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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 LA POSTA BAND OF DIEGUEÑO
14 MISSION INDIANS OF THE LA POSTA
15 RESERVATION, ON BEHALF OF
16 ITSELF AND ON BEHALF OF ITS
17 MEMBERS AS *PARENS PATRIAE*,

18 Plaintiffs,

19 v.

20 DONALD J. TRUMP, PRESIDENT OF
21 THE UNITED STATES, IN HIS
22 OFFICIAL CAPACITY; MARK T. ESPER,
23 U.S. SECRETARY OF DEFENSE, IN HIS
24 OFFICIAL CAPACITY; CHAD F. WOLF,
25 ACTING U.S. SECRETARY OF
26 HOMELAND SECURITY, IN HIS
27 OFFICIAL CAPACITY; AND
28 LIEUTENANT GENERAL TODD T.
SEMONITE, COMMANDING GENERAL
OF THE U.S. ARMY CORPS OF
ENGINEERS, IN HIS OFFICIAL
CAPACITY,

Defendants.

Case No.: 3:20-cv-01552-AJB-MSB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

**Motion for Preliminary Injunction
Hearing**

Date: September 17, 2020

Time: 2:00 p.m.

Location: Courtroom 4A (4th Floor)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Since time immemorial, the Kumeyaay people have lived in the area near San Diego and Imperial Counties surrounding what is now the United States-Mexico border. Since the arrival of Europeans in the region, the Kumeyaay territory, culture, religion, and very existence have been under attack to make way for non-Indian settlement. In the most recent episode of Indigenous erasure, the President of the United States and his administration are desecrating Kumeyaay ancestral burial and sacred sites to make way for a wall along the southern border. The La Posta Band of the Diegueño Mission Indians (“La Posta”), in its own capacity and as *parens patriae* on behalf of its citizens, requests a temporary restraining order and preliminary injunction to halt the construction of the border wall—a project being funded and constructed without authorization from Congress and which is violating the constitutional rights of the La Posta citizens.

STATEMENT OF FACTS

I. La Posta and the Land

La Posta is one of twelve bands of Kumeyaay people. Decl. of Gwendolyn Parada (“Chairwoman’s Decl.”) ¶ 4. The La Posta Reservation spans 3,556.49 acres and is located in the Laguna Mountains, 56 miles east of San Diego and 46 miles west of El Centro. *Id.* Although the Kumeyaay bands have been restricted to their respective current reservations by United States policy, the Kumeyaay people lived throughout the border area in San Diego and Imperial Counties for over 12,000 years. *Id.* ¶ 8–9; Decl. of Cynthia Parada (“Parada Decl.”) ¶ 4; Decl. of Thomas Holm (“Holm Decl.”) ¶ 14; Decl. of Stephen Rochester (“Rochester Decl.”) ¶ 4. Many of these village sites are sacred to La Posta citizens and contain human burial sites and other important cultural and archaeological artifacts. *Id.*; Parada Decl. ¶ 13.

Historically, the Kumeyaay moved through their ancestral territory via a system of trails, many of which are still known and used by the Kumeyaay today. *Id.* at ¶ 10.

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1 While most of these trails served commercial and social purposes, some trails have
 2 religious significance. *Id.* Many of these trails run in proximity to and across the United
 3 States-Mexico border in San Diego and Imperial Counties. *Id.*

4 The La Posta tribal citizens practice a religion that is based on oral tradition. Parada
 5 Decl. ¶ 8. The Kumeyaay creation story tells of the creation of the universe, similar to
 6 Genesis. *Id.* The creation story features many landmarks within the traditional Kumeyaay
 7 territory that La Posta citizens hold sacred today, such as Tecate Peak, Jacumba Hot
 8 Springs, and Table Mountain, among others. *Id.*; Chairwoman's Decl. ¶ 9; Rochester Decl.
 9 ¶ 7. La Posta citizens hold ceremonies and gatherings at these places, and without access
 10 to them, the Kumeyaay people are not able to practice their religion. Parada Decl. ¶ 10.

11 The Kumeyaay creation story also provides very specific instructions regarding
 12 burial practices. *Id.* ¶ 9. The handling and treatment of Kumeyaay remains is a key
 13 component of Kumeyaay religion which, like other organized religions, places great
 14 emphasis on burial rites. *Id.* ¶ 18; Chairwoman's Decl. ¶ 12; Rochester Decl. ¶ 4. For
 15 example, Kumeyaay burial practices call for certain songs to be sung for the dead. Parada
 16 Decl. ¶ 9. Similar to mainstream religious dogma,¹ an important Kumeyaay burial rule
 17 requires all parts of one's body to remain together after death. Parada Decl. ¶ 9. Kumeyaay
 18 religious rites require the proper treatment of Kumeyaay ancestors in the event of
 19 exhumation. *Id.* ¶ 13; Chairwoman's Decl. ¶ 12. Such treatment requires a properly trained
 20 and certified Kumeyaay person, and the human remains must be treated with respect,
 21 including the practice of smudging and singing to ensure proper reburial. *Id.*

22 **II. Impacts of the Border Wall Construction on La Posta's Religious and** 23 **Cultural Sites and Religious and Spiritual Practices.**

24
 25 ¹*See* Cardinal Gerhard Ludwig Müller and Archbishop Luis Francisco Ladaria Ferrer,
 26 *Congregation for the Doctrine of Faith, Instruction Ad resurgendum cum Christo*
 27 *regarding the burial of the deceased and the conservation of the ashes in the case of*
 28 *cremation*, Aug. 15, 2016, available at
<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2016/10/25/161025c.html>).

1
2 Defendants are currently constructing the border wall directly through Kumeyaay
3 burial sites and sacred lands, causing irreversible and easily avoidable damage to
4 Kumeyaay remains, cultural items, history, and religious practices. Chairwoman’s Decl. ¶
5 9, 12; Decl. of Javier Mercado (“Mercado Decl.”) ¶¶ 4-5; Holm Decl. ¶¶ 5–6; Rochester
6 Decl. ¶ 20. For example, Jacumba, known to contain an ancient tribal cemetery, and Tecate,
7 a historical Kumeyaay village site, are located within the path of the border wall project.
8 Chairwoman’s Decl. ¶ 11. Prior cultural resources surveys and Kumeyaay historians have
9 noted the existence of human remains, burial sites, and Kumeyaay archaeological sites
10 within the path of construction. *Id.* at ¶ 11; Parada Decl. ¶ 13; Rochester Decl. ¶ 4. In fact,
11 a CBP commissioned study identifies many Kumeyaay cultural sites within the border wall
12 construction area in San Diego. Holm Decl. ¶ 5. However, this study fails to identify many
13 more, and contains erroneous conclusions regarding the need for mitigation. *Id.*

14 In one disturbing episode, on July 10, 2020, human remains were discovered at a
15 previously unrecorded archaeological site which was under construction for the wall. Holm
16 Decl. ¶¶ 10–13; Mercado Decl. ¶ 8; Rochester Decl. ¶ 16. The appropriate U.S. Customs
17 & Border Protection (“CBP”) and U.S. Army Corps of Engineers (“Army Corps”) officials
18 were made aware of this discovery. When the discovery was confirmed to be human
19 remains, Defendants did not permit the La Posta to properly exhume the remaining burial
20 site. Mercado Decl. ¶¶ 9–11. Rochester Decl. ¶¶ 21–23. Instead, Defendants continued
21 construction of the border wall over the burial ground. *See* Mercado Decl. ¶ 11; Rochester
22 Decl. ¶¶ 24, 26. This desecration is antithetical to La Posta citizens’ religious beliefs and
23 prevents them from exercising their religious obligation to properly treat exhumed remains.
24 Parada Decl. ¶ 17.

25 In another instance of complete disregard for the rights and beliefs of La Posta
26 citizens, CBP and Army Corps officials ignored the report of an experienced tribal cultural
27 monitor that he had discovered Kumeyaay cultural items that indicated the likely presence
28 of other archaeological material. Mercado Decl. ¶ 12; Parada Decl. ¶ 16. As they did with

1 the discovery of human remains, Defendants callously continued to build the wall.
2 Mercado Decl. ¶ 12. In yet another episode, Defendants ignored the discovery of soil
3 conditions which indicate the presence of human remains and unceremoniously covered
4 the likely Kumeyaay burial site with fill soil and continued to build the wall. *Id.* at 13.

5 While Defendants have allowed tribal monitors to observe some construction
6 activity, Defendants have stripped the exercise of value by requiring monitors to agree not
7 to stop construction, even if cultural items are discovered. *Id.* at 15; Parada Decl. ¶ 16;
8 Rochester Decl. ¶ 17. Instead, Defendants force La Posta citizens to choose between
9 ignoring the desecration of their ancestors and the culture they created or to watch
10 powerlessly as construction crews and federal officials ignore their pleas. *Id.*

11 In addition, the border wall has made, and will continue to make, Kumeyaay burial
12 and sacred sites inaccessible to La Posta citizens. Parada Decl. ¶¶ 12, 17. One of the
13 sacred trails that links several present Kumeyaay reservations with Kumeyaay village
14 sites in what is now Mexico has been cut off by border wall construction. Parada Decl. ¶
15 13. Other sacred sites in the path of construction include, significantly, Tecate Peak,
16 Jacumba Hot Springs, and Table Mountain. *Id.* ¶ 5; Parada Decl. ¶ 13; Holm Decl. ¶ 5;
17 Rochester Decl. ¶¶ 4, 19. CBP has even threatened La Posta citizens with trespass charges
18 while engaging in a ritual dance within the border wall construction area. *Id.* ¶ 12. On
19 August 10, 2020, La Posta citizens attempted to visit a site within the border wall area to
20 pray but CBP denied them access and threatened them with arrest and felony charges if
21 they entered the site. Parada Decl. ¶ 18. Defendants will continue to destroy sacred
22 Kumeyaay sites as they next plan to construct the wall through Table Mountain.
23 Rochester Decl. ¶ 19.

24 **III. Unlawful Border Wall Funding and Construction**

25 A refrain of President Trump's 2016 election campaign was his promise to build a
26 U.S.-Mexico border wall. Request for Judicial Notice in Support of Temporary Restraining
27 Order and Preliminary Injunction ("RJN"), Ex. 1 (June 16, 2016 Presidential
28

1 Announcement Speech). Since taking office in 2017, the President repeatedly sought
2 appropriations from Congress for border barrier construction, yet Congress repeatedly
3 denied his requests. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (“*Sierra*
4 *Club I*”).

5 In Fiscal Year (“FY”) 2019, the President requested billions in border wall funding,
6 which Congress refused to appropriate. *Id.* at 678. The impasse triggered the nation’s
7 longest partial government shutdown, and ultimately, Congress appropriated only \$1.375
8 billion of the President’s request for \$5.7 billion for border wall funding. *Id.* at 678-79. To
9 ensure funding for the wall, the Defendants reprogrammed \$1.5 billion of Department of
10 Defense (“DoD”) funds toward border wall construction. *Id.* at 682. The Ninth Circuit held
11 that such reprogramming was unlawful and affirmed an injunction preventing the
12 Defendants from using the funds for border wall construction. *Id.*

13 Similar to FY 2019, the FY 2020 budget negotiations were contentious regarding
14 the border wall. President Trump requested \$5 billion, and DoD requested \$9.2 billion, for
15 construction of the border wall. RJN Ex. 2, 3. Congress rejected both the President’s and
16 DoD’s FY 2020 budget requests and allocated only \$1.375 billion for border wall
17 construction. *See Consolidated Appropriations Act (“CAA”), Pub. L. No. 116-93, § 209,*
18 *133 Stat. 2317, 2511–12 (2020).* Congress further prohibited the use of any appropriated
19 funds to “increase...funding for a program, project, or activity as proposed in the
20 President’s budget request for a fiscal year until such proposed change is subsequently
21 enacted in an appropriation Act...” *Id.*, Div. C § 739.

22 Unhappy with the result, Defendants replicated the FY 2019 conduct that the Ninth
23 Circuit found to be illegal. First, after Congress denied Defendants’ request for funding for
24 hundreds of miles in wall construction, the Department of Homeland Security (“DHS”)
25 initiated a request to DoD for funds for wall construction across “approximately 271
26 miles.” RJN Ex. 4. On February 13, 2020, Secretary of Defense Esper announced that DoD
27 would transfer and spend \$3.831 billion in funds Congress had appropriated for other
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1 purposes on border wall construction pursuant to §§ 8005 and 9002 of the CAA. *Id.* Ex. 5.
2 This funding was intended for other purposes but transferred into DoD’s Drug Interdiction
3 and Counter-Narcotics Activities (“Drug Interdiction”) fund to assist DHS with border wall
4 construction pursuant to 10 U.S.C. § 284 and then subsequently transferred for use by the
5 Army Corps to construct the border wall. *Id.* Ex. 6.

6 These unlawfully reprogrammed funds are funding the construction of
7 approximately fourteen miles of a replacement border wall and seven miles of new border
8 wall (the “Project”) in San Diego County and Imperial Counties (the “Project Area”). *Id.*
9 Ex. 7, 9-10 (map of the Project). Acting Secretary of Homeland Security Wolf invoked
10 section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
11 as amended, codified at 8 U.S.C. § 1103 note (“IIRIRA”), as authority for construction of
12 the Project. 85 Fed. Reg. 14958-60 (“IIRIRA Waiver”). To avoid having to account for
13 the significant cultural, historical, religious, and environmental impacts of his rash actions,
14 Acting Secretary Wolf waived multiple federal laws designed to protect historical,
15 religious, and cultural resources, the environment, and Indian tribes. *Id.*

16 A recent audit from the Office of the Inspector General (“OIG”), however,
17 concluded that CBP has not adequately justified the need for a physical barrier in the
18 Project Area. RJN Ex. 8 at 3. In fact, the audit concludes “the likelihood that CBP will be
19 able to obtain and maintain complete operational control of the southern border with
20 mission effective, appropriate, and affordable solutions is diminished.” *Id.* In particular,
21 the audit found CPB did not adequately justify its decisions to prioritize “certain southern
22 border locations over others for wall construction”—citing the Project as an example of
23 particularly arbitrary decision making. *Id.* at 9. The CBP ignored the results of its own
24 algorithm to expedite Project construction and could offer no rationale when asked by OIG.
25 *Id.* at 9-11.

26 **IV. Defendants’ Failure to Provide Notice to or Consult with La Posta**

27 The Defendants have failed to engage in consultation with La Posta regarding the
28

1 Project. La Posta only learned of Project construction informally during an unrelated
 2 meeting with the Bureau of Land Management in March 2020. Rochester Decl. ¶ 8. CBP
 3 did not offer to consult with La Posta at that time, nor has it since. Rochester Decl. ¶¶ 9–
 4 11, 19, 27. CBP representatives engaged in a phone call with tribal representatives in June,
 5 a Zoom meeting on July 8, and invited tribal representatives for a site visit on July 10, 2020.
 6 Rochester Decl. ¶ 13-14. However, neither engagement by CBP provided sufficient
 7 information about the construction plans, a schedule to permit La Posta to evaluate the
 8 Projects’ impacts on religious and cultural resources, nor has CBP provided a
 9 comprehensive evaluation of such impacts. *Id.* ¶ 27-28. CBP also claimed that the Project
 10 Area had previously been surveyed, however, tribal representatives pointed out that the
 11 2010 survey was outdated and inaccurate. Mercado Decl. ¶ 8; Rochester Decl. ¶ 15.

12 La Posta has requested formal consultation with CBP on numerous occasions both
 13 orally and in writing. Rochester Decl. ¶ 10; Mercado Decl. ¶ 6. Additionally, both CBP
 14 and Army Corps representatives were informed about the presence of Kumeyaay human
 15 remains and burials in the line of construction. Chairwoman’s Decl. ¶ 11-12; Mercado Decl.
 16 ¶ 9, 11-13. CBP has failed to stop construction to investigate any of the human remains,
 17 despite pleas from La Posta. Chairwoman’s Decl. ¶ 11. Due to this lack of consultation, La
 18 Posta has been unable to secure the location of its relatives’ burials. *Id.* ¶ 12.

19 LEGAL STANDARD

20 To obtain a preliminary injunction or temporary restraining order, a plaintiff “must
 21 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
 22 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
 23 that an injunction is in the public interest.” *Saravia for A.H. v. Sessions*, 905 F.3d 1137,
 24 1142 (9th Cir. 2018). A preliminary injunction may issue where “serious questions going
 25 to the merits [are] raised and the balance of hardships tips sharply in [plaintiff’s] favor.”
 26 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

27 ARGUMENT

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1 **I. La Posta is likely to succeed on the merits.**

2 La Posta is likely to succeed on the merits of its claims that the Defendants’
3 acquisition of funds for and construction of the Project is ultra vires, violates various
4 statutory provisions of the CAA, and violates the Constitutional rights of La Posta citizens.

5 **A. Defendants have unlawfully funded and begun construction of the project.**

6 The Defendants’ transfer of \$3.81 billion between DoD accounts, use of \$1.375
7 billion for the Project, and commencement of construction are all in direct violation of the
8 statutes allegedly authorizing such actions. La Posta is likely to succeed on these claims.

9 **i. La Posta has a cause of action both in equity and under the APA.**

10 Precedent in this circuit recognizes this Court’s authority to review the Defendants’
11 transfer of funds for and construction of the border wall and enjoin the actions either as an
12 ultra vires cause of action in equity, or under the Administrative Procedures Act (“APA”).
13 A plaintiff can assert an ultra vires cause of action when “the relief [it] requested ... was
14 traditionally accorded by courts of equity.” *Sierra Club v. Trump*, 963 F.3d 874, 890–91
15 (9th Cir. 2020) (“*Sierra Club II*”). The cause of action thus does not depend on the
16 “availability of a statutory cause of action;” but seeks a “‘judge-made remedy’ for injuries
17 stemming from unauthorized government conduct, and they rest on the historic availability
18 of equitable review.” *Id.* (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320,
19 327 (2015)).

20 The Ninth Circuit has previously recognized that the relief La Posta now seeks “has
21 been traditionally available.” *Id.* at 891 (citing *Harmon v. Brucker*, 355 U.S. 579, 581–82
22 (1958) (“Generally, judicial relief is available to one who has been injured by an act of a
23 government official which is in excess of his express or implied powers.”). The Court has
24 authority to review the Defendants’ use of funds for, and construction of, the Project as
25 ultra vires and enjoin those actions.

26 Alternatively, the APA provides a cause of action “for a final agency action for
27 which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Under the APA, the
28

1 operative question is whether the agency action is “arbitrary, capricious, an abuse of
2 discretion, or otherwise not in accordance with law,” or “in excess of statutory jurisdiction,
3 authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). The Ninth
4 Circuit has recognized the APA as an alternative cause of action for the types of claims
5 La Posta now brings. *California v. Trump*, 963 F.3d 926, 941 (9th Cir. 2020) (quoting *San*
6 *Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005) (“Where a statute
7 imposes obligations on a federal agency but the obligations do not ‘give rise to a ‘private’
8 right of action against the federal government[,] [a]n aggrieved party may pursue its
9 remedy under the APA”); *See also In re Border Infrastructure Envtl. Litig.*, 915 F.3d
10 1213, 1222 (9th Cir. 2019).

11 **ii. The CAA does not authorize Defendants’ transfer of funds to the**
12 **Drug Interdiction account.**

13 The Defendants transferred \$3.831 billion appropriated to the DoD from various
14 accounts to the Drug Interdiction account in violation of the CAA. The Secretary of
15 Defense cites CAA §§ 8005 and 9002 as authority for his transfer from various other
16 accounts to the Drug Interdiction account. CAA § 8005 authorizes the Secretary of
17 Defense to transfer funds “between such appropriations or funds or any subdivision
18 thereof, to be merged with and to be available for the same purposes, and for the same
19 time period, as the appropriation or fund to which transferred.” Subject to the same terms
20 and conditions as § 8005, CAA § 9002 authorizes the Secretary to transfer additional funds
21 only with the approval of the Office of Management and Budget. CAA § 8005 contains
22 restrictions on the transfer of funds including that the use must be “for higher priority
23 items, based on unforeseen military requirements, than those for which originally
24 appropriated and in no case where the item for which funds are requested has been denied
25 by the Congress.”

26 Finally, CAA § 739 contains the following overarching prohibition on use of funds
27 under the Act:

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1 None of the funds made available in this or any other appropriations Act may
2 be used to increase, eliminate, or reduce funding for a program, project, or
3 activity as proposed in the President’s budget request for a fiscal year until
4 such proposed change is subsequently enacted in an appropriation Act, or
5 unless such change is made pursuant to the reprogramming or transfer
6 provisions of this or any other appropriations Act.

7 Reading the plain language of the CAA, the Secretary lacked authority thereunder
8 to transfer the \$3.81 billion. The Ninth Circuit has held, as a matter of law, “the
9 requirement to build a wall on the southern border” was neither unforeseen nor a military
10 requirement. *California v. Trump*, 963 F.3d 926, 946-48 (9th Cir. 2020). Moreover, now,
11 as in the case of funds transferred pursuant to the 2019 CAA, the funds were included in
12 the President’s proposed budget but denied by Congress. Accordingly, the transfer is
13 prohibited by the terms and conditions of CAA §§ 739, 8005, and 9002.

14 The Ninth Circuit has previously recognized a valid ultra vires and APA cause of
15 action for a transfer in violation of § 8005. *Sierra Club II*, 963 F.3d at 892. To be sure,
16 when reviewing a claim under the APA, the Court must be satisfied that the interest the
17 plaintiff asserts is “arguably within the zone of interests to be protected or regulated by
18 the statute that he says was violated.” See *Match-E-Be-Nash-She-Wish Band of*
19 *Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). The zone of interest is
20 determined “not by reference to the overall purpose of the Act in question ... but by
21 reference to the particular provision of law upon which the plaintiff relies.” *Bennett v.*
22 *Spear*, 520 U.S. 154, 175 (1997).

23 The Supreme Court has clarified that the zone of interests test does “not require any
24 ‘indication of congressional purpose to benefit the would-be plaintiff.’ “ *Patchak*, 567
25 U.S. at 225 (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987)). It has
26 repeatedly emphasized that the zone of interests test is “not ‘especially demanding[.]’”
27 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quoting
28 *Patchak*, 567 U.S. at 225). Instead a plaintiff can satisfy the test (1) “if it is among those
[who] Congress expressly or directly indicated were the intended beneficiaries of a

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1 statute,” or (2) “its interests are sufficiently congruent with those of the intended
2 beneficiaries that the litigants are not more likely to frustrate than to further ... statutory
3 objectives.” *California v. Trump*, 963 F.3d at 941–42. “The test forecloses suit only when
4 a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes
5 implicit in the statute that it cannot reasonably be assumed that Congress intended to
6 permit the suit.’ “ *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke*, 479 U.S. at
7 399). “We apply the test in keeping with Congress’s ‘evident intent’ ... ‘to make agency
8 action presumptively reviewable[,]’ “and note that “the benefit of any doubt goes to the
9 plaintiff.” *Id.*

10 La Posta is within the zone of interests sought to be protected by these sections.
11 With regard to the identical § 8005 in the 2019 CAA, the Ninth Circuit has recognized
12 that “[t]he field of suitable challengers must be construed broadly in this context because,
13 although Section 8005’s obligations were intended to protect Congress, restrictions on
14 congressional standing make it difficult for Congress to enforce these obligations itself.”
15 *California v. Trump*, 963 at 942. The same broad construction must be applied to §§ 739
16 and 9002, which were also plainly intended to protect Congress.

17 La Posta is a suitable challenger because its interests are congruent with those of
18 Congress and are not “inconsistent with the purposes implicit in the statute.” *Patchak*, 567
19 U.S. at 225. As the Ninth Circuit recognized in *California v. Trump*, this challenge actively
20 furthers Congress’s intent to “tighten congressional control of the reprogramming
21 process.” 963 F.3d at 942 (quoting H.R. Rep. No. 93-662, at 16 (1973)). In particular, this
22 challenge furthers this intent because the congressional committees expressly disapproved
23 of DoD’s use of the authority here. *Id.*

24 Additionally, the Ninth Circuit held that the states of California and New Mexico
25 were within the zone of interest because Section 8005’s limitations protect California’s
26 and New Mexico’s sovereign interests in protecting their environment, “just as they
27 protect Congress’s constitutional interests, because they ensure that, ordinarily, Executive
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1 action cannot override these interests without congressional approval and funding.” *Id.* at
2 943. Similarly, here, La Posta has sovereign interests in protecting its environment,
3 cultural heritage, and the right of its citizens to practice their religion. This action ensures
4 that the executive does not overstep his authority to interfere with tribal sovereign
5 interests. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (“Legislature wields
6 significant constitutional authority when it comes to tribal relations, possessing even the
7 authority to breach its own promises and treaties. But that power, this Court has cautioned,
8 belongs to Congress alone”) (citations omitted).

9 Because §§ 8005, 9002, and 739 do not authorize the transfers at issue here, and La
10 Posta’s interest are within the zone of interest intended to be protected by those the
11 provisions, La Posta will succeed on the merits of its claim.

12 **iii. CAA does not authorize Defendants’ use of the \$1.375 billion for**
13 **the Project.**

14 While Congress explicitly denied the Defendants’ request for the billions of dollars
15 that they ultimately transferred into the Drug Interdiction account, Congress duly
16 appropriated \$1.375 billion for construction of a border “barrier system.” CAA Div. D §
17 209(a)(1). Like the transfers discussed above, however, the Defendants failed to meet the
18 terms and conditions required to perfect the appropriation. CAA Div. D § 210 prevents the
19 use of funds “for the construction of fencing ... within historic cemeteries.” Construction
20 has already uncovered historic tribal burials in the Project Area and threatens to excavate
21 a tribal historic cemetery in Jacumba. Thus, by using the funding to build a wall directly
22 through La Posta’s ancestral, historic burial grounds, Defendants violate the CAA. La Posta
23 is likely to succeed on the merits of its claim that the Defendants’ use of the \$1.375 billion
24 for border wall construction is unlawful and ultra vires.

25 **iv. Defendants may not use any of the funds because they failed to**
26 **consult with La Posta.**

27 CAA Div. D § 8129 prevents Defendants from using appropriated funds “in
28 contravention of ... Executive Order No. 13175.” Executive Order 13175 recognizes the

1 unique relationship between Indian tribes and the Federal Government and the trust
2 responsibility the government owes to Indian tribes stemming from that relationship.
3 *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249 (Nov.
4 6, 2000). As such, the order requires both meaningful consultation and input from Indian
5 tribes when federal agencies implement “policies that have tribal implications.” *Id.* at
6 67249. Agencies are required to engage in consultation prior to implementing such policies
7 and to look to “alternatives that would limit the scope of Federal standards or otherwise
8 preserve the prerogatives and authority of Indian tribes.” *Id.* at 67250. Each federal agency
9 implements its own policy in relation to tribes. *Id.*

10 DHS’ tribal consultation policy requires that the department affirmatively “[s]olicit
11 input from Tribal Governments of Indian Tribes for which DHS has identified a Tribal
12 Implication,” and then “[n]otify appropriate Tribal Governments of DHS’s desire to engage
13 in Consultation...”² DoD’s tribal consultation policy requires that DoD consult with Tribal
14 governments “[w]henver proposing an action that may have the potential to significantly
15 affect protected tribal resources, tribal rights, or Indian lands.”³

16 Here, Defendants failed to formally consult with La Posta regarding the Project.
17 Defendants have shared limited Project details with La Posta. CBP engaged with tribal
18 representatives via a phone call in early June, a webinar on July 8, and a field visit on July
19 10. However, to date, CBP has not provided sufficient information about the construction
20 plans and schedule to permit La Posta to evaluate the Projects’ impacts on religious and
21 cultural resources, nor has CBP provided a comprehensive evaluation of such impacts.

22 Because the Defendants have not properly consulted with La Posta, their use of
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24 ² DHS, Tribal Consultation Policy, Section III.A (available at
25 [https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20](https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf)
26 [Policy%20Final%20PDF_0.pdf](https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf) accessed July 27, 2020).

27 ³ DoD Instruction 4710.02 (Sept. 24, 2018) (available at
28 [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf?ver=20](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf?ver=2018-11-28-143903-320)
[18-11-28-143903-320](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf?ver=2018-11-28-143903-320)).

1 reprogrammed funds for the border wall is “in contravention of” Executive Order 13175
2 and in violation of the CAA. Defendants’ use of the funds is thus ultra vires.

3 **v. Defendants’ construction of the border wall is ultra vires because**
4 **they failed to consult with La Posta.**

5 Defendants lack authority not only to fund the border wall, but to construct it as
6 well. Defendants invoked section 102 of IIRIRA as authority for construction of the
7 Project. 85 FR 14958-60. However, the Defendants violated the prerequisite conditions
8 for exercise of the authority under the statute.

9 IIRIRA Section 102(a) authorizes the Secretary of Homeland Security
10 (“Secretary”) to “take such actions as may be necessary to install additional physical
11 barriers and roads . . . in the vicinity of the United States border to deter illegal crossings
12 in areas of high illegal entry into the United States.” Section 102(b) authorizes the
13 Secretary to install fencing and “additional physical barriers, roads, lighting, cameras,
14 and sensors to gain operational control of the southwest border” in “priority” areas. *Id.*
15 Section 102(b)(1)(C), however, requires the Secretary to consult with Indian tribes “to
16 minimize the impact on the environment, culture, commerce, and quality of life for the
17 communities and residents located near the sites at which such fencing is to be
18 constructed.” *Id.* “[T]he consultation provision applies to any border construction project
19 under section 102.” *See In re Border Infrastructure Env’tl. Litig.*, 284 F. Supp. 3d 1092,
20 1125 (S.D. Cal.), *cert. denied sub nom. Animal Legal Def. Fund v. Dep’t of Homeland*
21 *Sec.*, 139 S. Ct. 594, 202 L. Ed. 2d 428 (2018), and *aff’d*, 915 F.3d 1213 (9th Cir. 2019).

22 Although Section 102 does not define the term “consultation,” DHS’ policy on tribal
23 consultation provides a helpful starting point: ““Consultation”” involves the direct, timely,
24 and interactive involvement of Indian Tribes regarding proposed Federal actions on matters
25 that have Tribal Implications.”⁴ Additionally, because the consultation provision aims to
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27
28 ⁴ DHS Tribal Consultation Policy, Section II.B

1 minimize impacts in the area where fencing “is *to be* constructed” (emphasis added), timely
2 consultation must occur prior to construction activities.

3 As explained above, the Defendants have not consulted with La Posta prior to
4 construction to minimize the impact on the environment, culture, commerce, and quality
5 of life for La Posta, which is located near the Project Area.⁵ Because the Secretary failed
6 to meet the prerequisite to exercise authority under Section 102(a) and (b), the Defendants’
7 actions to construct the Project were, and are, ultra vires.

8 While this Court has previously denied a similar argument that the Secretary’s
9 waivers were ultra vires for failure to consult, this case demands a different conclusion. In
10 *In re Border Infrastructure Envtl. Litig.*, this Court concluded, “given the lack of a ‘clear
11 and mandatory’ mandate regarding the timing of consultation,” the Defendants did not act
12 “in excess of their delegated powers by approving the waivers or executing construction
13 contracts prior to completing the consultation process.” 284 F. Supp. 3d at 1126. While the
14 consultation provision may not be clear with regard to whether consultation must precede
15 *waivers* and *contracts*, the provision is clear that consultation must precede *construction*.
16 To hold otherwise would be inconsistent with the consultation provision’s stated purpose:
17 to minimize impacts in the area where fencing “is *to be* constructed.” IIRIRA §
18 102(b)(1)(C)(ii)(1) (emphasis added). Defendants have violated the clear and mandatory
19 prerequisite to the exercise of authority under Sections 102(a) and (b)—consultation—and
20 thus any construction on the Project is ultra vires.

21 **B. Defendants’ actions violate RFRA.**

22 The President’s former Attorney General has explained the import of federal law
23 protecting religious liberty: “[T]o the greatest extent practicable and permitted by law,
24 religious observance and practice should be reasonably accommodated in all government
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26
27 ⁵ See section I.A.iv, *supra*.

1 activity.”⁶ The hallmark of these laws, the Religious Freedom Restoration Act of 1993
2 (“RFRA”), requires the government to demonstrate that any government action that
3 “substantially burdens” a person’s “exercise of religion” is in “is in furtherance of a
4 compelling governmental interest” and “is the least restrictive means of furthering that
5 compelling governmental interest.” 42 U.S.C. § 2000bb–1.⁷ Defendants substantially
6 burden La Posta citizens’ exercise of religion by preventing them from accessing their
7 ancestral burial and other sacred sites, and the Project is not the least restrictive means of
8 furthering a compelling governmental interest.

9 **i. La Posta’s treatment of ancestral remains and access to sacred**
10 **sites is essential to its exercise of religion.**

11 “Exercise of religion” means “any exercise of religion, whether or not compelled by,
12 or central to, a system of religious belief.” 42 U.S.C. § 2000bb–2(4); 42 U.S.C. § 2000cc–
13 5(7)(A). In determining whether a set of beliefs should be protected as “religious,” the
14 Ninth Circuit has analyzed “whether the beliefs professed ... are sincerely held and whether
15 they are, in [a claimant’s] own scheme of things, religious.” *United States v. Ward*, 989
16 F.2d 1015, 1018 (9th Cir. 1992) (quoting *United States v. Seeger*, 380 U.S. 163, 174
17 (1965)).

18 Here, La Posta citizens hold sincere religious beliefs that exhumed burials must be
19 properly handled and reburied. They also hold sincere beliefs that various natural
20 landmarks within the path of the border wall projects are sacred places; and engage in
21 ceremonies and rituals there. Because La Posta’s beliefs are sincere and, in its own scheme
22 of things, religious, the practices in question are the “exercise of religion.”

23 **ii. The Project substantially burdens La Posta’s exercise of religion.**

24
25 ⁶ United States Attorney General Jeff Sessions, Memorandum for All Executive
26 Departments and Agencies, “Federal Law Protections for Religious Liberty” (October 6,
27 2017) (“Sessions Memorandum”) at 1 (available at
28 <https://www.justice.gov/crt/page/file/1006786/download>).

⁷ The IIRIRA Waiver did not waive RFRA.

1 The Project “substantially burdens” La Posta citizens’ exercise of their religion by
2 prohibiting such exercise. “Under RFRA, a ‘substantial burden’ is imposed only when
3 individuals are forced to choose between following the tenets of their religion and receiving
4 a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by
5 the threat of civil or criminal sanctions. (*Yoder*).” *Navajo Nation v. U.S. Forest Serv.*, 535
6 F.3d 1058, 1069–70 (9th Cir. 2008). Defendant’s actions constitute a substantial burden
7 under both *Sherbert* and *Yoder*.

8 First, the Defendants are excavating and desecrating Kumeyaay burials without
9 allowing La Posta access to properly treat the exhumed remains. While the Defendants are
10 now allowing one cultural monitor from La Posta within the 21-mile Project Area, such an
11 arrangement does not permit sufficient coverage to monitor every exhumation. Even when
12 a cultural monitor does observe an exhumation, she is not permitted access to properly treat
13 the remains in a culturally appropriate manner.

14 Second, the border wall has made and will continue to make Kumeyaay sacred sites
15 that lie within and south of the Project Area inaccessible. La Posta citizens are not and will
16 not be able to access Table Mountain, Jacumba Hot Springs, and Tecate Peak for religious
17 ceremonies. These sites lie within the Project Area and the Defendants’ continued
18 construction will prevent access to these sites by La Posta citizens. Additionally,
19 defendants have threatened La Posta citizens with arrest and criminal trespass charges
20 while attempting to access sites to pray and engage in ceremonies within the Project Area.

21 Preventing access to burial and sacred sites by threat of criminal sanction fits
22 squarely within the Ninth Circuit framework and amounts to a substantial burden. *Navajo*
23 *Nation*, 535 F.3d at 1070 (“The Plaintiffs are not fined or penalized in any way for
24 practicing their religion on the Peaks or on the Snowbowl”). While preventing access to
25 sites by physical barrier does not fit as nicely into the Ninth Circuit’s test, it should require
26 little analysis to determine that the outright prevention of the exercise of religion due to the
27 imposition of a physical barrier is a substantial burden. The Tenth Circuit’s simpler
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1 recitation of the substantial burden test makes this clear: government conduct amounts to
 2 a substantial burden when it “prevents the plaintiff from participating in an activity
 3 motivated by a sincerely held religious belief.” *Yellowbear v. Lampert*, 741 F.3d 48, 55
 4 (10th Cir. 2014); *see also* Sessions Memorandum at 4 (“In general, a government action
 5 that bans an aspect of an adherent’s religious observance or practice . . . will qualify as a
 6 substantial burden on the exercise of religion.” Here, the Project bans members of La Posta
 7 from properly treating their exhumed relatives and participating in ceremonies at their
 8 sacred sites, imposing a substantial burden on La Posta citizens exercise of religion.

9 The Defendants’ offers of inadequate cultural monitoring also forces La Posta and
 10 its members to choose between two untenable courses of action—either (a) participating
 11 in such limited cultural monitoring as CBP may choose to offer (while at the same time the
 12 ongoing construction is damaging and destroying La Posta’s religious and cultural
 13 resources), or (b) refusing to be an active participant in a process that will damage and
 14 destroy La Posta’s physical, spiritual, and cultural footprint in the Project Area. Forcing
 15 this choice violates RFRA.

16 **iii. The border wall projects are not the least restrictive means to**
 17 **further a compelling government interest.**

18 Because La Posta can demonstrate a substantial burden on their citizens’ exercise
 19 of religion, “the burden of persuasion shifts to the government to prove that the challenged
 20 government action is in furtherance of a ‘compelling governmental interest’ and is
 21 implemented by ‘the least restrictive means.’” *Navajo Nation*, 535 F.3d at 1068 (citing 42
 22 U.S.C. § 2000bb–1(b)). Defendants cannot meet that burden.

23 La Posta acknowledges Defendants’ interest is in border security. *See* Executive
 24 Order 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). However, a physical barrier along the
 25 span of the California-Mexico border is not the least restrictive means to further that
 26 interest. First, the Defendants can offer no evidence that a construction process and plan
 27 that accommodates Kumeyaay religious practice would not equally achieve its interest.
 28 Second, the Defendants can offer no evidence that construction of a wall is necessary to

1 achieve its interest in the Project Area. As the OIG reported, CBP did not adequately
 2 justify the need for the Project and ignored its own decision-making algorithm to
 3 arbitrarily prioritize the specific Project area. In fact, CBP’s approach diminishes “the
 4 likelihood that CBP will be able to obtain and maintain complete operational control” of
 5 the border. Thus, the Project is not the least restrictive (or most effective) way to achieve
 6 border security.

7 **C. The Project violates La Posta citizens’ Fifth Amendment rights.**

8 “No person shall . . . be deprived of life, liberty, or property without due process of
 9 law . . .” U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment authorizes
 10 a private cause of action as remedy for violations. *Davis v. Passman*, 442 U.S. 228, 242–
 11 44 (1979). The Fifth Amendment guarantees both procedural as well as substantive rights.
 12 *See, e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987).

13 **i. La Posta citizens have a constitutionally-protected property right.**

14 For purposes of the Fifth Amendment, “property” “denote[s] the group of rights
 15 inhering in the citizen’s relation to the physical thing, as the right to possess, use and
 16 dispose of it.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). “[T]he types
 17 of interests protected as property are varied and, as often as not, intangible, relating to the
 18 whole domain of social and economic fact.” *Logan v. Zimmerman Brush Co.*, 455 U.S.
 19 422, 430 (1982) (internal quotations omitted). In slightly more concrete terms, “[t]he
 20 property interests that due process protects extend beyond tangible property and include
 21 anything to which a plaintiff has a ‘legitimate claim of entitlement.’” *Nozzi v. Hous. Auth.*
 22 *of City of Los Angeles*, 806 F.3d 1178, 1191 (9th Cir. 2015), *as amended on denial of reh’g*
 23 *and reh’g en banc* (Jan. 29, 2016) (quoting *Board of Regents of State Colleges v. Roth*, 408
 24 U.S. 564, 576–77 (2015)). The “dimensions” of such an entitlement “are defined by
 25 existing rules or understandings that stem from an independent [of the Constitution] source
 26 such as state law—rules or understandings that secure certain benefits and that support
 27 claims of entitlement to those benefits.” *Id.* Federal statutes, likewise, have been
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1 recognized as an independent source of law that may create property interests subject to
2 the protection of the Fifth Amendment. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332
3 (1976) (recognizing Fifth Amendment property interest in social security benefits created
4 by federal statute).

5 La Posta citizens have constitutionally protected property interests in their cultural
6 items and ancestral remains. The Native American Graves Protection and Repatriation Act
7 (“NAGPRA”), 25 U.S.C. §§ 3001–3013, for example, recognizes a tribe’s right to
8 “possess, use and dispose” of cultural items that rest on federal lands and to which they
9 have an ancestral or cultural connection. *See Gen. Motors Corp.*, 323 U.S. at 378. In fact,
10 NAGPRA “vests ‘ownership and control’ over cultural items” in tribes that are culturally
11 affiliated with the remains or in whose aboriginal territory the items were discovered. *White*
12 *v. Univ. of California*, 765 F.3d 1010, 1016 (9th Cir. 2014) (quoting 25 U.S.C. § 3002(a)).

13 The remains that Defendants are desecrating are of the lineal ancestors of current La
14 Posta citizens, and La Posta’s aboriginal lands extend into the Project Area, meaning, that
15 even if cultural affiliation cannot be established for certain items, La Posta citizens are
16 entitled to possess and use these items in religious and cultural practices. Thus—based
17 even on the cursory and inadequate monitoring and site-evaluation Defendants have
18 allowed—it is clear La Posta citizens have a right to the “ownership or control” of these
19 cultural items. This interest is more than sufficient to create a property right that the Fifth
20 Amendment protects. *See, generally Armstrong v. United States*, 364 U.S. 40, 44 (1960)
21 (holding materialmen’s liens abrogated by action of the United States were property
22 protected by the Fifth Amendment); *Lynch v. United States*, 292 U.S. 571, 579 (1934)
23 (recognizing contract rights as property protected by Fifth Amendment).

24 The IIRIRA Waiver of NAGPRA does not change this result. NAGPRA does not
25 “limit any procedural or substantive right which may otherwise be secured to individuals
26 or Indians tribes . . .” 25 U.S.C. § 3009(4). This means that the waiver of NAGPRA does
27 not preclude La Posta’s tribal members from protecting their property interests via means
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1 other than NAGPRA, such as direct action under the Fifth Amendment. Moreover, the
 2 property rights NAGPRA recognizes vest as soon as cultural items are “excavated or
 3 discovered.” 25 U.S.C. § 3002(a); *White*, 765 F.3d at 1016. Upon excavation or discovery,
 4 no “governmental agency retains discretion to grant or deny the benefit” of ownership and
 5 control of cultural items to lineal descendants and, in their absence, culturally-associated
 6 tribes. *Brenizer v. Ray*, 915 F. Supp. 176, 181 (C.D. Cal. 1996); *see generally* 25 U.S.C.
 7 §§ 3001–10. Thus, with respect to the known cultural items that have been found by
 8 Kumeyaay people and historical preservation professionals since November 16, 1990, the
 9 IIRIRA Waiver is immaterial.

10 **ii. Defendants violate La Posta citizens’ substantive and procedural**
 11 **due process rights.**

12 “When a fundamental right is recognized, substantive due process forbids the
 13 infringement of that right ‘at all, no matter what process is provided, unless the
 14 infringement is narrowly tailored to serve a compelling state interest.’” *Witt v. Dep’t of Air*
 15 *Force*, 527 F.3d 806, 817 (9th Cir. 2008) (quoting *Reno v. Flores*, 507 U.S. 292, 301–02
 16 (1993)). “Procedural due process imposes constraints on governmental decisions which
 17 deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due
 18 Process Clause[.]” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). As explained above, the
 19 border wall construction activities implicate La Posta citizens’ constitutionally-protected
 20 property interests. Because of the nature of these interests, La Posta citizens are entitled to
 21 basic notice and the opportunity to be heard regarding the deprivation of these interests.
 22 *See, e.g., id.* (“Parties whose rights are to be affected are entitled to be heard; and in order
 23 that they may enjoy that right they must first be notified.” (internal quotations and citations
 24 omitted)). “[D]ue process is flexible and calls for such procedural protections as the
 25 particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), and
 26 “requires analysis of the governmental and private interests that are affected.” *Eldridge*,
 27 424 U.S. at 334.

1 This analysis requires consideration of “the private interest that will be affected by
2 the official action,” “the risk of an erroneous deprivation of such interest through the
3 procedures used, and the probable value, if any, of additional or substitute procedural
4 safeguards”, and “the Government’s interest, including the function involved and the fiscal
5 and administrative burdens that the additional or substitute procedural requirement would
6 entail.” *Id.* at 334–35. Furthermore, “the right to notice and an opportunity to be heard
7 ‘must be granted at a meaningful time and in a meaningful manner.’” *Id.* (quoting
8 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

9 Defendants’ destruction of Kumeyaay cultural heritage and ancestral remains
10 violates La Posta citizens’ substantive due process rights because the actions are not
11 narrowly-tailored to serve that interest, as explained in Section I(B)(iii). Even if narrowly
12 tailored, the actions violate La Posta citizens’ procedural due process rights. Defendants
13 gave no formal notice to La Posta regarding the timing, sites, or manner of construction
14 activities for the Project. Instead, Defendants have refused to provide this information or
15 engage in formal consultation despite repeated requests. The lack of any meaningful notice
16 before Defendants began destroying Plaintiffs’ property falls far below the constitutional
17 standard. Defendants’ non-process carries an enormous risk of the erroneous deprivation
18 of constitutionally-protected property and liberty interests—it already has. Although tribal
19 cultural sites and ancestral cemeteries were identified in prior surveys, and are known to
20 many Kumeyaay people, those sites were not avoided, and no advance opportunity to
21 protect them was afforded.⁸ Instead, Plaintiffs are becoming aware of violations of their
22 interest only after it is too late to protect them, such as when human remains were found
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26 ⁸The general notices of certain of Defendants’ actions related to this matter published in
27 the Federal Register cannot be sufficient given the more than “purely speculative” interest
28 of Plaintiffs in known Kumeyaay historical, spiritual, and archeological sites. *See Williams*
v. Mukasey, 531 F.3d 1040, 1042 (9th Cir. 2008).

1 on July 10, 2020 and the CBP *did nothing* to protect them from the path of heavy
2 construction equipment.

3 Native American human remains have been destroyed, and possibly even pulverized
4 by heavy equipment and made into the cement that is used to anchor the metal barrier in
5 place. No process was afforded before this occurred. The tragedy is deepened by how easily
6 avoidable episodes like this are. When human remains were found, however, the CPB did
7 nothing. Defendants’ begrudging agreement to allow tribal monitors without authority to
8 stop work months after commencing construction and destroying unknown numbers of
9 burial sites and cultural items falls far short. *Mullane v. Central Hanover Bank & Trust*
10 *Co.*, 339 U.S. 306, 315 (1950) (“Process which is a mere gesture is not due process.”).

11 The standard for the process due when government actions threaten to destroy tribal
12 cultural property is embodied by NAGPRA and its implementing regulations, 45 C.F.R.
13 Pt. 10. Plaintiffs, however, are willing to consult with Defendants to find a mutually-
14 agreeable procedure which affords the basic protections outlined at the conclusion of this
15 memorandum. While these safeguards would impose administrative and financial burdens
16 on Defendants, temporarily ceasing the Project would, according to the CBP’s own
17 algorithm, actually allow CBP to use its resources more effectively in other areas.
18 Moreover, pausing construction activities to afford time to take the steps necessary to give
19 due process to foundational rights is what the Constitution requires.

20 **II. La Posta is suffering irreparable harm and will suffer further harm in**
21 **the absence of a preliminary injunction.**

22 La Posta citizens are deeply connected to their religion and cultural heritage.
23 Construction of the Project has permanently destroyed and blocked access to numerous
24 and irreplaceable sacred sites and cultural remains. Such actions have seriously harmed La
25 Posta citizens by destroying their ability to practice their culture and religion. Many more
26 sacred sites and cultural artifacts lie in the path of construction. Defendants have also
27 unlawfully desecrated human remains belonging to La Posta ancestors. These remains can
28 never be salvaged once destroyed. Without a preliminary injunction, Defendants will

1 continue with these actions leaving the La Posta to continue to face serious harm.

2 The Defendants’ actions do not only harm La Posta’s unique interests in their culture
3 and religion but deprive their citizens of constitutionally protected rights. It is well
4 established in the Ninth Circuit that the deprivation of constitutional rights “unquestionably
5 constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

6 **III. The public interest and balance of the equities weigh in favor of an**
7 **injunction.**

8 When the government is a party to a case in which a preliminary injunction is sought,
9 the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v.*
10 *Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). By denying the Defendants’ request for
11 funding the Project, “Congress presumably decided such construction at this time was not
12 in the public interest.” *Sierra Club I*, 929 F.3d at 707. And while the public surely has an
13 interest in border security, the public also has an interest in ensuring that “statutes enacted
14 by [their] representatives are not imperiled by executive fiat.” *Sierra Club II*, 963 F.3d at
15 895 (quotations and citations omitted). The Ninth Circuit has forcefully recognized the
16 Defendants’ relative lack of interest in this context:

17 Defendants cannot suffer harm from an injunction that merely ends an unlawful
18 practice. . . . Defendants’ position essentially boils down to an argument that the
19 Court should not enjoin conduct found to be unlawful because the ends justify the
20 means. No matter how great the collateral benefits of building a border wall may be,
21 the transfer of funds for construction remains unlawful. The equitable maxim ‘he
22 who comes in equity must come with clean hands’ would be turned on its head if
unlawful conduct by one party precluded a court from granting equitable relief to
the opposing party.

23 *Id.* at 895–96 (internal citations and quotations omitted).

24 The harm to La Posta, on the other hand, is not speculative, and will be irreparable
25 in the absence of an injunction. Accordingly, this factor favors La Posta, and counsels in
26 favor of a preliminary injunction, to preserve the status quo and La Posta’s invaluable
27 cultural resources until the merits of the case can be promptly resolved.

CONCLUSION & REQUEST FOR RELIEF

For the foregoing reasons, La Posta is likely to succeed on the merits, will continue to suffer irreparable harm in the absence of a preliminary injunction, and the public interest and balance of equities favors an injunction. Accordingly, La Posta respectfully request this court enter a preliminary injunction that requires the Defendants to immediately cease all construction activity on the Project until the Defendants (i) adequately consult with La Posta regarding cultural items, sacred sites, and historical sites which may be adversely impacted by the Project; (ii) take appropriate, respectful measures to mitigate the adverse impacts, including (a) tribal monitoring (with authority to stop work), (b) modification of proposed border security measures, (c) catalogue and repatriation of cultural items within the Project Area, and (d) a cultural survey of the Project Area that allows for registration of all sites eligible for listing on an appropriate registry; and iii) permit access to Kumeyaay sacred sites, as identified by La Posta.

Respectfully submitted.

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