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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERATED INDIANS OF GRATON RANCHERIA,

Plaintiff,

v.

DOUG BURGUM, in his official capacity as Secretary of the Interior, *et al*.,

Defendants.

FEDERATED INDIANS OF GRATON RANCHERIA,

Plaintiff,

v.

DOUG BURGUM, in his official capacity as Secretary of the Interior, *et al*.,

Defendants.

Consolidated Case Nos. 3:24-cv-8582-RFL, 3:25-cv-1640-RFL

PLAINTIFF'S REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Koi Nation of Lake County is 50 miles away from the Shiloh Site. That is a longer distance than from this courthouse in San Francisco to San Jose. Lake County has been Koi's home for the last 3,000 years, it is where the United States established Koi's Rancheria in the 20th century, and the place that Koi has zealously defended from development. *See Koi Nation of N. Cal. v. City of Clearlake*, 330 Cal. Rptr. 3d 718, 721-722 (Ct. App. 2025) (successfully opposing the City of Clearlake's efforts to build a hotel on the basis of inadequate tribal consultation). Rather than build a casino in Lake County, however, Koi has repeatedly attempted to buy up Bay Area properties with the help of out-of-state developers, and it has now come for FIGR's ancestral land in Sonoma County. Contrary to the government's assertions, the only ties to Sonoma that Koi has established by "historical documentation," 25 C.F.R. § 292.2, are: passing trade routes Koi's ancestors used to travel to Bodega Bay; the relocation of individual tribal members in the 20th century; and the burials of two dozen individuals in regular—not tribal—cemeteries after 1945. We said this before, and the government has not shown otherwise: No court or DOI official has ever approved a restored-lands application on facts anywhere close to Koi's.

But DOI's decision fails even before we get to the merits. The government now concedes that the only DOI document purporting to grant Dearman—a subordinate with no role in gaming issues—authority to take land into trust was an unpublished, temporary memorandum from 2024 that did not even have an end date. Not only that, but the government has no evidence that the official listed above Dearman in the memorandum was unavailable to act. These issues are dispositive—that is why we put them first in our motion. That the government relegates them to second place speaks volumes.

In any event, Dearman's analysis fails on the merits for multiple reasons. First off, the Shiloh Site cannot be "restored" to Koi under any reasoned interpretation of the Indian Gaming Regulatory Act ("IGRA"). Indeed, the government now *admits* that the Shiloh Site was "privately owned" between 1880 and 1994, Opp. 27, which significantly undercuts any assertion that Koi occupied or used the Shiloh Site in the 20th century. The government tries to get around that problem by quoting unsupported statements from Koi's historical report such as the claim that the

Shiloh Site "is in the core area where the Koi Nation worked as agricultural laborers and has resided for more than a century" and that an orchard ten miles from the Shiloh Site "became a de facto tribal headquarters for the Koi." Opp. 12 (citing AR28768, 28917). Not one of those statements is supported by "historical documentation" as 25 C.F.R. § 292.2 requires. And more importantly, Koi must prove that it has a significant historical connection " '*to the land*' itself," not just to the surrounding area. *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 566 (D.C. Cir. 2016) (quoting 25 C.F.R. § 292.12(b)).

The government suggests none of that matters because the Court should just defer to Dearman's conclusions. But Dearman's analysis is deeply problematic. Take, for example, Dearman's claim that Koi's ancestors "sourced, manufactured, and traded clamshell beads and magnesite that were geographically specific to the region of the Shiloh Site." AR27. That assertion cannot be reconciled with Dearman's concession several pages earlier that clam shells were found in Bodega Bay—more than 25 miles west—and magnesite was mined from quarries in Lake County—50 miles north. AR11. As discussed in detail below, Dearman's analysis is replete with contradictory conclusions and ahistorical rewrites of the record. The Court should not defer to such arbitrary and capricious decisionmaking.

The government also fails to meaningfully respond to our challenge to DOI's regulations. It attempts to draw a confusing and inaccurate distinction between as-applied and facial challenges, but our argument is straightforward: The plain meaning of "restored" means to "give back"—something impossible here because Koi never occupied the Shiloh Site. Moreover, another IGRA provision known as the two-part exception allows tribes to game on land without establishing a historical connection, provided other requirements are met. *See* 25 U.S.C. § 2719(b)(1)(A). If Koi's tenuous ties were enough to classify the Shiloh Site as "restored," that would write the two-part exception right out of the statute. So either Dearman misconstrued DOI's regulations defining "significant historical connection" or the regulations must be invalidated as applied to Koi. The government's failure to engage with that argument tells the Court everything it needs to know.

The government's privileges and immunities defense also crumbles because it is based on the same erroneous premise that Koi has actually lived on and around the Shiloh Site for the past

century. Even if that were true, Koi still would not come close to establishing the kind of "ancient connection" that DOI has required of every other similarly situated tribe. *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1215 (D. Kan. 2006). The government tries to lower the bar by minimizing FIGR's and other tribes' connections, but even a cursory look at those decisions confirms that DOI looked for centuries-long tribal presence. Dearman impermissibly applied different rules to Koi.

That is not all. Dearman's analysis of land and jurisdictional conflicts under the Indian Reorganization Act ("IRA") was non-existent. As we explained, Dearman thought he did not need to perform the analysis at all because there would be no conflict *after* "the Shiloh Site is accepted into trust." Mot. 32; AR33. The government understandably does not defend Dearman's reasoning and offers its own explanation for why the IRA is satisfied. But judicial review of agency action is limited to the grounds that *the agency* invoked, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020), so the Court should reject the government's newfound rationalizations.

The government's response also confirms that DOI failed to evaluate the project's impact on tribal cultural resources under the National Historic Preservation Act ("NHPA") and take a "hard look" at its environmental effects under the National Environmental Policy Act ("NEPA"). According to the government, it was permissible for DOI to conduct nearly all the NHPA field studies it relied upon without FIGR's knowledge or participation and without even accounting for Koi's proposed Vegas-style casino, as long as FIGR could "express its disagreement" down the line. And it was also permissible to short-circuit NEPA's core requirement that DOI consider alternative locations by applying arbitrary criteria to exclude every location besides the one Koi had purchased beforehand. That cannot be right.

DOI admitted that it rushed to rule on Koi's application "before the next administration," Dkt. No. 40-1 at 13, and, well, it shows. Dearman should have never been the person to approve Koi's application and when he did, he papered over huge gaps in the record, failed to square inconsistent conclusions, and blew past key statutory and regulatory safeguards. The Court should vacate the ROD and the Decision Letter, reverse the trust decision, and remand to DOI to do the work properly.

ARGUMENT

I. Dearman Lacked Authority To Issue The ROD And The Decision Letter.

The government claims Dearman "had a temporary delegation authority" to rule on Koi's application based on an unpublished September 2024 memorandum. Opp. 18-19. But as the government concedes, the memorandum empowered Dearman to act "only when" "no preceding official on the list" was available and the situation "require[d] immediate action." AR3-4. The government's failure to identify anything in the record indicating that no preceding official on the list was unavailable or that immediate action was necessary therefore is dispositive.

The government's uncited, unexplained one-liner (at 20) that the "official listed in the third position was unavailable" does not fix the problem. Not only is judicial review limited to "the administrative record," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (citation omitted), but the government even now does not cite any evidence to support its claims of unavailability. An "assertion, without more," is not enough. *Nw. Env't Advocs. v. U.S. Env't Prot. Agency*, 745 F. Supp. 3d 1150, 1185 (D. Or. 2024); *see also Fla. Power & Light Co.*, 470 U.S. at 743 (noting an agency cannot rely on a "record made initially in the reviewing court").

Lacking any evidence, the government falls back on the presumption of regularity, *see* Opp. 20-21, but the problem here is that the government didn't act with regularity in the first place. The government's cases confirm the presumption does not apply to the predicate question of whether Dearman acted "within the scope of his authority." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated in part on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also Echevarria-North v. Shinseki*, 437 F. App'x 941, 946 (Fed. Cir. 2011) ("The presumption of regularity does not attach to every action taken by a public agency, only to those actions that, for example, are part of the agency's official duties or known course of business, or that constitute ministerial steps." (quotation marks and citation omitted)). And besides, the Ninth Circuit requires at least "some evidence that the public actor properly discharged the relevant official duties" before the presumption can apply. *Gov't of Guam v. Guerrero*, 11 F.4th 1052, 1058 (9th Cir. 2021). There is none here.

In any event, the 2024 memorandum was not a valid temporary delegation of authority. DOI has exacting requirements for creating "temporary delegation[s]": They must be "issued as a Secretary's Order" *not* "as memoranda," provide an "Order number" and, most importantly, set an expiration date. *See* Mot. 17; 012 Department Manual ("DM") 1.1, 1.8, 1.9; 200 DM 1.3. The government does not dispute that the 2024 memorandum fails on all counts, which, again, is the end of the matter. *See* Opp. 19-20.

The government, however, attempts a sleight of hand. After calling the memorandum a "temporary delegation of authority" for two pages, the government says it is actually a "succession memorandum," so the Court should look to procedures set out in 302 DM 2.4.C, which govern "the format for designating successors to positions subject to the Vacancies Act." Opp. 20; *but see* Opp. 19 (professing that the "relevant" portion of the 2024 memorandum was "a *temporary delegation of authority* pursuant to Reorganization Plan No. 3 of 1950, rather than *acting performance*") (emphasis added). This new Government position isn't any better than their old one. The Vacancies Act governs the designation of acting officials—it would apply, for example, if Dearman had assumed the role of Acting Assistant Secretary. But that is plainly not what happened here: There is no record of Dearman taking on that role even though 302 DM 2.5 requires an official purporting to act as a "successor" to maintain a record of "the period during which the authority was exercised." And Dearman expressly said he was exercising authority "by delegation." AR36, 96; *see also Stand Up Cal.! v. U.S. Dep't of Interior*, 994 F.3d 616, 626 (D.C. Cir. 2021) (distinguishing between "succession" and "redelegation").

In a last-ditch effort (at 21), the government insists that FIGR's cases do not prove that *Dearman specifically* lacked power to issue the ROD and the Decision Letter. We never said they did. We cited those cases for the straightforward proposition that *if* an agency official acts without authority, the Court "shall . . . set aside" that action. *See* Mot. 17 (collecting authorities). The government does not contest that point.[1]

[1] The government briefly suggests (at 20) that a DM violation cannot give rise to "a third-party claim." They provide no analysis or explanation of this argument, and it should not be considered. In any event, FIGR does not seek affirmative relief from a DM violation; we argue that Dearman issued the ROD and the Decision Letter "in excess of statutory authority." Mot. 16. The APA of

II. The Shiloh Site Is Not "Restored" Land.

The government structures its IGRA arguments around one central premise: that Koi established a permanent presence on and around the Shiloh Site beginning in the 1900s. *See* Opp. 12-16. Based on that premise, the government argues that Koi demonstrated a sufficient historical connection for purposes of 25 C.F.R. § 292.12(b) and that Dearman's analysis was reasonable and in line with prior agency decisions. But the government should have known after reviewing the record that Koi's claim of permanent tribal presence on the Shiloh Site in the 20th century is not just unsupported but *foreclosed* by historical documents. Indeed, the government itself admits later in the brief that the Shiloh Site was privately owned between 1880 and 1994, which significantly undercuts Koi's claim that it occupied the Site that time. Without that central premise, the government's arguments fail. And critically, the government does not have a back-up position: While it points out that trade routes are *relevant* to the historical analysis—a proposition with which we agree—it does not seriously contend that trade routes are *enough*.

A. Koi Cannot Show A Significant Historical Connection To The Shiloh Site.

Start with the government's admission that the Shiloh Site "was privately owned" "between 1880 and 1994." Opp. 27; *see also* AR213. That admission all but resolves the case because land cannot be "restored" under IGRA unless a tribe demonstrates " 'a significant historical connection *to the land*' itself." *Grand Ronde*, 830 F.3d at 566 (quoting 25 C.F.R. § 292.12(b)). To be sure, one way to show a connection is to "demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2. But this "vicinity" test is a proxy—it works only if the "circumstances of use and occupancy lead[] to the natural inference that the tribe also made use of the parcel in question." *Grand Ronde*, 830 F.3d at 566; *see also Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002) (land qualifies as "restored" when "evidence clearly establishe[s] that *the parcel* was of historic, economic and cultural significance to the Band" (emphasis added)); *Butte County v. Chaudhuri*, 887 F.3d 501,

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course provides a cause of action for that claim. 5 U.S.C. § 706(2)(C); *see, e.g., Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, 633 F. Supp. 3d 132, 169-170 (D.D.C. 2022) (scrutinizing the DM to ensure the official had authority to issue a gaming decision).

508 (D.C. Cir. 2018) (affirming because "the Secretary determined that the Tribe also had direct historical connections to the Chico parcel, not just the nearby Rancheria"). The government quibbles with what "vicinity" means, but it ultimately concedes that the regulations "permit a restoration of land" only if a tribe can draw "a natural inference that the tribe historically used or occupied the subject parcel." Opp. 11 (citation omitted). In the end, there is simply no historical evidence that Koi used or occupied the Shiloh Site itself in the 20th century, and the government's concession that the Site was privately owned during that time considerably weakens any inference that Koi occupied the parcel.

The only other evidence of Koi's presence on the Shiloh Site itself is Koi's assertion that its ancestors passed through it on the way to Bodega Bay to collect clam shells starting about 400 years ago. Merely traversing a site, however, is not enough of a connection as a matter of law. *See, e.g.*, Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29366 (May 20, 2008) (trade routes do not create a "significant historical connection" because the restored-lands exception "require[s] something more than evidence that a tribe merely passed through a particular area"); Mot. 21-22, 24 (collecting cases).

The government does not seriously argue otherwise. It says (at 11) that trade routes can be relevant to establishing a significant historical connection. But that of course does not mean trade routes are *enough*—the government's two cited cases themselves make that clear. *See Grande Ronde*, 830 F.3d at 568 ("documentation of a trade route [i]s insufficient to establish" a significant historic connection); *Stand Up for Cal.! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 260 (D.D.C. 2016) (the Department's regulations "require something more than evidence that a tribe merely passed through a particular area").

Moreover, *Grand Ronde* and *Stand Up for California!* did not even apply the restored-lands exception. *Grand Ronde* involved the initial-reservation exception, which can be satisfied by showing that the land in question is "*within an area* where the tribe has significant historical connections." 25 C.F.R. § 292.6(d) (emphasis added). In line with that, *Grand Ronde* primarily relied on evidence of "use or occupancy three miles northwest of the [proposed] parcel" as well as "exclusive use and occupancy . . . within 14 miles." 830 F.3d at 567-568. And the tribe in *Stand*

Up for California! asked the government to acquire land "pursuant to the Secretarial two-part determination" in 25 U.S.C. § 2719 (b)(1)(A), which, as discussed, does not require "*any* historical connection to the land to develop a gaming establishment." 204 F. Supp. 3d at 258. All the same, the tribe established that the land it was seeking fell within the "boundaries of its last reservation under an unratified treaty"; that "in the 1850s, ancestors of the Tribe settled" within 2.5 miles from the site; and that "likely a majority" of the Tribe's members secured seasonal work in the area around the site in the 1900s. *Id.* at 231, 258, 260. So neither *Grand Ronde* nor *Stand Up for California!* supports classifying the Shiloh Site as "restored" land based on trade networks alone.

B. In Any Event, "Historical Documentation" Does Not Demonstrate A Permanent Koi Presence In The Vicinity Of The Shiloh Site.

The government cites over a dozen statements in Koi's historical report concluding that Koi permanently relocated to the vicinity of the Shiloh Site over a century ago. *See* Opp. 12-16. As just discussed, the government's admission that the Shiloh Site itself was privately owned between 1880 and 1994 undercuts the importance of any evidence that Koi was present in the Shiloh Site's *vicinity*. But in any case, those statements are not supported by the "historical documentation," as 25 C.F.R. § 292.2 requires.

Start with farm workers. The government claims that "Koi members 'were annually involved in the agricultural harvests in the Russian River Valley,' " Opp. 12 (quoting AR28830), that "Koi ancestral families 'came to the Russian River Valley to work and eventually to live permanently,' " Opp. 12 (quoting AR28873), and that the Shiloh Site "is in the core area where the Koi Nation"—not just its members—"worked as agricultural laborers and has resided for more than a century," Opp. 16 (quoting AR28917). AR28830 and AR28917 are part of Koi's summary; they have no underlying citations to any historical documents. As for the assertion on AR28873, it supposedly comes from J.P. Munro-Fraser, *History of Sonoma County* 56-57 (1880). But the cited passage says nothing at all about any Indian people working or settling in the Russian River Valley. In fact, the entire book does not once mention "Koi," "Pomo," or "Lower Lake" people.[2]

[2] While DOI did not provide the full text of this source in the record, FIGR obtained a text-searchable electronic version and could locate no reference to the quoted language. *See* https://archive.org/details/historyofsonomac00alle/page/n11/mode/2up.

What the historical documents actually show is that several "Lake County Indians" were seen "picking hops and grapes" once in 1901 and once more in 1915. AR28829. Even granting that "Lake County Indians" is a reference to Koi, *at most*, Koi has established that several of its members engaged in seasonal labor for a few years in the early 1900s—a far cry from a "permanent[]" settlement for "more than a century." Opp. 12.

The government next claims that Koi's leader Tom Johnson and his family settled at an orchard 10 miles away from the Site in 1918, and that "orchard area became the center of the Koi Nation community." Opp. 12, 16 (quoting AR28704). The government cites no less than 8 different passages from Koi's report to that effect. *See* Opp. 11-16. *Just one* of those passages, however, cites to an underlying source—and that source is a 2020 personal communication from Koi member and current Vice-Chair Dino Beltran, not a "historical" document, 25 C.F.R. § 292.2. *See* AR28832, 28929. Even the government recognizes how thin a reed that is—when citing to AR28832, it "omit[s]" the citation to Beltran's communication. *See* Opp. 12. Every other passage on the government's list simply repeats Beltran's assertion without a shred of documentary support. That is not a historical analysis; that is a house of cards.

To be sure, Mr. Johnson was an important pan-Indian advocate for the Koi and other Indian tribes from the 1920s until the 1940s, and his ancestors appear to still live in the Santa Rosa area. *See* AR28858-70 (detailing Johnson's accomplishments). But nothing in the record even hints that Koi members came down from Lower Lake to gather at Mr. Johnson's house, let alone to permanently settle in the area of the Shiloh Site because of Mr. Johnson. *See also* AR1825-28 (FIGR's comment alerting DOI to evidence contradicting Koi's assertions on this point).

The government next points to census data, but that is more of the same. Census reports establish that Mr. Johnson's family was *the only* Koi family in Santa Rosa in the 1900s. *See* AR28884 (1920); AR28895 (1930); AR28896 (1940).[3] Not only that, but other census reports show that the vast majority of Koi members remained in the Lower Lake region throughout the 20th century. *See* AR28876-77 (1880); AR28878-79 (1900); AR 28880 (1905); AR 28881-82

[3] The 1940 census report includes two other Koi members—the husband and daughter of Emma Ives (née Johnson).

(1910); AR28886-87 (1920); AR 28888-90 (1923); 28896-97 (1940); *see also* AR28891-94 (noting that the Johnson family was the only one to list "Sonoma County" as their residence in the 1928-1933 "enrollment of California Indians"; other families stated they lived in "Lower Lake" and "Cache Creek"); AR28845 (reporting that Koi's ancestors refused to "leav[e] the shore of Clear Lake or Cache Creek" in 1938 because of the Tribe's commitment "to traditional subsistence, especially fishing"); AR28844-45 (explaining that the federal government sought to acquire another rancheria in the 1930s for the twenty-three "Lower Lake" Indians who remained on their ancestral homeland); AR28847 (discussing "Lower Lake Indian families" that continued to live in Lake County in the late 1950s). The government says not one word about those documents.

Finally, the government points out that 23 Koi members are buried in Sonoma County, including around the Shiloh Site. Opp. 16 (citing AR28912). What the government omits, however, is that the earliest of those burials dates back to only 1945, and many are from the last two decades. *See* AR28912. That does not show a "longstanding . . . connection to the land." *Wyandotte*, 437 F. Supp. 2d at 1215; *see* Dkt. No. 99-12 at 19 ("[E]vidence of the Band's citizens' movements as late as the 1960s is more of a *modern* era activity, as opposed to *historic*, as those two terms are used in the Part 292 regulations.").

To sum up: Koi's "historical documentation," 25 C.F.R. § 292.2, at most shows that: (1) its ancestors traversed *through* the area of the Shiloh Site to reach Bodega Bay; (2) a handful of Koi members worked as farm laborers in the first two decades in the 1900s; (3) one Koi family permanently moved to an orchard 10 miles away from the Shiloh Site in 1918; and (4) 23 Koi members were buried throughout Sonoma County after 1945. Koi's evidence also establishes that most Koi families remained in their ancestral homeland in Lower Lake throughout the 20th century and that the Shiloh Site was privately owned from 1880 until 1994, undercutting any inference that Koi occupied the parcel itself during that time. No case or DOI decision has found a significant historical connection on those facts.

C. Dearman's Analysis Is Arbitrary And Capricious And Departs From Decades Of Settled Agency Precedent Without Any Explanation.

The government asks this Court to defer to Dearman's decision because it was supported by substantial evidence and consistent with the Department's past decisions. Our discussion immediately above already illustrates why that is wrong, and that's just for starters.

Take, for example, the record evidence. Dearman based his restored-lands conclusion on three findings: (1) Koi "sourced, manufactured, and traded clamshell beads and magnesite that were geographically specific to the region of the Shiloh Site"; (2) "the Tribe documents [revealed] that tribal members were buried in various places in and around Lower Lake and in the Russian River Valley, including burial sites for tribal members in Lake, Sonoma, and Napa Counties" in "the early 1900s"; and (3) there was "a pattern of occupancy and subsistence-like migratory and seasonal labor in and around the Shiloh Site." AR27.

Findings one and two are squarely rebuffed by the record. As we already explained, Koi did not source or manufacture the beads and magnesite anywhere near the Shiloh Site: clam shells were found in the Bodega Bay and magnesite was mined from quarries in Lake County. *See* Mot. 24; *see also* AR11 (conceding this point elsewhere in the Decision Letter). As for burials, the earliest one dates back to 1945, not "the early 1900s," as just discussed. *See supra* p. 10; *see also* AR28912. And although Dearman implies that Koi buried their dead at tribal cemeteries—he says, for example, that "the Koi Nation has used the area around the Shiloh Site as burial grounds for over a century" and that Koi members were buried at "sites for tribal members," AR27—there are no Koi tribal burial sites in Sonoma; Koi members were buried in public cemeteries. Mot. 25; *see also* AR28912. We explained all of that in the opening brief, and the government has no response. *See* Opp. 15-16.

As for finding three—that Koi produced historical documents demonstrating occupancy and subsistence "*in and* around the Shiloh Site," AR 27 (emphasis added)—the only way Dearman could have reached it was by ignoring key evidence in the record that conclusively established that the Shiloh Site was privately owned between 1880 and 1994, *see supra* p. 8. The government protests that the "APA does not require Interior to identify and refute every piece of contrary evidence or opposing argument in its decision" and that a "curt explanation may suffice." Opp.

15 (quotation marks and citation omitted). But this was not just any piece of evidence; it went to the heart of the most important inquiry in this case. And Dearman did not offer a "curt" explanation—he flat-out ignored that evidence even as he recognized that the ultimate question is whether Koi's evidence "cause[d] a natural inference that the tribe historically used or occupied *the subject parcel*." AR26 (emphasis added). That is the definition of arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A).

Nor does Dearman explain how he arrived at his conclusion that Koi established a "pattern" of occupancy and subsistence in the vicinity of the Shiloh Site. AR27. He simply says there was one without a single citation. *See id.* The government says there was enough evidence in the record to support Dearman's analysis. Opp. 15-16. But that is wrong, *see supra* pp. 6-10, and it also does not respond to our argument that *Dearman* failed to justify his conclusions, rendering them arbitrary and capricious. *See Dep't of Homeland Sec.*, 591 U.S. at 20-21 ("It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action"; "*post hoc* rationalization" will not do (quotation marks and citation omitted)).

The government also suggests that Dearman's background discussion can fill the gaps in his analysis, Opp. 15-16 & nn.6-7, but Dearman's background observations are even more problematic. For example, he claims that "[n]umerous censuses were conducted that evidence the presence of the Koi Nation and their ancestors in Lake and Sonoma Counties." AR14. But the census data he goes on to discuss shows that "Pomo Indians" lived "in Lower Lake," not Sonoma. *See id*; *see* AR 28876-28897. Similarly, Dearman claims that the "Lower Lake Pomo were . . . working in agriculture as seasonal workers . . . throughout the Sebastopol and Santa Rosa areas while residing in and around Lower Lake, Cache Creek, and the Sebastopol-Santa Rosa area" in 1920 and that "most Tribal members have remained" in Santa Rosa since. AR15 (citing AR28771, 28886, 28887). But those record citations establish that Koi members lived *in Lake County* throughout the 19th and 20th centuries. Finally, Dearman parrots Koi's assertion that Tom Johnson's house served as the "tribal political headquarters." AR27. But his only support for that conclusion is AR28772, which describes Pomo dialects and does not mention either Tom Johnson

or Koi at all. The government's claim that Dearman's analysis "is well supported in the record," Opp. 16, is careless at best.

That is not all. As we have explained, Dearman flouted past DOI decisions like Guidiville, *Wyandotte*, and *Grand Traverse* without explaining why he "abandoned a decades-old practice." *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 918 (2025) (brackets omitted); Mot. 25-26. The government insists that Dearman correctly distinguished Guidiville because there, "the Band had failed to substantiate that its ancestors used the trade route at issue *in any capacity*." Opp. 14. But the Guidiville decision says that "even assuming a trade route existed," "the Band cannot establish its subsistence use or occupancy based on the fact that its ancestors travelled to various locations to trade and interact with other peoples and then returned to the Clear Lake region." *See* Dkt. No. 99-2 at 14. The Guidiville Band, like Koi, also provided evidence that its members lived in the vicinity of the parcel during the Outing Program in the 1920s and 1930s, but DOI found that evidence insufficient because the Outing Program "relocated individual Indians," not the entire tribe. *Id.* at 18-19. And DOI ultimately denied Guidiville's application because the Band, also like Koi, could not show any tribal "village or burial ground" within the parcel's vicinity. *Id.* at 19. The APA therefore required Dearman to "provide a reasoned explanation" and "consider serious reliance interests" before departing from Guidiville, and his failure to do so renders his decision arbitrary and capricious. *Wages & White Lion*, 145 S. Ct. at 917 (cleaned up).

The government similarly dismisses *Wyandotte*, *Grand Traverse*, and *Butte County*, but that precedent is not so easily evaded, either. For example, it is true that Wyandotte moved on from the land a hundred years ago, but the tribe actually lived on the parcel itself for eleven years and established a sacred burial ground nearby. Mot. 26. That is a far stronger historical connection than Koi's trade routes and the relocation of several Koi members, yet DOI still dismissed Wyandotte's application. On the flip side, DOI granted the application in *Grand Traverse* because the land to be acquired was "at the heart of the region that comprised the core of the Band's aboriginal territory" that the band lived on "continuously from at least 100 years before treaty times until the present." 198 F. Supp. 2d at 925; *contra* Opp. 15 (claiming that DOI granted the application because the tribe presented evidence of "trail networks"). And the tribe in *Butte County*

hunted, fished, and gathered *directly on the parcel*, and the parcel sat only "10 miles from the Tribe's former Rancheria" and just one mile from a site of spiritual significance to the tribe. 887 F.3d at 508; *see also* Dkt. No. 99-3 at 46, 49-50 (finding that the Mashpee Tribe established a significant historical connection based on "archeological evidence" of multiple tribal "settlements" "between six and 11 miles from the" site); Dkt. No. 99-4 at 127-129 (same, because Cowlitz provided "historical accounts" describing "a large tribal presence" in the vicinity of the site as well as "the tribe's reliance on the natural resources of the area, especially fish and fur animals, for subsistence use and trade"). Koi's evidence comes nowhere close to that.

A final note. Decisions like Guidiville, Cowlitz, and Mashpee spent many pages analyzing the tribes' historical claims. *See* Dkt. No. 99-2 at 12-19; Dkt. No. 99-3 at 45-52; Dkt. No. 99-4 at 125-136. They carefully reviewed primary source documents, rejected self-serving assertions when the tribes did "not provide reliable historical documentation," Dkt. No. 99-2 at 17, and reviewed reams of past agency decisions to ensure consistency, *e.g.*, Dkt. No. 99-4 at 127 n.229. Dearman did not do any of that work here. His analysis comprises just three paragraphs with three citations—one of which he manages to mangle. AR27; *see supra* pp. 10-11 (discussing citation to AR28912). The Court should vacate and remand.

D. To The Extent DOI's Regulations Defining "Significant Historical Connection" Allow The Department To Classify The Shiloh Site As "Restored" Land, The Regulations Cannot Be Reconciled With The IGRA And Are Invalid As Applied.

FIGR argued that to the extent DOI's regulations defining "significant historical connection" allow DOI to classify the Shiloh Site as "restored" land, the regulations cannot be reconciled with the IGRA and are invalid as applied. Mot. 27. We explained that the plain meaning of "restore" is to "bring back," but there is no evidence in the record that Koi ever lived, worked on, or used the Shiloh Site beyond traversing near it on the way to Bodega Bay. *Id.* (quoting *Grand Traverse*, 198 F. Supp. 2d at 928). Rather than address that argument, the government spends the bulk of its response contending that "Koi met the regulatory standard." Opp. 17. But that is entirely irrelevant where the challenge is to the regulations themselves, particularly after *Loper Bright Enters. v. Raimondo*. *See* 603 U.S. 369, 412-413 (2024) (reviewing courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority").

The government also pushes for a distinction between a facial and an as-applied challenge. But even in an as-applied challenge, the question is whether *the statute* precludes agency action. *See, e.g., Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 41-42 (D.D.C. 2019) (finding 25 C.F.R. § 292.10(b)'s definition of "restored to Federal recognition" invalid "as applied" to Koi because the regulation impermissibly excludes *de facto* terminated tribes "contrary to the plain language of the statute"). DOI's regulatory history is irrelevant.

When the government finally gets to the IGRA, it says only that the regulations' emphasis on "significant historical connections" is consistent with Congress's attempt "to promote parity between established tribes, which had substantial land holdings at the time of IGRA's passage, and restored tribes, which did not." Opp. 17-18 (citation omitted). But we have no quarrel with the historical-connection requirement; our argument is that Dearman's limitless interpretation of "significant historical connection" renders the statutory language meaningless. So if the Court finds that DOI's regulations allowed (or compelled) Dearman to extend the restored-lands exception to Koi, it should invalidate the regulations as applied. The government has nothing to say about *that* argument.

The government also ignores the facts of this case. As we explained, "lands near Koi's home are freely 'available.' " Mot. 28 (quoting AR16; AR23526). Requiring Koi to "acquire lands as near as possible to . . . [its] original ancestral homeland" therefore would not put Koi at a disadvantage relative to more established tribes, as the government fears. *Butte County v. Hogen*, 609 F. Supp. 2d 20, 29 (D.D.C. 2009). On the other hand, reading "restored" to encompass lands fifty miles away from a tribe's ancestral homeland when the tribe has never lived or worked on that land would render IGRA's two-part exception obsolete. *See* 25 U.S.C. § 2719(b)(1)(A) (allowing tribes to game on any land within the State without showing a historical connection if the Secretary determines "that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and the Governor "concurs"). If Koi did not want to satisfy Section 2719(b)(1)(A)'s requirements, it should have gamed on land where it has deep historical ties. But instead, Koi tries

to game the system. The government's persistent refusal to address this issue and acknowledge that Dearman's analysis wrote Section 2719(b)(1)(A) out of IGRA is fatal to its arguments.

E. The Indian Canon Does Not Apply.

There is no question that Dearman applied the Indian canon of construction when assessing Koi's historical evidence. Dearman said: "perceived gaps or inconsistencies within the historical documents must be considered against this backdrop and, where possible, resolved in favor of the applicant tribe" in line with the "Indian canons of statutory interpretation." *See* AR26. We argued that was improper for two reasons. First, the Indian canon is a tool of "statutory interpretation"; it does not allow DOI to paper over inconsistencies in the factual record. Mot. 19 (citing *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 217 (D.D.C. 2020)). Second, the Indian canon does not apply where, as here, "all tribal interests are not aligned." *Id.* (quoting *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015)). Once again, the government does not respond to those arguments. Instead, it cites an irrelevant regulation, faults FIGR for "disagree[ing] with the weight Interior accorded Koi's submissions," and asks this Court for deference. Opp. 18. Because the application of the Indian canon was improper as a matter of law, the Court should remand and require DOI to reconsider Koi's historical evidence without putting a thumb on the scale.

III. Preferential Treatment Of Koi Violates The IRA's Privileges And Immunities Clause.

The government's privileges and immunities argument suffers from the same fundamental defect as its IGRA argument: The government assumes, contrary to the evidence, that Koi historically occupied the Shiloh Site. That assumption is wrong, but even if it were true, Koi still would not come close to establishing the kind of longstanding connection that DOI has required of every other similarly situated tribe. The government's tortured readings of the Cloverdale and Mechoopda decisions only confirm that point.

The government says that Cloverdale "established a historical connection by occupying land 'in the vicinity' of its trust acquisition in 1925." Opp. 22 (quoting Dkt. No. 99-5 at 4-5). But that is not what happened. DOI found that "the Tribe began occupying *the former Cloverdale Rancheria* beginning in 1925." Dkt. No. 99-5 at 6 (emphasis added). The parcel Cloverdale sought

to acquire was "contiguous and within" that former Rancheria. *Id.* And the "Tribe also submitted information regarding its ancestral and indigenous use of the lands." *Id.* The same is true of Mechoopda's application. The government claims that DOI granted the application because of "trade routes and [a] dwelling on a ranch 8 miles from the acquisition." Opp. 22. But the "dwelling" was actually "the primary historic village of Mechoopda" that "the Tribe used throughout its early history," and the Tribe provided evidence of other settlements even closer to the site. Dkt. No. 99-6 at 22-23. The Tribe also established that it used the site itself "for fishing, gathering, trade, marriage, and other ceremonies." *Id.* at 22. And finally, the site was "within the reservation boundaries that would have been created for the Tribe under the Treaty of 1851." *Id.* at 23. Even if the Court were to credit every one of Koi's unsupported factual assertions, Koi's ties to the land would still come nowhere close to that.

The government also tries to distinguish FIGR's application on the ground that "Congress mandated its restoration of land" and DOI "looked to FIGR's history of living between 10 to 27 miles from a parcel, generalized trade routes, and modern headquarters." Opp. 22. These arguments fare no better. DOI required FIGR to show "historical connections" just like any other tribe. Dkt. No. 99-11 at 9. In assessing FIGR's evidence, DOI explained that "there are limits to what constitutes restored lands" and the term may not be extended "to any lands that the tribe conceivably once occupied throughout its history." *Id.* at 7. And it granted FIGR's application only after confirming that FIGR had "many ancient village sites within a short radius" of the parcel—including three villages within *1 mile* of the site and five villages within 10. *Id.* at 9. DOI also cited "Congressional findings" of FIGR's "significant historical connections" to the land. *Id.* Once again, Koi's evidence does not come close.

The government suggests these differences do not matter because the restored-lands analysis is "necessarily, fact-intensive, and will vary based on the unique history" of the tribe. Opp. 22 (quoting AR18). But the *legal standards* must remain the same. That is the essence of "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998). Dearman was able to rule for Koi only by ignoring the standards articulated in the

Cloverdale, Mechoopda, and FIGR decisions as well as others discussed above. *See supra* pp. 13-14. If that is not preferential treatment, it is difficult to see what would qualify.

The government finally questions whether IRA's privileges and immunities clause applies to gaming decisions at all because IGRA creates "different categories of exceptions" to accommodate differently situated tribes. Opp. 22. But Cloverdale, Mechoopda, and FIGR invoked *the same* restored-lands exception that Koi does. Dkt. No. 99-5 at 2; Dkt. No. 99-6 at 2; Dkt. No. 99-11 at 2. And courts have already held—including on Koi's behalf—that "25 U.S.C. § 5123(f) applies to IGRA." *Koi Nation*, 361 F. Supp. 3d at 51-52 (capitalization altered); *see also Scotts Valley*, 633 F. Supp. 3d at 155-156 (analyzing whether DOI's restored-lands decision complied with IRA's privileges and immunities clause). We cited those decisions in the opening brief, *see* Mot. 30, and the government offers no cases holding otherwise. Section 5123(f) therefore provides yet more reason to vacate the ROD and the Decision Letter.

IV. Dearman's IRA Analysis Was Arbitrary And Capricious.

The government argues that the IRA's implementing regulations set a low bar—they only require DOI to "consider" land-use and jurisdictional conflicts, not "resolve" them—and that Dearman adequately performed that basic task. Opp. 23. Beg to differ. Local residents, government entities, and tribes submitted hundreds of comments explaining that they spent decades creating a Community Separator area to preserve open space and limit commercial development, and that a massive Vegas-style casino would devastate those efforts. *See* AR17743-44, 2279-2386. Dearman did not question any of those comments; he agreed that a Class III casino would be "inconsistent with zoning of the surrounding properties." AR33. His only response was that *after* the Shiloh Site is taken into trust, local land-use regulations "would no longer" apply so there would be no "significant adverse land use effects." *Id.* Let that sink in. If Dearman's theory is correct, every trust decision would automatically satisfy 25 C.F.R. § 151.10(f) (1995). We acknowledge that the APA does not invite courts to undertake their own factfinding, but the agency must provide at least a "rational basis" for its decisions. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003). Dearman's explanation is anything but.

The government does not defend Dearman's analysis but suggests *a different* rationale: The Shiloh Site, it says, is sufficiently close to residential areas, a mobile home park, and big box stores so that "Koi's proposal would have a minimal impact." Opp. 23-24 (citing AR30964 (Final EIS), 18088-89 (Draft EIS)). But as discussed, "judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Regents of the Univ. of Cal.*, 591 U.S. at 20. And 25 C.F.R. § 151.10(f) (1995) expressly requires the "Secretary" (or her authorized representative) to evaluate land-use conflicts when deciding whether to take land into trust. Dearman did not rest his decision on the Shiloh Site's proximity to residential areas and big box stores, so the Court should not consider it, either.

The government also argues (at 25) that Dearman did not need to evaluate the distance between the Shiloh Site and Koi's historic homeland and Rancheria in Lake County even though § 151.11 requires the Department to consider the "distance from the boundaries of the tribe's reservation" and "give greater weight to the concerns raised" by local governments "as the distance from the reservation increases." 25 C.F.R. § 151.11(b) (1995). According to the government, § 151.11(b) is irrelevant because "Koi reestablished itself near the Shiloh Site over 100 years ago." Opp. 25. But as discussed extensively above, the record does not support that contention. *See supra* pp. 8-10. And once again, that is not the rationale that Dearman advanced—he said only that the Shiloh Site "is located approximately 12 miles from its Tribal headquarters in Santa Rosa, California." AR35. As we explained, tribal headquarters are not an appropriate measuring stick because tribes could simply move their headquarters closer to the project site. Mot. 34. The government's only response is that the Lower Lake Rancheria was closer than we claim. But 55 miles is the distance reported in the record. *See, e.g.*, AR22, 25030, 31928; *see also* AR28844 (explaining that the Rancheria was located "between Lower Lake and Clear Lake Highlands").

Dearman's land-use and jurisdictional analysis consists of just two paragraphs summarily concluding "that the acquisition of the Shiloh Site in trust would not cause conflicts of land use or other jurisdictional problems" at all. AR34. The government's repeated attempts to bolster that analysis only underscore its inadequacies. The Court should vacate and remand.

V. FIGR Is Entitled To Summary Judgment On Its NHPA Claim.

Nothing has changed since the Court observed that the government "railroaded the tribe." Dkt. 40-1 at 5:19-20. If anything, the claim has gotten stronger after the government's brief. That filing confirms several deficiencies identified in FIGR's opening brief, including that DOI conducted tests without notice after beginning consultation, *see* Opp. 33, only revealed other tests a year after they were conducted, *id*. at 35, had not designed those studies to consider "Koi's proposed project," *id*. at 39 (citing AR32157), and more.

The government would have the Court excuse all of this because FIGR had an "opportunity to express its views" later. Opp. 32 (emphasis omitted), 33, 34; *see also id.* at 36 ("provide input"). But the NHPA requires that meaningful consultation start "early" and continue "at *all* stages." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (emphasis added). Were it otherwise, the government could just settle on its desired "outcome" and render consultation an "empty formality," even where it would "affect the outcome." *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010) (citing *Te-Moak Tribe*, 608 F.3d at 609). That is exactly what happened here.

A. DOI Violated The NHPA Several Times Over.

As FIGR demonstrated in its opening brief, DOI flouted its obligation to "stop, look, and listen" before it issued the ROD. *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). To defend its conduct, DOI overstates its level of cooperation with FIGR and understates FIGR's rights. But DOI's after-the-fact rationalizations cannot save its arbitrary and capricious determination that no historic properties would be affected.

1. DOI Did Not Initiate Timely Consultation.

The NHPA required DOI to consult FIGR "early in the planning process." That should have started when FIGR wrote to DOI explaining that "tribal cultural resources are present" at the site and requesting consultation all the way back in August 2022. AR23363. Yet, DOI does not dispute that it took three months to acknowledge FIGR as a consulting party, AR23119, gathered nearly all the information upon which it relies prior to initiating consultation, *see id.* (chronicling DOI's four unnoticed studies), and even after it did so, waited for another year to schedule a

consultation meeting, AR23320-21. DOI also *admits* that, in the intervening period, it conducted more field studies and destructive testing of artifacts removed from the Project Site—all without FIGR's involvement. AR23572. And it continued to withhold studies months after completion, throughout the consultation. AR23321-22.

The government begins (at 31) by disclaiming two field studies as Koi's own research over which it had no control.[4] But Dearman's extensive use of them, *see* Opp. 26-27 (citing AR205-206), underscores the problem: The government relied heavily on information FIGR could not have "advise[d] on," *see* 36 C.F.R. § 800.2(c)(2)(ii)(A). Regardless, DOI admits (at 26-27) that it signed an agreement with Koi and its consultant on April 26, 2022, and went on to conduct two other studies without notifying FIGR. AR23319-20.[5] The government falls back (at 31) on an argument that there is "no requirement" that tribes "be involved in field studies" at all. Perhaps tribes need not "participate" in each test, but the NHPA *does* require that tribes "identify properties of importance" prior to their destruction. Opp. 31 (citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016)). That requirement would become a dead letter if the government could conduct all its cultural resource testing *before* consultation.

The government next appears to argue that FIGR blessed the government's pre-consultation surveys by later requesting to see them. Opp. 31 (citing AR358). But FIGR was clear that any studies "outside of the formal Section 106 process [were] unacceptable," AR23362 (August 10, 2022, Ltr. to DOI), and that tribal cultural resources were present on the Site, including in the same letter the government cites, *see* AR358 ("strongly urg[ing]" that no testing be conducted without "participation . . . of the culturally affiliated tribes"), *cited at* Opp. 32. FIGR instead wanted the surveys so it could attempt to "identify its concerns." *See* 36 C.F.R. § 800.2(c)(2)(ii)(A). Yet the government denied FIGR even that much until March 7, 2023, five months after FIGR first requested copies, AR23362, and four months after the government formally initiated consultation. AR23319, 23368. FIGR's "lack of information" rendered

[4] Reports of these first two studies, conducted in February and April 2022 by John Parker, are in the record under seal. Dkt. Nos. 18-9, 18-10.

[5] Reports of these second two studies, one by Thomas Origer in May 2022 and another by John Parker in August 2022, are likewise before the Court under seal. Dkt. Nos. 18-11, 18-12. The August 2022 Parker study is the "destructive" test referenced in FIGR's opening brief. Mot. 36.

"meaningful" consultation effectively "impossible" for that entire period. *Quechan Tribe*, 755 F. Supp. 2d at 1118 (explaining that consultation requires more than a tribe "gather[ing] its own information"). FIGR nevertheless reviewed the surveys and raised detailed concerns in an August 7, 2023, letter. AR23389-93. But those comments could not be addressed because DOI had *already* determined that "no historic properties would be affected" before it even met with FIGR. AR23320-21. DOI did not agree to meet with FIGR until nine months after FIGR's original request, and only after the SHPO requested DOI consult with FIGR. AR23320. That failure to commence consultation "early" set the stage for the procedural failures that followed. *See* 36 C.F.R. § 800.2(c)(2)(ii)(C); *see infra* pp. 23-25.

The government's cases (at 30-31) undercut its own argument. DOI relies on *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 803 (9th Cir. 1999) for the proposition that pre-consultation surveys do not mean there was a failure to consult. But in *Muckleshoot*, the agency "fell short in involving the Tribe in developing its identification strategy" and only made up for it by conducting extensive consultation over two years, after which it changed its position based on the consulting tribe's request. *Id.* at 806. This case is also nothing like *Standing Rock Sioux*, where the Army Corps "took numerous trips" to the site with members of the affected Tribe, 205 F. Supp. 3d at 32, held "no fewer than seven [consultation] meetings," *id*. at 21, and even offered "consulting tribes an opportunity *to conduct cultural surveys*," *id*. at 22. Finally, in *Te-Moak Tribe*, there was a "unique historic background" of informal consultation with the tribe going back years before the proposal issued. 608 F.3d at 609. It is true that the government need not "acquiesce to every tribal request," and the tribe need not control the project. *Quechan Tribe*, 755 F. Supp. 2d at 1119. But the government equally cannot "glide over" Section 106's requirements. *Id.*

2. DOI Did Not Allow FIGR To Advise On The Identification Of Historic Properties.

After it belatedly purported to initiate consultation, DOI continued to avoid giving FIGR opportunities to provide input and, when it could no longer do that, ignored FIGR's advice. The government can only defend its conduct by arguing that FIGR was inappropriately seeking to enlarge its role. But that is not what FIGR sought to do.

The government's analysis (at 33-34) of the canine survey underscores its efforts to marginalize FIGR. The government does not dispute that DOI had conducted the canine survey without notice, AR23321, or that FIGR only learned of the study "*two months*" later, AR23572, after which it immediately raised concerns. AR23425 (explaining the site was covered in standing water, inhibiting the dogs' senses). Even assuming this form of ex-post consultation was permissible (it was not), the government made no effort to "consider" FIGR's views. *See* 36 C.F.R. § 800.16. The government makes it *seem* like it did, citing a memorandum from the survey professional addressing FIGR's standing-water concern. Opp. 33. But the government omits that it created this memorandum on December 30, 2024, *after* it had already issued a final EIS, and by which time the TRO had been granted. AR23588. Case after case holds that this sort of belated attempt to buttress a conclusion—let alone do so in litigation—is insufficient. *E.g.*, *Quechan Tribe*, 755 F. Supp. 2d at 1119 (finding consultation had to occur "before the project was approved"); *Hualapai Indian Tribe v. Haaland*, 755 F. Supp. 3d 1165, 1189 (D. Ariz. 2024) (agency must "give full consideration" to tribe-identified artifacts "*before* determining that they do not meet the definition of 'effects' under Section 106") (quotation marks omitted). And the government's memorandum acknowledged that "the ability of the dogs to identify scent under standing water is an uncertainty." AR23590. Standing water covered "*more than half*" the area during the canine survey. AR23435.

Despite the poor conditions, the botched canine survey did identify some potential locations of human remains and DOI's expert opined that the parcel is highly likely to have visible human remains or burials. AR274, 23321-24. DOI eventually agreed to perform excavation and trench work to evaluate further, which itself was conducted in an unsafe manner that denied FIGR's ability meaningfully to participate. AR23549-52. Even so, the trenching found more artifacts that DOI ignored. AR23325.[6]

The government argues that these fundamental problems amount to mere "disagreement" with its methodology, which alone is inadequate to support an NHPA claim. But FIGR's claim is

[6] The government overstates its argument (at 30) that FIGR's "archeologist recommended on multiple occasions that the excavator stop digging." According to the cited report, these recommendations related to two of the eight trenches examined in the study. AR340-343.

not based on just the canine survey, just the trenching debacle, or even those two incidents taken together. FIGR's opening brief and the declaration of its Tribal Historic Preservation Officer demonstrates a concerted effort by DOI to undertake surveys and studies without giving FIGR a chance to comment in advance, and to ignore FIGR's input after the fact. *See* AR23317-29.

3. DOI Undermined FIGR's Efforts To Articulate Its Views.

DOI also denied FIGR a meaningful opportunity to "articulate its views." 36 C.F.R. § 800.2(c)(2)(ii)(A). The government recasts FIGR's arguments as substantive disagreements. But DOI issued its "no historic properties" determination while FIGR was still reviewing the information that DOI had provided, and before it had even received all the reports DOI relied on. AR23320, 23572, 23463. These are not just substantive disagreements; they reflect a rush to reach decisions *before* getting input from FIGR, thereby precipitating a breakdown in the Section 106 process.

The government suggests that the mere presence of FIGR's expert reports in the record means that DOI contemporaneously considered them. But the record shows no trace that DOI considered the DeGeorgey report—which described at least one precontact archaeological site on the parcel—prior to the ROD. If it did, DOI surely would have cited it. Nor is there any indication DOI considered the April 3-5, 2024, and August 19, 2024, reports from FIGR's archaeologist, AR25287, 25936, which rebutted DOI's assertion that the 40 artifacts it *had* considered were merely "isolated," and which DOI did not include in its required submissions to the state and federal preservation authorities. AR31799-31805, 32157. The government now, only in this litigation, raises substantive questions about the reports that FIGR could have addressed if given the opportunity through a meaningful consultation process.

The government (at 38) also mischaracterizes *Quechan Tribe* and *Hualapai*. *Hualapai* did not turn solely on issues related to the area of potential effects ("APE"), it also found the government's "limited consultation" deficient because it was not "conducted in a manner sensitive to [its] concerns and needs." 755 F. Supp. 3d 1165, 1190-91 (D. Ariz. 2024). *Quechan Tribe*, meanwhile, does not create a lower *procedural* bar for smaller undertakings—consultation must still "commence early" and continue at all stages. 755 F. Supp. 2d at 1108. That case also

undercuts DOI's attempts to pad the administrative record: As *Quechan* explained, "the sheer volume of documents" DOI submits or considers "doesn't in itself show the NHPA-required consultation occurred." *Id*. at 1118. And DOI's proportionality argument favors FIGR in any event. Given the discrete APE, FIGR's considerable in-house subject matter expertise, and the ready accessibility of outside experts, DOI could have easily engaged in good-faith consultation with FIGR.

4. Any Alleged Timeliness Failure By The SHPO Is Not Binding On FIGR.

California's SHPO—an independent state official unaffiliated with FIGR—told DOI in July 2024 that the NHPA process was "insufficient, inadequate, and not reasonable" and must be restarted. AR23468. The government now argues (at 38) that SHPO's alleged failure to object within 30 days rendered the NHPA process complete. But the DOI officials waived this argument by agreeing to "engage further with the SHPO" as if it had objected. Opp. 38; AR32160.[7] In any event, the government offers no authority, and there is none, that SHPO's missed deadline means that DOI met its obligations *as to FIGR* as a matter of law. Nor could it operate to cure the procedural violations FIGR has identified. *See* Mot. 36-37 (relying on DOI's actions between February 2022 and May 2024). The SHPO letter also gave DOI clear notice of its consultation inadequacies. Even if the timing of the SHPO's objection allowed the government to claim the process fulfilled procedurally, it does not—and cannot—shield agency action from judicial review. 5 U.S.C. § 706. Rather, the SHPO's independent conclusions corroborate FIGR's complaints and the objections of other tribes, state and local governments, neighbors, and other stakeholders: DOI did not fulfill its statutory consultation obligation.

B. DOI's Consultation Failures Rendered The ROD And Decision Letter Arbitrary And Capricious.

FIGR's opening brief collected the "new information" it would have offered in a meaningful consultation process. That information—including the archaeological sites DOI failed

[7] DOI did not properly involve FIGR in this process, either. After it reengaged with the SHPO but failed to reach resolution, DOI forwarded the issue to the Advisory Council on Historic Preservation ("ACHP") for review. AR32160 (citing 36 C.F.R. § 800.4(d)(1)(ii)). That procedure required DOI to "concurrently notify all consulting parties." 36 C.F.R. § 800.4(d)(1)(ii). But DOI did not do so, and it now asserts it merely asked ACHP for an advisory opinion. Opp. 9 (citing 36 C.F.R. § 800.9(a)).

to analyze, AR23577; Dkt. No. 17-2 at 1-2—coupled with its failure to account for the proposed project, more than demonstrate prejudice. *See* AR25292-93 (noting "several areas" on the parcel that meet the "widely accepted" definition of "an archaeological site"). The government fails to come to grips with the relevant legal standard and its factual arguments fail to rehabilitate its decision.

Throughout its brief, the government argues that consultation would not have produced outcome-determinative changes. *See, e.g.*, Opp. 32, 34, 35-37. Yet it never addresses the stringent standard generally applicable to this type of argument. Harmless error " 'may be employed only when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.' " *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 880 (9th Cir. 2009) (cleaned up) (quoting *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004)). Those principles apply with all force to NHPA cases, where delayed consultation, alone, can "affect the outcome" by causing the government to double down on its rationale. *Quechan Tribe*, 755 F. Supp. 2d at 1108; *cf. Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 786 (9th Cir. 2006) (explaining that "delay" produces "inflexibility," meaning "more [] harm will be tolerated"). Indeed, where the underlying procedural violation turns on depriving a party of information, it would be Kafkaesque to apply exacting scrutiny to the information it later offers.

The government's responses to the information FIGR put forward fail to persuade. It first tries (at 31) to dismiss FIGR's arguments as mere methodological disagreements. But that is a category error. While consultation may not provide a right to "certain methods," Opp. 31, methodological deficiencies that a party identifies "may very well" render an agency finding "arbitrary and capricious." *Ariz. Health Care Cost Containment Sys. v. Ctrs. for Medicare & Medicaid Servs.*, 683 F. Supp. 3d 977, 997 (D. Ariz. 2023). That is the ultimate issue here.

The government next asks the Court (at 35) to disregard DeGeorgey's expert report because it did not respond to all of DOI's studies. *See* 36 C.F.R. § 800.13. Specifically, while DeGeorgey *did* respond to Parker, who conducted three of DOI's four initial studies, *supra* p. 21 nn. 4-5, the government points out that his report did not mention the May 2022 Origer study. But it cites no

portion of that study addressing DeGeorgey's concerns, and the study in fact found a "high potential for buried archaeological site indicators" at the Site. AR239. The government's other arguments (at 35-36) trying to rehabilitate Parker's sentence-long analysis, *see* AR206, at most underscore that there is an expert dispute about the historical significance of an archeological site and that the site would be disturbed by the project. The government also does not engage with FIGR's August 2024 report, which specifically considered the reports DOI cites and concluded that several areas on the parcel meet the criteria for an archaeological site. AR25289-91.[8] FIGR's archeologists explained that DOI's studies left up to "*80%*" of the project site "unsurveyed." AR25290 (emphasis added). And they opined that "51 to 100 additional artifacts may be present in the 37 to 44 acres of nonsurveyed" land. *Id.*; *see also* AR25296 (noting these objects exist in a "highly sensitive archaeological environment"). The fact that there are "relevant preservation issues" in the record that FIGR had no opportunity to "discuss" is powerful evidence that remand for additional consultation is appropriate. *See Quechan Tribe*, 755 F. Supp. 2d at 1108 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)).

The government, moreover, has no compelling answer (at 39) to our argument that DOI failed to account for Koi's proposed casino. Indeed, the government can point to only one study that even considered "commercial uses," AR32158—and that brief acknowledgement can hardly account for the disruption required for the project DOI ultimately approved.

While DOI does not take a clear position on the quantum of information necessary for the Court to find prejudice, FIGR's showing is more than sufficient. As the Ninth Circuit recently explained in the preliminary injunction context, it was enough for a party to identify a site that the agency had not properly identified as a protected cultural property—as FIGR has here. *See Tohono O'odham Nation v. U.S. Dep't of Interior*, --- F.4th ---, 2025 WL 1499053, at *11 (9th Cir. May 27, 2025) (applying a programmatic agreement entered under the NHPA). Even without that, courts have found parties likely to succeed based on information that would "refute the [agency's]

[8] The government's focus (at 35) on a specific "structure" misses the larger point. As DeGeorgey and the archeologists have explained, DOI's assumption that the artifacts at the site were isolated resulted in a failure to analyze areas of the site as cohesive "historic properties" worthy of evaluation under the NHPA. Dkt. No. 17-2 at 1; AR25293. The government still has not responded to that concern.

'effects' determination." *Hualapai Indian Tribe*, 755 F. Supp. 3d at 1191. DeGeorgey's and FIGR's reports, coupled with the scoping deficiencies FIGR identified, at minimum furnish evidence against the reasonableness of DOI's conclusion and raise significant questions about what a thorough process could have uncovered. We will never know the full extent of that information, however, because DOI refused to conduct a meaningful consultation process.

VI. The Final EIS Is Fatally Flawed Under NEPA.

A. DOI's Refusal To Consider Any Off-Site Alternatives Was Arbitrary, Capricious, And Contrary To NEPA.

DOI essentially asks this Court to endorse a NEPA process where the alternatives analysis—the very "heart of the environmental impact statement"—was a hollow exercise. 40 C.F.R. § 1502.14. DOI argues (at 40-41) it could limit its review to the single parcel of land Koi happened to own, ignoring all other possibilities. This position is legally baseless, factually unsupported, and turns NEPA's mandate on its head.

DOI's primary defense (at 42)—that *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) and similar cases only require DOI to consider sites Koi "already ha[s] authority to use"—misstates those cases and NEPA's requirements. An agency's "stated goal of a project necessarily dictates the range of reasonable alternatives." *Muckleshoot Indian Tribe.*, 177 F.3d at 812. Indeed, *'Ilio'ulaokalani* is directly on point. The Ninth Circuit held that when a project's purpose is broad and not, "by its own terms, tied to a specific parcel of land," an agency cannot arbitrarily refuse to consider alternatives beyond that single parcel. 464 F.3d at 1098. Koi's stated purpose was not to build a casino *on the Shiloh Site* specifically; it was the broad, location-agnostic goal "to facilitate tribal self-sufficiency, self-determination, and economic development." AR30835. Where an off-site alternative could achieve the project's goal with less environmental impact, an agency cannot dodge its duty by claiming its hands are tied by the land the applicant has already acquired. Reasonable alternatives can, and often do, include those for which land "would have [to be] purchased outright." *Id.* at 814. As the Seventh Circuit aptly put it, the fact that an applicant "does not *now* own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist." *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

DOI's belated attempt to justify its decision by citing a regulation[9] requiring a land-into-trust applicant to present evidence of title to land is a classic impermissible "*post hoc* rationalization" that appears nowhere in the FEIS. *Regents of the Univ. of Cal.*, 591 U.S. at 21. And even if the Court could consider it, the argument misses the forest for the trees. NEPA requires an evaluation of "alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema*, 807 F.2d at 638. DOI's job was to analyze whether a casino in the region met the purpose and need statement, not to rubber-stamp the applicant's preferred location.

City of Angoon v. Hodel supports FIGR, not the government. 803 F.2d 1016 (9th Cir. 1986); Opp. 40. There, the Ninth Circuit permitted an agency to disregard a land-exchange alternative for one reason: The project's purpose was inextricably tied to a specific parcel of land. The agency had properly defined its goal as providing a "safe, cost effective means of transferring timber harvested on *their land* to market." *Id.* at 1021 (emphasis added). Given that site-specific purpose, the court held that "it makes no sense to consider the alternative ways by which another thing might be achieved." *Id.* That is the opposite of the situation here, where the project's purpose is *not* "tied to a specific parcel of land" and there is "no tenable reason" to confine the alternatives to that site. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987), *rev'd on other grounds sub nom Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). A casino in Lake County plainly serves that purpose, making DOI's refusal to consider it—unlike the agency's refusal in *Angoon*—an arbitrary violation of NEPA.

The only rationale actually offered by the government—that an off-site alternative is not "feasible" because the Tribe may not "be able to purchase" it, AR18085-86—is not supported by the record. Koi proposed a $689.2 million project. AR17953. The notion that it could not sell the Shiloh Site and acquire a parcel in Lake County to pursue a project of this magnitude defies reality. Tellingly, DOI has evaluated alternatives on land not owned by tribes in other casino projects. For example, the Final EIS for the Tejon Indian Tribe considered a site that the tribe did not own as Alternative B. *See* Dep't of Interior, *Final Environmental Impact Statement, Tejon Indian Tribe*

[9] DOI cites 25 C.F.R. § 151.14(a); the pre-2024 regulation that governed Koi's application was codified at § 151.13(a).

Trust Acquisition and Casino Project 2-17 (Oct. 2020), available at: https://www.tejoneis.com/final-eis/, *cited at* AR2827. And when deciding on Wilton Rancheria's application, DOI not only identified land that the tribe did not own in Alternative F but eventually selected that parcel over the tribe's preferred alternative in the Draft EIS. Dkt. No. 99-7, at 3-4, 180. The feasibility argument is a smokescreen.

The government's claim (at 41) that a Lake County site might not qualify as "restored lands" fares no better. The argument addresses only one regulatory path to that status, but three others remain viable. For instance, a modern connection is established if the land "is near where a significant number of tribal members reside." 25 C.F.R. § 292.12(a)(2). The record shows that 25% of Koi members live in Lake County, AR20487. Finally, the government's suggestion that DOI had to credit Koi's "desire to build in Sonoma County" or that considering alternatives would "undermine Koi's sovereignty" (at 41) are more *post hoc* rationalizations that have no basis in the record or the law.

Perhaps most damning is the process itself. DOI eliminated *all* off-site alternatives in a report dated September 2022, AR20488—twenty-two months *before* it even issued a Draft EIS and invited public comment. AR23241, 23255. Having made up its mind, DOI then ignored dozens of comments urging consideration of a Lake County alternative, including from the Governor, the County, and four other tribes. AR26006-12, 26017-22, 21773-86. This was not a "hard look" but a pre-determined outcome masquerading as an environmental review.

B. DOI's Failed To Take The Required "Hard Look" At Project Impacts.

NEPA's "hard look" doctrine is not some minor technicality; it is a mandate to rigorously assess a project's real-world consequences. DOI's opposition brief confirms that DOI fundamentally failed to meet this standard.

1. Cultural Resource Impacts

DOI attempts (at 44) to divorce its flawed NHPA Section 106 consultation from its NEPA analysis, but the FEIS makes this impossible. The FEIS explicitly relies on the Section 106 process—which the SHPO found "insufficient, inadequate and unreasonable," AR23468—to conclude that "known historic properties" would not be affected. AR30935. It is nonsensical to

argue that a "hard look" under NEPA can be based on a consultative process that was a demonstrable failure.

DOI's reliance (at 45-46) on the proposed "mitigation" measures does not solve the problem. Measures B and C are merely after-the-fact procedures to pause construction *after* irreplaceable artifacts or remains have been unearthed. These are not proactive protections; they are protocols for managing a disaster already in progress. Measure D only relates to construction worker training. *Te-Moak Tribe* does not support DOI's position that measures B and C are permissible in this context. 608 F.3d at 601; Opp. 46. The mineral exploration project at issue there did not involve taking land into trust, so the project did not extinguish state-law rights as this one does. By the time the mitigation measures are triggered here, FIGR's legal rights under state law will already have been eliminated Koi's favor. In the context of a land-into-trust decision, these measures do nothing to prevent the primary harm.

2. Major Land Use Conflicts

DOI does not deny the Project is fundamentally incompatible with the area's zoning and character. Instead, it asks the Court to accept a series of illogical rationalizations that are the hallmark of an arbitrary and capricious decision. DOI points to a commercial zone near the proposed site, but NEPA requires an analysis of the Project's compatibility with its actual neighborhood—a quiet area of homes, a church, and agricultural land that is plainly incompatible with a Vegas-style casino.

And while the FEIS referenced these fundamental land use tensions, DOI's ultimate decision approving the project employed some jiggery-pokery: by taking the land into trust, it claims, all state and local zoning conflicts magically disappear. But an agency cannot ignore the tangible impacts of dropping a massive casino into a quiet residential and agricultural community simply by waving a jurisdictional magic wand. The project's incompatibility with the area's established character—a character protected by voter-approved open-space designations—is precisely the kind of conflict NEPA requires agencies to confront, not wish away.

3. Clear and Present Wildfire and Evacuation Risks

On the life-or-death issue of wildfires, the FEIS is dangerously deficient. DOI attempts to frame this as a mere disagreement among experts, Opp. 49, but this is not a battle of competing, credible analyses who all asked the right questions and came to different conclusions. Instead, DOI's defense of its evacuation analysis misses FIGR's central point—that the agency used a generic model with flawed inputs. Mot. 45-46. In response, DOI touts a "conservative" model without addressing the fundamental critique that it wasn't based on a site-specific analysis of evacuating a casino during a real-world wildfire. *See* Opp. 48.

The agency cannot hide behind the "expert deference" rule when its chosen experts failed to perform the basic analytical work the situation demands. Relying on an incomplete and inadequate study is the very definition of an arbitrary decision, and deferring the creation of an actual evacuation plan to some point in the future is an abdication of responsibility. DOI argues (at 49) that mitigation need not be legally enforceable at this juncture, but the case it relies on makes clear that "broad generalizations and vague references to mitigation measures" fall far short of what DOI "is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). But NEPA's "hard look" requirement is especially important when community safety is at stake.

4. Inadequate Traffic Studies

DOI's opposition is remarkably silent on the headline flaw that invalidates its traffic analysis: Its study undercounts the project's weekday vehicle trips by nearly three times. By inexplicably rejecting the standards in the Institute of Transportation Engineers (ITE) methodology for casinos, DOI's consultant produced a trip estimate of 11,000 trips, when the industry-standard number is closer to 29,000. The government had no response to FIGR's point that DOI's traffic analysis incorrectly rejected industry-standard methods based on a mistaken assumption that those are based on Las Vegas casinos. Mot. 47-48. The government simply cites back to the FEIS, which does not address this issue. Opp. 50-51.

This is not a minor discrepancy; it is a foundational error that renders the dependent analyses for noise, air quality, and land use impacts meaningless. Rather than defend this

indefensible number, the government again invokes the deference rule. But that rule is not a license to reject industry-standard data without a rational explanation. An agency's reliance on an expert opinion that is unreasonable, unsubstantiated, or contrary to the evidence in the record does not survive arbitrary and capricious review.

5. Unresolved Water and Wastewater Issues

The government also fails to answer to the host of deficiencies detailed in FIGR's opening brief with regard to the project's significant impacts to water supply and wastewater management. For example, the government acknowledges that it has reviewed only "concept level plans" and punts a detailed analysis of the water issues to another agency, arguing that the casino will need to apply for a "NPDES discharge permit." Opp. 53. FIGR stands on its initial arguments and the expert analysis in the record, which shows that DOI failed to take the required hard look at these critical issues and instead deferred them to another agency.

CONCLUSION

For the foregoing reasons, the Court should grant FIGR's summary-judgment motion and deny Federal Defendants' cross motion.

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Respectfully submitted,

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