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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERATED INDIANS OF THE GRATON RANCHERIA,

Plaintiff,

v.

DEB HAALAND, in her official capacity as Secretary of the Interior, BRYAN NEWLAND, in his official capacity as Assistant Secretary for Indian Affairs, BRYAN MERCIER, in his official capacity as Director of the United States Bureau of Indian Affairs, AMY DUTSCHKE, in her official capacity as Regional Director of the Bureau of Indian Affairs Pacific Region, the UNITED STATES DEPARTMENT OF THE INTERIOR, and the UNITED STATES BUREAU OF INDIAN AFFAIRS,

Defendants.

Case No. 3:24-cv-8582-RFL

Defendants' Response to Plaintiff's Motion for a Preliminary Injunction

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INTRODUCTION

The Constitution and Administrative Procedure Act ("APA") do not permit Plaintiff to prevent the Department of the Interior ("Interior") from completing its decision-making process on whether to approve or disapprove the Koi Nation's land-into-trust application. Assuming other pleading requirements are met, and should any future decision actually injure Plaintiff, Plaintiff could challenge a decision to take land into trust *after* such a decision is made and the land is taken into trust. The Court should deny Plaintiff's motion for a preliminary injunction, ECF No. 35, because the Court lacks jurisdiction, Plaintiff has failed to state a claim, and Interior is complying with the National Historic Preservation Act ("NHPA"). Plaintiff's alleged irreparable harm—that it will lose ownership and control of cultural resources on the Shiloh Parcel—also mischaracterizes Plaintiff's rights under California law. Defendants continue to assert all the arguments made in their response to Plaintiff's motion for a temporary restraining order, ECF No. 26, and where possible do not restate them here. Defendants instead elaborate on and provide additional support for those arguments, and respond further to issues identified by the Court during the December 20th hearing.

FACTUAL BACKGROUND

Interior's decision-making process remains incomplete because it has not made a final decision on Koi's application to take the Shiloh Parcel into trust. Defs.' Resp. to Pl.'s Mot. for TRO & Order to Show Cause 4-7 ("Defs.' TRO Resp."), ECF No. 26. As additional background, the Shiloh Parcel is an active farm surrounded by roads and other development. Defs.' Ex. 4 at 1-4, 3-47; Defs.' Ex. 11 at 2-25 (additional Final EIS excerpts)[1]; ECF No. 26-4. By the time archeologists conducted field inspections in 2022, "90% of the area had been ripped to a depth of at least 4 feet prior to vineyard planting[.]" ECF No. 18-9 at 15. Such farming activity could turn cultural resources to the surface and potentially damage resources present, such as by chipping obsidian. *Id.*; Defs.' Ex. 4 at 3-63. The one historic site found on the

[1] Defendants' exhibit numbering builds off the exhibits filed with Defendants' response to Plaintiff's TRO motion, ECF No. 26.

property is the remains of a 20th century residence from when the property was privately owned. ECF No. 18-9 at 15-16. The residence's remains—its concrete foundation—had been pushed to Pruitt Creek's bank. *Id.* at 16. To the extent the impression has been created that the Shiloh Parcel is a pristine archeological site, it would be incorrect.

Second, Defendant clarifies that Plaintiff has not alleged the Shiloh Parcel was ever part of its historic rancheria. *See* Defs.' Ex. 10 at 3:7-10 (12/20/2024 hearing transcript). The Graton Rancheria, encompassing approximately 15.5 acres, was established in the 1920s near the town of Graton, which is southeast of the Shiloh Parcel. H.R. Rep. No. 106-677, at 4-5 (2000). Plaintiff has not alleged that the Shiloh Parcel has ever been trust or reservation land. Rather, Plaintiff alleges that its Southern Pomo ancestors were present generally throughout Sonoma and Marin Counties and that Southern Pomo villages were located near present-day Windsor. Compl. ¶¶ 19-20, 34, ECF No. 1. Defendants do not dispute the Southern Pomo peoples' ancestral connection to Sonoma County. However, several modern federally recognized tribes trace their ancestry to the Southern Pomo people. Defs.' Ex. 4 at 3-59. Further, despite Plaintiff's repeated characterization of Koi as "interlopers," Koi has submitted evidence, including expert reports, to Interior regarding Koi's historic presence in Sonoma County. Sarris Decl. ¶ 5, ECF No. 16; Pl.'s Mem. in Supp. of Mot. for TRO & Order to Show Cause 8, ECF No. 13 ("Pl.'s TRO Mot."); Defs.' TRO Resp. 4-5. This includes trade routes passing near the Shiloh Parcel. Supplement to Sept. 15, 2021 Restored Land Request 33 (Mar. 2023), www.koinationsonoma.com/wp-content/uploads/2023/03/Supplemental-Restored-Land-Request-.pdf.[2]

Third, Interior's Final EIS proposes several mitigation measures to protect cultural resources that may be discovered on the Shiloh Parcel should Interior grant Koi's application. Defs.' Ex. 11 at 4-12 to -14. These measures include requiring a professional archeologist be present and that interested Sonoma County Tribes such as Plaintiff be invited to monitor any ground-disturbing activities within 150 feet of Pruitt Creek or 50 feet of areas for which there was an alert during the canine field survey. *Id.* at 4-12. The EIS also proposes that, if

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[2] This citation is to the bates stamp at the center bottom of the page.

archeological resources are inadvertently discovered during "construction-related earth-moving activities, all work within 50 feet of the find shall be halted until a professional archaeologist . . . or paleontologist if the find is of a paleontological nature, can assess the significance of the find in consultation with [Interior]." *Id.* at 4-13. Interior would notify "any Indian tribe that might attach religious and cultural significance to the affected property (i.e. the Interested Sonoma County Tribes)," the State Historic Preservation Officer ("SHPO"), and Advisory Council on Historic Preservation ("ACHP"). *Id*. Interior then "shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions." *Id.* And the EIS provides that:

> If human remains are discovered during ground-disturbing activities on the Project Site, work within 50 feet of the find shall halt immediately . . . If the remains are determined to be of Native American origin . . . [c]onsistent with NAGPRA requirements, 1) reasonable effort shall be made to secure and protect the human remains . . .; 2) [Inteior] shall consult with Koi Nation and any other Indian Tribe with potential cultural affiliation (i.e. the Interested Sonoma County Tribes) to discuss the recovery and treatment of the remains (43 CFR Part 10.4(b)); 3) no later than 30 days after the remains are determined to be of Native American origin, a written plan of action shall be prepared that addresses the custody of the remains and the planned disposition (43 CFR Part 10.5(d)(1) and 43 CFR Part 10.4); and 4) the disposition of the human remains, funerary objects, sacred objects, or objects of cultural patrimony shall be carried out in accordance with procedures set forth in 43 CFR Part 10.6.

Id. at 4-13 to -14. If incorporated into a Record of Decision ("ROD"), Interior would have legal authority to monitor compliance with these mitigation measures (the EIS, as discussed previously, Defs.' TRO Reply 11-14, has no legal consequences and does not affect anyone's rights or obligations). 40 C.F.R. § 1505.3. If any mitigation measures are not adopted in a ROD approving Koi's application, Interior "must state why such measures were not adopted." Defs.' Ex. 4 at 1-3. Interior is thus not seeking to shut out Plaintiff and other Tribes from protection of any cultural resources that may be found on the property should it be taken into trust.

STANDARD OF REVIEW

"A 'preliminary injunction is an extraordinary and drastic remedy' which should not be granted unless the movant shows 'substantial proof' and '*by a clear showing*, carries the burden

of persuasion.'" *Hundred Acre Wine Grp. v. Lerner*, No. 22-cv-07305-RFL, 2024 WL 1090625, at *1 (N.D. Cal. Feb. 2, 2024) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)) (emphasis in original). A plaintiff must show that they are 1) "likely to succeed on the merits," 2) "likely to suffer irreparable harm in the absence of preliminary relief," 3) "that the balance of equities tips in his favor," and 4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. Plaintiff is unlikely to succeed on the merits of its claim.

The Court should deny Plaintiff's motion because Plaintiff is unlikely to succeed on the merits of their claim. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Plaintiff has not identified a final agency action that would support jurisdiction, established standing, or pleaded the elements of a NHPA claim. And even if Plaintiff's NHPA claim was otherwise viable, Interior is complying with the NHPA.

a. Plaintiff has not challenged a final agency action under the APA and the Court therefore lacks jurisdiction.

Plaintiff seeks to stop Defendants from making a decision on Koi's application to have land taken into trust. The proposed land-into-trust transfer is the "undertaking" Interior is assessing and a decision to approve that transfer would be a final agency action. But the preliminary analytical steps informing that potential decision are not. Plaintiff thus has not identified a final agency action, and thus cannot establish this Court's jurisdiction. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990).

The final agency action for a NHPA claim is an undertaking or a decision to fund or approve an undertaking, which has not occurred here. "[T]he finality doctrine is 'concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.*, 408 F.3d 638, 645 (9th Cir. 2005) (quoting *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 828 (9th Cir. 2002)). Section 106 of the NHPA requires an agency to consider the effects of an undertaking on historic properties "prior to the approval of the expenditure of any Federal funds

on [an] undertaking or prior to the issuance of any license." 54 U.S.C. § 306108; *see also* 36 C.F.R. § 800.1(b). The steps in Section 106 review are only "intermediate agency action[s]" that build towards the undertaking, 5 U.S.C. § 704, and those interlocutory steps do not affect any parties' rights, much less in a concrete way, until there is a decision to proceed with the undertaking. *See infra* p. 12.

This case illustrates the point—Plaintiff's alleged concrete injury is a change in legal status effected by the *potential* undertaking, the proposed land-into-trust transfer. A decision on the proposed undertaking might (but is not certain to) "inflict[] an actual, concrete injury." *Indus. Customers*, 408 F.3d at 645. Indeed, Plaintiff seemed to recognize that an agency action would need to cause concrete harm to be final, Pl.'s Reply Mem. in Supp. of Mot. for TRO & Order to Show Cause 3, ECF No. 28 ("Pl.'s TRO Reply"), and that any such harm would arise from issuance of a ROD approving Koi's application, *id.* at 8. Indeed, it acknowledged that the steps of the NHPA process are part of the "path" to a decision on Koi's application. Pl.'s Mem. in Supp. of Mot. for a Prelim. Inj. 3, ECF No. 35 ("Pl.'s PI Mot."). Steps on a path to a decision are textbook interlocutory actions that by definition do not qualify as "final." 5 U.S.C. § 704. Plaintiff—who bears the burden of proof in moving for a preliminary injunction—has still not identified a single case in which a plaintiff was able to establish a court's jurisdiction over a claim seeking to stop a decision-making process that might lead to a future decision on an undertaking.

In contrast, courts have recognized that the final agency action for a NHPA claim is the undertaking or a decision funding or approving the undertaking. The Ninth Circuit identified the issuance of a permit—which was preceded by a finding of no adverse effect—as "the relevant agency action" for a NHPA claim. *Apache Survival Coal. v. United States*, 21 F.3d 895, 88-900, 907 (9th Cir. 1994). The D.C. Circuit held that the "'final agency action' in an NHPA claim must be a 'federal undertaking.'" *Karst Env't Educ. & Prot., Inc. v. Env't Prot. Agency*, 475 F.3d 1291,1296 (D.C. Cir. 2007). Citing *Karst*, the Eastern District of California has said the same. *Franco v. U.S. Forest Serv.*, No. 2:09-cv-01072, 2016 WL 1267639, at *13 (E.D. Cal. Mar. 31, 2016), partially vacated on other grounds by *Winnemen Wintu Tribe v. U.S. Forest*

Serv., 2017 WL 1093902 (E.D. Cal. Mar. 23, 2017). The Eastern District of Pennsylvania dismissed a NHPA claim because the expenditure of funds on or approval of the undertaking "acts as the deadline for agency action, and because that deadline ha[d] not passed, there ha[d] not been the requisite final agency decision to establish a ripe claim." *Save Ardmore Coal. v. Lower Marion T'ship*, 419 F. Supp. 2d 663, 675 (E.D. Pa. Nov. 9, 2005). And considering an argument strikingly similar to Plaintiff's here that the "termination" of the Section 106 process is a final agency action, the Central District of California held:

> [F]inal agency action did not occur in this case until April 29, 2013 when the USFWS approved the [proposed plan] and the Record of Decision and issued the [permit] to Tejon. While January 17, 2013, [the day that the USFWS sent its "no adverse impact" letter to the California Historic Preservation Officer,] likely marked the end of the NHPA consultation process . . . it by no means "marked the consummation of the [USFWS's] decision-making process," *see Bennett*, 520 U.S. at 177-78. Completing the NHPA's consultation process was an intermediate procedural step that occurred prior to the ultimate approval of the Record of Decision and the issuance of the [permit]. . . .
>
> Tejon does not cite to a single case holding that the termination of the NHPA consultation process constitutes "final agency action." This lack of support is unsurprising given the Ninth Circuit's description of NHPA as "a procedural statute requiring government agencies to 'stop, look, and listen' *before* proceeding with agency action." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010) (emphasis added). When faced with similar circumstances, courts invariably find that final agency action occurs not at the conclusion of NHPA consultation, but when Records of Decision and permits are issued.

Wishtoyo Found. v. U.S. Fish & Wildlife Serv., No. CV 19-03322-CJC, 2019 WL 6998665, at *4-5 (C.D. Cal. Oct. 16, 2019). There is no support for reaching a different conclusion here.

Plaintiff has not identified any cases supporting its argument that it can challenge steps of the Section 106 process that might lead to a decision to approve an undertaking. *See* Defs.' TRO Resp. 9, 13. Plaintiff mischaracterizes *Hualapai Indian Tribe v. Haaland*, No. 24-cv-08154, 2024 WL 4678059 (D. Ariz. Nov. 5, 2024), as finding that "a determination of 'no historic properties were affected' constitutes final agency action." Pl.'s TRO Reply at 4. But Hualapai brought its claim after the agency issued a decision record and approved an operations plan that, without further action, permitted exploratory drilling. 2024 WL 4678059, at *9;

Compl., *Hualapai Indian Tribe v. Haaland*, No. 3:24-cv-08154, ECF No. 1. Hualapai challenged a decision to approve an undertaking, a final agency action. The Court was thus able to review the agency's *underlying* finding that no historic properties would be affected because "[t]he scope of judicial review of final agency action includes the power to review the intermediate and procedural agency actions leading up to the final challenged result." *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992). Not only does *Hualapai* not stand for what Plaintiff cited it for, it illustrates a NHPA claim can and must be brought after a final decision on the undertaking.

Preservation Coalition of Erie County v. FTA, 356 F.3d 444 (2d Cir. 2004) likewise does not support Plaintiff's effort to forestall a decision here. Critically, the plaintiff in that case brought their NHPA claim after the agency issued a ROD, and the question of when the plaintiff could have brought its claim was not before the court. *See id.* at 453 n.6. That case's statement that an agency's EIS was a final agency action is thus dicta, relegated to a footnote. Indeed, the Southern District of New York granted a motion to dismiss a NHPA claim for lack of a final agency decision. While citing *Preservation Coalition* elsewhere in its decision, the court remarked that "[t]he Second Circuit has not defined what constitutes 'final agency action' under [the] NHPA," but that "[t]he D.C. Circuit has noted that, under the NHPA, that final action must be a 'federal undertaking.'" *Friends of Hamilton Grange v. Salazar*, No. 08 Civ. 5220, 2009 WL 650262, at *22 (S.D.N.Y. Mar. 12, 2009) (citation omitted). It then dismissed a claim alleging that an agency failed to consult with the plaintiff in deciding to abandon a site because there had not been a "final decision to abandon the site's development." *Id.* Thus, even a court on whom *Preservation Coalition* is binding looked for an ultimate, concrete decision as the point of final agency action. *Preservation Coalition*'s dicta offers no basis for breaking from the great weight of Ninth Circuit and other case law.

Moreover, should the Court find that Interior has already taken final agency action in this case, it would cut off the administrative record in a manner that would contradict APA record review principles. A court's review of an agency's decision under the APA is based on the administrative record before the agency at the time it took the challenged action. *Fence Creek*

Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1132 (9th Cir. 2010); 5 U.S.C. § 706. By definition, the administrative record does not include post-decisional materials. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (2006). If the Final EIS is treated as the final agency action for Plaintiff's NHPA claim, any comments or other information received after the EIS's publication, any opinion from ACHP, and any mitigation measures implemented through the ROD (should Interior grant Koi's application) would not be part of the record despite the fact that they would have been considered by Interior in assessing the proposed undertaking's effects on historic properties. The fact that Interior's discussions of "matters germane to the NHPA with . . . ACHP" or other parties is "voluntary[y]," Pl.'s PI Mot. at 5, is irrelevant. Cutting off the record contravenes the principle that review of whether an agency decision was arbitrary or capricious should be based on the "whole record" before the agency. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Finally, Plaintiff is incorrect that Defendants are "talking out of both sides of their mouths" regarding the existence of final agency action (or lack thereof). Pl.'s PI Mot. at 5. Defendants have consistently maintained that: 1) the SHPO's failure to timely respond to Interior's request for concurrence means that, as a matter of law, Interior could conclude consultation, but 2) as a practical matter, that event did not end Interior's decision-making process on Koi's application—a decision on which would be the potential final agency action under *Bennett v. Spear*, 520 U.S. 154 (1997)—or even end Interior's consideration of potential impacts to historic properties. Defendants have also maintained that even if NHPA consultation concluded, it would not affect anyone's legal rights absent further action from Interior in the form of a decision on Koi's application. Defs.'s TRO Resp. at 12; Defs.' Ex. 10 at 13:9-18, 14:21 to 16:10; *infra* p. 12. Plaintiff admits as much. Pl.'s TRO Reply at 9. There thus has not been a final agency action that could support judicial review. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys*., 603 U.S. 799, 809 (2024).

b. Plaintiff lacks standing and its claim is not ripe.

Plaintiff lacks standing for two primary reasons. First, their alleged concrete injury is based on a mischaracterization of California law governing Native American human remains.

Second, Plaintiff does not have standing to challenge a discretionary decision that Interior has not made. For similar reasons, Plaintiff's claim is unripe.

Standing and ripeness are interrelated jurisdictional requirements. The constitutional minimum of Article III standing requires that a Plaintiff prove they 1) have suffered an "injury in fact" that is "concrete and particularized[,]" 2) that there is a "causal connection between the injury and the conduct complained of[,]" and 3) the plaintiff's injury would likely be redressed by a favorable decision on the merits. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted). For a threatened injury to suffice for standing, it must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). Ripeness has been characterized by the Ninth Circuit as "standing on a timeline," concerned not so much with who may sue but when. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). "[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022) (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)).

Plaintiff's alleged injury-in-fact relies on a mischaracterization of its rights under California law. Plaintiff cites California Public Resources Code Section 5097.98 as allowing it to "control the disposition of any Native American human remains, associated funerary items, and all other cultural goods found on site," and alleges that it will be divested of this purported right if Interior grants Koi's application. Pl.'s TRO Mot. at 14-15; *see also id.* (claiming items found on the property "belong to" Plaintiff); Pl.'s PI Mot. at 4 (claiming taking the land into trust would "divest FIGR of ownership and control" over cultural resources and remains); McQuillen Decl. ¶¶ 27, 32-33, ECF No. 18. Section 5097.98 only covers human remains and items[3] buried with such remains, not all cultural resources. Cal. Pub. Res. Code § 5097.98(d). But even for human remains, Section 5097.98 creates only a consultation right—not a right of ownership or control. If remains are discovered, Section 5097.98 requires the landowner to ensure the remains

[3] "Items" is the language used by the statute.

are "not damaged or disturbed by further development activity until the landowner has discussed and conferred . . . with the most likely descendants regarding their recommendations" on how to handle the remains or associated items. *Id.* § 5097.98(b). "The landowner shall discuss and confer with the descendants all reasonable options regarding the descendants' preferences for treatment." *Id.* But the landowner ultimately has the right to reject the recommendations and reinter the remains in a location on the property that will not be subject to further disturbance. *Id.* § 5097.98(e). Plaintiff is incorrect that Koi "currently has no say in the disposition of Native American human remains at the Project location." McQuillen Decl. ¶ 29. Koi, as landowner, instead has the ultimate say under California law.

Plaintiff has not shown how a decision on Koi's application would deprive it of any rights it currently has under California law. Plaintiff thus fails to identify a concrete harm even if Interior were to take the land into trust, and fails to adequately allege standing. Further, to the extent Plaintiff would refocus on Section 5097.98's procedural process, that process is similar to that proposed in the Final EIS. Under the EIS's proposed mitigation measures, construction within 50 feet of any remains discovered "during ground-disturbing activities on the Project Site" would need to stop until a plan for handling the remains has been developed in consultation with the Koi Nation and potentially culturally affiliated tribes. Defs.' Ex. 11 at 4-13 to -14. The EIS proposes requirements to take reasonable steps to secure and protect any remains while the plan is developed. *Id.* Plaintiff has identified no meaningful difference between the procedures in Section 5097.98 and those proposed in the EIS, much less how any difference will harm Plaintiff. To the extent Plaintiff complains that the measures are not guaranteed, this only highlights the prematurity of its claim. It is speculative that: 1) any mitigation measures will be necessary because Interior has not approved Koi's application; and 2) that proposed mitigation measures would not be implemented if Interior completes its ongoing decision-making process by taking the land into trust. *See* Defs.' TRO Resp. at 9 (citing cases); *infra* pp. 11-12.

Even if Plaintiff's characterization of their rights under California law was correct, their allegation that they may be deprived of those rights is too speculative for standing because it requires assuming how government officials will exercise their decision-making authority.

Defs.' TRO Resp. at 9. Indeed, Plaintiff made a similar argument when a local community group challenged what was then Interior's not-yet-made decision to allow gaming on Plaintiff's trust land. Interior had already taken the land into trust, and the community group argued they would suffer environmental and other harms from Plaintiff's operation of a proposed casino. But, as Graton argued, because "the Property [could not] be developed and used for gaming without further federal and state action," the group had not "satisfie[d] the 'irreduc[i]ble Constitutional minimum' of 'concrete and particularized' injury that is 'actual and imminent, not conjectural or hypothetical.'" [4] Intervenor's Mot. to Dismiss First Am. Compl., *Stop the Casino 101 Coal. v. Kempthorne*, No. 3:08-cv-02846 (N.D. Cal. Feb. 20, 2009), ECF No. 50 (2009 WL 3502584) (quoting *Lujan*, 504 U.S. at 560). This Court agreed, finding that "until the Tribe obtaine[d]" approval for its plan, "plaintiffs' injuries remain[ed] too anticipatory to create standing." *Stop the Casino 101 Coal.*, 2009 WL 1066299, at *4. The group's speculation regarding the remaining regulatory process was insufficient for standing, even though gaming was ultimately permitted on Graton's land. Similarly, until Interior decides whether to approve Koi's application, Plaintiff's alleged injury from Interior potentially granting the application is "too anticipatory to create standing." *Id.*

Because Plaintiff is attempting to challenge a decision Interior has not made, Plaintiff's claim is unripe. The Ninth Circuit reversed a district court's ruling that plaintiffs could not bring a NHPA claim after an undertaking (a disbursement of funds) occurred because it "could create a situation where cases are dismissed as unripe before disbursement of federal funds and dismissed as moot after disbursement of federal funds." *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998). The Ninth Circuit thus implicitly recognized that claims brought prior to an undertaking occurring or being approved are unripe. As the Eastern District of Pennsylvania put it, "the approval of the expenditure of federal funds [or issuance of a license] acts as the deadline for agency action" under the NHPA, and until that deadline passes, "there has not been the requisite

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[4] Plaintiff also stated there that "the ROD will constitute final agency action regarding the Tribe's proposed development of the Property." Mot. to Dismiss at 7.

final agency decision to establish a ripe claim." *Save Ardmore Coal.*, 419 F. Supp. 2d at 675. There, as here, "Plaintiff['s] claim . . . is simply not ripe." *Id.*; *see also Hamilton Grange*, 2009 WL 650262, at *18.[5] That a NHPA claim is not currently ripe does not mean it never will be. If Interior grants Koi's application, an APA claim challenging that decision could be brought at that point (assuming other pleading and jurisdictional requirements are met).

Nor is Plaintiff's allegation of a procedural injury sufficient to create standing. First, Plaintiff has not suffered a procedural injury at this point. At oral argument, the Court found that Plaintiff had standing at least in part because Plaintiff no longer had a legal right to make BIA engage in consultation under Section 106. Defs.' Ex. 10 at 18:19-25. Plaintiff reiterates this alleged injury. Pl.'s PI Mot. at 3. But at no point throughout this process has Plaintiff had the right to make Interior consult with it. *See Save Ardmore Coal.*, 419 F. Supp. 2d at 674-75. As discussed above, the NHPA only requires an agency consider impacts to historic properties "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 54 U.S.C. § 306108. An agency does not have any obligation to consult, and there is no right to consultation, without an undertaking. *Tule Lake Comm. v. FAA*, No. 20-cv-688, 2020 WL 5749839, at *4-5 (E.D. Cal. Sept. 25, 2020). Interior will have had no obligation to comply with the NHPA, and Plaintiff could not have suffered any procedural injury under that statute, until and unless Interior decides to approve an undertaking that would trigger the need to have complied with those obligations. *See id*; *infra* pp. 15-16 (discussing Plaintiff's failure to state a claim). Finding that there is a right to consultation circles back to the reason Plaintiff has not alleged a concrete harm—it presumes the undertaking will occur.

Even if Plaintiff had a procedural right that had been infringed at this point, their alleged NHPA procedural injury is insufficient for standing in the absence of a certainly impending concrete harm. *Hamilton Grange*, 2009 WL 650262, at *15. It is well-established that

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[5] *Hamilton Grange* dismissed the claim on prudential rather than constitutional ripeness grounds. This was because the plaintiff alleged the agency's abandonment of a property was causing concrete, ongoing harm in the form of blight and crime. 2009 WL 650262, at *16. Such a current injury is absent in this case, making constitutional ripeness is the relevant doctrine here.

"deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009). This threshold issue was also "illustrated in [*Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016),] where Spokeo, Inc. violated the Fair Credit Reporting Act by posting incorrect information about Robins; however, violation of the statute alone was not enough. In order to establish a 'concrete' injury in fact, Robins had to show how the incorrect information *actually* harmed him." *Ealy v. Redfield*, No. 22-35962, 2024 WL 719038, at *1 (9th Cir. Feb. 22, 2024) (emphasis in original). Here too, Plaintiff has not been "actually harmed" by the alleged inadequate consultation because Interior has not taken action based on the consultation. *Id.* Plaintiff's allegation that it will be harmed in the future is both based on an incorrect interpretation of California law and "too anticipatory to create standing." *Stop the Casino 101 Coal.*, 2009 WL 1066299, at *4.

Nor does Plaintiff have standing based on Plaintiff's purported sovereignty over Koi's land. The Court found, based on the TRO briefs, that Plaintiff has standing based on its claimed injury to tribal sovereignty connected with the Section 106 process, and pointed towards *Confederated Tribes & Bands of the Yakama Nation v. Yakama County*, 963 F.3d 982 (9th Cir. 2020). Defs.' Ex. 10 at 6:21-24. But Koi owns title to the land at issue. Plaintiff has fallen far short of establishing that it possesses sovereignty over Koi's land, much less that Interior could infringe upon such alleged sovereignty. *Yakama* is thus not analogous. *Yakama* concerned who between the Tribe, state, and federal government could exercise criminal jurisdiction within Yakama's reservation. Criminal jurisdiction is a clear attribute of sovereignty, and the policy at issue in *Yakama* directly implicated Yakama's ability to govern within its own boundaries. This was a concrete, cognizable injury for standing purposes. The additional cases cited in Plaintiff's motion, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 468 n.7 (1976) and *Mille Lacs Band of Ojibwe v. Cty. of Mille Lacs*, 508 F. Supp. 3d 486, 506-07 (D. Minn. 2020), likewise directly implicated tribal self-government. *Moe* concerned who had ability to regulate conduct on tribal land and *Mille Lacs Band* concerned where reservation (and hence law enforcement) boundaries lay. But absent express authorization from Congress, tribes

do not possess sovereignty "beyond what is necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544, 564 (1981); *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989). This case is distinct from *Yakama*, *Moe*, and *Mille Lacs Band*, as it concerns land beyond Plaintiff's rancheria and does not implicate Plaintiff's ability to govern conduct on its own land or within its reservation. Plaintiff thus identifies no injury to its sovereignty.

Finally, the Court pointed to the testing of obsidian found at the site as a concrete injury. Defs.' Ex. 10 at 7:6-12. While Defendants deny that the surveys and testing done in this case were improper, as discussed more below, any alleged past injury to artifacts is not redressable by a NHPA claim. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61-64 (D.D.C. 2018). The most a successful NHPA claim could entitle Plaintiff to is remand with vacatur, which cannot repair any past alleged damage to artifacts or other items.

Ultimately, Plaintiff is making an unsupportable argument it would have standing for a NHPA claim even if Interior denied Koi's application or simply did not act on the application. This is contrary to the NHPA, which ties consultation and review to the approval of an undertaking. Moreover, Plaintiff seeks to halt a decision-making process that *may* lead to a decision that *might* injure Plaintiff. But courts have jurisdiction only over "actual cases and controversies" where a dispute has materialized between the parties. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). No dispute can materialize absent a decision from Interior to grant Koi's application, and the Court lacks jurisdiction until and unless Interior makes that decision and takes the land into trust.

c. Plaintiff is unlikely to succeed on the merits of its NHPA claim.

Plaintiff is also unlikely to succeed on the merits because its Complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6). An agency cannot have violated Section 106 of the NHPA without having approved expenditure of funds on or issuing a license for an undertaking. Plaintiff has not and cannot allege Interior has approved an undertaking here, and indeed Plaintiff seeks to prevent Interior from doing so. Plaintiff thus would prevent its own claim from even having the opportunity to accrue. But even if Plaintiff were able to overcome the myriad

jurisdictional and pleading deficiencies in its complaint, Interior is complying with the NHPA.

i. Plaintiff's complaint should be dismissed for failure to state a claim.

Plaintiff has not pleaded the elements of a NHPA claim because it has not alleged Interior funded or approved an undertaking without "tak[ing] into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. Section 106 provides that an agency, "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." *Id.* An agency thus cannot have violated Section 106 without having approved funds for an undertaking or issued a license. Plaintiff has not alleged, and cannot allege, that Interior has approved an undertaking in violation of Section 106 because Interior has made no decision on Koi's application. Plaintiff thus cannot allege a threshold element of an NHPA claim, and their complaint should be dismissed under Rule 12(b)(6). *See Apache Survival Coal.*, 21 F.3d at 888-900, 907; *Karst*, 475 F.3d at 1298; *Hamilton Grange*, 2009 WL 650262, at *22; *Tule Lake Comm.*, 2020 WL 5749839, at *4-5; *Nat. Trust for Hist. Pres. v. Blanck*, 938 F. Supp. 908, 918 (D.D.C. 1996) ("It is clear that 'an agency need not satisfy the § 106 process at all . . . unless it is engaged in an undertaking."). [6]

ii. Interior is complying with the NHPA.

Plaintiff's NHPA claim is reviewed under the APA's "arbitrary or capricious" standard of review. Defendants refer back to their response to Plaintiff's TRO motion for a description of this "highly deferential" standard. Defs.' TRO Resp. 15. The Court's review under the APA is based on and limited to the agency's administrative record. *Id.* But because Interior has not made a decision on Koi's application, the administrative record on which the Court would evaluate any ultimate decision is not closed. Plaintiff's effort to have the Court review a still-evolving record to halt an unmade decision thus improperly seeks to limit the record.

Even if the record was closed, though, Plaintiff would be unlikely to succeed on the

[6] The D.C. Circuit treats final agency action as a requirement for a cause of action under the APA rather than as a jurisdictional requirement. *Karst*, 475 F.3d at 1298. *Hamilton Grange* did the same. 2009 WL 650262, at *22.

merits of a NHPA claim. Section 106 is "a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs" on historic properties. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). It does not impose substantive preservation requirements even when an agency finds historic properties will be affected. *See Presidio Hist. Ass'n v. Presidio Trust*, 811 F.3d 1154, 1168-70 (9th Cir. 2016); 36 C.F.R. § 800.7. Further, Section 106 only requires an agency consider impacts to "historic propert[ies]," not artifacts, archeological sites, or cultural resources generally. 54 U.S.C. § 306108. A historic property is one "included in or eligible for inclusion on, the National Register of Historic Places" under the criteria set out in 36 C.F.R. § 60.4. "[D]istricts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association" and meet one of four criteria regarding historical importance may be eligible for inclusion on the National Register.

Interior has given Plaintiff and other tribes "a reasonable opportunity to identify [their] concerns about historic properties," advise on their identification and evaluation, and voice their concerns about the potential land-into trust decision. 36 C.F.R. § 800.2(c)(2)(ii). After inviting local tribes to consult more than two years ago, Interior circulated and requested comments on reports regarding the identification of historic properties in March 2023. Defs.' Ex. 3 at 1, 5. Consulting parties, including Plaintiff, had several months to comment on the surveys. *Id.* Despite follow up from Interior, Plaintiff did not submit its tardy comments until five months after Interior circulated the reports. *Id.* Nonetheless, and despite the SHPO not providing any substantive response to Interior's first request for concurrence in August 2024, Interior reinitiated consultation and considered Plaintiff's comments. *Id.* at 1. Interior also met with Plaintiff to discuss its concerns. *Id.* at 1, 7. That meeting led to further review, and a canine survey was performed at Plaintiff's request to search for human remains, followed by excavations that revealed only one piece of chipped obsidian. *Id.* at 1; Defs.' Ex. 4 at 3-63. Plaintiff's archeologist was present at and actively participated in the excavation, at multiple points recommending that the excavator stop digging because of the absence of cultural resources. ECF No. 18-25 at 8-9. Plaintiff's assertion that their archeologist was prevented from

meaningfully participating in the excavation, Pl.'s TRO Mot. at 23, is thus contradicted by the record. ECF No. 18-25 at 8-9. Interior provided Plaintiff a "reasonable opportunity" to identify concerns and advise on the identification of properties. The NHPA required no more.

Plaintiff has also focused heavily on the adequacy of the canine search of the property, which they characterize as having been done in "deplorable" conditions. There were varying amounts of water on the property during the two-day canine search. Interior held a call with a representative from the Institute for Canine Forensics, Adela Morris, in February 2024 to discuss the results. Defs.' Ex. 12 at 1.[7] Ms. Morris stated that "scent areas" identified by the search dogs "would likely have been *smaller* in dryer conditions." *Id.* at 2 (emphasis added). She further stated that while one search area should be monitored during construction, she "[did] not recommend further testing in any other areas." *Id.* In another call between a consultant on the project and Ms. Morris in December 2024:

> Ms. Morris indicated that moisture is generally a good condition for canine scent surveys. [Institute for Canine Forensics] has conducted surveys under very dry conditions and again after rains, and dogs generally identify more scents under wet conditions. Water appears to release scent into the environment similar to cooking. Scent molecules compete for space with water molecules, and the water molecules push the scent molecules out releasing them into the atmosphere. . . .

Id. at 3. While she recognized that standing water's impact is uncertain, "because they were alerting, she felt comfortable that the dogs were able to sufficiently determine scent under the conditions that were present during the surveys." *Id.* She stated that "further canine studies are not recommended." *Id.* It is not arbitrary and capricious for Interior to rely on these statements from a professional who "has been involved in human remains detection with her dogs since 1986 and has deployed her dogs on hundreds of searches . . .." ECF No. 18-22 at 47.

Based on the information currently before Interior, a finding that no historic properties would be affected by taking the land at issue into trust is reasonable. Resources found on the site

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[7] Defendants have redacted portions of Exhibit 12 that include location-specific information. Defendants do not believe that any of the information in Exhibit 12 is protected from disclosure under the NHPA but have redacted the document out of an abundance of caution. Defendants will provide an unredacted copy of Exhibit 12 to Plaintiff's counsel.

were widely scattered and from disparate time periods. Defs.' Ex. 4 at 3-62 to -64. While some obsidian found may be artifacts, other pieces appear to have been the result of agricultural activities on the property. *Id.* at 3-63. Obsidian hydration testing—which "involves cutting a thin section out of the edge of the obsidian specimen" and measuring the width of its "hydration rim" to measure age—led to the conclusion the pieces "[did] not represent an intact cultural feature or site." *Id.* at 3-63 to -64. Only five pieces tested "had measurable hydration that could indicate human tool manufacture[,]" and results of the hydration showed they were from three different time periods. *Id.* at 3-64. It is reasonable for Interior to conclude that widely scattered obsidian pieces from different time periods do not constitute an intact cultural site that would qualify for inclusion on the National Register of Historic Places.

Plaintiff is incorrect that Interior's review process was rushed and filled with "cut corners." Pl.'s PI Mot. at 6. Interior's robust, multi-year review evolved based on feedback from consulting parties and the public. Defs.' Ex. 3 at 1. After initially preparing an Environmental Assessment, Interior moved forward with a more detailed EIS after considering feedback. Defs.' Ex. 4 at 1-2. It gave consulting parties several months to review and comment on resource reports. Defs.' Ex. 3 at 1, 5. It reinitiated consultation even though the SHPO offered no substantive critique of Interior's initial request for concurrence, held meetings with consulting parties, and conducted additional studies that Plaintiff requested. *Id.*; Defs.' Ex. 6. The only thing those additional studies led to was a single piece of chipped obsidian. Defs.' Ex. 4 at 3-63. When the SHPO declined to concur in Interior's no historic properties affected finding a month after its deadline to respond, Interior met with the SHPO to try and address their concerns. Defs.' Ex. 3 at 1. And requesting an advisory opinion from ACHP when NHPA regulations would allow Interior to end consultation is far from a shortcut. Defs.' Ex. 2. Plaintiff has failed to show that Interior has acted arbitrarily or capriciously, and is thus unlikely to succeed on the merits of its NHPA claim.

II. Plaintiff fails to identify any irreparable harm that would occur in the absence of emergency relief.

Plaintiff has not alleged an imminent, irreparable harm it will suffer absent a preliminary injunction. As discussed above, California law does not give Plaintiff its claimed right to control disposition of any human remains or cultural resources that may be found on Koi's land. *See supra* pp. 9-10. Plaintiff cannot be irreparably injured by deprivation of a right it does not possess. And should Interior grant Koi's application, the EIS proposes robust procedures for protecting any human remains discovered on the site and for involving Tribes like Plaintiff in deciding how to treat those remains. Defs.' Ex. 11 at 4-13 to -14. In fact, the proposed measures appear to provide Plaintiff with more opportunities to be involved in cultural resource protection than Section 5097.98 because the measures extend beyond discovered human remains and associated buried items. *Id.* at 4-12 to -14. Plaintiff has thus not shown how they would be harmed by a possible future decision. And to the extent Plaintiff claims injury from the mitigation measures being proposed, rather than guaranteed, it is because Plaintiff has placed Interior in a Catch-22 by seeking to enjoin the decision through which Interior could make the measures binding. Plaintiff should not be allowed to manufacture irreparable harm for a preliminary injunction by preventing Interior from making the decision through which it would mitigate any such harm.

There are additional problems with Plaintiff's claimed irreparable harm. For there to be any imminent irreparable harm—either to cultural resources discovered on the property or to the ability to consult regarding those resources—Plaintiff would need to prove that activities that would unearth cultural resources on the property are imminent and may reveal or damage cultural resources before the Court has the opportunity to hear this case on the merits. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Salazar*, No. 12-cv-3021, 2013 WL 417813, at *4 (E.D. Cal. Jan. 30, 2013); *Stand up for Cal.! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 81-83 (D.D.C. 2013) (finding plaintiff's predictions of what a tribe would have "the *ability* to do once the land is transferred" into trust insufficient). Plaintiff has made no such showing. First and foremost, such a showing cannot be made because it requires

assuming that Interior will decide to take land into trust. Additionally, the EIS reports that, should Interior accept the land into trust, "[c]onstruction of Alternative A is conservatively assumed to occur in one phase beginning in 2026 and lasting 18 to 24 months, with an anticipated opening day in 2028." Defs.' Ex. 11 at 2-14. Plaintiff has thus not proven that any harm will occur to unidentified cultural resources in the time it will take the court to fully adjudicate a "garden-variety APA claim," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012), that will not involve discovery or trial. And Plaintiff is incorrect, Pl.'s TRO Reply at 9, that the potential burden of meeting the jurisdictional and pleading requirements of a proper APA claim, should it accrue once Interior makes a decision on the Koi Nation's application, is an irreparable harm. *See Guifu Li v. A Perfect Franchise, Inc.*, No. 5:10–CV–01189–LHK, 2011 WL 2293221, at *4 (N.D. Cal. June 8, 2011).

III. Neither the balance of equities nor the public interest weigh in Plaintiff's favor.

Defendants incorporate the arguments regarding the balance of equities and public interest from their response to Plaintiff's TRO Motion here. The balance of equities and public interest do not weigh in Plaintiff's favor when it would have the opportunity to bring an APA claim challenging a decision to grant Koi's application in the future should that decision be made. Additionally, Plaintiff's countervailing allegation of harm is weakened further once the mischaracterization of California law on which it is based is considered.

CONCLUSION

Plaintiff's motion does not meet any of the requirements for preliminary injunctive relief. Plaintiff has not identified a final agency action, lacks standing, and has failed to state a claim. Even if Plaintiff's NHPA claim was otherwise viable, it would not be likely to succeed on the merits. Further, Plaintiff has not identified a non-speculative irreparable harm or shown that the balance of equities and public interest weigh in its favor. For all these reasons, the Court should deny Plaintiff's motion.

Respectfully submitted this 2nd day of January, 2025.

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