UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FEDERATED INDIANS OF GRATON RANCHERIA, Plaintiff, v. DEB HAALAND, et al., Defendants.	Case No. 24-cv-08582-RFL **ORDER DENYING PRELIMINARY INJUNCTION** Re: Dkt. No. 35

This case concerns a 68.60-acre parcel of land that is already owned in fee simple by Koi Nation. In 2021, Koi Nation submitted an application to the Department of Interior to request that the federal government take the land into trust, for the purpose of authorizing the tribe to open a gaming facility on the land. As part of that process, DOI was required under the National Historic Preservation Act ("NHPA") to engage in government-to-government consultation with the Federated Indians of Graton Rancheria regarding the potential effects to historic properties that would result from the proposed action.

On December 13, 2024, Plaintiff filed a motion for temporary restraining order (Dkt. No. 12) on the grounds that Defendants failed to engage in meaningful consultation, as required by the NHPA. The Court initially granted the Temporary Restraining Order on December 20, 2024, and set the preliminary injunction hearing for January 9, 2025. (Dkt. No. 30.) The Court has considered the additional briefs and evidence submitted by the parties concerning the proposed preliminary injunction, as well as the parties' submissions from the temporary restraining order motion and the oral argument from both hearings, and enters the following findings of fact and conclusions of law. The Court has subject matter jurisdiction over this case because Plaintiff's

procedural injury is tied to a concrete underlying harm sufficient to meet the injury-in-fact requirements under Article III. Similarly, the section 106 violation for failure to consult constitutes final agency action under the Administrative Procedure Act, meaning that the agency action was ripe for review. However, Plaintiff has not satisfied its burden to demonstrate an immediate threat of irreparable harm if injunctive relief is denied. Although Plaintiff has demonstrated its enduring connection to the land at issue and any potential ancestral remains and artifacts that may be present there, Plaintiff has not shown that those remains and artifacts are in immediate danger at this juncture, or that Plaintiff will likely be deprived of its state law rights to provide recommendations regarding the disposition of those items, with immediate consequences. Accordingly, for the reasons stated below, the motion for preliminary injunction is denied.

I. BACKGROUND

A. Historical Context

Koi Nation is a federally recognized tribe, but currently has no tribal lands held in trust for it. In 1916, the United States purchased a 141-acre tract of land on behalf of Koi Nation, but the sale of that land was authorized by Congress in 1956, even though Koi Nation's status as a federally recognized tribe was never formally terminated. Decades later, in 2000, the Department of Interior affirmed that Koi Nation remained federally recognized. Nonetheless, the federal government still holds no land in trust for the tribe. In 2021, Koi Nation submitted the application at issue, seeking to have land taken into trust for the purpose of opening a gaming facility.

Koi Nation, which descends from the Southeastern Pomo culture, has historical connections to the parcel of land at issue. But so too do other tribes, including the Federated Indians of Graton Rancheria, which is of Southern Pomo ancestry. The potential effects that any such project would have on ancestral remains, artifacts, and other historic properties are consequences that DOI is therefore required to assess when making its decision regarding the land.

B. NHPA Review Process

Because the proposed action qualified as an "undertaking"—"a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency," which includes activities "requiring a Federal permit, license, or approval"—statutory obligations under § 106 of the NHPA were triggered. 54 U.S.C. § 300320. Under § 106, the agency is required to consider the undertaking's effect on historic properties, which includes a requirement that the agency consult with federally recognized tribes that may "attach[] religious and cultural significance to historic properties." 36 C.F.R. § 800.2(c)(2)(ii). To effectuate this requirement, once a tribe is recognized as one that may attach religious and cultural significance to historic properties potentially affected, the tribe must be given a reasonable opportunity to "identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id.*

NHPA's implementing regulations require that "the agency official shall ensure that the section 106 process is initiated early in the undertaking's planning," and requires that, at the latest, it be completed "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." *Id.* § 800.1(c). In the initiation phase, the agency "shall identify any other parties entitled to be consulting parties," including relevant tribes, and "invite them to participate as such in the section 106 process." *Id.* § 800.3(f). Then, "in consultation with . . . any Indian tribe . . . that might attach religious and cultural significance to properties within the area of potential effects," the agency "shall take the steps necessary to identify historic properties." *Id.* § 800.4(b). If the agency "finds that . . . there are no historic properties present," the agency "shall provide documentation of this finding" to the State Historic Preservation Officer ("SHPO"), who is charged with advising federal agencies on the interests of the state and its citizens in preserving their cultural heritage. *Id.* § 800.4(d)(1). The agency also "shall notify all consulting parties, including Indian tribes." *Id.* If the SHPO "does not object within 30 days of receipt of an adequately documented finding, the agency official's

responsibilities under section 106 are fulfilled." *Id.* § 800.4(d)(1)(i).

The § 106 consultation process under the NHPA is separate from the environmental review that occurs for federal projects under the National Environmental Policy Act ("NEPA"). NHPA review is not required to be conducted together with NEPA review, but the implementing regulations encourage agencies to coordinate the two review processes. 36 C.F.R. § 800.8. Thus, an agency may use environmental assessments and environmental impact statements required under NEPA to comply with the NHPA's requirements.

C. DOI's NHPA Consultation Process with Graton Rancheria

The section 106 consultation process in this matter appears to have suffered from many deficiencies. First, as previously mentioned, consultation with potentially affected tribes should be initiated early into the planning process. However, the agency conducted field surveys as early as March 2022, despite not notifying Plaintiff of the project and prior surveys until July 25, 2022. (Dkt. No. 18 ("McQuillen Decl.") at 3.)[1] Additionally, Plaintiff was not consulted at various points throughout the process. For example, studies were performed on February 17-20, 2022, April 3, 2022, April 11, 2022, and May 3, 2022, without notice to Plaintiff. The study conducted on April 3, 2022, involved the collection and later destructive testing of obsidian, which is a cultural artifact, without notice to Plaintiff. (*Id.* at 4.) On July 18, 2023, the agency made a finding that there were no historic properties affected by the proposed project, and sent that finding to the SHPO. (*Id.* at 5.) The SHPO responded on August 10, 2023, detailing the inadequacy of the agency's section 106 consultation process. (Dkt. No. 18-17.)

The agency met with Plaintiff in November 2023, and decided to conduct another canine survey. On January 23-24, 2024, a canine survey was conducted, again without notice to Plaintiff. (McQuillen Decl. at 6.) Graton Rancheria was notified that the canine survey had occurred on March 19, 2024. (*Id.*) In that letter, the agency notified the tribe that it planned to conduct follow-up trench excavation work, where a tribal monitor was present but was unable to

[1] Citations to page numbers refer to the ECF pagination.

enter the trenches due to poor weather conditions. (*Id.* at 7.) The tribe raised its concerns about the conditions under which the surveys were carried out in letters to the agency. But despite these concerns, on May 6, 2024, the agency wrote to the SHPO stating that it had made a finding of no historic properties affected by the project. (*Id.* at 8.) At that point, the agency had not responded to the concerns raised by the tribe.

On July 10, 2024, after the 30-day deadline for response had passed, the SHPO sent a letter to the agency, again detailing its concerns with the consultation process. That letter requested that the agency reinitiate consultation. (*Id.* at 8-9.) However, consultation was never reinitiated. Instead, on November 22, 2024, DOI published its Final Environmental Impact Statement ("EIS"). The EIS contained a section entitled "Section 106 Compliance." (Dkt. No. 26-4 at 81.) That section stated:

> As described above, the BIA carried out efforts pursuant to 36 CFR Part 800.4 to identify whether historic properties are present within the APE for the Proposed Project. Consistent with 36 CFR Part 800.4(a) these efforts included: 1) determining the area of potential effect . . .; 2) reviewing existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified; 3) seeking information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and 4) gathering information from Indian Tribes to assist in identifying properties which may be of religious and cultural significance to them and may be eligible for the National Register.
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> Using the information gathered during these efforts, the BIA determined that a finding of No Historic Properties Affected is appropriate for the Proposed Action.

(*Id.*) The EIS then recounted the back-and-forth with the SHPO described above, and stated, "As no objection was received from SHPO within 30 days of the BIA's request for concurrence [on May 6, 2024], the BIA's responsibilities under Section 106 should be considered to be fulfilled pursuant to 36 CFR Part 800.4 (d)(i)." (*Id.*) The EIS stated that the agency nonetheless voluntarily "elected to forward the finding and supporting documentation to the [Advisory Council on Historic Preservation ("ACHP")] and request that the Council review the finding in

accordance with 36 CFR Part 800.9(a)." (*Id.*) Section 800.9(a) allows the agency to seek an "advisory opinion" from ACHP, but does not require such an opinion for NHPA compliance. That request was sent on October 28, 2024, and ACHP has not provided a response. (Dkt. No. 26-1 ¶ 21; Dkt. No. 26-2.)

D. Additional Steps Required Before Construction Could Begin on Any Gaming Facility

The application process to take the land into trust, and ultimately, to approve any gaming activity, requires a number of additional steps after the publication of the EIS. In addition to clearing NHPA review, the agency must also show that it completed the required NEPA review. After a Final EIS is published, NEPA's implementing regulations require that a Record of Decision is issued, which summarizes the agency's decision. 40 C.F.R. § 1505.2 ("each agency shall prepare and timely publish a concise public record of decision or joint record of decision"). Once that is issued, the land may be taken into trust.

Moreover, because Koi Nation's underlying request is for a gaming license, additional steps follow the trust decision. The final approval decision requires DOI to determine whether Koi Nation's application satisfies the "restored lands exception" to the general prohibition against gaming on Indian lands contained in the Indian Gaming Regulatory Act. If the agency determines that the exception applies, Koi Nation's gaming application may be approved.

Additional time will likely pass before any construction as well. The EIS discusses three alternative construction proposals: a larger gaming facility ("Alternative A"); a smaller gaming activity ("Alternative B"); and a winery and hotel ("Alternative C"). No timeline is specified for Alternatives B or C, but Alternative A is "conservatively assumed to occur in one phase beginning in 2026 and lasting 18 to 24 months." (Dkt. No. 40-2 at 15.) Plaintiff has not submitted evidence concerning the imminence of any construction or ground-disturbing activities.

II. DISCUSSION

A. Article III Standing

Because subject matter jurisdiction must be addressed before proceeding to the merits, the first inquiry is whether Plaintiff has Article III standing. "To satisfy the injury in fact requirement [under Article III], a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing." *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003) (internal quotation and citation omitted). Procedural injury, alone, cannot confer Article III standing, but instead must be tied to an underlying harm. Plaintiff alleges that it has already been injured by Defendants' finding of "No Historic Properties Affected," which is a procedural injury tied to a concrete, underlying harm. (Dkt. No. 35 at 8.) According to Plaintiff, by making this finding, Defendants terminated the tribe's right to further consultation and cleared the path for Defendants to approve the Project without undertaking any additional consultation with the tribe. (*Id.*) Under the NHPA, this amounts to an alleged procedural violation of § 106 for failure to consult.

Defendants argue that there is no freestanding right to consultation, and therefore, that no basis exists to challenge a procedural violation for failure to consult until after the undertaking has been approved. Thus, it is Defendants' position that a procedural violation has not yet occurred. However, the NHPA's implementing regulations do not describe the right to consultation as attaching only at the point at which the undertaking has been approved. Rather, the regulations describe the right to consultation as arising "early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c). As described in greater detail in Section I.B above, at the initiation phase, the agency is required to identify interested tribes and invite them to participate, *id.* § 800.3(f), and then to identify historic properties in consultation with those tribes, *id.* § 800.4(b). Also, the regulations state that the "agency official must *complete* the section 106 process *prior* to the approval" of the undertaking. *Id.* § 800.1(c) (emphasis added). That further

confirms that an agency may declare the section 106 process completed, giving rise to the procedural violation of a failure to consult, *prior* to the moment of the undertaking itself.

Although the ultimate decision to approve the undertaking may still be pending, Plaintiff is not challenging that decision at this juncture, nor is it relying on the broader decision regarding the taking of the land into trust as the basis for its articulated injury-in-fact for Article III standing. Instead, Plaintiff points to the procedural violation that has already occurred as the basis for its harm.

Plaintiff's procedural injury—the § 106 violation for failure to consult—is sufficiently tied to a concrete, on-the-ground harm to meet the requirements for injury-in-fact. The right to consultation under the NHPA does not exist in a vacuum, but rather, exists as a means to respect and effectuate tribal sovereignty, and to give weight to tribal perspectives when determining activities that may affect their vital interests in ancestral remains, cultural artifacts, and historical properties. 36 C.F.R. § 800.2(c)(2)(ii)(C) ("Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes."); *cf. Confederated Tribes and Bands of Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020) (finding injury articulated as "infringement on its tribal sovereignty and right to self-government" as sufficiently concrete when analyzing a state's exercise of criminal jurisdiction over tribal members on tribal land). And the regulations promulgated under the NHPA are designed to implement procedures that protect tribal interests in their cultural resources and artifacts through consultation.

For this reason, the alleged procedural violation for failure to consult is connected to an underlying harm: that is, the effects on Plaintiff's sacred cultural artifacts and ancestral remains that will be overlooked as a result of being shut out of the decisionmaking process. *See, e.g.*, *Env't Defense Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 870 (9th Cir. 2022) (finding in a different statutory context that where there is a failure to consult, the "asserted injury is that the environmental consequences might be overlooked" (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994))). Accordingly, there is sufficient

concrete harm associated with the procedural violation to meet the injury-in-fact requirement under Article III. *Backus v. General Mills, Inc.*, 122 F. Supp. 3d 909, 919 (N.D. Cal. 2015) ("The injury may be minimal . . . an identifiable trifle is sufficient to establish standing" (quoting *Preminger v. Peak*, 552 F.3d 757, 763 (9th Cir. 2008) (quotation and citation omitted))).

B. Ripeness

The alleged procedural violation is a final agency action that is ripe for judicial review. Under § 704, a federal court's authority to hold unlawful or otherwise set aside agency action extends only to "final agency action." 5 U.S.C. § 704. DOI's finding of "No Historic Properties Affected" constitutes final agency action under the APA. Final agency action "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotations and citations omitted); *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) ("In determining whether an agency's action is final, we look to whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms is expected." (quotations and citations omitted)). The finality requirement is interpreted in a "pragmatic and flexible manner." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 150 (1967).

DOI incorporated its finding into the Final Environmental Impact Statement that it issued on November 22, 2024. It stated, "[u]sing the information gathered during these efforts, the BIA determined that a finding of No Historic Properties Affected is appropriate for the Proposed Action." This is indicative of the fact that the "finding" reflected the definitive statement on the agency's position on the matter: that is, that the proposed action affected no historic properties. Although Defendants now argue that the agency may still change its mind, or could voluntarily consult with Plaintiff or ACHP despite having no legal obligation to do so, "[t]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."

Sackett v. E.P.A., 566 U.S. 120, 127 (2012).[2]

Additionally, DOI stated in the EIS that the "BIA's responsibilities under Section 106 should be considered to be fulfilled pursuant to 36 CFR Part 800.4(d)(i)." That reflects DOI's determination that it considers its legal duty to engage in consultation fully discharged. Thus, although BIA may *choose* to re-engage the tribe, the legal consequence of making such a finding is that the agency is under no further obligation to do so. For purposes of the APA, this constitutes a final agency action that is properly reviewable by a federal court.

DOI nonetheless insists that no final agency action can occur for purposes of Plaintiff's NHPA claim until after the agency issues its Record of Decision under NEPA pursuant to 40 C.F.R. § 1505.2. But unlike the regulations promulgated under NEPA, the implementing regulations for the NHPA do not require a Record of Decision at all when there is a finding of no historic properties. *See* 36 C.F.R. § 800.4(d)(1)((i) (where there is a finding of "no historic properties present," "the agency official's responsibilities under section 106 are fulfilled" if the SHPO does not object within 30 days of receiving the adequately documented finding of no historic properties); *see also id.* § 800.8(c)(4) (even where the agency found "effects of an undertaking on historic properties are adverse" and the agency elects to use NEPA documents to demonstrate its NHPA compliance, the agency's "responsibilities under section 106" are "satisfied" *either* by a binding commitment to mitigation measures "incorporated in" the "ROD" *or* by responding to comments from ACHP). Defendants offer no satisfactory explanation as to why Plaintiff's NHPA claim should be treated as unripe because DOI has yet to issue a ROD that is not even required by the NHPA in the first place.

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[2] As Defendants conceded at oral argument, the parties have been unable to identify any cases addressing whether a final EIS making a finding of "no historic properties" is a final agency action for purposes of a NHPA claim. The Court has not located any such case either. Defendants point to *Wishtoyo Found. v. U.S. Fish & Wildlife Serv.*, No. 19-cv-03322, 2019 WL 6998665, at *4-5 (C.D. Cal. Oct. 16, 2019) to support their argument that the termination of the § 106 consultation process does not constitute final agency action. *Wishtoyo*, however, did not involve a final EIS concluding there was no historic properties after giving the SHPO an opportunity to comment. Instead, *Wishtoyo* involved the issue of whether an earlier step in the process constituted a final agency action: the agency's letter communicating its finding of no historic properties to the SHPO and requesting SHPO's response.

C. Preliminary Injunction

The analysis therefore proceeds to the merits. To obtain a preliminary injunction, a plaintiff must show: (1) likelihood of success on the merits; (2) likelihood that imminent irreparable harm would result if injunctive relief were denied; (3) that the equities weigh in plaintiff's favor; and (4) that the public interest weighs in favor of injunctive relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Where the government is a party to the litigation, the last two factors merge. The Ninth Circuit applies a "sliding scale" approach, such that "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, to issue a preliminary injunction, the plaintiff must demonstrate that, at some level, all four factors are met. Because Plaintiff has failed to carry its burden to show a likelihood of immediate irreparable harm, the other factors need not be analyzed.

"An irreparable harm is one that cannot be redressed by a legal or equitable remedy" following adjudication on the merits. *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1050 (N.D. Cal. 2004). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

Plaintiff has alleged two distinct, yet interrelated, theories for the irreparable harm it will suffer if Defendants are not enjoined from taking the land into trust for Koi Nation: (1) damage or disturbance of cultural artifacts and remains associated with Plaintiff, and (2) loss of rights to be consulted about the disposition of remains and associated artifacts found on the land. Neither is sufficient to support a finding of an immediate threatened injury, on the current record.

First, Plaintiff suggests that irreparable harm to cultural artifacts or remains may occur absent injunctive relief. (Dkt. No. 35 at 10; Dkt. No. 13 at 30 ("'Damage to or destruction of any' cultural or religious sites 'easily' meets the irreparable harm requirement" (quoting

Quechan Tribe of the Fort Yuma Indian Reservation v. Dep't of Interior, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010))).) However, any possible harm that might result to the actual cultural artifacts or remains does not appear to be sufficiently imminent to meet the requirements for irreparable harm. Plaintiff has introduced no evidence as to when ground-breaking activities are likely to occur, if the land is taken into trust. According to the EIS, if the agency does accept the land into trust, construction of the Alternative A plan is "conservatively assumed to occur in one phase beginning in 2026 and lasting 18 to 24 months." (Dkt. No. 40-2 at 15.) Plaintiff bears the burden to show that harm to artifacts or remains is imminent. On the current record, and at this juncture, the Court cannot conclude that Plaintiff has met that burden.

As to Plaintiff's second theory, Plaintiff argues that it would be irreparably harmed by the change in legal status that would result from a decision to take the land into trust because the tribe would immediately lose the protections currently afforded to it under California state law. Currently, if Koi Nation were to find Native American remains on the land, California Public Resources Code § 5097.98 requires consultation with the most likely descendants of those remains regarding their disposition, which could potentially include Plaintiff based on their historic connection to the land. Section 5097.98 requires that the landowner "shall discuss and confer" with the most likely descendants regarding their "preferences for treatment" of those remains and "associated items." *Id.* § 5097.98(b). The descendants "shall complete their inspection and make recommendations or preferences for treatment within 48 hours of being granted access to the site." *Id.* § 5097.98(a). If the landowner and the descendants are unable to reach an agreement, mediation would be required. *Id.* § 5097.98(e). If mediation is unsuccessful, the landowner must reinter the remains "with appropriate dignity on the property in a location not subject to further and future subsurface disturbance" and to take steps to protect the new site. *Id.* Although these requirements would be unenforceable against Koi Nation itself, they could be enforced through prospective injunctive relief against tribal officers. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) (finding that even though a tribe's sovereign immunity extends to claims arising out of off-reservation conduct, "tribal immunity does not bar

such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct").

Plaintiff observes that, once the land is taken into trust on behalf of Koi Nation, treatment of remains and artifacts would be governed by the Native American Graves Protection and Repatriation Act ("NAGPRA"). Under NAGPRA, if Native American remains or cultural artifacts are discovered on the land, Koi Nation would have priority over Plaintiff and other tribes in the process for determining their disposition. 43 C.F.R. § 10.7(a). As a result, if remains were to be found prior to a full adjudication on the merits, Plaintiff argues that it would be stripped of its ability to consult in any decisionmaking process.

The EIS, however, proposes mitigation measures that would preserve Plaintiff's right to be consulted if Native American remains and artifacts are discovered. Specifically, the EIS provides that Plaintiff and other Sonoma County tribes may select an archeologist who will be notified at least 7 days prior to ground disturbance in any area within either (a) 150 feet of Pruitt Creek, or (b) 50 feet of any area where there had been a canine alert. (Dkt. No. 40-2 at 43.) The archaeologist may then elect to participate in monitoring of ground-disturbing activities. (*Id.* at 43-45.) Also, if human remains are unexpectedly discovered during ground-disturbing activities in any area, all work within 50 feet would be halted. If the remains are determined to be of Native American origin, the federal government "shall consult" with "Koi Nation and any other Indian Tribe with potential cultural affiliation (i.e., the Interested Sonoma County Tribes [a term which includes Plaintiff])" to discuss disposition. (*Id.* at 45.) In addition, within thirty days, a written plan of action must be developed concerning the remains as well as "funerary objects, sacred objects, or other objects of cultural patrimony." (*Id.*) That plan must be implemented prior to resuming construction in the area. (*Id.* at 44-45.) The EIS also provides for requirements to consult with Plaintiff if prehistoric or historic archeological resources are discovered to which Plaintiff might attach religious and cultural significance. (*Id.* at 44.)

At this point, and on this record, the harms associated with any potential changes to Plaintiff's rights are too speculative to assess. Plaintiff protests that the consultation procedures

in the EIS are "grossly inadequate" (Dkt. 43 at 14), but those procedures may or may not be the ones ultimately adopted in a future Record of Decision. Also, even assuming the procedures adopted are those in the EIS, Plaintiff does not specifically identify why the proposed mitigation measures are worse than those available under state law. Currently, Koi Nation, through a limited liability company, owns the land and is not obligated to notify Plaintiff prior to ground-disturbing activities at all. Moreover, California Public Resources Code § 5097.98 does not require the landowner to consult Plaintiff about disposition of cultural artifacts not associated with remains, and does not require the landowner to adopt Plaintiff's recommendations about disposition of remains or associated items. At this juncture, the Court lacks sufficient evidence to find irreparable harm to be imminent based on potential differences in the consultation rights under state law versus under the EIS.

Plaintiff also argues that it will lack an adequate remedy if Koi Nation does not comply with the consultation requirements proposed in the EIS. Koi Nation has adopted a law requiring itself to "comply with all Applicable Mitigations set forth in the Bureau of Indian Affairs' decision documents associated with the Trust Acquisition" at issue. (Dkt. No. 47-1 ("Koi Nation Tribal Gaming Ordinance") at 49.) Plaintiff contends that, in the event that Koi Nation violates its own law by failing to follow the consultation requirements in whatever form they are adopted, Plaintiff will lose its ability to sue to demand consultation. It is not clear whether Plaintiff currently has a private right of action under state law to enforce Section 5097.98's consultation requirements either, though. *See* Cal. Pub. Res. Code § 5097.98 (omitting any mention of a private right of action). But even if Plaintiff did, it would be pure speculation to find irreparable harm from loss of that remedy. The need for a private right of action would come into play only if (a) the land is taken into Trust following a future Record of Decision adopting the consultation measures as described, (b) remains are found, (c) Koi Nation violates its own laws by failing to consult as required, (d) the lack of consultation threatens some form of imminent harm, and (e) the federal government does not enforce the requirements that were adopted in the future Record of Decision, despite its current litigation position that it has the authority to do so under 40

C.F.R. § 1505.2(c). Among other things, the Court has no basis in the current record to find it likely that Koi Nation would break its own laws by failing to consult as required.

Plaintiff has also raised the possibility that the decision to take the land into trust might be irreversible. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), makes clear that, in an APA challenge to the federal government's decision to take land into trust for an Indian tribe, the courts have the power to reverse that transaction by stripping the federal government of its title to that land. *Id.* at 224. Defendants conceded at oral argument that they would not challenge any such court order on the basis that the court lacked authority to enter it. Accordingly, that cannot form a basis for a finding of irreparable harm.

III. CONCLUSION

In sum, Plaintiff has not met its burden to establish that it is likely to suffer irreparable harm. Although the Court recognizes Plaintiff's concerns that it may not be alerted to a potential irreparable harm before it is too late, the current record is insufficient to support a finding that irreparable harm is likely and imminent. Plaintiff's motion for a preliminary injunction is **DENIED** without prejudice to being renewed upon changed circumstances establishing such harm to be imminent. The temporary restraining order previously entered (Dkt. No. 30) is **VACATED**.

At oral argument, DOI stated that it would potentially be able to commit to monitoring the project for the start of construction and to alerting Plaintiff thirty days before any ground-breaking activity, as it has done in similar cases cited in its papers. DOI is **ORDERED** to file a status report within 30 days of this Order regarding its position in that regard.

IT IS SO ORDERED.

Dated: January 10, 2025

RITA F. LIN
United States District Judge