying with NHPA, constitute a violation of APA Section 706(1). Accordingly, FIGR requests that the Court "compel agency action unlawfully withheld or unreasonably delayed."

68. Defendants' tribal consultation actions and inactions described herein are also arbitrary, capricious and an abuse of discretion, are otherwise not in accordance with law, and have occurred without observance of the procedure required by law. For these reasons, FIGR requests that the Court hold these actions unlawful and set them aside as required by APA Sections 706(2)(A) and (D).

69. Plaintiff is entitled to a declaratory judgment by the Court in which it determines the rights and duties of Plaintiff FIGR and the Defendants with respect to the inadequacy of the Section 106 consultation conducted in connection with the Koi Nation Project application for a land into trust transaction pursuant to 28 U.S.C. §§ 2201-2202.

70. A dispute has arisen between Plaintiff FIGR, on the one hand, and Defendants, on the other hand, regarding their respective rights and obligations relating to the Section 106

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consultation for the Koi Nation Project. As explained herein, FIGR contends that Defendants violated the NHPA by conducting a wholly deficient Section 106 consultation. FIGR is informed and believes, and on that basis alleges, that Defendants disagree with this position.

71. Plaintiff FIGR is also entitled to temporary, preliminary and permanent injunctive relief to prevent irreparable harm from occurring to the tribal sovereignty of FIGR and other Southern Pomo tribes, to their rights over Southern Pomo ancestors and sacred objects located at the Project Site, and to their control over these cultural resources.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Federated Tribes of Graton Rancheria respectfully requests that the Court enter judgment in its favor as follows:

1. That the Court enter a declaratory judgment that Defendants violated the NHPA, its implementing regulations, and the APA by (A) failing to conduct a legally adequate Section 106 tribal consultation with Plaintiff FIGR, and (B) issuing the Final Environmental Impact Statement for the Project prior to the completion of a legally adequate Section 106 tribal consultation process with FIGR and other tribes;

2. That the Court enjoin Defendants from making and/or implementing any final decision on the land into trust decision for the Koi Nation Project before completing a legally adequate Section 106 process that, in consultation with FIGR and other culturally affiliated tribes, identifies all historic properties, including traditional cultural properties, in an appropriate expanded APE for the Project; fully considers the Project's direct, indirect and cumulative effects on these historic properties; addresses and resolves all of the adverse effects to such historic properties; and resolves all disputes arising under that process;

3. That the Court grant Plaintiff temporary restraining orders and preliminary and permanent injunctions;

4. That the Court award Plaintiff its attorneys' fees, expert witness fees, and other costs pursuant to 54 U.S.C. § 307105;

5. That the Court retain jurisdiction of this action to ensure compliance with its decree; and

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6. That the Court award Plaintiff such further and other relief as the Court may deem appropriate or necessary.

Dated: November 27, 2024

SHARTSIS FRIESE LLP

/s/ Paul P. Spaulding, III
By: PAUL P. "SKIP" SPAULDING, III

Attorneys for Plaintiff
FEDERATED INDIANS OF GRATON RANCHERIA

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