

Case No. 20-5333

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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MANZANITA BAND OF THE KUMEYAAY NATION, et al.,  
*Appellants*

v.

CHAD WOLF, Under Secretary of Homeland Security for  
Strategy, Policy, and Plans, et al.,  
*Appellees*

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On Appeal from the United States District Court  
for the District of Columbia  
No. 1:20-cv-02712 (TNM)

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**APPELLANTS' EMERGENCY MOTION FOR INJUNCTION  
PENDING APPEAL AND FOR EXPEDITED APPEAL**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

**Parties and Amici.** The parties who appeared in the District Court were Plaintiffs Manzanita Band of the Kumeyaay Nation, Campo Kumeyaay Nation, Ewiiapaayp Band of Kumeyaay Indians, Iipay Nation of Santa Ysabel, Sycuan Band of the Kumeyaay Nation, John Elliott, and Kumeyaay Heritage Preservation Council, and Defendants Chad Wolf, in his official capacity as Under Secretary of Homeland Security for Strategy, Policy, and Plans, the Department of Homeland Security, Mark Morgan, in his official capacity as Senior Official Performing the Duties of the Commissioner of the United States Customs and Border Protection, the United States Customs and Border Protection (“CBP”), Scott Spellmon, in his official capacity as Commanding General of the United States Army Corps of Engineers, and the United States Army Corps of Engineers. (The complaint named Todd Semonite as the Commanding General of the United States Army Corps of Engineers, but Scott Spellmon occupied that office during the litigation.) As of the date of this filing, there are no amici below.

The parties appearing in this Court are Appellants Manzanita Band of the Kumeyaay Nation, Campo Kumeyaay Nation, Ewiiapaayp Band of Kumeyaay Indians, Sycuan Band of the Kumeyaay Nation, John Elliott, and Kumeyaay Heritage Preservation Council (collectively, “Tribes”), and Appellees Chad Wolf, in his official capacity as Under Secretary of Homeland Security for Strategy, Policy,

and Plans, the Department of Homeland Security, Mark Morgan, in his official capacity as Senior Official Performing the Duties of the Commissioner of the United States Customs and Border Protection, the United States Customs and Border Protection, Scott Spellmon, in his official capacity as Commanding General of the United States Army Corps of Engineers, and the United States Army Corps of Engineers. As of the date of this filing, there are no amici in this Court.

**Rulings under Review.** The rulings at issue in this Court are the District Court's October 16, 2020 Memorandum Opinion and Order denying the Plaintiffs' Motion for a Preliminary Injunction, which are available at ECF Nos. 23 and 24 in the docket for case number 1:20-cv-02712 (TNM) in the United States District Court for the District of Columbia. The Memorandum Opinion and Order have been provided to this Court by the District Court, and the Memorandum Opinion is available at 2020 WL 6118182.

**Related Cases.** Before the District Court, Defendants filed a Notice of Related Cases indicating that the following cases pending in the United States District Court for the District of Columbia are related to this one: *Center for Biological Diversity v. Esper*, No. 1:19-cv-00408 (TNM) and *Center for Biological Diversity v. Esper*, No. 1:20-cv-01230 (TNM).

**RULE 26.1 DISCLOSURE STATEMENT**

Appellant Kumeyaay Heritage Preservation Council (“KHPC”) is a non-profit association that was created by nine Kumeyaay Indian tribes to support the preservation of Kumeyaay history and culture. It has no parent corporation, and no corporation owns 10% or more of stock in KHPC.



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## INTRODUCTION

Pursuant to Circuit Rules 8 and 27(f), Appellants (“Tribes”) seek an emergency injunction pending appeal and an expedited appeal to prevent the desecration of their ancestors’ remains and the sites and resources on which their religious exercise depends, caused daily by the Appellees’ illegal construction of a fence at the U.S.-Mexico border. The District Court denied the Tribes’ request for a preliminary injunction because it reasoned the Tribes did not face irreparable harm. The Tribes ask the Court to act on this motion by November 20, 2020 to preserve the Tribes’ rights pending appeal.

Appellees are constructing the border fence without complying with federal laws. They claim they can do so in part because Appellee Chad Wolf (“Wolf”), who unlawfully claims to be Acting Secretary of Homeland Security (“Secretary”), purported to waive the applicability of those laws, including the Native American Graves Protection and Repatriation Act (“NAGPRA”), National Environmental Policy Act (“NEPA”), National Historic Preservation Act (“NHPA”), Endangered Species Act (“ESA”), and Administrative Procedure Act (“APA”). He did so by claiming the Secretary’s authority under the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). But he has no right to that authority.

On November 10th, the Tribes notified counsel for Appellees of their intention to file this motion, which Appellees oppose.

## BACKGROUND

The Kumeyaay are the indigenous people of southern California and northern Mexico. Today, Kumeyaay are members of thirteen federally-recognized Indian tribes in southern California. Kumeyaay practice their religion and culture at sites in both countries, including in the areas of border fence construction.

For instance, Tecate Peak (Kuchamaa), located on the border in San Diego County east of the project sites, is a mountain listed on the National Register of Historic Places (“NRHP”). Religious leaders and Kumeyaay healers historically held ceremonies there, Elliott ¶¶8, and it is equivalent to a cathedral in Kumeyaay religion. Kumeyaay Boundary Mountain (Awi’hopil) is a sacred mountain, Elliott ¶¶4, 6, located just north of the border, less than a thousand feet from the border fence project site, Carrico ¶14. Awi’hopil served as a resting place for traveling Kumeyaay, and Kumeyaay use and occupancy of the area is confirmed by a large archaeological site, P-37-004466, located within ten yards of the border fence, *td*.

Jacumba is a village site in San Diego County that extends several miles in all directions from Jacumba Hot Springs. The 4,222-acre NHPA-protected Jacumba Valley Archaeological District adjacent to the border fence encompasses 144 archaeological sites, including Kumeyaay villages, sacred, ceremonial, and plant-gathering sites, and trails. Haws Decl. ¶23. Jacumba still has religious significance and is the central location of a Kumeyaay origin story. Carrico ¶¶15-17; Elliott ¶¶4,



5, 10. Kumeyaay traditionally used water from the Jacumba springs for its restorative powers. Carrico ¶16. Jacumba is an important location for gathering natural resources that support Kumeyaay religious and cultural practices. Elliott ¶¶10-11; Carrico ¶17.

East of Jacumba is the NHPA-protected Yuha Basin Discontiguous District. A 1977 survey there produced the greatest concentration of pre-contact archaeological resources in southern California to that date. Haws ¶24.

Villages and sacred sites in Jacumba are linked by historically- and religiously-significant trails to Kumeyaay villages to the north and with points east. Carrico ¶18-19. Some trails were used for travel, trade, and gathering; Kumeyaay used others to travel to ceremonial and sacred sites. *Id.*

The bighorn sheep inhabiting the border region have special cultural significance to the Kumeyaay, Elliott ¶17, and are protected by the ESA, 74 Fed. Reg. 17,288 (Apr. 14, 2009). Construction of a new border fence segment in western Imperial County could disrupt a migration path for bighorn sheep and irreparably harm the species. Robert L. Peters et al., Defs. of Wildlife, *In the Shadow of the Wall: Part II Borderlands Conservation Hotspots on the Line* 9-10 (2018).<sup>1</sup>

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<sup>1</sup> <https://defenders.org/sites/default/files/migration/docs/defenders-borderreport-partii.pdf>.

Kumeyaay religion and culture depend on Kumeyaay access to these resources. The new sections of border fence threaten that access, as they directly affect Jacumba and other sites and threaten to destroy irreplaceable historical resources and artifacts.

Construction threatens cremation and burial sites. A forensic anthropologist determined that remains found at the project site during construction are likely human. Carrico ¶30; Haws ¶18. Inadequate monitoring of construction makes inevitable the further destruction or disturbance of human remains. In Kumeyaay religion, if human remains are disturbed, the deceased's soul cannot rest until Kumeyaay people engage in reinterment ceremonies. Santos Decl. ¶16; Elliott ¶15. Without sufficient monitoring and mitigation, such ceremonies are not possible.

The Tribes suffer injury each day that construction continues, and the Tribes are therefore requesting immediate relief.<sup>2</sup>

### **LEGAL STANDARD**

A movant seeking an injunction pending appeal must make a clear showing “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm

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<sup>2</sup> The Tribes did not immediately appeal the District Court's order only because tribal representatives discovered on October 20 that the fence had been constructed through a Kumeyaay cultural site that the Tribes had previously been unable to visit. The Tribes began evaluating the site and the construction impacts to determine whether to present that evidence to the District Court or come directly to this Court. The Tribes then received information that construction may be completed by end of December, making it necessary to seek emergency relief here.

in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). It must additionally be “likely” that the district court “abused its discretion in not sufficiently crediting” the movant’s showing of the factors and denying a preliminary injunction. *Id.* at 1131-32 (citing *Wash. Metro. Area Transit Comm’n. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).<sup>3</sup>

Under the first factor, a movant must establish a likelihood of success on at least one claim. *See Winter*, 555 U.S. at 20; *League of Women Voters v. Newby* (*Newby II*), 963 F.3d 130, 134 (D.C. Cir. 2020); *see also A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 921 (6th Cir. 2018) (“reasonable likelihood of success on the merits” sufficient for an injunction pending appeal). Under the second factor, harm is irreparable when it is “so ‘imminent that there is a clear and present need for

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<sup>3</sup> *John Doe* found that the movant had failed to show the first two factors and that the district court did not abuse its discretion in the weight it gave those factors. *Id.* at 1135. Assuming *John Doe* might suggest the district court’s ruling on each factor is reviewed for abuse of discretion, here that would only apply to irreparable harm, since the District Court made no findings on any other factor. “A district court abuses its discretion when it makes an error of law,” *Oceana, Inc. v. Ross*, 920 F.3d 855, 864 (D.C. Cir. 2019) (quotation omitted), and abuses its discretion on the irreparable harm factor by denying an injunction despite a record that “strongly suggests...a likelihood of irreparable harm,” *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1171 (Fed. Cir. 2014).

equitable relief” and “beyond remediation.” *League of Women Voters v. Newby* (*Newby I*), 838 F.3d 1, 8 (D.C. Cir. 2016) (alteration omitted) (quoting *England*, 454 F.3d at 297). A movant must demonstrate “at least some injury” to obtain relief. *England*, 454 F.3d at 297. These first two factors are the “most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). The third and fourth factors “merge when the Government is the opposing party.” *Id.* at 435. D.C. Circuit courts evaluate these factors on a “sliding scale”—if a “movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).

The District Court only considered the second factor, but all factors favor an injunction pending appeal because the Tribes will succeed on the merits, Appellees are causing irreparable harm, and the equities favor the Tribes.

## ARGUMENT

### I. THE TRIBES ARE LIKELY TO SUCCEED ON THE MERITS.

Appellees have failed to comply with IIRIRA and other federal statutes that govern federal construction projects.

#### A. Appellees Have Not Complied with IIRIRA’s Consultation Requirement.

Appellees are constructing the border fence under IIRIRA §102, 8 U.S.C. §1103 note, which mandates that the Secretary “shall consult with...Indian

tribes...to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which [border] fencing is to be constructed.” IIRIRA §102(b)(1)(C)(i). Consultation must precede construction, since consultation must relate to sites at which fencing “is to be constructed.” IIRIRA §102(b)(1)(C)(i). The infinitive “to be” means construction “is due to happen,” *see New Oxford American Dictionary* 142 (3d ed. 2010), in contrast to the present-tense “shall consult” used earlier, *see Carr v. United States*, 560 U.S. 438, 449-50 (2010). And consultation *after* construction would lack “serious purpose” and not be “likely to produce tangible results.” *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring).

Appellees did not engage with the Tribes until *after* DHS announced the projects. *See* Haws ¶¶10-11; Enriquez Decl. ¶¶12, 28. The overwhelming majority of communications with the Tribes occurred after construction began, Enriquez ¶¶14, 30-61, and construction has never stopped, Santos ¶¶6, 8-19 & Exs. 2, 8. Appellees’ communications with the Tribes have not been sufficient to gather information from the Tribes, Haws ¶¶12, 19, 21, 25b-c, e; Santos ¶13, and Appellees have rejected opportunities to integrate such meaningful input into their plans.

The Tribes have repeatedly raised concerns that went unaddressed. *See, e.g.*, Haws ¶¶12, 18, 21; Santos Ex. 2. Tribal representatives warned that human remains were found near the project site and requested proper surveying and monitoring.

Haws ¶¶12, 17-18; Santos ¶¶14-15. The Tribes noted that CBP’s cultural resource monitoring is less comprehensive than other recent projects, Santos Ex. 2 at 11; *see* Enriquez ¶¶30-32, 37, 54. Appellees downplayed tribal concerns, asserted CBP will tell the Tribes what it has *already* decided to do, *see* Haws ¶14, and maintained that they do not have adequate funds to employ even one tribal monitor per active construction site, Enriquez ¶¶54, 72; Santos Ex. 2 at 11; Haws ¶25f-g; Elliott Decl. (Second) ¶2.

**B. Appellees’ Demand that the Tribes Engage in Consultation Without Stopping Construction Violates RFRA.**

Appellees have also demanded that the Tribes engage in “communication” and “coordination” *while construction is ongoing*—requiring the Tribes to accept severe ongoing restrictions on their ability to engage in Kumeyaay religion in exchange for the benefit of consultation (albeit limited), purportedly to determine how to minimize effects which have already occurred and are continuing. Appellees are also preventing the Tribes from engaging in religious ceremonies. This violates RFRA.

RFRA prohibits Appellees from implementing federal law in a manner that would substantially burden *any* exercise of religion, unless the burden is the “least restrictive means” of furthering a “compelling governmental interest.” 42 U.S.C. §§2000bb-1(a)-(b), 2000bb-2(4), 2000bb-3(a). The government imposes a “substantial burden” by forcing a person to either follow her religion and forfeit

benefits or abandon her religion to accept benefits, *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963), or by coercing her not to exercise her faith, *see Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972).

Appellees are imposing those burdens. Areas of religious significance are being harmed or degraded on an ongoing basis, Elliott ¶¶10-12, 15, which the Tribes must accept to consult and hopefully limit further harms to religious practice. Kumeyaay individuals have had to negotiate with federal officials to engage in religious practices at or near the project site. *Id.* ¶16. And, because there are insufficient monitors, *see* Haws ¶¶17-18, 25g-h, k; Santos ¶14, monitoring is inadequate to determine when human remains are disturbed and religious ceremonies are required, and so these rites are made impossible.

Appellees point to *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), and *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F.Supp.3d 77 (D.D.C. 2017), to suggest that there is no substantial burden where the Government interferes with Indian religious practice by undertaking “internal activities” on its own lands. Similarly, the District Court cited *Lyng* to support its finding that the Tribes’ showing of likely harm to important nearby sacred sites that is “incidental to the Government’s use of its own land” did not meet the irreparable harm standard. Op.13. But in those cases, the government’s actions were “internal”

because adherents' subjective religious feelings were impacted by government action while religious sites and ceremonies were unaffected. *See Lyng*, 485 U.S. at 453-54; *Navajo Nation*, 535 F.3d at 1063; *Standing Rock*, 239 F.Supp.3d at 89. Here, sites are impacted, and certain rites are impossible. That is not purely "internal," and it imposes a substantial and continuing burden, even on government land. *See United States v. Hoffman*, 436 F.Supp.3d 1272, 1285 (D. Ariz. 2020) (substantial burden from prosecution of adherents for entering federal lands to engage in "activity motivated by sincerely held religious beliefs" (citing *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.))).

Appellees' actions are not justified by a compelling interest. The Government carries the burden to demonstrate that the burden on religious exercise is the least restrictive alternative for achieving a compelling government interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (citation omitted). Whatever the interest, Appellees' approach is not narrowly tailored to achieve it. The Government could have consulted and developed a route, construction methods, schedules, and protocols to accommodate Kumeyaay religion. Because this alternative is available, Appellees' actions violate RFRA.



**C. Appellees Are Violating NEPA, NHPA, NAGPRA, and ESA.**

**1. Appellees Have Not Complied with “Stop, Look, and Listen” Laws.**

The construction of the border fence triggers federal laws that require agencies to “stop, look, and listen” before undertaking such efforts. Under NEPA, federal agencies must take a “hard look” at the possible environmental impacts before approving a major project and provide a written discussion of such impacts. *See* 42 U.S.C. §4332(C)(i)-(iii). Under the NHPA, federal agencies must “take into account the effect of [a federal] undertaking on any historic property” protected by the NHPA. 54 U.S.C. §306108; *see* 36 C.F.R. §800.16(l). NAGPRA, 25 U.S.C. §§3001-3013, governs the federal government’s treatment of Indian human remains and funerary objects, *id.* §3001(3). Under the ESA, *see* 16 U.S.C. §1533, federal agencies must consult with the Fish and Wildlife Service to “reduce the likelihood of conflicts between listed species or critical habitat and proposed actions,” 50 C.F.R. §402.11(a).

Appellees have not complied with these statutes.

**2. Failure to Comply is not Excused by Wolf’s Purported Waivers.**

Appellees argue that these laws do not apply because Wolf purportedly waived them, as allowed by IIRIRA §102(c)(1).<sup>4</sup> But IIRIRA only allows the *Secretary* to issue

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<sup>4</sup> *See* 85 Fed. Reg. 14,958 (Mar. 16, 2020); 85 Fed. Reg. 14,960 (Mar. 16, 2020).

waivers. Wolf has never legally held that position, so his purported waivers are invalid. *See Casa de Md. v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165, at \*14 (D. Md. Sept. 11, 2020).

Wolf has never been confirmed by the Senate and can only exercise the Secretary's authority pursuant to laws authorizing the President to temporarily designate an officer to serve as Acting Secretary. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). Those laws are the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§3345-3349d, and the Homeland Security Act, 6 U.S.C. §113. Under those laws, Wolf is not Secretary.

The FVRA allows the President to designate officers to temporarily replace a Senate-confirmed officer who resigns. 5 U.S.C. §3345(a)(2)-(3). On December 9, 2016, the President used that authority to issue Executive Order 13,753, 81 Fed. Reg. 90,667, designating the order of succession to the office of the Secretary. On December 15, 2016, the Secretary issued Delegation 00106, describing the order of succession or delegation of authority for various DHS offices. Blackwell Decl. Ex. 5. Section II.A of Delegation 00106 provided that, if the Secretary resigned, Executive Order 13,753 controlled the order of succession. Section II.B provided that "Appendix A" would control delegation of the Secretary's authority in the event of a "disaster or catastrophic emergency."

Later, Congress amended the Homeland Security Act to allow the Secretary to set succession for vacancies in the position of Secretary, notwithstanding the FVRA. 6 U.S.C. §113(g)(1)-(2). On April 9 and 10, 2019, Secretary Kirstjen Nielsen purported to exercise that authority by signing a memorandum (“April 9 Memo”) approving an amended Appendix A of Delegation 00106 (“Purported April 10 Delegation”). *See* Blackwell Exs. 1, 2. That created a new order of succession to the office of Secretary *in the event of a disaster or emergency*, but did not affect Section II.A or the order of succession *in the event of resignation*. This limited change is reflected in the text of the Purported April 10 Delegation.<sup>5</sup>

On April 10, Nielsen left office. At that time, the official who was next in line under Section II.A and Executive Order 13,753 was the Director of Cybersecurity and Infrastructure Security Agency, who was *fourth* in line in the event of the Secretary’s resignation.<sup>6</sup> However, DHS instead applied the order of succession in Appendix A – which did not apply because Nielsen resigned and there was no disaster or emergency – and elevated Kevin McAleenan, who was *seventh* in line.

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<sup>5</sup> The April 9 Memo and Purported April 10 Delegation were invalid because Nielsen had resigned on April 7. *See* @realDonaldTrump, Twitter (Apr. 7, 2019 6:02 PM), <https://twitter.com/realDonaldTrump/status/1115011884154064896>. But whether they were valid or not, Executive Order 13,753 continued to govern.

<sup>6</sup> Executive Order 13,753 refers to the “Under Secretary for National Protection and Programs,” but Congress subsequently re-designated that officer’s title. *See* 6 U.S.C. §652(a), (b).

Because his elevation was invalid, McAleenan could not act as Secretary. *See Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014); *Casa de Md.*, 2020 WL 5500165, at \*22-23.

On November 8, 2019, McAleenan purported to revise the Purported April 10 Delegation. Blackwell Ex. 3 (“Purported Revised Delegation”). Under 6 U.S.C. §113(g)(2), that can only be done by the *Secretary*, not the *Acting Secretary*. *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, No. 19-3283 (RDM), 2020 WL 5995206, at \*23 (D.D.C. Oct. 8, 2020). But even if the Acting Secretary had that authority, McAleenan did not legally hold the office, and the Purported Revised Delegation was void. *See Casa de Md.*, 2020 WL 5500165, at \*23.

That day, McAleenan resigned. Wolf was Under Secretary for Strategy, Policy, and Plans. Although Executive Order 13,753 does not designate that Under Secretary as an officer who can serve as Acting Secretary, the Purported Revised Delegation made him next in line. DHS relied on it to elevate Wolf to Acting Secretary. But, as the Purported Revised Delegation was void, Wolf cannot perform the functions or duties of the Secretary, *see SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017), including issuing IIRIRA waivers. Wolf has been nominated to be Secretary, but never confirmed.

Appellees argue that Wolf’s authority was subsequently validated, along with his waivers. They say the FEMA Administrator, who is now next in line under

Executive Order 13,753, amended the order of succession to make Wolf next in line and surrendered his position as Acting Secretary to Wolf without resigning as FEMA Administrator. Swartz Ex. 2. Wolf then purported to ratify his earlier waivers. *See* 85 Fed. Reg. 59,651 (Sept. 23, 2020).

These actions were void. An Acting Secretary cannot designate an order of succession. *See supra* 14. Moreover, even if the Acting Secretary could do so, the text of the Homeland Security Act does not implicitly authorize him to transfer the Secretary's authority to another official without congressional or presidential involvement. To interpret the Homeland Security Act to give him that unilateral power implicates serious constitutional concerns.

Appellees also argue that IIRIRA's jurisdictional provisions bar the Tribes' claims. *See* IIRIRA §102(c)(2)(A)-(B). But §102(c)(2)(A)-(B) do not apply because they only limit claims arising from actions or decision "by the Secretary of Homeland Security pursuant to [IIRIRA §102(c)(1)]." IIRIRA §102(c)(2)(A); *see id.* §102(c)(2)(B). They do not bar claims "aris[ing] from" other sections, even if a 102(c)(1) waiver might be a *defense* to such claims. *See N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, slip op. at 24-25 (D.C. Cir. 2020) (citing *In re Border Infrastructure Env't Litig.*, 915 F.3d 1213, 1221-22 (9th Cir. 2019)). And the Tribes' non-constitutional claims arise from subsections 102(a) and (b)(1)(C)(i), which authorize construction and require consultation, not section 102(c)(1).

And § 102(c)(2)(A)-(B) do not bar any of the Tribes' claims because Wolf is not the Secretary. Those provisions only apply to a claim "arising from" an action or decision of "the Secretary of Homeland Security." The Tribes' claims "arise from" actions or decisions by an *Under Secretary*. The limitation on appellate jurisdiction over appeals of such claims, IIRIRA §102(c)(2)(C), does not apply for the same reason. And IIRIRA does not, by its own terms, foreclose suit under the APA, 5 U.S.C. §702; *see* IIRIRA §102(b)(1)(C)(ii)(I).

## **II. THE TRIBES WILL BE IRREPARABLY HARMED IF CONSTRUCTION CONTINUES.**

Appellees' construction without adequate review or tribal consultation irreparably harms the Tribes. An injunction pending appeal is justified where appellant "is likely to suffer irreparable harm in the absence of preliminary relief." *John Doe*, 849 F.3d at 1131 (quoting *Winter*, 555 U.S. at 22 (citations omitted)). Here, harm is not only likely, it is already occurring. So even under the most demanding abuse of discretion standard, the district court erroneously withheld an injunction despite a record that "strongly suggests...a likelihood of irreparable harm." *See Trebro*, 748 F.3d at 1171.

The District Court identified and rejected three bases for irreparable harm: destruction of Kumeyaay culture and religion through disturbance of burial and religious sites; lack of access to the project sites that burdens Kumeyaay exercise of

religion, and injury to the Tribes' procedural rights. Op.6. Its analysis of each was flawed.

The District Court first committed clear error by inadequately considering evidence showing harm to Kumeyaay religious, cultural, and burial sites within the project area. Border fence construction involves substantial ground-disturbing activities.<sup>7</sup> When undertaken on or near Kumeyaay cultural and religious sites without proper evaluation and mitigation, such activities damage or destroy those sites and the natural resources on which they depend, *see supra* 7-11, and can disinter Kumeyaay ancestors' remains, Carrico ¶¶28-31.

It is undisputed that evidence of historic habitation was found in and near the project sites, including tools and evidence of funerary ceremonies a few feet from the fence. Haws ¶18. Appellees' evidence shows that CBP found "previously-identified" archaeological resources in impacted areas. Enriquez ¶¶47, 51. The District Court concluded this did not show irreparable harm because the discoveries were outside the project site. Op.9. That conclusion is clearly erroneous, considering the evidence above. It also fails to credit the undisputed evidence that typical Kumeyaay archaeological "sites are not small areas of archaeological

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<sup>7</sup> *San Diego County Border Barrier Projects*, CBP, Mar. 16, 2020, <https://www.cbp.gov/document/environmental-assessments/san-diego-county-border-barrier-projects>; *Imperial County Border Barrier Project*, CBP, Mar. 16, 2020, <https://www.cbp.gov/document/environmental-assessments/imperial-county-border-barrier-project>.

deposits...that can easily be defined on the ground,” Carrico ¶20, and that the cultural artifacts *near* construction sites indicate that artifacts and ancestral remains almost certainly lie *within* the project footprint, *id.* ¶28. The District Court erred when it found the Tribes’ declarant “fails to link [t]his conclusion to the Projects,” Op.8, by entirely failing to consider his undisputed statement that “[t]here were at least two villages that straddled...the U.S.-Mexico international border within the San Diego and El Centro Project Areas,” Carrico ¶20, and that such sites “typically contain human burials and associated funerary features,” *id.* ¶28.

The Tribes also presented undisputed evidence that a cremated human bone was found at one of the project sites on July 31, 2020. Carrico ¶30; *See* Enriquez ¶85; *id.* Ex. I. The District Court discounted this evidence because the bone was found outside the project footprint. Op.7-9. That overlooks the evidence demonstrating that a bone fragment indicates that archaeological and burial sites are nearby, including within the construction footprint. Carrico ¶¶28-30; Santos ¶¶14, 16. The disruption of burial sites caused by unmitigated construction gravely injures the Kumeyaay, whose religion requires sacred ceremonies to put the souls of the disturbed dead at rest. *See* Elliott ¶15; Elliott (Second) ¶3-5; Santos ¶16. If Kumeyaay cannot undertake these ceremonies, their spiritual and emotional harms cannot be redressed with damages. *See Yankton Sioux Tribe*, 209 F.Supp.2d at 1022.



The District Court did not address the government's construction practices, which prevent detection of human remains and thereby prevent the Tribes from conducting reburial ceremonies. *See* Elliott ¶15. Appellees have refused to undertake adequate advance surveys or give the Tribes an opportunity to consult and review impacted areas before construction begins, Haws ¶25b-c, e, k, which is necessary for adequate monitoring and detection, Carrico ¶27. Appellees are rapidly removing and pulverizing enormous quantities of soil without adequate inspection, Santos ¶¶14-16; Elliott (Second) ¶2, which maximizes the risk of harm to human remains. Violation of a religious freedom right protected by the Constitution or RFRA is irreparable as a matter of law. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F.Supp.2d 106, 129 (D.D.C. 2012); *see also England*, 454 F.3d at 301.

The District Court committed error in finding no irreparable harm even if cultural and religious artifacts fell within the project footprint in light of the government's mitigation steps. The District Court failed to consider the irreparable harm caused by Appellees' violation of the NHPA, NAGPRA, ESA, and NEPA, which protect the environment, historic properties, and ancestral remains. The District Court instead relied on Appellees' various ersatz mitigation strategies. *See* Op. at 9-10. In the absence of valid IIRIRA waivers – a merits question the District Court never resolved – those mitigation efforts were *per se* inadequate. Because harm to the resources protected by these statutes is irreparable as a matter of law,

*see, e.g., Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Nat'l Wildlife Fed. v. Burford*, 835 F.2d 305, 323 (D.C. Cir. 1987); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F.Supp.2d 1104, 1120 (S.D. Cal. 2010), and because such harms are ongoing, the District Court's finding of no irreparable harm was an abuse of discretion, *see Chappell-Johnson v. Powell*, 440 F.3d 484, 487 (D.C. Cir. 2006) (error of law is abuse of discretion).

Next, the District Court erred in discounting evidence that irreparable harm is caused by Appellees limiting access to the project site and refusing to adopt monitoring procedures adequate to detect human remains and conduct ceremonies. Kumeyaay monitors' and other tribal members' access to the project sites has been limited significantly and subject to apparently ad hoc limitations. *See* Haws ¶¶18, 25e-h; Elliott ¶16. This access is insufficient for the Tribes to advise Appellees of possible damage caused by construction. Yet, the District Court concluded that the presence of *any* tribal monitors undermines the Tribes' assertions of harm and that the Tribes could decide to fund their own monitors. Op.15. There is no legal basis for this conclusion, which saddles the Tribes with mitigation responsibilities that IIRIRA assigns to the Government.

The District Court erroneously concluded the Tribes are not suffering irreparable harm because CBP has allowed Kumeyaay people to conduct limited religious ceremonies at or near certain project sites. Op.15. But even temporary

access has required extensive negotiation with government employees. Elliott ¶16. This impedes the free exercise of religion, *supra* at 19, and the District Court's conclusion to the contrary is unsupported.

Finally, Appellees have infringed the Tribes' procedural rights, *see Lujan*, 504 U.S. at 572 n.7, which cannot be cured retroactively, *Quechan*, 755 F.Supp.2d at 1120. The District Court wrongly dismissed these harms after concluding that the Tribes had not suffered any concrete injuries. Op.17. As discussed above, the Tribes *are* suffering concrete, irreparable harms from construction in the absence of adequate consultation and mitigation. Moreover, the Tribes are harmed by Appellees' failure to comply with federal laws, which protect the Tribes' cultural, religious, and natural resources. The Tribes have suffered both irreparable procedural harms and tangible impacts from the violation of these statutes. "[S]uch procedural harm does bolster plaintiffs' case for a preliminary injunction." *Fund for Animals v. Norton*, 281 F.Supp.2d 209, 222 (D.D.C. 2003).

### **III. THE EQUITIES FAVOR AN INJUNCTION.**

The balance of equities and the public interest heavily favor an injunction. No public interest can be advanced by Appellees' illegal conduct harming the Tribes' patrimony and constitutional rights, as "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Newby I*, 838 F.3d at 12 (D.C. Cir. 2016) (citations omitted). "To the contrary, there is a substantial public interest in having

governmental agencies abide by the federal laws that govern their existence and operations.” *Id.* (quotation omitted).

Appellees do not have a valid interest in advancing government interests in an illegal manner.<sup>8</sup> Appellees have not only failed to follow prescribed review and consultation procedures; they have also undertaken construction at the direction of Wolf, who has never properly served as Secretary. The public interest therefore lies on the same side of the scale as the Tribes’ interests: both weigh in favor of halting Appellees’ illegal construction activities until federal law been followed.

Appellees’ asserted interests cannot tip the balance in their favor. Appellees “fail to address how the construction of additional physical barriers would further the interdiction of drugs,” *Sierra Club v. Trump*, 963 F.3d 874, 897 & n.16 (9th Cir. 2020), and any financial costs flowing from an injunction do not rise to the level of irreparable harm, *e.g.*, *Steele v. United States*, 287 F.Supp.3d 1, 5 (D.D.C. 2017).

Because Appellees plainly intend to continue violating the law unless, the balance of the equities and public interest weigh heavily in favor of granting the relief requested. The Tribes request an order enjoining further ground disturbing activity in the project segments subject to this action until the Appellees agree to

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<sup>8</sup> Even if the government had a valid interest, the court may still give “greater weight to the possibility that [the Tribes] could suffer an ongoing constitutional violation while this litigation proceeds.” *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

measures acceptable to the Tribes for mitigating adverse impacts on Kumeyaay religious practices and cultural resources.

### **REQUEST FOR EXPEDITED APPEAL**

In light of the extreme importance of these issues to the Kumeyaay people and the ongoing irreparable harm, pursuant to Circuit Rule 47.2(a) the Tribes request an expedited appeal:

Opening Brief Due:	November 17
Response Brief Due:	December 2
Reply Brief Due:	December 7
Hearing:	December 15

### **CONCLUSION**

For the foregoing reasons, the Tribes respectfully request that the Court grant their Motion.

DATED this 13th day of November, 2020.

/s/ Colin Cloud Hampson

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### CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because, excluding the items permitted by Fed. R. App. P. 27(a)(2)(B), this brief contains 5,187 words, including footnotes.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in Microsoft Word using Times New Roman, 14-point font.

Respectfully submitted this 13th day of November, 2020.

/s/ Colin C. Hampson

Colin C. Hampson

*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2020, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system.

I certify that the participants of this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted this 13th day of November, 2020.

/s/ Colin C. Hampson

Colin C. Hampson

*Counsel for Appellants*



***Manzanita Band of the Kumeyaay Nation, et al. v. Wolf et al.***  
**No. 20-5333**

**APPELLANTS' EMERGENCY MOTION FOR INJUNCTION  
PENDING APPEAL AND FOR EXPEDITED APPEAL**

**- ATTACHMENTS -**

## ATTACHMENTS

1. Order on Motion for Expedited Preliminary Injunction (Oct. 16, 2020)
2. Memorandum Opinion (Oct. 16, 2020)
3. Authenticating Affidavit of Frank S. Holleman  
*Exhibit 1 to Holleman Affidavit*  
*Exhibit 2 to Holleman Affidavit*
4. Declaration of Angela Elliott Santos in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction  
*Exhibit 1 to Santos Declaration*  
*Exhibit 2 to Santos Declaration*  
*Exhibit 3 to Santos Declaration*  
*Exhibit 4 to Santos Declaration*  
*Exhibit 5 to Santos Declaration*  
*Exhibit 6 to Santos Declaration*  
*Exhibit 7 to Santos Declaration*  
*Exhibit 8 to Santos Declaration*
5. Declaration of John Elliott in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
6. Declaration of Lisa Haws in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
7. Declaration of Richard Carrico in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
8. Second Declaration of John Elliott in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction  
*Exhibit 1 to Second Elliott Declaration*
9. Declaration of Paul Enriquez  
*Exhibit I to Enriquez Declaration*
10. Declaration of Neal J. Swartz  
*Exhibit 2 to Swartz Declaration*
11. Declaration of Juliana Blackwell  
*Exhibit 1 to Blackwell Declaration*  
*Exhibit 2 to Blackwell Declaration*  
*Exhibit 3 to Blackwell Declaration*  
*Exhibit 5 to Blackwell Declaration*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MANZANITA BAND OF THE  
KUMEYAAY NATION, *et al.*,

Plaintiffs,

v.

CHAD WOLF, *et al.*,

Defendants.

Case No. 1:20-cv-02712 (TNM)

**ORDER**

Upon consideration of the Plaintiffs' Motion for an Expedited Preliminary Injunction, the pleadings, relevant law, related legal memoranda and arguments of counsel in opposition and support, and the entire record of this case, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that Plaintiffs' [7] Motion for an Expedited Preliminary Injunction is DENIED.

**SO ORDERED.**

Under 28 U.S.C. § 1292(a)(1), this is an appealable Order.

Dated: October 16, 2020

\_\_\_\_\_  
/s/  
TREVOR N. McFADDEN, U.S.D.J.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**MANZANITA BAND OF THE  
KUMEYAAY NATION, *et al.*,**

Plaintiffs,

v.

**CHAD WOLF, *et al.*,**

Defendants.

Case No. 1:20-cv-02712 (TNM)

**MEMORANDUM OPINION**

This case is about whether the Government can build the border wall on federal land notwithstanding concerns that Native American gravesites may be disturbed in the process. Plaintiffs are affiliated with the Kumeyaay Nation. They seek an expedited preliminary injunction to halt construction of two barrier projects along the U.S.-Mexico border in California. The Government argues that Kumeyaay religious or cultural materials have yet to be identified within the construction sites and that there are protocols in place to avoid or mitigate any potential harm in the future. A preliminary injunction is an extraordinary remedy that demands a clear showing of imminent harm that is both certain and great. Plaintiffs have not met this high standard. So the Court will deny their motion for expedited injunctive relief.

**I.**

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) grants broad authority to Defendants Department of Homeland Security (“DHS”) and U.S. Customs and Border Patrol (“CBP”) to build “border barrier infrastructure along the southern border.” Defs.’ Opp’n to Pls.’ Mot. for Prelim. Inj. (“Defs.’ Opp’n”) at 12, ECF No.

16.<sup>1</sup> The IIRIRA’s statutory scheme reflects congressional intent to ensure that construction proceeds expeditiously, unimpeded by litigation that has historically beset such projects. *See Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 239 (D.D.C. 2019) (concluding it was “crystal clear that Congress intended to eliminate litigation that would delay the expeditious construction of border security infrastructure, to the fullest extent possible, *i.e.*, to the extent constitutionally allowed.” (cleaned up)). It authorizes the DHS Secretary to “waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary.” IIRIRA § 102(c)(1).

There also is limited judicial review of these waivers. A federal court can only consider a cause or claim arising from the waiver based on a constitutional violation. *Id.* § 102(c)(2)(A). And a claim must be brought within sixty days of the waiver. *Id.* § 102(c)(2)(B). Even for these constitutional challenges, the IIRIRA only provides a limited right of appeal. Any final or interlocutory decision on these waivers “may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.” *Id.* § 102(c)(2)(C).

Invoking the IIRIRA, DHS and other government agencies have set out to construct barrier projects at different locations along the U.S.-Mexico border. *See* Defs.’ Opp’n at 14. This has prompted litigation all over the country as various entities and individuals seek to halt construction for different reasons, and with mixed results. Last year, the Supreme Court stayed an injunction issued against border barrier construction. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). And it recently declined to lift that stay. *See Trump v. Sierra Club*, 140 S. Ct. 2620 (2020). Since the Supreme Court’s initial stay decision, other courts have denied or stayed injunctions halting construction of different border barrier projects. *See* Defs.’ Opp’n at 48

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<sup>1</sup> All page citations refer to the page numbers that the CM/ECF system generates.

(citing cases). This includes a district court that last month considered and denied a similar preliminary injunction request brought by another Indian tribe of the Kumeyaay Nation involving the same barrier projects. *See id.* Ex. 1, ECF No. 48-1.

Construction of the barrier projects at issue here is taking place on a narrow strip of federal land that parallels the U.S.-Mexico border in San Diego and Imperial Counties, California (collectively, the “Projects”). Compl. for Decl. & Inj. Relief (“Compl.”) ¶ 51, ECF No. 1; Decl. of Paul Enriquez (“Enriquez Decl.”) ¶ 11, ECF No. 16-5. In these areas, “CBP has long had a border security presence.” Enriquez Decl. ¶ 18. Most of the construction—fourteen of the twenty miles—will replace existing fencing. *Id.* ¶¶ 14, 17. And the Projects are located within an area that “functions primarily as a law enforcement zone.” *Id.* ¶ 11. DHS identified the Projects as drug-smuggling corridors. Defs.’ Opp’n at 15.

Exercising the authority under the IIRIRA, Defendant Chad Wolf purported to waive various federal laws that would otherwise apply to construction of the Projects.<sup>2</sup> *See* Compl. ¶¶ 52, 54; Enriquez Decl. ¶¶ 12, 15. In effect then, construction proceeded with the understanding that these federal laws do not apply to the Projects. Mot. for TRO & Prelim. Inj. (“Pls.’ Mot.”) at 15, ECF No. 7.

Plaintiffs are affiliated with the Kumeyaay Nation, which consists of thirteen federally recognized Indian tribes with reservations in southern California. Compl. ¶ 1. They include five tribes of the Kumeyaay Nation, a tribe member, and the Kumeyaay Heritage Preservation Council (collectively, the “Kumeyaay”). *Id.* ¶¶ 6–13. Generations of Kumeyaay members have

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<sup>2</sup> Waived statutes included the Administrative Procedure Act, the Endangered Species Act, the National Environmental Policy Act, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act. *See* Compl. ¶¶ 52, 54.

practiced their religion and culture in the United States and Mexico. Pls.’ Mot. at 17. This requires “access to, and the availability of, the sacred sites, mountains, trails, landscape, and cultural and natural resources in the region.” *Id.* at 21.

The Kumeyaay consider the treatment of human remains sacred to their religious beliefs. *Id.* at 17. They believe that “a person’s soul cannot rest in the afterlife if the remains are disturbed, or if parts of the body of the deceased are separated after death.” *Id.* In the event of disinterment or separation from the body, the Kumeyaay “engage in religious ceremonies to restore peace to the souls of the dead.” *Id.* According to the Kumeyaay, their religious and cultural practices are now at risk.

The Kumeyaay claim that the land for the Projects contains “numerous sites of longstanding, documented, and continuing cultural and religious importance to the Kumeyaay people.” *Id.* They allege that while the construction “involves substantial ground-disturbing activities,” the Government has not established sufficient consultation and mitigation procedures to protect their religion and culture. Compl. ¶¶ 91, 93. To the Kumeyaay, discovery of burial sites and human remains is “inevitable.” Pls.’ Mot. at 22. And they cannot conduct “the ceremonies necessary to rest the souls of the deceased in peace.” *Id.*

The Kumeyaay filed a Complaint against DHS, the CBP, the U.S. Army Corps of Engineers, and several individuals within these agencies in their official capacities (collectively, the “Government”). Compl. ¶¶ 14–19. They raise claims under the Religious Freedom Restoration Act of 1993 (“RFRA”), the First Amendment, and the federal laws Wolf purported to waive. *See id.* ¶¶ 146–84. The Kumeyaay seek declaratory relief and an injunction barring more construction activity until the Government satisfies its consultation and statutory obligations. *Id.* at 65–67.

Two days after filing the Complaint, the Kumeyaay moved separately for a temporary restraining order and preliminary injunction repeating their request to halt construction of the Projects until adequate consultation and review procedures can be established.<sup>3</sup> *See* Pls.’ Mot. The parties completed briefing on this motion, and the Court held a hearing. The motion is now ripe.

## II.

Preliminary injunctions are both “extraordinary and drastic.” *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (cleaned up). They are “never awarded as of right.” *Id.* at 690. And they “should not work to give a party essentially the full relief he seeks on the merits.” *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (per curiam). Preliminary injunctions are reserved for situations when “it is manifest that the normal legal avenues are inadequate.” *Id.* at 1174.

To secure a preliminary injunction, the moving party “must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). And it “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22.

Irreparable harm has “always” served as the “basis of injunctive relief in the federal courts.” *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (cleaned up). So the D.C. Circuit “has set a high standard.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The alleged injury “must be both certain and great; it must be actual and not theoretical.”

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<sup>3</sup> During an initial scheduling hearing, the Kumeyaay agreed that the Court should construe their motion as a request for an expedited preliminary injunction under Local Civil Rule 65.1(d). *See* Min. Entry (Sept. 25, 2020).



*Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). And it must be “of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.* (cleaned up) (emphasis in original).

Indeed, failure to establish irreparable harm dooms a preliminary injunction, even if the other three factors favor relief. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. If there is no irreparable harm, a court need not consider the remaining factors. *See CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (declining to consider the remaining factors because the plaintiff “has made no showing of irreparable injury here”).

A court can grant a preliminary injunction “based on less formal procedures and on less extensive evidence than in a trial on the merits, but if there are genuine issues of material fact raised in opposition to a motion for a preliminary injunction, an evidentiary hearing is required.” *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) (cleaned up). Neither the Kumeyaay nor the Government asked the Court to resolve any factual disputes through an evidentiary hearing. And the Court finds no such hearing is needed because any factual dispute is not material to this motion.

### III.

As the impetus for injunctive relief, the Court starts its analysis with the irreparable harm factor. And that is where it will end. The Court need not review the other three factors because the Kumeyaay fail to make out a certain, great, and imminent injury in the absence of a preliminary injunction. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016).

The Kumeyaay raise three theories of irreparable harm: destruction of Kumeyaay culture and religion, lack of access to the Projects, and injury to their procedural rights. None holds water.

A.

The Kumeyaay’s principal claim of injury is this: So long as construction at the Projects continues without proper consultation and mitigation measures, it will “unavoidably damage” cultural and religious sites and artifacts, as well as the natural setting and resources “on which the sacred nature of such sites depends.” Pls.’ Mot. at 50. The Court does not doubt the significance of the region to the Kumeyaay’s religion. But they have not made a clear showing to support their contention for any of these alleged harms.

1.

For starters, no Kumeyaay burial sites or remains have been identified within the narrow strip of federal land where construction is taking place, even after the Government surveyed and re-surveyed the land. *See* Enriquez Decl. ¶¶ 47, 51, 84; Tr. of Mot. for TRO (“Hr’g Tr.”) 51:19–20, ECF No. 22 (“[N]o human remains were found during any of that work.”). The Kumeyaay instead base a likelihood of irreparable harm on evidence found *near* the Projects. This includes the discovery of two human remains.<sup>4</sup> *See* Pls.’ Mot. at 22. One object was found twenty miles west of the project in San Diego and another was found south of the project, possibly in Mexico.<sup>5</sup> Enriquez Decl. ¶¶ 43, 89.

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<sup>4</sup> The CBP also received an initial report of a human bone later found to be PVC piping. Enriquez Decl. ¶ 86.

<sup>5</sup> The Government contends the bone was in Mexico, but the Kumeyaay claim the bone was within the United States but outside the project in San Diego. *Compare* Enriquez Decl. ¶ 43, *with* Decl. of Richard Carrico (“Carrico Decl.”) ¶ 30, ECF No.7-5. The Court need not resolve this dispute because it is not material. Both parties agree the bone was located outside the Projects. *See* Hr’g Tr. 36:16–19 (confirming agreement that human remains were found south of the project in San Diego).

This evidence is insufficient on its own to establish actual, imminent injury. The Kumeyaay rely on these discoveries to show that it is “extremely likely” similar materials are located within the Projects’ construction zones.<sup>6</sup> See Pls.’ Reply in Supp. of Mot. for Prelim. Inj. (“Pls.’ Reply”) at 18, ECF No. 18. To support their conclusion, the Kumeyaay provide declarations from Richard Carrico, a “well-recognized authority on southern California Native Americans,” and Angela Elliott Santos, the Chairwoman of Plaintiff Manzanita Band. See Carrico Decl. ¶ 6; Decl. of Angela Elliott Santos (“Santos Decl.”) ¶ 2, ECF No. 7-2. The Court is unconvinced.

Carrico provides examples of village sites “in the border region of California that have produced burials,” including “most of the village sites excavated in San Diego county.” Carrico Decl. ¶ 28. He thus concludes that it “would be *reasonable* . . . that human remains would be associated with the large village complexes *near* Campo and Jacumba.” Carrico Decl. ¶ 29 (emphasis added). Two holes sink this evidence. Carrico fails to link his conclusion to the Projects. He broadly refers to complexes *near* Campo and Jacumba, but the Court is left to speculate whether the Projects’ construction zones fall within either area. Indeed, the Government submits evidence showing that the construction zones are outside both Campo and Jacumba. See Enriquez Decl. ¶ 100; *id.* Ex. A. And even if Carrico’s conclusions do apply to the Projects, he speaks only to the *origin* of human remains, not the likelihood remains will be found within the construction zones.

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<sup>6</sup> A declaration from Lisa Haws, the Tribal Historic Preservation Officer and Tribal Administrator for Plaintiff Manzanita Band, mentions that various objects were discovered during a July 2020 site visit. See Decl. of Lisa Haws (“Haws Decl.”) ¶ 18, ECF No. 7-4. This statement, even if true, leaves several questions open for speculation. Was the “probable human bone” confirmed to be such? Do the objects belong to the Kumeyaay? Were these discoveries raised with the Government? If so, how did the Government respond? Without this information, the Kumeyaay cannot rely on this discovery as a basis for their irreparable harm claim.

Chairwoman Santos states that she “repeatedly cautioned CBP that there are cultural resources *near* the border” and “important facts were discovered 25 feet below ground *close* to the border.” Santos Decl. ¶ 14 (emphasis added). This evidence only confirms what is already known: Potential Kumeyaay resources were identified outside the Projects’ construction zones. But the fact remains that the Government has found no Kumeyaay remains within the Projects. *See* Enriquez Decl. ¶ 84.

Even if human remains or other artifacts are likely to be found within the Projects—which the Kumeyaay have not clearly established on this record—their irreparable harm theory is undermined by Government measures in place to avoid and mitigate any harm to their religion and culture. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454 (1988) (“It is worth emphasizing . . . that the Government has taken numerous steps in this very case to minimize the impact that construction of the [ ] road will have on the Indians’ religious activities.”). The Government conducted surveys and re-surveys of the areas at the Kumeyaay’s request, with Kumeyaay cultural monitors present. Hr’g Tr. 51:13–19 (“CBP has reviewed survey data, they did record searches, they conducted new surveys in advance of this construction in 2020. And at plaintiffs’ request, through the consultation process, they re-surveyed specific areas requested by plaintiffs that were likely to have cultural items; and they did so with the tribal cultural monitors present.”); Enriquez Decl. ¶¶ 20, 51.

As the Kumeyaay admit, “CBP hosted a number of conference calls with the Tribes about the border construction project . . . in July, August, and September 2020, and in which it provided information about their cultural surveying efforts and monitoring in San Diego.” Santos Decl. ¶ 13; *see also* Enriquez Decl. ¶ 50 (describing “what has become a recurring,

biweekly call with the Kumeyaay Tribes, including Plaintiffs”). A coordination meeting between the Kumeyaay and Government took place just last month. *See* Haws Decl. ¶ 21.

The Government also has committed to a protocol establishing procedures for the “avoidance, treatment, curation, and repatriation of cultural resources.” Enriquez Decl. ¶¶ 52, 60. Under the protocol, the Government will try to avoid “areas where resources are found” and will leave those resources in place “wherever possible.” *Id.* ¶ 52. If the Government cannot avoid a resource, the protocol requires it to immediately halt construction within 100 feet of the resource “until it can be treated appropriately.” *Id.* This may include “culturally appropriate repatriation efforts to address the discovery” within 48 hours. *Id.*

There is already concrete evidence of these efforts. When surveys identified two archeological sites at the project in Imperial County, the Government “took steps to ensure that the sites would not be impacted.” *Id.* ¶ 26. It realigned an access road and required a construction contractor to find a new location for a proposed well site to avoid the archeological site. *Id.* In another instance, a re-survey identified “the presence of known and previously unidentified individual resources or ‘isolates.’” *Id.* ¶ 47. These isolates were not eligible for listing on the National Register, but the CBP shared the survey results with the Kumeyaay and consulted with them before agreeing to “various protection measures.”<sup>7</sup> *Id.* ¶¶ 47–51, 56–57. This led to flagging the isolates and creating a buffer zone “to ensure that they were not disturbed during construction activities.” *Id.* ¶ 50.

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<sup>7</sup> According to the Government, this re-survey, like the earlier surveys, “did not reveal the presence of cultural sites or artifacts that would be eligible for listing on the National Register of Historic Places.” Enriquez Decl. ¶ 47.

To be sure, the Kumeyaay argue that the Government's measures are insufficient. *See* Pls.' Mot. at 53 n.14; Santos Decl. ¶ 13; Haws Decl. ¶ 25. But this is a question best left for the merits stage of the case.<sup>8</sup> For now, the mitigation efforts in place undermine the Kumeyaay's burden to establish both irreparable and imminent harm, especially given their own evidentiary shortcomings. *Accord Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 36 (D.D.C. 2016) (denying Indian tribe's request for preliminary injunction of oil pipeline construction near reservation in part because the construction was subject to restrictions "that make it unlikely that construction will damage or destroy sites of cultural significance to the Tribe"); *Macht v. Skinner*, 715 F. Supp. 1131, 1137 (D.D.C.), *aff'd*, 889 F.2d 291 (D.C. Cir. 1989) ("[I]n balancing the equities in this case, it is appropriate for the Court to consider the attempts at mitigation[.]").

Judge Boasberg recently considered a similar preliminary injunction request in *Eastern Band of Cherokee Indians v. U.S. Department of Interior*, Civil Action No. 20-757 (JEB), 2020 WL 2079443 (D.D.C. April 30, 2020). There, a tribe sought a preliminary injunction to halt the transfer of land for the construction of a casino. *Id.* They claimed that without an injunction they would lose their statutory consultation rights and any "cultural patrimony and/or human remains" found on site. *Id.* at \*4 (cleaned up).

Judge Boasberg denied the request. He noted that the site was a "highly disturbed area that has been used for multiple purposes." *Id.* at \*6 (cleaned up). There also was no evidence that "places the cultural relics on the proposed gaming site itself" or that "any of those items belonged to the Cherokee." *Id.* at \*5. The government agency's searches of "historical and

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<sup>8</sup> All of the Kumeyaay's statutory claims, except RFRA, challenge the adequacy of consultation and protective measures currently in place. *See* Compl. ¶¶ 146–53, 162–80.

archeological literature, as well as the National Register of Historic Properties,” did not identify any “eligible or potentially eligible historic properties or paleontological resources.” *Id.* at \*6 (cleaned up). Even if historical artifacts did exist on site, he found that the builders agreed to “use certain best practices and undertake enumerated mitigation measures so that the proposed complex would have a less than significant impact across several environmental measures.” *Id.* (cleaned up). Judge Boasberg reasoned that since there was “no evidence of Cherokee artifacts and the land has already been substantially disturbed by state construction activities, the plan suffices to greatly reduce the imminence of injury.” *Id.* at \*7.

So too here. The Projects are located “within a narrow construction corridor on federal land that parallels the international border, most of which is previously disturbed.” Defs.’ Opp’n at 50. Most of the construction—fourteen of the twenty miles—will replace fencing that already exists, and the areas function as a law enforcement zone. Enriquez Decl. ¶¶ 11–17. No Kumeyaay artifacts or remains have been discovered within the Projects’ construction zones, despite the Government’s surveys and re-surveys. *See id.* ¶ 84; Hr’g Tr. 51:13–20. So the Court cannot say with any confidence that the Kumeyaay certainly face injury at all. More, there are measures in place to mitigate any potential harm if materials are discovered, as the Government has already shown with its treatment of remains found near the Projects. *See* Enriquez Decl. ¶ 87 (stating the Government did not prevent the Kumeyaay from crossing the U.S.-Mexico border to retrieve the human remain discovered so that it could be appropriately relocated).

## 2.

The Court need only briefly address the Kumeyaay’s argument that the Projects will inflict irreparable harm on “nearby sacred sites used by tribal members and the natural resources on which those sacred sites depend.” Pls.’ Reply at 26. This includes Tecate Peak, Boundary

Mountain, Jacumba Valley and Hot Springs, Table Mountain, the Yuha Basin, and the trail system the Kumeyaay use to link their villages to each other and the sacred sites. *See* Pls.’ Mot. at 17–21. The area surrounding the Projects is no doubt significant to the Kumeyaay’s practices. *See* Decl. of John Elliott (“Elliott Decl.”) ¶¶ 4–11, ECF No. 7-3; *see also* Carrico Decl. ¶¶ 14–19, 24–25.

These harms, however, run headlong into a critical feature of the construction: it takes place only on federal land. Enriquez Decl. ¶ 11. In the context of the First Amendment, the Supreme Court has declined to enforce a permanent injunction barring government construction on federal land that would have “devastating effects on traditional Indian religious practices.” *Lyng*, 485 U.S. at 451. The Court reasoned that the “Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.” *Id.* at 452. It found that “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” *Id.* Thus, the Court held, “[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land.” *Id.* at 453 (emphasis in original).

The Court reserves the merits of the Kumeyaay’s First Amendment and RFRA claims for a later time. But *Lyng* is instructive regarding the Kumeyaay’s claimed harms to the surrounding sites. As in *Lyng*, construction for the Projects is on a narrow strip of federal land that serves as a law enforcement zone and will largely replace fencing that has been in place for at least ten years. Enriquez Decl. ¶¶ 11, 102. Through the lens of *Lyng* then, damage to the surrounding areas—even those integral to the Kumeyaay religion and culture—that is incidental to the Government’s use of its own land fails to meet the heightened standard for irreparable harm.



The record also does not support a clear showing that these sites will suffer actual damage. The Kumeyaay only cite Mr. Elliott's concerns and fears about the Projects' effect on the sacred sites, not any evidence that injuries are likely to occur. *See* Elliott Decl. ¶¶ 9, 12, 17, 19. While sincere, Mr. Elliott's sentiments do not meet the required showing for a preliminary injunction. *See Wis. Gas Co.*, 758 F.2d at 674 ("Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." (cleaned up)). And they are unsupported by the rest of the evidence. Tecate Peak is located seven miles northwest of the project in San Diego, and the Government represents that construction will not affect it or Kumeyaay members' access to it. Enriquez Decl. ¶ 91. The Government makes similar representations for Boundary Mountain, Jacumba Valley and Hot Springs, and Table Mountain. *Id.* ¶¶ 92–93. The Kumeyaay also will retain their use of any historical trails, as the construction "will not alter their orientation on the landscape."<sup>9</sup> *Id.* ¶ 96.

In short, the Kumeyaay have not made a clear showing of imminent, irreparable harm to their culture and religion.

## **B.**

Next, the Kumeyaay claim that their access to the Projects has been "limited." Pls.' Mot. at 52. This, they argue, inflicts harm in two ways. The Kumeyaay cannot advise the Government of "*possible* damage to sites or of the import of sites, artifacts, or remains that earthmoving uncovers." *Id.* (emphasis added). It also "blocks their ability to engage in religious ceremonies, which directly infringes on their ability to worship in violation of the Free Exercise Clause and substantially burdens their religious exercise in violation of RFRA." *Id.* at 54.

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<sup>9</sup> The Government offers similar evidence for the migration of the bighorn sheep, which "will continue to be able to use known movement corridors it has relied on historically for such movement." Enriquez Decl. ¶ 105.

These harms, however, are only as strong as their foundation. And the foundation is quicksand. The Kumeyaay cite no instance in which the Government has barred their members from the Projects. They instead describe a single incident in which there was “much intense discussion and argument” as several members sought access to the Projects. *See* Elliot Decl. ¶ 16. But as the Kumeyaay concede, the members could enter. *Id.* So there is insufficient evidence that the Kumeyaay’s “First Amendment interests are either threatened or in fact being impaired at the time relief is sought.” *Nat’l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (cleaned up). The Government contends that the “CBP does not prevent or interfere with individuals who access these areas to observe construction, recreate, pray, or hold religious ceremonies so long as the activities do not pose an immediate threat to border security or public safety.” Enriquez Decl. ¶ 101. And the Kumeyaay have not shown otherwise.<sup>10</sup>

The record also does not show that the Government has prevented the Kumeyaay from advising on “possible damages” to sites or artifacts. As of now, the CBP funds at least three tribal cultural monitors.<sup>11</sup> *See* Pls.’ Mot. at 53. And there are “no limits on where tribal cultural monitors can observe construction activity” within the Projects. Enriquez Decl. ¶ 70. The Kumeyaay argue that more monitors are needed. *See* Pls.’ Mot. at 53; Haws Decl. ¶¶ 18, 25e–h.

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<sup>10</sup> During the motion hearing, counsel for the Kumeyaay admitted that the Projects were not places where the Kumeyaay conduct religious ceremonies regularly. Hr’g Tr. 32:3–8. Their concern is that Kumeyaay ceremonies “would need to take place because the bodies are being harmed or dug or separated.” *Id.* But as of now, no evidence of human remains has been found at the Projects. Enriquez Decl. ¶ 84; Hr’g Tr. 50:21–51:9.

<sup>11</sup> The parties appear to dispute the number of tribal cultural monitors present at the Projects. The Government contends there are six total monitors, four at the project in San Diego and two for the project in Imperial County. *See* Defs.’ Opp’n at 53. The Court need not resolve this factual dispute because it is not material. *See Cobell*, 391 F.3d at 261. Regardless of the number, the presence of these monitors weighs against a finding of irreparable harm.

Perhaps. But the Government has invited the Kumeyaay to employ their own monitors for the Projects, which they have declined to do. Enriquez Decl. ¶ 70. To be sure, the Kumeyaay are under no legal obligation to provide monitors. Their decision not to do so, however, weakens their claim that they cannot oversee construction activities to mitigate potential damage.

The court reached a similar conclusion in *Standing Rock Sioux Tribe*. 205 F. Supp. 3d at 4. In that case, an Indian tribe moved for a preliminary injunction to prevent permitting of an oil pipeline near the tribe's reservation. The court denied the motion in part because the tribe had declined the Army Corps' invitation to "visit the sites or even conduct its own surveys." *Id.* at 36. As the court reasoned, the tribe could not then argue "that there would be a likely injury at these places by claiming that it was prevented from assessing these sites." *Id.*

The facts here warrant the same result. At least at this preliminary stage, the purported harms stemming from lack of access are theoretical, not actual. *See Wis. Gas Co.*, 758 F.2d at 674.

### C.

Finally, the Kumeyaay suggest that the Government has stripped them of their procedural rights, which they claim "is itself an irreparable harm." *See* Pls.' Mot. at 54. They appear to rely on their right to consultation under the IIRIRA and the federal statutes Wolf purported to waive. *See id.* at 51. The Court disagrees.

The Kumeyaay's alleged injury to their consultation rights—even if undisputed—cannot constitute irreparable harm on its own. *See, e.g., E. Band of Cherokee Indians*, 2020 WL 2079443, at \*4 ("A chorus of federal courts . . . has found that procedural injury, standing alone, cannot constitute irreparable harm." (collecting cases)).

The Kumeyaay still must identify a “concrete” and “great” injury that accompanies their alleged procedural injury. *See Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 327 (D.D.C. 2018). They fail to do so. The Kumeyaay claim that lack of consultation prevents them from preserving and protecting their culture and religion. *See* Pls.’ Mot. at 53. These are the same injuries already raised, just dressed differently. As the Court explained above, the evidence is insufficient for the Kumeyaay to meet their heightened burden. So it likewise fails here.

More, the Kumeyaay concede that consultation *is* happening. Indeed, their RFRA claim depends on consultation with the Government. *See* Pls.’ Mot. at 30–35. And the Government has documented its efforts to consult with the Kumeyaay before and after construction began for these Projects. *See* Defs.’ Opp’n at 22–24. The Kumeyaay dispute whether this consultation is sufficient. The Court need not resolve the merits of their challenge now.<sup>12</sup> For now, evidence of consultation undermines the Kumeyaay’s ability to establish a clear showing of their procedural injury.

#### IV.

On this record, the Court finds no reason to deviate from the clear intent of the IIRIRA to ensure expeditious construction of the barrier projects. The Court acknowledges the Kumeyaay’s efforts to preserve their culture and religious practices. But a preliminary injunction is an “extraordinary and drastic remedy.” *Munaf*, 553 U.S. at 689.

The evidence shows that construction is proceeding on a narrow strip of federal land. And there are some consultation and protections in place to avoid damage if Kumeyaay cultural and religious resources are discovered within the construction zones, which has yet to occur.

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<sup>12</sup> For its part, the Government argues that the consultation provision of the IIRIRA—the primary statute that the Kumeyaay rely on—is silent on the scope, extent, or timing of consultation for barrier projects. *See* Defs.’ Opp’n at 19–22.

Against this evidence, the Kumeyaay have not made a clear showing that they will suffer imminent, irreparable injury in the absence of an injunction here. The Court thus declines to consider the other three factors for a preliminary injunction. It will address the merits in the normal course and the Kumeyaay will be able to pursue their injunctive relief through the claims they raise in their Complaint. For these reasons, Plaintiffs' motion is denied.

Dated: October 16, 2020

/s/  
TREVOR N. McFADDEN, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MANZANITA BAND OF THE KUMEYAAY  
NATION *et al.*,

Plaintiffs,

v.

CHAD WOLF, in his official capacity as Under  
Secretary of Homeland Security for Strategy,  
Policy, and Plans *et al.*

Defendants.

Case No. 1:20-cv-02712 -RC

AUTHENTICATING AFFIDAVIT OF FRANK S. HOLLEMAN TO SHOW  
COMPLIANCE WITH LOCAL RULE 65.1(a)

I, Frank Holleman, declare pursuant to 28 U.S.C. § 1746:

1) I am over the age of 21 years and am competent to testify about the matters stated herein. I know the facts stated in this affidavit on my own personal knowledge, and they are true to the best of my knowledge, information, and belief.

2) Attached to this Affidavit as Exhibit 1 is an excerpt of Delegation 00106, Rev. 08.5, signed by Kristjen Nielsen on April 10, 2019. This copy is identical to a copy of the Delegation that the Department of Homeland Security filed in proceedings in *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118 (D. Md. Sept. 11, 2020), *see* ECF No. 41-1 at 3-7.

3) Attached to this Affidavit as Exhibit 2 is an amendment to Delegation 00106 which was signed by Kevin McAleenan on November 8, 2019. This copy is identical to a copy of the Delegation that the Department of Homeland Security filed in proceedings in *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118 (D. Md. Sept. 11, 2020), *see* ECF No. 41-1 at 71.

4) Attached to this Affidavit as Exhibit 3 is the August 3, 2020 affidavit of Juliana Blackwell, which the Department of Homeland Security filed in proceedings in *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118 (D. Md. Sept. 11, 2020), *see* ECF No. 41-1 at 1-2, and which attests to the accuracy of the documents discussed in ¶¶ 2-3, *supra*.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: September 23, 2020

  
Frank S. Holleman

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 1**



Department of Homeland Security  
DHS Delegation Number: 00106  
Revision Number: 08.5  
Issue Date: 12/15/2016  
Updated Date: 04/10/2019

## **DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS**

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### **I. Purpose**

This is a succession order for named positions and a delegation of authority for the continuity of essential functions of officials at the Department of Homeland Security (DHS) in case of absence, the inability of the incumbent to act during disasters or catastrophic emergencies, or vacancies in offices.

### **II. Succession Order/Delegation**

A. In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.

B. I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, in the event I am unavailable to act during a disaster or catastrophic emergency.

C. The order of succession for the named positions, other than the Office of the Secretary, are provided in Annexes B through AC.

D. I hereby delegate authority to the officials occupying the identified positions in the orders listed in Annexes B through AC to exercise the powers and perform the functions and duties of the named positions in case of death, resignation, inability to perform, absence, or inability to act during a disaster or catastrophic emergency until that condition ceases.

E. In terms of named positions in which appointment is required to be made by the President, by and with the advice and consent of the Senate (PAS), if positions are vacant as that term is used in the Federal Vacancies Reform Act of 1998, the First Assistant shall act as the incumbent until a successor is appointed, unless otherwise designated by the President. The individual serving in the position identified as the first to succeed is designated the “First Assistant” for the purposes of the Federal Vacancies Reform Act of 1998. If the First Assistant position is vacant, the next designated official in the order of succession may exercise all the powers, duties, authorities, rights, and functions authorized by law to be exercised by the incumbent, but may not perform any function or duty required by law to be performed exclusively by the office holder.

F. For all other positions that are not subject to the Federal Vacancies Reform Act of 1998, any official in the order provided for in the succession order may exercise all the powers, duties, authorities, rights, and functions authorized to be performed by the incumbent, to the extent not otherwise limited by law.

G. Only officials specifically designated in the order of succession for each of the named positions in Annexes B through AC are eligible, subject to modification in accordance with Section II.I. Unless formally appointed by the Secretary, persons appointed on an acting basis, or on some other temporary basis, are ineligible to serve as a successor; therefore, the order of succession would fall to the next designated official in the approved order of succession.

H. The prohibition on any re-delegation of powers, authorities, functions, and duties contained in Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents is not applicable to restrict the authority of any individual who is exercising the authority of a vacant position under this Delegation. Such an individual shall, however, be bound by such Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents, and shall not further re-delegate powers to any individual.

I. Each Annex may be updated separately. A Component Head seeks modification of his/her order of succession by forwarding a proposed updated Annex to the Office of Operations Coordination (OPS), Continuity Division and the Office of the Under Secretary for Management (MGMT), Program Manager, Delegations and Directives; Annexes are processed by MGMT, in consultation with the Office of the General Counsel (OGC), for approval of the Secretary. At a minimum, the Annex is coordinated with OGC and the White House Liaison. Where possible, Component orders of succession should be at least three positions deep and geographically dispersed.

J. The Office of the Executive Secretary, MGMT, and OPS are responsible for maintaining a current list of incumbents holding all positions identified in Annexes B through AC.

K. Nothing in this delegation is intended to limit my discretion as Secretary to depart from this delegation.


### III. Authorities

A. Title 5, United States Code (U.S.C.) §§ 3345-49 (Federal Vacancies Reform Act of 1998, as amended)

B. Title 6, U.S.C., § 112 (Secretary; functions)

### IV. Office of Primary Interest

OPS and MGMT is the office of primary interest for maintaining and updating the Annexes to this Delegation.

  
\_\_\_\_\_  
Jeh Charles Johnson  
Secretary of Homeland Security  
\_\_\_\_\_  
Date

#### Legend

Career	C
Limited Term Appointment	L
Military Officer	M
Non-Career in the Senior Executive Service or Schedule C	N
Presidential Appointee	P
Presidential Appointee with Senate Confirmation	S
Scientific Professional	T
First Assistant pursuant to the Federal Vacancies Reform Act	*

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

<b>Annex</b>	<b>Title</b>	<b>Issue Date</b>
Annex A	Order For Delegation of Authority by the Secretary of the Department of Homeland Security	Revision 08.5, 04/10/2019
Annex B	Deputy Secretary, Office of the	Revision 08.5, 04/10/2019
Annex C	Citizenship and Immigration Service Ombudsman	Revision 06, 09/14/2016
Annex D	Citizenship and Immigration Services, United States	Revision 06, 09/14/2016
Annex E	Civil Rights and Civil Liberties, Office for	Revision 06, 09/14/2016
Annex F	Coast Guard, United States	Revision 06, 09/14/2016
Annex G	Countering Weapons of Mass Destruction Office	Revision 08.2, 05/21/2018
Annex H	Customs and Border Protection, United States	Revision 06, 09/14/2016
Annex I	Executive Secretariat	Revision 06, 09/14/2016
Annex J	Federal Emergency Management Agency	Revision 06, 09/14/2016
Annex K	Federal Law Enforcement Training Center	Revision 06, 09/14/2016
Annex L	General Counsel, Office of the	Revision 06, 09/14/2016
Annex M	Immigration and Customs Enforcement, United States	Revision 06, 09/14/2016
Annex N	Inspector General, Office of	Revision 06, 09/14/2016
Annex O	Intelligence and Analysis, Office of	Revision 06, 09/14/2016
Annex P	Legislative Affairs, Office of	Revision 06, 09/14/2016
Annex Q	Management Directorate	Revision 06, 09/14/2016
Annex R	National Protection and Programs Directorate	Revision 08, 07/11/2017
Annex S	Operations Coordination, Office of	Revision 06, 09/14/2016
Annex T	Partnership and Engagement, Office of	Revision 06, 09/14/2016
Annex U	Strategy, Policy, and Plans, Office of	Revision 08.4, 02/15/2019
Annex V	Privacy Office, Chief	Revision 06, 09/14/2016
Annex W	Public Affairs, Office of	Revision 06, 09/14/2016
Annex X	Science and Technology	Revision 07, 01/19/2017
Annex Y	Secret Service, United States	Revision 06, 09/14/2016
Annex Z	Transportation Security Administration	Revision 08.3, 10/23/2018
Annex AA	Chief Financial Officer (DHS)	Revision 06, 09/14/2016
Annex AB	Deputy Administrator, Federal Emergency Management Agency (FEMA)	Revision 06, 09/14/2016
Annex AC	Protection and National Preparedness (FEMA)	Revision 06, 09/14/2016

## **ORDER FOR DELEGATION OF AUTHORITY BY THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY**

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security
2. Under Secretary for Management
3. Commissioner of U.S. Customs and Border Protection
4. Administrator of the Federal Emergency Management Agency
5. Director of the Cybersecurity and Infrastructure Security Agency
6. Under Secretary for Science and Technology
7. Under Secretary for Intelligence and Analysis
8. Administrator of the Transportation Security Administration
9. Director of U.S. Immigration and Customs Enforcement
10. Director of U.S. Citizenship and Immigration Services
11. Under Secretary for Strategy, Policy, and Plans
12. General Counsel
13. Deputy Under Secretary for Management
14. Deputy Commissioner of U.S. Customs and Border Protection
15. Deputy Administrator of the Transportation Security Administration
16. Deputy Director of U.S. Immigration and Customs Enforcement
17. Deputy Director of U.S. Citizenship and Immigration Services
18. Director of the Federal Law Enforcement Training Centers

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 2**

**Amendment to the Order of Succession for the Secretary of Homeland Security**

Section II.A of DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, is amended hereby to state as follows: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A."

By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security by amending Annex A of *DHS Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106. Annex A is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

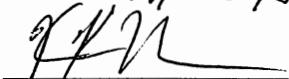
Annex A, Order for Delegation of Authority by the Secretary of the Department of Homeland Security

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security;
2. Under Secretary for Management;
3. Commissioner of the U.S. Customs and Border Protection;
4. Under Secretary for Strategy, Policy, and Plans;
5. Administrator and Assistant Secretary of the Transportation Security Administration;
6. Administrator of the Federal Emergency Management Agency;

No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

Dated: 11/08/19



Kevin K. McAleenan  
Acting Secretary of Homeland Security

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 3**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs,

V.

CHAD F. WOLF, *et al.*,

Defendants.

Civil Action No. 8:20-cv-2118

## DECLARATION OF JULIANA BLACKWELL

I, Juliana Blackwell, make the following declaration.

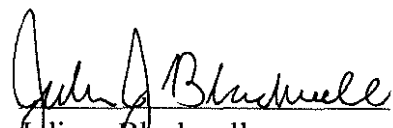
1. I am the Deputy Executive Secretary, within the Office of the Executive Secretary, U.S. Department of Homeland Security (DHS). I have worked in this office since February 2007. I am responsible for maintaining official documents approved or signed by the Secretary and Deputy Secretary of Homeland Security. I also know when a Secretary of Homeland Security vacates the office, and when a new Secretary of Homeland Security begins service as the Secretary. This declaration is based on my personal knowledge and on information that I reviewed in the course of my official duties as an employee of DHS.
2. The document, attached as Exhibit 1, is a true and correct copy of DHS Delegation Number 00106, Revision Number 08.5 titled "DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS", issued December 15, 2016, and updated April 10, 2019.
3. The document, attached as Exhibit 2, is a true and correct copy of DHS Delegation Number 00106, Revision Number 08.6 titled "DHS ORDERS OF SUCCESSION AND

DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS”, issued December 15, 2016, and updated November 14, 2019.

4. The document, attached as Exhibit 3, is a true and correct copy of a memorandum titled “Designation of an Order of Succession for the Secretary”, issued by then General Counsel John M. Mitnick and dated April 9, 2019, signed by then Secretary Kirstjen Nielsen on April 9, 2019.
5. The document, attached as Exhibit 4, is a true and correct copy of the “Amendment to the Order of Succession for the Secretary of Homeland Security” issued by then Acting Secretary Kevin K. McAleenan and dated November 8, 2019.
6. Kirstjen Nielsen was confirmed as the Secretary of Homeland Security on December 5, 2017 and remained as the Secretary until she vacated the position on April 10, 2019.
7. Kevin K. McAleenan resigned as Acting Secretary of Homeland Security on November 13, 2019.

In accordance with 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 3<sup>rd</sup> day of August, 2020 in Washington, D.C.



Juliana Blackwell  
Deputy Executive Secretary  
Office of the Executive Secretary  
Department of Homeland Security

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MANZANITA BAND OF THE KUMEYAAY  
NATION, *et al.*,

Plaintiffs,

v.

CHAD WOLF, in his official capacity as Under  
Secretary of Homeland Security for Strategy,  
Policy, and Plans, *et al.*

Defendants.

**Case No. 1:20-cv-02712 -RC**

**DECLARATION OF ANGELA ELLIOTT SANTOS IN SUPPORT OF PLAINTIFFS’  
MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

I, Angela Elliott Santos, declare as follows:

1. My declaration is based on my personal knowledge, and I am competent to testify to the contents of my declaration in this proceeding.

2. I am a member of the Manzanita Band of the Kumeyaay Nation (“Tribe” or “Manzanita Band”), a federally-recognized Indian tribe, which governs the Manzanita Indian Reservation. I am the Chairwoman, the highest elected office of, the Manzanita Band, a position I have held since April 2015. Before serving as Chairperson, I served as an elected member of the Tribe’s Executive Committee since December 1998. I currently serve as the Chairperson of the Kumeyaay Heritage Preservation Council (“KHPC”) and have served as a delegate on behalf of the Tribe to KHPC since 2012. I have been active for many years in efforts on behalf of the Tribe to protect Kumeyaay culture, history, traditions and religious rights.

3. The Manzanita Reservation comprises more than 4,500 acres and is located just north of Live Oak Springs, California and the Campo Reservation, approximately ten miles north

of the U.S.-Mexico border. Most members of the Manzanita Band live on the Reservation and in and around the Kumeyaay Nation's aboriginal territory which includes San Diego and Imperial Counties and extends south into northern Baja California. I have lived on the Manzanita Reservation for almost 30 years.

4. My family comes from the Hilmiarp and Oswai Clans, which occupied the area north and south of the U.S.-Mexico border just south of the Manzanita Reservation. My family historically has close ties to the border area in east San Diego County and western Imperial County. My father, Leroy J. Elliott, was a spiritual leader and a leader among bird singers, who sing traditional Kumeyaay songs at ceremonial and cultural events. He taught me Kumeyaay traditional ways and passed his extensive knowledge to me and my sisters and to our children. He served as Chairman of our Tribe for over 17 years and advocated vigorously to preserve Kumeyaay cultural resources. His commitment to our Kumeyaay culture and traditions inspires me to fight to protect our cultural rights, including the issues in this case.

5. On March 23, 2018, I sent a letter to Customs and Border Protection ("CBP") requesting consultation on all aspects of the border barrier projects in our area including planning, design, alignment, surveys, construction, monitoring, changes in design, restoration and mitigation, information, including your draft environmental documents, documentation on any previous activities or construction in the areas of the border barrier projects ("Project Area") along with any document searches, a meeting to be set as soon as possible after receiving the requested information and before any decisions are made and before ground breaking activities begin. Letter to Paul Enriquez, U.S. Customs and Border Patrol responding to a February 23, 2018, attached as Exhibit 1. The Tribe received no response to that letter.

6. On August 3, 2020, the Manzanita Band, along with KHPC, the Campo Kumeyaay Nation, Ewiiapaayp Band of Kumeyaay Nation, the Iipay Nation of Santa Ysabel, and San Pasqual Band of Mission Indians sent a letter dated July 31, 2020 to Chad Wolf, Commissioner Morgan, and Commanding General Semonite, in which we demanded that the agencies: stop all ground disturbing activities at the border fence construction projects in San Diego and Imperial Counties until all impacts on Kumeyaay religious beliefs, practices, and cultural resources had been fully evaluated and provide adequate access to the Project sites by tribal monitors. Letter from Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation et al., to Chad F. Wolf et al. (July 31, 2020), attached as Exhibit 2. The Tribes also demanded that the Agencies consult with the Tribes by providing information about the Project plans and schedule, a completed Environmental Stewardship Plan (“ESP”) as required by federal law, and cultural resource studies completed since 2010, by receiving and accepting comments from Kumeyaay representatives on the requested documents, and meeting with Kumeyaay representatives to discuss these matters. We also demanded the Agencies take concrete actions to avoid and mitigate impacts to cultural and religious resources. The Tribes proposed a specific timeline for completing the consultation and limiting the delay of the projects.

7. On August 5, 2020, the Jamul Indian Village sent the Mr. Wolf, Commissioner Morgan, and Commanding General Semonite a letter joining in the July 31, 2020 letter’s comments and positions. Letter from Erica M. Pinto, Chairwoman, Jamul Indian Vill., to Chad F. Wolf et al. (Aug. 5, 2020), attached as Exhibit 3.

8. On August 6, 2020, I called Paul Enriquez, the CBP official who had been acting as the CBP contact with Tribes on border fence matters, requesting consultation and a temporary stop to border fence construction, including a videoconference between tribal leaders and federal

government officials to discuss the Tribes' position on border fence construction. I also asked for a response to our July 31, 2020 Letter. I sent a letter following up on this conversation. *See* Letter from Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation, to Paul Enriquez, Acquisitions, Real Estate & Env'tl. Dir., Border Wall Project Mgmt. Off., CBP (Aug. 10, 2020), attached as Exhibit 4.

9. On August 17, 2020, CBP wrote me a letter stating that a "response to your letter is being finalized, and I anticipate that you will receive it soon." Letter from Paul Enriquez, Dir., Acquisition, Real Estate & Env'tl., Infrastructure Portfolio, Program Mgmt. Office Directorate, CBP, to Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation (Aug. 17, 2020), attached as Exhibit 5.

10. On August 17, 2020, I sent a letter to Mr. Wolf, Commissioner Morgan, and Commanding General Semonite, requesting a response to our July 31, 2020 letter. *See* Letter from Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation, to Chad F. Wolf, Acting Sec'y, DHS et al. (Aug. 17, 2020), attached as Exhibit 6.

11. On August 21, 2020, I sent another letter to Mr. Wolf, Commissioner Morgan, and Commanding General Semonite, repeating the request and noting the urgency of the matter. *See* Letter from Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation, to Chad F. Wolf et al. (Aug. 21, 2020), attached as Exhibit 7.

12. The evening of August 24, 2020, I received by email a letter from the U.S. Border Patrol dated August 20, 2020 purporting to respond to our letter dated July 31, 2020. *See* Letter from Aaron M. Heitke, Chief Patrol Agent, CBP, San Diego Sector, to Angela Elliott Santos, Chairwoman, Manzanita Band of Kumeyaay Nation (Aug. 20, 2020), attached as Exhibit 8. The letter stated that the project in San Diego County was being carried out under an IIRIRA waiver

but CBP “is committed to responsible environmental stewardship.” *Id.* at 1. However, the letter noted that an ESP had not been completed and refused to stop construction activities. The letter said the Border Patrol would “engage in ongoing dialogue with tribal leadership and members to address concerns to the greatest extent possible.” *Id.* at 3. CBP also said it had hosted conference calls with representatives of the Kumeyaay Nation in May and June of the year and hosted with the Corps a site visit of the Project on July 9, 2020.

13. CBP hosted a number of conference calls with the Tribes about the border construction project in which I participated in July, August and September 2020, and in which it provided information about their cultural surveying efforts and monitoring in San Diego. However, such calls were nothing more than briefing sessions and did not constitute meaningful consultation, as CBP did not seek the Tribes’ views about how to mitigate or avoid adverse impacts on Kumeyaay rights.

14. On these calls I repeatedly cautioned CBP that there are cultural resources near the border. I have particularly expressed concern that near Eco Substation near Jacumba important artifacts were discovered 25 feet below ground close to the border. I objected to the environmental consultants’ treatment of artifacts and classifying them as “isolates” without considering the likelihood that they evidence a larger cultural site of importance. This is particularly a concern in Jacumba as the hot springs is a sacred site, and the broader area is a significant Kumeyaay settlement site and an intersection of important cultural, trade and travel routes. I insisted that qualified Kumeyaay monitors be placed at all ground disturbing activity to identify possible discoveries at the site and to evaluate the soil. I urged CBP to use cadaver dogs to assist in identifying human remains and cremation sites. I explained that we have seen cadaver dogs used in this manner successfully in the past. I also expressed concern that in July there were no

monitors, and even when CBP later increased monitors to three, that was inadequate because there are more than three construction sites at a time, so substantial ground disturbing activity has occurred in the project areas without Kumeyaay monitors. I am told the work in the project in Imperial County been underway for quite some time without Kumeyaay monitors.

15. I have also expressed concern that during construction the heavy equipment trenches out such a large volume of soil so quickly that it is too dangerous to monitor the soil for any discovery of cultural resources or human remains. On July 9, 2020 I visited a construction site with Paul Enriquez, a CBP official, and it was unlike any construction site that I have seen because of the volume and rate of soil extraction with heavy equipment and many large dump trucks.

16. Because of the historic settlements at Tecate, Jacumba and other locations along the border, there is no question that there are cremation sites and human remains in the project areas that have been, and are being destroyed by the trenching and other ground disturbing activity. This violates the Kumeyaay belief that the remains of our ancestors are sacred, and they must be kept together for eternity. We believe that the separation of the remains of a deceased person threatens harm to that person's soul. I have seen this belief control the disposition of remains of my family members.

17. While it has claimed on occasion to solicit tribal input, CBP has not truly sought the Kumeyaay Tribes' views on mitigating or avoiding impacts on Kumeyaay cultural resources or religious interests, nor has it altered its construction plans in response to tribal comments. Furthermore, construction is ongoing with insufficient monitoring. CBP has been briefing us on the construction that they are doing, but they do not listen to us; then they point to our participation



in the meetings as a justification for their continuing construction and destruction of Kumeyaay cultural resources.

18. If CBP had truly consulted with the Tribes in advance of construction, made appropriate revisions to plans to avoid or mitigate adverse impacts, and provided for proper Kumeyaay monitoring, cadaver dogs and appropriate protocols, the Tribes would not have been forced to bring this court action. The Tribe seeks a long-term relationship with CBP in addressing cultural resources matters in CBP construction and operations activities. We believe that the Tribes and CBP can work together in a true government-to-government manner that provides for both the federal and the tribal interests.

19. Yet the government has refused to treat our beliefs as valid and worthy of consideration in planning and building the border wall in our Kumeyaay territory. The government's occasional request for "comment" from the Tribe and multiple "briefings" while ignoring our pleas and destroying Kumeyaay traditions, history and religion in the border projects are a cruel trick. The government claims that it has a trust obligation to the Kumeyaay tribes, but when the government decides to build the wall, it gives no thought to the project's impacts on our spiritual values and beliefs or our views about such matters. It feels dehumanizing. It makes clear that the government does not believe that our religion is legitimate or real. It is truly painful and exhausting to explain our religion over and over again and to have our pleas for respect and honor ignored. I can only hope that we can survive it.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 2020

  
Angela Elliott Santos

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 1**



## Manzanita Band of the Kumeyaay Nation

March 23, 2018

Paul Enriquez  
Real Estate and Environmental Branch Chief  
Border Patrol and Air and Marine  
U.S. Customs and Border Patrol

Dear Mr. Enriquez,

I am responding to your letter dated February 23, 2018 regarding the Replacement of Primary Border Wall in San Diego County, California. I would like to start by saying that the construction of this Project will have damaging effects on known and undiscovered cultural resources of the Kumeyaay Nation. The Manzanita Tribal Government on behalf of its people hereby request to be immediately consulted on all aspects of this Project including planning, design, alignment, surveys, construction, monitoring, changes in design, restoration and mitigation. I am requesting any and all information, including your draft environmental resources surveys and survey reports and the draft Environmental Stewardship Plan and documentation on any previous activities or construction in the Project Area along with any document searches you have conducted on this or previous projects, to be sent to the Tribe for review and a meeting to be set as soon as possible after receiving the requested information and before any decisions are made and definitely before ground breaking activities begin.

We understand that portions of the Project Area have been disturbed by previous activities however the potential for further effects or destruction of cultural resources is highly likely. We are requesting that a monitoring plan and a Tribal Participation plan be drafted for our review and that full time Kumeyaay monitors are on duty on all surveys and any and all ground disturbing activities for this project. You should know that we take our history very seriously which includes our history written on the land. This Project slices through the center of the Kumeyaay Territory and we will not have our history erased.

I look forward to hearing back from you and to working with you to preserve the Kumeyaay History of this area.

Sincerely,

Angela Elliott Santos, Tribal Chairwoman  
Manzanita Band of the Kumeyaay Nation

cc: Mr. John Petrilla

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 2**



## Manzanita Band of the Kumeyaay Nation

July 31, 2020

Chad F. Wolf, Acting Secretary  
U.S. Department of Homeland Security  
Washington, DC 20528

Mark A. Morgan, Acting Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, 6.5E Mail Stop 1039  
Washington DC 20229-1100

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Re: Request to Stop Construction of Border Barrier Project for Consultation and  
Evaluation of Impacts on Kumeyaay Cultural Resources and Religious Rights

Dear Acting Secretary Wolf, Acting Commissioner Morgan and Lt. General Semonite:

We write on behalf of the following federally-recognized tribes of the Kumeyaay Nation: the Manzanita Band of the Kumeyaay Nation, the Campo Kumeyaay Nation, the Ewiiapaayp Band of Kumeyaay Indians, the Iipay Nation of Santa Ysabel and the San Pasqual Band of Mission Indians.<sup>1</sup> This letter is also on behalf of the Kumeyaay Heritage Preservation Council ("KHPC"), which represents nine federally-recognized tribes of the Kumeyaay Nation charged with protecting Kumeyaay spirituality, cultural resources, and heritage within the aboriginal territory of the Kumeyaay people. Our aboriginal territory extends to, and beyond, the U.S.-Mexico border in San Diego and Imperial Counties. Our Tribes' reservations are located in eastern San Diego County. The Manzanita Reservation, the Campo Reservation and the Ewiiapaayp Reservation are located in close proximity to the U.S.-Mexico border.

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<sup>1</sup> 85 Fed. Reg. 5462-5465 (2020).



Chad F. Wolf, Acting Secretary  
Mark A. Morgan, Acting Commissioner  
Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
July 31, 2020  
Page 2

We share responsibility for protecting this area with the U.S. Customs and Border Protection (“CBP”), and we believe that responsibility includes an obligation to work together when our different responsibilities may conflict.

The CBP’s construction of border barriers and related activities on the U.S.-Mexico border within our aboriginal territory, specifically San Diego and Imperial Counties (“Projects”), is such an instance. The Tribes and KHPC are gravely concerned that CBP has not adequately evaluated the potential impacts of the construction projects in this area on Kumeyaay religious beliefs, practices, and cultural resources, which cannot be done without meaningful consultation with the Kumeyaay Tribes. To date, CBP has not adequately consulted with the Kumeyaay Tribes, which is essential to fulfill CBP’s obligations under federal statutes, the Free Exercise of Religion Clause of the U.S. Constitution’s First Amendment, and the federal government’s trust obligations to Indian tribes. We request that CBP, and in accordance with their roles in the Projects, the Department of Homeland Security (“DHS”) and U.S. Army Corps of Engineers (“Corps”),<sup>2</sup> take the following actions in order to comply with their obligations under federal law to protect Kumeyaay religious and cultural rights, and to consult with the Kumeyaay to minimize any impact on these rights:

1. Stop, immediately, all ground disturbing construction activity until the impacts on Kumeyaay religious beliefs, practices, and cultural resources have been fully evaluated and appropriate action taken to minimize and mitigate such impacts.
2. Before resuming any ground disturbing activity, identify potentially impacted religious and cultural resources and sites in or adjacent to Project areas and allow tribal monitors to evaluate the steps necessary to protect these areas from damage or destruction by Project activities.
3. Consult with the Kumeyaay Tribes regarding the Projects’ impacts on Kumeyaay religious beliefs, practices, and cultural resources by taking the following steps:
  - a. Provide to the Tribes no later than August 6, 2020 the following information:
    - i. Project plans and schedule, including the location of trenching, road construction, ancillary facilities construction and use, and contact information for the Corps personnel who can provide updated construction project information in a timely manner.
    - ii. A completed Environmental Stewardship Plan for the Project that addresses the care and handling of Kumeyaay cultural resources.
    - iii. Cultural resources surveys collected and carried out and planned for the Project area, including confidential appendices and site records for cultural resource sites in and near the Project areas. CBP has provided

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<sup>2</sup> As the Tribes understand that CBP, DHS, and the Corps all have significant roles in administering the Projects, references to CBP should be understood to include DHS and the Corps.

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

July 31, 2020

Page 3

information about a 2010 survey of about five miles of land along the border and a spreadsheet reflecting partial site data collected and selected site records, but CBP has not provided information about surveys done for the Project or any project-specific analysis of impacts on cultural resources.

- b. Receive and accept comments on behalf of Kumeyaay representatives, which will be submitted no later than two weeks following delivery to the Tribes of the information described in subsection (a), which comments will address potential impacts to Kumeyaay religious and cultural resources, identify additional work needed to evaluate such resources and impacts, and set forth options for avoiding and mitigating adverse impacts.
    - c. Meet with Kumeyaay representatives to discuss the Kumeyaay Tribes' concerns and comments regarding the matters discussed in Item 3(b) above and seek to reach agreement on an appropriate course of action.
  4. Take appropriate action to avoid and mitigate adverse impacts based upon the Kumeyaay Tribes' comments and concerns regarding impacts on Kumeyaay religious and cultural resources and rights. We anticipate that mitigation steps to consider will include, but will not be limited to, the following: (a) site avoidance, (b) temporary fencing during construction for site avoidance of potentially impacted resources; (c) potential reduction of the roadway in select areas to accommodate site avoidance; and (d) long-term protection such as capping or some other means to protect the resources while leaving the area bare.
  5. Mitigate adverse impacts by means that include monitoring carried out pursuant to protocols developed in consultation with the Tribes to accommodate religious concerns, and to address how any discovery of cultural resources during ground disturbance activity will be managed. Monitoring measures will include the use of forensic dogs to identify potential sites containing human remains, and a protocol will be developed to set forth procedures for disposition of human remains or other cultural resources.

These three actions – stopping construction, engaging in meaningful consultation, and taking concrete and timely steps to reduce and mitigate adverse impacts – are necessary to both of our missions. The Kumeyaay Tribes have been responsible for protecting our religion and culture, and the resources on which they rely, from time immemorial. For CBP, the responsibility to avoid imposing undue burdens on Kumeyaay religious and cultural rights and resources is set forth in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended (“IIRIRA”),<sup>3</sup> the Religious Freedom Restoration Act, and the First Amendment to the U.S.

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<sup>3</sup> Public Law 104–208, Div. C, 110 Stat. 3009–546, 3009–554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109–13, Div. B, 119 Stat. 231, 302,

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

July 31, 2020

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Constitution. The three actions proposed above (collectively, “the Kumeyaay action plan”) fulfill these responsibilities. Otherwise, the Tribes will be forced to choose between two untenable courses of action--either (a) participate in such limited consultation as CBP may choose to offer at the same time that the CBP’s ongoing activities in the Project areas are damaging or destroying Kumeyaay religious and cultural resources, rendering such consultation ineffective at best, or (b) refuse to be an active participant in a process that will damage or destroy the Kumeyaay people’s physical, spiritual, and cultural footprint in the Project areas because to do so violates their religious and cultural obligations as Kumeyaay people. Neither of these two courses of action will protect Kumeyaay religion and culture, and forcing that choice on the Kumeyaay Tribes is unlawful.

Please advise us in writing no later than August 6, 2020 whether the CBP will halt construction immediately, and agree to undertake the Kumeyaay action plan to avoid further violation of the law and damage to Kumeyaay religious and cultural rights and resources.

These requests, and the basis on which they are made, are discussed further below.

## **I. Kumeyaay Territory, History and Religious and Cultural Interests**

The Kumeyaay are the original people of the geographic area between the Pacific Ocean to the Colorado River and the San Luis Rey River south to Baja California and the Sea of Cortez. For generations, the Kumeyaay have lived, worshipped, and been buried or cremated throughout this region, including in the Project site and on both sides of the border. The Kumeyaay thus have a robust historical and cultural footprint in the region surrounding and including the Project areas. The enclosed diagram shows the Kumeyaay clans (Miskwis, Kwitark, Paipa, Hitlmawa, Kwainyi’l, Saiku’r, Oswai and Hilmiarp) that are known to have occupied the Project areas, including the villages of Tecate and Jacumba.

The region is home to significant Kumeyaay spiritual and cultural sites reflecting our deep and abiding ties to the area, which makes the Project area highly sensitive. Tecate, for example, is a Kumeyaay settlement, whose name means “knife or cut,” and which straddled what is now the Mexico-United State border in the western portion of the Project area. Our Boundary Mountain (Awi’hopil) is also located near the Project site. The mountain’s southern flanks are within between 650 and 780 feet of the border. One archaeological site, P-37-004466, is recorded just north of the border wall and southwest of Boundary Mountain. Kumeyaay interviewed in the early 1980s identified this prominent peak as a resting place for native runners as they traveled east/west from the mountains to the desert and also north/south through adjacent Jewell Valley and south

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306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109–367, section 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, Div. E, Title V, section 564, 121 Stat. 2090 (Dec. 26, 2007). 85 Fed. Reg. 14,958, 14,959 (2020) (San Diego County); 85 Fed. Reg. 14,960, 14,961 (2020) (Imperial County).



Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

July 31, 2020

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into what is now Mexico.<sup>4</sup> The peak is also known to the Kumeyaay as Lookout Point because of the sweeping view of Kumeyaay territory offered from its summit.

Jacumba Valley (Jacume/Hametaay) is a village site extending from its center near the Jacumba Hot Springs several miles in all directions, including south into what is now Mexico. Jacumba Valley is the central location of a Kumeyaay origin story. It has also been recommended for listing as a Multiple Resource Area, meaning that it is comprised of several types of important resources such as village sites, sacred area, plant gathering locales, trails, and other significant resources that collectively distinguish the area from other smaller sites with a less comprehensive set of related religious and cultural resources. Jacumba Valley extending from the north and across the international border is known in the Kumeyaay language as “Hametaay” meaning “pumpkin” or “pumpkin shaped” in reference to its landform. Jacumba itself probably means “bubbling” or “roiling water” in reference to the well-known hot springs there, which are associated with well-known archaeological sites. Rumerosa, in Mexico, is a ceremonial solstice site just south of Jacumba, which further evidences the geographic continuum of Kumeyaay sites on both sides of the border.

The Jacumba Valley continues to be an important collecting area for junipers, white sage, greasewood, and jojoba.<sup>5</sup> An iron oxide scum that appears in some of the pooled ground water in the area is boiled to produce a brilliant red to orange pigment that is used for rock art and face painting.

The Kumeyaay people operated and used an extensive trail system to link their coastal villages with those of the eastern mountains and the desert. Known trail and travel corridors in proximity to the border, and in some cases crossing the border, include the Jewell Valley trail system.<sup>6</sup> These trails link Jacumba to the In-ko-pah Gorges to the east and several villages to the north within what are now the Manzanita, Campo and La Posta Indian Reservations. While many of the recorded trails are associated with travel, trade, and procurement of resources, some are of a more spiritual and sacred nature. Kumeyaay holy men and healers (kwesiyaay) used special trails to access mediation spots such as Kuchamma (Tecate Peak), to travel to sacred springs, and to perform rituals that may have included painting images upon rock face.

In addition, Jacumba is the location of the emergence of the two brothers, Tuchaipai and Yokomatis, in a Kumeyaay origin story.<sup>7</sup> Tuchaipa and Yokomatis emerged from the ground at

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<sup>4</sup> Clyde M. Woods, *Identification and Evaluation of Native American Cultural Resources Situated Within One Mile of the Proposed and Existing Rights-of-Way in California* A2-29 (April 1982) (“Woods”).

<sup>5</sup> Woods at A2-10.

<sup>6</sup> Woods at A2-32.

<sup>7</sup> Woods at A2-10.

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

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the base of a hill among the springs.<sup>8</sup> And one of the Kumeyaay songs, which is derived from a travel song, tells of two brothers who travel long distances alone--going on past many villages and people. This song is said to have originated at Jacumba and was then sung to the Manzanita people from where it spread to other settlements and singers. Kumeyaay traditionally believe that a hill at Jacumba is the house built by the two brothers; to the south is a hot spring which represents the portal or the door to the house.<sup>9</sup> From the hill one can see Mokopá, an important landmark mountain several miles to the south in Mexico.

Not surprisingly, given this history, there are a number of significant archeological sites in the region, including near the border. Site SDI-7074, immediately adjacent to the border wall near Jacumba, involves extensive findings, including a 10,000-year-old stone hearth at 21 feet below the surface.

Given the extensive use by the Kumeyaay of the area, there is also a high probability that human remains are in the Project areas, particularly near Tecate and Jacumba. Indeed, there is no reason to believe otherwise. We understand that today a forensic anthropologist from the San Diego County Medical Examiner's Office traveled to the Project site and found faunal remains that are likely human. And human remains were found at site P-37-004281 for the border project in west San Diego even though discovery of such an extensive site at that location was not anticipated.

## II. The Project

According to CBP's website, the CBP is constructing new border barrier projects in eastern San Diego County, "replacing approximately 14 miles of existing primary pedestrian barrier with new steel bollard fencing and constructing approximately five (5) miles of new steel bollard fencing" ("Project").<sup>10</sup> The design of the new steel bollard fencing includes 30-foot steel bollards that are approximately 6" x 6" in diameter."<sup>11</sup> The fence is only part of the Project, however. It also includes "the installation of a linear ground detection system, road construction or refurbishment, and the installation of lighting, which will be supported by grid power and include embedded cameras."<sup>12</sup> The waiver issued by the Secretary of Homeland Security under Section 102(c) of IIRIRA describes the geographic scope of the Project in east San Diego County as "[s]tarting approximately one and one-half (1.5) miles east of Border Monument 243 and

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<sup>8</sup> DuBois, Constance Goddard, "Diegueño Mortuary Ollas," *American Anthropologist* 9 no. 3, 229 (July-Sept. 1907).

<sup>9</sup> Du Bois, Constance Goddard, "Ceremonies and Traditions of the Diegueno Indians," *Journal of American Folklore* 21 no. 81 (1908).

<sup>10</sup> <https://www.cbp.gov/document/environmental-assessments/san-diego-county-border-barrier-projects>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Chad F. Wolf, Acting Secretary  
Mark A. Morgan, Acting Commissioner  
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extending east to the San Diego-Imperial County line.”<sup>13</sup> In addition, the Tribes understand that CBP is working on border barrier projects in the El Centro Sector in Imperial County. The IIRIRA waiver describes the geographic scope of the Project in west Imperial County as “[s]tarting at the San Diego—Imperial County line and extending east approximately 11 miles.”<sup>14</sup> Accordingly, references to “Projects” in this letter include both the barrier projects in both San Diego and El Centro Sectors in San Diego and Imperial Counties.

Although the Tribes have not been provided information about the specific construction plans for the Projects, the Tribes have been told by workers that the Projects involve trenching eight feet deep and two feet across, and the displacement of approximately 1.3 million cubic feet of soil along 14 miles. If these estimates are correct, it will result – and may have already resulted – in the destruction or desecration of irreplaceable cultural resources whose presence and use by the Kumeyaay people long predates the establishment of the border, and which are essential to understanding and documenting the history of the border, as well as that of the Kumeyaay people. This is therefore a matter that is deeply concerning to the Kumeyaay people.

### **III. Consultation**

CBP states that it is constructing the Projects pursuant to Section 102 of IIRIRA, which expressly requires consultation with Indian tribes to minimize the Project’s impacts on their culture and communities. The Act provides that “[i]n carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.” Pub. L. 104–208 § 102(b)(1)(C)(i). Consultation under that provision is “mandatory” and applies to any border construction project under Section 102 of the IIRIRA. *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1123 (S.D. Cal. 2018), *cert. denied sub nom. Animal Legal Def. Fund v. Dep’t of Homeland Sec.*, 139 S. Ct. 594, and *aff’d*, 915 F.3d 1213 (9th Cir. 2019).

To date, CBP has not complied with this explicit consultation obligation, and therefore must take immediate action to do so in order to minimize the Projects’ impacts on the Kumeyaay Tribes’ culture and communities. While Border Patrol staff shared Project information via webinar with tribal representatives in May and June, and participated in a field visit on July 9, to this date CBP has not provided information about the construction plans and schedule that is sufficient to permit the Kumeyaay Tribes to evaluate the Projects’ impacts on religious and cultural resources, nor has CBP provided a comprehensive evaluation of such impacts. Nor does it appear that CBP has gathered the information necessary to such an evaluation. On a recent conference call hosted by CBP, Cogstone, a firm retained by CBP to assist with environmental and cultural resources impacts, informed the Tribes that Cogstone had not gathered all available archeological site

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<sup>13</sup> 85 Fed. Reg. 14,958, 14,959 (2020) (Section 2).

<sup>14</sup> 85 Fed. Reg. 14,960, 14,961 (2020) (Section 2).

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records and had not completed a cultural resources survey for the Protect site. In response, the Kumeyaay representatives identified a number of areas of special interest with respect to cultural resources, sacred sites such as Boundary Peak and Jacumba Hotsprings. At this date, we continue to await a response to those concerns.

It also appears CBP has not prepared an Environmental Stewardship Plan (“ESP”) for the Projects, notwithstanding CBP’s representation that ESPs are created for projects notwithstanding the use of waivers. Without a full evaluation of religious and cultural resources in the area, informed by a detailed understanding of Project plans, the proper evaluation, avoidance, and mitigation of impacts on these resources is impossible.<sup>15</sup> And it bears repeating that such studies are only useful if they are done prior to construction, which is necessary to provide direction to ground crews, and more importantly, because damage from construction activities cannot be undone.

Worse still, at the time of this writing, construction activities, including trenching, road construction, and clearing land for ancillary facilities, are underway, and Kumeyaay resources are being impacted.

In a letter dated July 26, 2020 CBP stated that it would arrange to have Tribal cultural monitors accompany an archaeologist to survey four project areas totaling approximately 7.15 miles where no construction activities have yet occurred. We welcome this proposal, provided that you confirm that no construction will occur on these segments until the survey is complete, that potential impacts will be evaluated in consultation with the Tribes, and that appropriate mitigation to avoid or minimize such impacts will be undertaken as required by § 102(b)(1)(C)(i) of the IIRIRA. We will assist with the evaluation of those segments on those terms – but we will not assist in an evaluation that is undertaken with no promised protection for our religious and cultural resources. We will also assist in survey work on segments where construction is presently underway, provided that construction stops immediately and will not proceed further until the survey work is completed. Again, we will not participate in a process in which we must effectively consent to the destruction or desecration of our religious and cultural resources in order to protect those resources.

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<sup>15</sup> The CBP announced in connection with a similar border wall project for a 14-mile segment of the border in western San Diego County that it “notified numerous tribes” of that project and “continued to work in a collaborative manner” with tribes and “considered and incorporated comments during the scoping period into this ESP.” Department of Homeland Security, San Diego Sector Secondary Wall Replacement Project 1-2, 1-3 (May 2019), available at [https://www.cbp.gov/sites/default/files/assets/documents/2019-Jul/ESP\\_Secondary%20Wall\\_050119\\_508\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jul/ESP_Secondary%20Wall_050119_508_0.pdf). Such steps do not constitute meaningful consultation.

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The consultation proposed above is intended to assist CBP in complying with its legal obligations and avoid the imposition of an improper and illegal burden on the Kumeyaay people's practice of their religion.

#### **IV. Minimizing Impacts on Kumeyaay Cultural Resources and Religious Rights**

We believe that a framework for our working together is already in place. While the Secretary of Homeland Security has waived the National Environmental Policy Act, National Historical Preservation Act ("NHPA") and other laws for the Projects,<sup>16</sup> the CBP announced in connection with a similar border wall project for a 14-mile segment of the border in western San Diego County that it has "applied the general standards and guidelines associated with the NHPA as the basis for evaluating potential environmental impacts and appropriate [best management practices]."<sup>17</sup> The DHS has also announced that "DHS has been coordinating and consulting, and intends to continue doing so, with other federal and state resource agencies to ensure that impacts to the environment, wildlife, and cultural and historic artifacts are analyzed and minimized, to the extent possible."<sup>18</sup>

In addition, the CBP states on its website that:

When operating under waivers authorized by Congress and issued by the Secretary of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) prepares Environmental Stewardship Plans (ESPs) that summarize the natural and cultural resource surveys conducted during project planning and estimate the potential environmental impacts based on the initial design. During construction, environmental monitors ensure implementation of the Best Management Practices developed and recorded in ESPs and report on any deviations from the Best Management Practices.

Environmental Stewardship Summary Reports (ESSRs) document the final "footprint" of segments constructed under the waiver. These reports incorporate construction changes approved after the ESPs were prepared that may have resulted in changes to the predicted impacts, as well as summarize the results from environmental monitor reports during construction.<sup>19</sup>

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<sup>16</sup> 85 Fed. Reg. 14,958, 14,959 (2020) (Section 2); *see also* 85 Fed. Reg. 14,960, 14,961 (2020).

<sup>17</sup> Department of Homeland Security, San Diego Sector Secondary Wall Replacement Project 3-49 (May 2019), available at [https://www.cbp.gov/sites/default/files/assets/documents/2019-Jul/ESP\\_Secondary%20Wall\\_050119\\_508\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jul/ESP_Secondary%20Wall_050119_508_0.pdf).

<sup>18</sup> *See* <https://www.dhs.gov/news/2019/05/15/dhs-issues-waiver-expedite-border-wall-projects-california>.

<sup>19</sup> <https://www.cbp.gov/about/environmental-management-sustainability/documents/esp-essr>.



Chad F. Wolf, Acting Secretary

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But these commitments have not been met. Construction has commenced even before an ESP has been completed for the Projects.<sup>20</sup> The Tribes have not been able to locate such a document or other environmental analysis on the CBP website, and the CBP website states “[i]f no ESSRs are listed for a Sector, this indicates that there are no ESSRs applicable for the Sector.”<sup>21</sup> Clearly, no ESP has been conducted or considered for the Projects. Compounding that failure, Cogstone is gathering cultural resources information while construction proceeds, and the information they have gathered to date is incomplete, as the information that Cogstone shared with the Tribes does not include cultural resource investigations in the area carried in the last 10 years. Accordingly, it appears CBP has not yet fully investigated or inquired as to the environmental and cultural impacts of the Projects.

DHS is violating the Kumeyaay’s federal rights to practice their religion by proceeding with construction activities, including trenching, road construction, and clearing land for ancillary facilities, without adequately evaluating the impacts of that activity on Kumeyaay religious beliefs, practices, and cultural resources. At the same time, DHS has recognized that the protection of Indian sacred sites requires such an evaluation before proceeding, by stating that “DHS policy is to respect the interests and beliefs of federally recognized tribes and to enter into consultation with them on matters that may affect those interests and beliefs. Where appropriate, DHS will protect the location and existence of Indian sacred sites and other matters in accordance with tribal concerns, as permitted by applicable law.” DHS Directive 017-01, V.G.<sup>22</sup> Such protection cannot be provided without engaging in effective consultation before the Projects proceed. And that must proceed now, in accordance with the Kumeyaay action plan.

The obligation of the CBP to do so is explicitly stated in § 102(b)(1)(C)(i) of the IIRIRA, and is independently required by Religious Freedom Restoration Act of 1993 (“RFRA”), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, which the DHS Secretary has not waived, and which therefore must be complied with, through consultation and corrective action, by the CBP. The RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§ 2000bb–1(a), (b). If the Tribes are afforded consultation only after-the-fact, without being provided an opportunity to protect the location and existence of religious and cultural resources before the Projects proceed, and to seek to avoid or minimize impacts on such resources before the Projects proceed, they will be forced to choose between participating in a process that runs simultaneously with the damage or destruction of the Kumeyaay religious and cultural resources that the process purports to protect, or refusing to participate in the extinction of their

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<sup>20</sup> The CBP website contains no ESP for the Project. <https://www.cbp.gov/about/environmental-management-sustainability/documents/esp-essr>.

<sup>21</sup> *Id.*

<sup>22</sup> [https://www.dhs.gov/sites/default/files/publications/mgmt/education/mgmt-dir\\_017-01-historic-preservation-asset-mgmt-operations\\_revision-00.pdf](https://www.dhs.gov/sites/default/files/publications/mgmt/education/mgmt-dir_017-01-historic-preservation-asset-mgmt-operations_revision-00.pdf).

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

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people's religion and physical, spiritual, and cultural footprint in the Project areas because to do so is to violate their religious and cultural obligations as Kumeyaay people. Forcing that choice on the Kumeyaay people imposes a substantial burden on their free exercise of religion in violation of RFRA.

That CBP has not taken adequate steps to evaluate the potential impacts of the Projects on Kumeyaay resources and interests is undeniable for two reasons: first, the Kumeyaay people have not been consulted by CBP; and second, they are the keepers of Kumeyaay religious and cultural beliefs and practices. And as noted above, while CBP has proposed to work with the Tribes on cultural survey work on 7.15 miles of segments of the Projects where construction has not commenced, that commitment must be solidified as proposed above to be protective. In addition, such survey work is needed on the portions of the Projects where construction is underway – which must be stopped for that to occur.

We must also emphasize the Kumeyaay Tribes' grave concerns about the inadequate monitoring of ground disturbing activity on the Projects. Beginning July 10, 2020 Cogstone retained one tribal monitor per day to monitor construction activities, and in a letter dated July 26, 2020 CBP committed to funding Tribal monitors for only approximately 45, 10-hour person days. However, one monitor cannot cover ground disturbing activity at multiple sites, and the duration of the monitoring to which CBP has committed is wholly inadequate. For example, ten to twenty monitors were used for ground disturbing activity during construction of other infrastructure projects in the area, including Sunrise Powerlink, Tule Wind, Ocotillo Wind and Eco Substation. Our additional concerns include:

- Incomplete information about the scope and location of ground disturbing activity. Cogstone advised a tribal representative on July 23, 2020 that there were three active construction areas, but construction also appears to be occurring on access roads, dump sites and other ancillary locations.
- Inadequate opportunity to review soils at all work areas, which must be done ahead of, during, and after all ground disturbances. CBP and its contractors have kept Kumeyaay monitors an unreasonable distance from ground disturbing equipment, and often provide access well after the initial disturbance. Such constraints prevent meaningful detection of resources and impacts. Tribal Monitors are trained to work in proximity to machinery to allow immediate detection of cultural items and prevent harm to important sites, and they must be allowed to fulfill their role.
- Inadequate opportunity to remove, safeguard, and repatriate all cultural articles in accordance with the Kumeyaay religious practices.

Basic protocols necessary to ensure appropriate mitigation of impacts should include the following:

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

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1. Survey known and suspected cultural sites prior to and following ground disturbances.
2. Review the project areas prior to ground disturbance.
3. Tribal monitors at each location during ground disturbance in sufficiently close proximity to witness the uncovering of potential cultural materials.
4. Where there is a reasonable basis for expecting cultural materials to be found, the avoidance of using heavy machinery or explosives that precludes the ability for Tribal monitors to view and recover uncovered materials.
5. Coordination between work crews and Tribal monitors to provide daily and future coordination of construction plans that will allow meaningful avoidance of impacts to cultural resources.
6. Requiring sampling and testing of soil when the tribal monitors determine that the soil has characteristics associated with soil potentially containing remains or archeological resources. The extent of sampling and testing depends on initial testing of the soil and likelihood that human remains or other resources are present.

Consultation is necessary to develop the procedures by which these protocols would be carried out. We anticipate that a minimum of ten tribal monitors are needed to ensure adherence to the protocols described above.

We are prepared to engage in meaningful government-to-government consultation with the CBP, but the construction work must stop to permit such consultation and the evaluation of the Projects' impacts on Kumeyaay cultural resources and religious practices. The commencement and continuation of construction activities in the absence of a full evaluation of the Projects' impacts on Kumeyaay religious and cultural resources and consultation with Kumeyaay people on how to avoid or minimize such impacts unlawfully conditions consultation on the relinquishment of our rights to access sacred sites and practice our religion in the Project areas.

We look forward to your favorable response regarding the implementation of the Kumeyaay action plan and hope that we can work through these matters collaboratively and on a government-to-government basis. If we are not able to do so, the Tribes will consider other options for protecting their cultural patrimony and religious rights.



Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

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Sincerely,

MANZANITA BAND OF THE KUMEYAAY NATION

A handwritten signature in black ink, reading "Angela Elliott Santos". The signature is fluid and cursive, with the first name "Angela" being the most prominent.

Angela Elliott Santos, Chairwoman

KUMEYAAY HERITAGE PRESERVATION COUNCIL

A handwritten signature in black ink, reading "Angela Elliott Santos". The signature is fluid and cursive, with the first name "Angela" being the most prominent.

Angela Elliott Santos, Chairwoman

CAMPO KUMEYAAY NATION

Marcus Cuero, Chairman

IIPAY NATION OF SANTA YSABEL

Bernice Paipa, Chairwoman

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

July 31, 2020

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Sincerely,

MANZANITA BAND OF THE KUMEYAAY NATION

Angela Elliott Santos, Chairwoman

KUMEYAAY HERITAGE PRESERVATION COUNCIL

Angela Elliott Santos, Chairwoman

CAMPO KUMEYAAY NATION



Marcus Cuero, Chairman

IIPAY NATION OF SANTA YSABEL

Bernice Paipa, Chairwoman

Chad F. Wolf, Acting Secretary  
Mark A. Morgan, Acting Commissioner  
Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
July 31, 2020  
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Sincerely,

MANZANITA BAND OF THE KUMEYAAY NATION

Angela Elliott Santos, Chairwoman

KUMEYAAY HERITAGE PRESERVATION COUNCIL

Angela Elliott Santos, Chairwoman

CAMPO KUMEYAAY NATION

Marcus Cuero, Chairman

IIPAY NATION OF SANTA YSABEL

A handwritten signature in black ink, reading "Bernice Paipa". The signature is written in a cursive, flowing style.

Bernice Paipa, Chairwoman

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

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SAN PASQUAL BAND OF MISSION INDIANS

A handwritten signature in dark ink, appearing to read "Stephen W. Cope". The signature is fluid and cursive, with the first name "Stephen" being the most prominent part.

Stephen W. Cope, Spokesman

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS

Robert Pinto, Sr., Chairman

Enclosure

cc: Paul Enriquez, Acquisition, Real Estate and Environmental Director, U.S. Border Patrol  
Darrel Williams, U.S. Army Corps of Engineers

Chad F. Wolf, Acting Secretary

Mark A. Morgan, Acting Commissioner

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General

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SAN PASQUAL BAND OF MISSION INDIANS

Stephen W. Cope, Spokesman

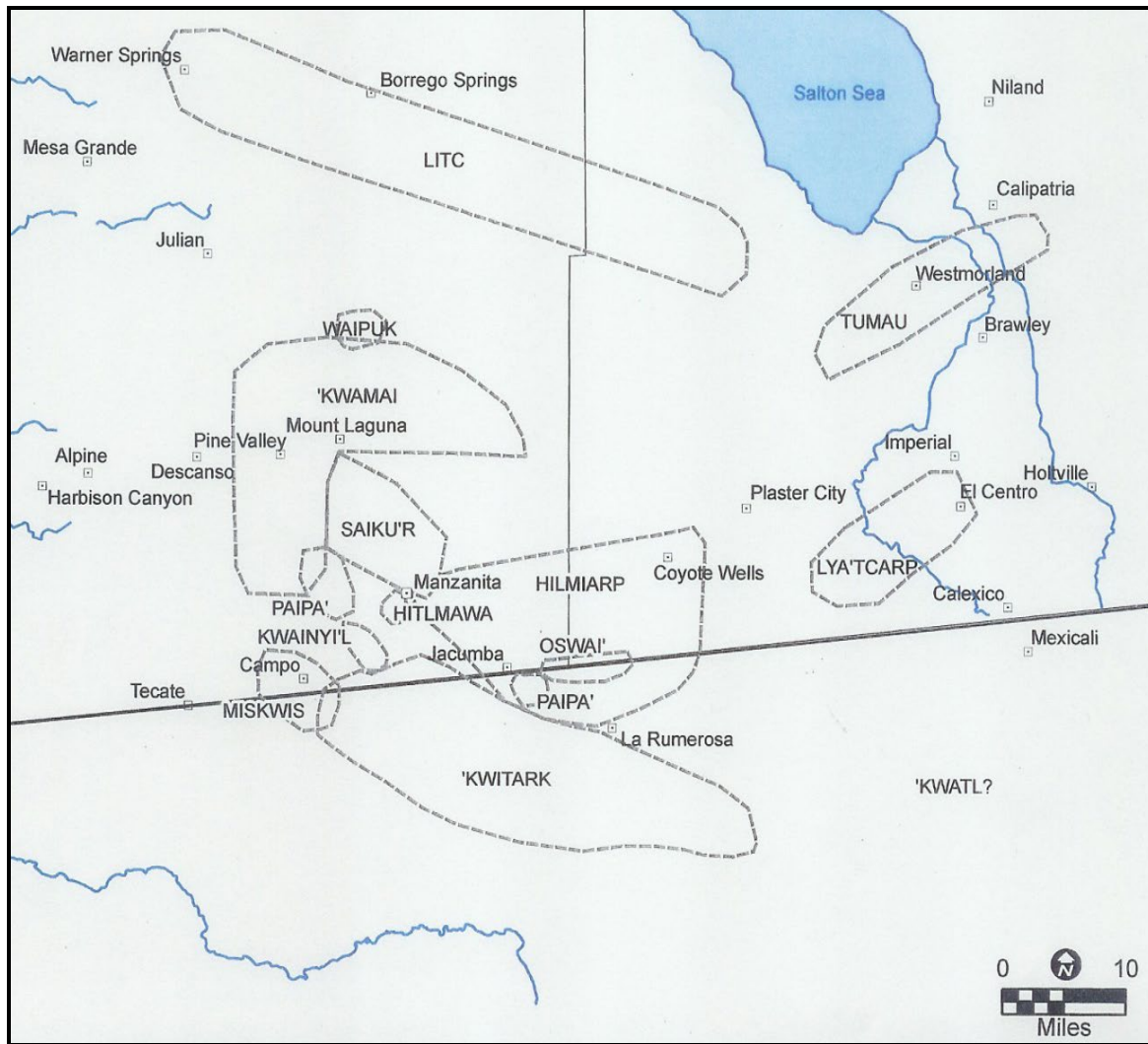
EWIIAAPAYP BAND OF KUMEYAAY INDIANS

A handwritten signature in black ink, appearing to read "Robert Pinto, Sr.", with a stylized flourish at the end.

Robert Pinto, Sr., Chairman

Enclosure

cc: Paul Enriquez, Acquisition, Real Estate and Environmental Director, U.S. Border Patrol  
Darrel Williams, U.S. Army Corps of Engineers



### Shimulls (Clans) of Southern Imperial and San Diego County

*Sources: Richard L. Carrico and Leslie Spier, Southern Diegueño Customs, 1923, 1965.*

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 3**





August 5, 2020

Chad F. Wolf, Acting Secretary  
U.S. Department of Homeland Security  
Washington, DC 20528

Mark A. Morgan, Acting Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, 6.5E Mail Stop 1039  
Washington DC 20229-1100

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Re: Letter Dated July 31, 2020 regarding Request to Stop Construction of Border  
Barrier Project for Consultation and Evaluation of Impacts on Kumeyaay Cultural  
Resources and Religious Rights

Dear Acting Secretary Wolf, Acting Commissioner Morgan and Lt. General Semonite:

The Jamul Indian Village, a federally recognized Indian Tribe, has reviewed the  
above referenced correspondence that was recently addressed to you and joins in the  
comments and positions taken by the signatory Tribal governments. Please consider  
the Jamul Indian Village as one of the co-signatories to the letter.

Sincerely,

Erica M. Pinto, Chairwoman

JAMUL INDIAN VILLAGE

EMAIL: [info@jamulindianvillage.com](mailto:info@jamulindianvillage.com)

TEL: 619.669.4785  
FAX: 619.669.4817  
ADDR: P. O. Box 612  
Jamul, CA 91935

[jamulindianvillage.com](http://jamulindianvillage.com)



*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 4**



## Manzanita Band of the Kumeyaay Nation

August 10, 2020

Paul Enriquez  
Acquisitions, Real Estate and Environmental Director  
Border Wall Project Management Office  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, NW Mail Stop 1039  
Washington, DC 20229

Re: Telephone conference regarding Kumeyaay Tribes' letter requesting suspension of construction activity on border wall in San Diego and Imperial Counties pending evaluation of Kumeyaay Tribes' cultural resources impacts

Dear Mr. Enriquez,

I write to follow up on our telephone conference of August 6 regarding the Kumeyaay Tribes' request in our July 31 letter that the U.S. Customs and Border Protection ("CBP") suspend construction of the border barrier projects in San Diego and Imperial Counties pending evaluation of the impacts of those projects on Kumeyaay religious and cultural resources, and consultation with the Tribes concerning measures to avoid and mitigate such impacts. We reached out to you since you have been the CBP contact with the Tribes on matters related to the border barrier projects in recent weeks.

As we explained on our conference call, the Tribes seek to open and maintain a channel for communicating with the Department of Homeland Security, CBP, and the U.S. Army Corps of Engineers (collectively, "Agencies") on the issues raised in the Tribes' letter and their resolution. We also emphasized on the call that temporarily stopping construction while the impacts of that activity are reviewed is critical because the identification and avoidance or mitigation of the impacts of construction on Kumeyaay cultural sites and religious practices cannot occur after the fact. Consultation is timely only if it precedes the action that is the subject of the consultation.

You stated that Office of the Acting Secretary of Homeland Security is preparing a response to the Tribes' letter, and that you expect that response to be issued the week of August

Paul Enriquez, Acquisitions, Real Estate and Environmental Director

August 10, 2020

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10. Please confirm when we can expect the response. As we explained on our conference call, the Tribes proposed a very short timeframe for responding to the information regarding the barrier projects that we requested in the July 31 letter (assuming that information is supplied by the Agencies) so as not to delay work on the projects any more than is absolutely necessary. As we understand construction is proceeding even now, the risk to tribal religious and cultural resources, and the burdens on tribal religious practices is very high, and there is even greater urgency to our request.

As we also discussed on the call, the Tribes expect that once the Agencies have responded to the Tribes' letter, a videoconference between tribal leaders and appropriate government officials will be useful so that the parties can have a full discussion of the parties' positions. We urge that such a meeting be scheduled promptly after receipt of the Agencies' response and welcome suggested dates for that meeting now.

As we also discussed, the Tribes are also prepared to assist with the monitoring of the construction activity pending receipt of the Agencies' response to the issues discussed in the Tribes' July 31 letter. The Tribes will have to reevaluate that position if the Agencies' response does not afford protection for the Tribes' religious and cultural rights and resources, but the Tribes believe that such monitoring should be conducted now. In our view, this should be done pursuant to a memorandum of understanding between CBP and each Tribe, not through Cogstone, the environmental consulting firm. Doing so through a memorandum of understanding is consistent with the government-to-government relationship between the federal government and the Tribes and comports with federal agency practice on such matters. Furthermore, the Tribes believe they are the best judge of the qualifications of tribal cultural monitors, and that requiring background checks on tribally-selected monitors is inconsistent with the government-to-government relationship and typical federal agency practice. We understand that you are evaluating alternative approaches with respect to these issues and will get back to us as soon as you have done so.

We look forward to your prompt response on these matters as well as the Agencies' response to the Tribes' July 31 letter.

Sincerely,

A handwritten signature in black ink that reads "Angela Elliott Santos". The signature is fluid and cursive, with the first name "Angela" being the most prominent.

Angela Elliott Santos, Chairwoman

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 5**

1300 Pennsylvania Avenue NW  
Washington, DC 20229



U.S. Customs and  
Border Protection

August 17, 2020

Chairwoman Angela Elliott Santos  
Manzanita Band of the Kumeyaay Nation  
P.O. Box 1302  
Boulevard, CA 91905  
Email: [aelliottsantos7@aol.com](mailto:aelliottsantos7@aol.com)

SUBJECT: Kumeyaay Tribes' Comments on San Diego and Imperial Counties Border Barrier Projects

Dear Chairwoman Elliott Santos:

Thank you for your letter dated August 10, 2020 regarding ongoing coordination and the status of U.S. Customs and Border Protection's (CBP) response to the Kumeyaay Tribes' comments regarding border barrier construction in the U.S. Border Patrol (USBP) San Diego Sector. A response to your letter is being finalized, and I anticipate that you will receive it soon. We understand the urgency of this request given that construction is ongoing. At this time, the U.S. Army Corps of Engineers (USACE) does not plan to stop construction while our coordination efforts continue. We are continuing to work with the USACE to temporarily delay certain ground-disturbing activities per prior coordination to ensure tribal monitors are present and to re-survey specific areas of concern outlined by interested Tribes.

Regarding your request for a memorandum of understanding between CBP and each Tribe for the use of Tribal monitors, I welcome your suggestions on how best to achieve this. I have also reached out to the Department of the Interior's Bureau of Indian Affairs to identify potential solutions. At this time, working with Cogstone Resource Management and/or other contractors is the most expeditious strategy to ensure tribal monitors can support the project and additional areas are surveyed per the Tribes' request. Requiring background checks for personnel supporting active border barrier construction projects is a standard practice and deviating from this practice poses a risk to border security operations.

CBP will continue to work closely with you and all interested Tribes on this project and other border barrier construction projects.

Respectfully,

A handwritten signature in blue ink that reads "Paul Enriquez".

Paul Enriquez  
Director  
Acquisition, Real Estate and Environmental

Chairwoman Angela Elliott Santos

Page 2

Infrastructure Portfolio

Program Management Office Directorate

U.S. Border Patrol

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 6**



## Manzanita Band of the Kumeyaay Nation

August 17, 2020

Chad F. Wolf, Acting Secretary  
U.S. Department of Homeland Security  
Washington, DC 20528

Mark A. Morgan, Acting Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, 6.5E Mail Stop 1039  
Washington DC 20229-1100

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Re: Follow-up on Tribal Request to Stop Construction Activity for Border Barrier  
Project for Consultation and Evaluation of Impacts on Kumeyaay Cultural  
Resources and Religious Rights

Dear Acting Secretary Wolf, Acting Commissioner Morgan and Lt. General Semonite:

I write to follow up on the Kumeyaay Tribes' request in our July 31, 2020 letter (enclosed) that construction activity on the border barrier projects in San Diego and Imperial Counties be suspended pending evaluation of the impacts of those projects on Kumeyaay religious and cultural resources, and consultation with the Tribes concerning measures to avoid and mitigate such impacts. I followed up with a letter to Paul Enriquez, Acquisitions, Real Estate and Environmental Director, U.S. Customs and Border Protection on August 10, 2020. A copy of that letter is enclosed.

Mr. Enriquez said on a telephone call on August 6, 2020 that you would likely provide the Tribes a response to the July 31, 2020 letter sometime the week of August 10. Since we have not received a response, we write to inquire with you directly about when you will respond. As we have explained, because construction is proceeding, this matter is urgent as the risk to tribal religious and cultural resources and the burdens on tribal religious practices is high.



Chad F. Wolf, Acting Secretary  
Mark A. Morgan, Acting Commissioner  
Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
August 17, 2020  
Page 2

We wish to clarify that the Tribes' July 31, 2020 request that construction be stopped pending evaluation and consultation is distinct from the court action recently filed by the La Posta Band of Diegueño Mission Indians in federal court in San Diego.

We look forward to your prompt response to the Tribes' July 31, 2020 letter.

Sincerely,

  
Angela Elliott Santos, Chairwoman

Enclosures

cc: Paul Enriquez, Acquisition, Real Estate and Environmental Director, U.S. Border Patrol  
Cherie Short, Deputy Assistant Secretary Intergovernmental Affairs, U.S. Department of Homeland Security, [cherie.short@hq.dhs.gov](mailto:cherie.short@hq.dhs.gov)  
Lisa Morales, Senior Liaison and Tribal Nations Program Manager, U.S. Army Corps of Engineers, [Lisa.T.Morales@usace.army.mil](mailto:Lisa.T.Morales@usace.army.mil)  
Marcus Cuero, Chairman, Campo Kumeyaay Nation  
Bernice Paipa, Chairwoman, Iipay Nation of Santa Ysabel  
Stephen W. Cope, Spokesman, San Pasqual Band of Mission Indians  
Robert Pinto, Sr., Chairman, Ewiiapaayp Band of Kumeyaay Indians  
Erica M. Pinto, Chairwoman, Jamul Indian Village

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 7**



## Manzanita Band of the Kumeyaay Nation

August 21, 2020

Chad F. Wolf, Acting Secretary  
U.S. Department of Homeland Security  
Washington, DC 20528

Mark A. Morgan, Acting Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, 6.5E Mail Stop 1039  
Washington DC 20229-1100

Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Re: Additional Follow-up on Tribal Request to Stop Construction Activity for Border Barrier Project for Consultation and Evaluation of Impacts on Kumeyaay Cultural Resources and Religious Rights

Dear Acting Secretary Wolf, Acting Commissioner Morgan and Lt. General Semonite:

The Kumeyaay Tribes received the letter dated August 17, 2020 from Paul Enriquez, Director, Acquisition, Real Estate and Environmental Director, U.S. Border Patrol, stating that a response to the Kumeyaay Tribes' July 31, 2020 letter requesting suspension of construction activity on the border barrier projects in San Diego and Imperial Counties is being finalized, and that he anticipates we should receive the response soon.

As stated previously, this matter is urgent, and the Tribes look forward to your prompt response to the Tribes' July 31, 2020 letter.

Chad F. Wolf, Acting Secretary  
Mark A. Morgan, Acting Commissioner  
Lt. General Todd T. Semonite, Chief of Engineers and Commanding General  
August 21, 2020  
Page 2

Sincerely,

  
Angela Elliott Santos, Chairwoman

Enclosures

cc: Paul Enriquez, Acquisition, Real Estate and Environmental Director, U.S. Border Patrol  
Cherie Short, Deputy Assistant Secretary Intergovernmental Affairs, U.S. Department of  
Homeland Security, [cherie.short@hq.dhs.gov](mailto:cherie.short@hq.dhs.gov)  
Lisa Morales, Senior Liaison and Tribal Nations Program Manager, U.S. Army Corps of  
Engineers, [Lisa.T.Morales@usace.army.mil](mailto:Lisa.T.Morales@usace.army.mil)  
Marcus Cuero, Chairman, Campo Kumeyaay Nation  
Bernice Paipa, Chairwoman, Iipay Nation of Santa Ysabel  
Stephen W. Cope, Spokesman, San Pasqual Band of Mission Indians  
Robert Pinto, Sr., Chairman, Ewiiapaayp Band of Kumeyaay Indians  
Erica M. Pinto, Chairwoman, Jamul Indian Village

*Manzanita Band of the Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 8**

**U.S. Customs and  
Border Protection**

August 20, 2020

Chairwoman Angela Elliott Santos  
Manzanita Band of the Kumeyaay Nation  
P.O. Box 1302  
Boulevard, CA 91905  
Email: aelliottsantos7@aol.com

Dear Chairwoman Elliott-Santos,

Thank you for your letter dated July 31, 2020 regarding border barrier construction within the U.S. Border Patrol's (USBP) San Diego Sector. We hope to address your concerns regarding the project's potential impacts and U.S. Customs and Border Protection's (CBP) outreach efforts with the Tribal Bands of the Kumeyaay Tribal Nation.

The project at issue is situated in eastern San Diego County near Campo, California (the Project). The Project includes the construction of approximately 14 miles of new steel bollard fencing in place of existing dilapidated primary pedestrian barrier and approximately a half mile of new steel bollard fencing where no barriers currently exist. The existing primary fencing no longer meets USBP's operational needs. The Project is being carried out with the assistance of the Department of Defense (DoD) pursuant to DoD's authority under 10 U.S.C. § 284.

The Project is being carried out under a waiver issued by the Secretary of Homeland Security, which was issued on March 16, 2020, pursuant to section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended. The Secretary's IIRIRA waiver sets aside the application of certain natural resource and environmental laws in order to ensure the expeditious construction of the border barrier.

Although the Project is being carried out under an IIRIRA waiver, CBP is committed to responsible environmental stewardship. CBP engages in environmental planning within a managed timeframe to meet operational needs. Environmental planning informs project planning and execution on all border barrier projects, including the Project. To this end, CBP has reviewed existing survey data for biological, cultural, and natural resources within the project area and has conducted additional surveys for this project. As a part of this environmental planning, CBP has also engaged in a robust outreach effort. CBP has consulted with federal, state, and local agencies, tribal nations, and other interested stakeholders to obtain their input concerning the Project, including information regarding sensitive resources such as biological, cultural, and historical sites and/or artifacts within the project area.

As noted, the data and information outlined above informs project planning and execution. For example, CBP has developed a suite of Best Management Practices (BMPs) that avoid or minimize impacts to sensitive resources. The BMPs are implemented by the construction contractor during

construction activities. As an example, designated construction staging areas and transportation corridors have been identified to limit potential impacts to cultural resources. All construction vehicles and equipment must stay within designated work areas. If cultural resources are encountered, ground-disturbing work within 100 feet will stop and the monitors will be notified to coordinate an archaeological assessment. In addition, the data and information CBP obtained through environmental planning is used to prepare an Environmental Stewardship Plan (ESP) which identifies potential environmental impacts from the implementation of the project.

The Project is being executed entirely within the Roosevelt Reservation, a 60-foot corridor of federally-owned property that parallels the border with Mexico and is designated to carry out border security operations activities. Nevertheless, CBP recognizes that the project area is within the historical use area of the Tribal Bands of the Kumeyaay Nation. We also understand that certain areas are considered culturally sensitive to the Tribal Bands of the Kumeyaay Nation. To that end, we remain committed to working closely with the Manzanita Band of the Kumeyaay Nation, the Campo Band of the Kumeyaay Tribal Nation, the Iipay Nation of Santa Ysabel, the Ewiiapaay Band of Kumeyaay Indians, the San Pasqual Band of Mission Indians, the Jamul Indian Village and other tribal leadership and representatives to address the Tribes concerns to the best of our ability as the Project continues.

Please see responses to your specific requests below.

- 1. Stop, immediately, all ground disturbing construction activity until the impacts on Kumeyaay religious beliefs, practices, and cultural resources have been fully evaluated and appropriate action taken to minimize and mitigate such impacts.**

Given the importance of the Project to border security, we cannot halt construction activities. However, per previous discussions with the Manzanita Band of the Kumeyaay Nation and other tribal leaders and representatives, CBP is working with the U.S. Army Corps of Engineers (USACE) to temporarily delay certain ground disturbing activities in certain areas outlined in your letter.

In addition, CBP is working closely with interested tribes to the best of our ability to ensure tribal monitors are present during certain ground disturbing activities, such as mechanical trenching and excavation, grading, grubbing vegetation, controlled detonations, and geotechnical exploration throughout the project areas.

- 2. Before resuming any ground disturbing activity, identify potentially impacted religious and cultural resources and sites in or adjacent to Project areas and allow tribal monitors to evaluate the steps necessary to protect these areas from damage or destruction by Project activities.**

Please see response above.

- 3. Consult with the Kumeyaay Tribes regarding the Projects' impacts on Kumeyaay religious beliefs, practices, and cultural resources by taking the following steps:**



**a. Provide to the Tribes no later than August 6, 2020 the following information:**

**i. Project plans and schedule, including the location of trenching, road construction, ancillary facilities construction and use, and contact information for the Corps personnel who can provide updated construction project information in a timely manner.**

CBP is working with USACE and its contractor to obtain project locations and schedules to coordinate tribal monitoring for certain areas. As the contracting agency, all questions related to the contract and/or personnel for this project should be directed to USACE.

**ii. A completed Environmental Stewardship Plan for the Project that addresses the care and handling of Kumeyaay cultural resources.**

CBP is currently in the process of preparing the ESP for this project and it will be made available after it is finalized.

**iii. Cultural resources surveys collected and carried out and planned for the Project area, including confidential appendices and site records for cultural resource sites in and near the Project areas. CBP has provided information about a 2010 survey of about five miles of land along the border and a spreadsheet reflecting partial site data collected and selected site records, but CBP has not provided information about surveys done for the Project or any project-specific analysis of impacts on cultural resources.**

To date, CBP has provided tribal leaders and the tribal historic preservation officers of the Tribal Bands of the Kumeyaay Tribal Nation with a copy of a past cultural survey report for a portion of the project area and has provided additional survey data from past cultural survey reports. In addition, CBP has provided local tribes with the data collected from the additional cultural field surveys completed in 2020. Some of this data has been provided through CBP's environmental contractor.

In coordination with the tribes, CBP will be re-surveying certain areas of the project identified as areas of concern by the tribes during a WebEx discussion on July 10, 2020. CBP will continue to provide updated data as additional surveys are completed and a final Cultural Resources Survey Report summarizing the past and recent data is being prepared and will be provided to the tribes when completed.

**b. Receive and accept comments on behalf of Kumeyaay representatives, which will be submitted no later than two weeks following delivery to the Tribes of the information described in subsection (a), which comments will address potential impacts to Kumeyaay religious and cultural resources, identify additional work needed to evaluate such resources and impacts, and set forth options for avoiding and mitigating adverse impacts.**

While the public comment period for this project closed on May 15, 2020, CBP will continue to engage in ongoing dialogue with tribal leadership and members to address concerns to the greatest extent possible.



The consultation letter that was initially distributed in March 2020 for the Project can be found at the link below.

<https://www.cbp.gov/document/environmental-assessments/san-diego-county-border-barrier-projects>

**c. Meet with Kumeyaay representatives to discuss the Kumeyaay Tribes' concerns and comments regarding the matters discussed in Item 3(b) above and seek to reach agreement on an appropriate course of action.**

CBP hosted conference calls in May and June this year with designated representatives of the Tribal Bands of the Kumeyaay Tribal Nation. The purpose of the calls were to provide information on the project area and to continue to share project details. Additionally, CBP and USACE hosted a site visit of the border barrier project with Kumeyaay Tribal Nation representatives on July 9, 2020 and will continue to engage in ongoing dialogue with interested tribes.

**4. Take appropriate action to avoid and mitigate adverse impacts based upon the Kumeyaay Tribes' comments and concerns regarding impacts on Kumeyaay religious and cultural resources and rights. We anticipate that mitigation steps to consider will include, but will not be limited to, the following: (a) site avoidance, (b) temporary fencing during construction for site avoidance of potentially impacted resources; (c) potential reduction of the roadway in select areas to accommodate site avoidance; and (d) long-term protection such as capping or some other means to protect the resources while leaving the area bare.**

CBP is in the process of outlining and memorializing procedures for notifying project personnel and tribal representatives if any historical or cultural artifacts are identified within the project area. In such an event, work would be immediately halted and the procedures would be implemented, to include repatriating artifacts to the affiliated tribe.

For example, if significant cultural resources are found on or within close proximity to the project area, CBP will work to avoid the area and will strive to leave the resources in place. If an object cannot be avoided, work will be halted immediately within 100 feet of the resource. No more than 48 hours after the notification of discovery, the tribes and CBP will complete culturally appropriate repatriation efforts to address the discovery. Additional time may be granted to secure appropriate repatriation but shall not exceed five calendar days. The tribe on whose traditional land the item was found shall be provided with the opportunity to confer with their tribal cultural leaders to determine appropriate actions.

**5. Mitigate adverse impacts by means that include monitoring carried out pursuant to protocols developed in consultation with the Tribes to accommodate religious concerns, and to address how any discovery of cultural resources during ground disturbance activity will be managed. Monitoring measures will include the use of forensic dogs to**

**identify potential sites containing human remains, and a protocol will be developed to set forth procedures for disposition of human remains or other cultural resources.**

As noted above, CBP is outlining and memorializing the procedures should any historical or cultural artifacts be identified during construction activities. Currently, the project execution timeframe and availability of funding does not allow for CBP to implement monitoring measures such as the use of forensic dogs. CBP will continue to work closely with tribal leaders and representatives to ensure continued access to areas for religious ceremonies.

We appreciate your feedback and appreciate your interest in working with DHS and CBP on this important border security project. We hope to continue to build upon our relationship as construction progresses to address and mitigate concerns, to the greatest extent possible, while simultaneously continuing our commitment to securing the border.

Respectfully,



Aaron M. Heitke  
Chief Patrol Agent  
U.S. Border Patrol, San Diego Sector

RECEIVED  
8/26/20

Exh. 8 to Santos Decl

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MANZANITA BAND OF THE KUMEYAAY  
NATION, *et al.*,

Plaintiffs,

v.

CHAD WOLF, in his official capacity as Under  
Secretary of Homeland Security for Strategy,  
Policy, and Plans, *et al.*

Defendants.

**Case No. 1:20-cv-02712-RC**

**DECLARATION OF JOHN ELLIOTT IN SUPPORT OF PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, John Elliott, declare as follows:

1. My declaration is based on my personal knowledge, and I am competent to testify to the contents of my declaration in this proceeding.

2. I am a member of the Manzanita Band of the Kumeyaay Nation, a federally-recognized Indian tribe, which governs the Manzanita Indian Reservation. I live on the Manzanita Reservation. I also hold an elected leadership position in the Tribe, as a member of the Tribe's Executive Committee, which is a position I have held since 2004. In addition, I am the Chairman of the Kumeyaay Diegueño Land Conservancy ("KDLC"), an organization of the Kumeyaay Tribes that works to strengthen Kumeyaay ancestral ties to the ocean, mountains and desert through protective land management, cooperative agreements and educational programs. I have held this position since 2015. And for approximately ten years (including my service as Chairman), I have been a Manzanita Band delegate to the KDLC. I am also a certified Kumeyaay

cultural monitor. As this description indicates, much of my service to the Tribe has been focused on protecting our culture.

3. Within the culture of the Kumeyaay people, I come from the Hilmiarp, Qui Nilly and Oswai Clans, which occupied the area north and south of the U.S.-Mexico border just south of the Manzanita Reservation. I was raised in a traditional family in Kumeyaay terms. My great-great-grandfather Jim McCarty was the leader of the Kruk ceremonies. His knowledge about our ceremonies and traditions was passed on through our family, and then down to me. My uncle and aunt, who were also my godparents, were also active in Kumeyaay traditional ways, and they passed those ways onto me. Others of my elders also passed down knowledge about Kumeyaay religion, tradition and history to me. I actively practice traditional Kumeyaay ceremony and religion, and have a role in our ceremonies, some of which have changed over time, though their importance to our people has not. I am regularly asked, because of my upbringing, to assist families with the Kumeyaay death and grieving ceremonies when their loved ones pass on.

4. The area south of the Manzanita Reservation and along the U.S.-Mexico border is sacred in Kumeyaay tradition and history. Many sacred sites and spiritual forces are found there, which have important roles in our traditional stories, and are accessed by travel routes across our territory. For example, Tabletop Mountain in the Jacumba Valley is sacred and is part of an east-west corridor of sacred sites from Pilot Knob at the Colorado River near Yuma (which is close to a historic Kumeyaay village called Eastern Strong House), then west to Signal Mountain and Coyote Mountain, to Pinnacle Rock, Round Mountain and Boundary Mountain, to Kuchamaa and then the Coronado Islands. Just south of Jacumba in Mexico is a Kumeyaay ceremonial solstice site named Rumorosa, which is a part of this corridor as well. A separate north-south

corridor follows the migratory path of the bighorn sheep and transects the east-west corridor in the Jacumba Valley.

5. The north-south corridor through Jacumba also plays a role in the Kumeyaay belief about the journey of the spirit of the deceased. We believe that when a Kumeyaay person dies, their spirit travels on a journey to heaven, what we also call the spirit world, that includes a route south from Pinnacle Rock (just north of the Campo Reservation and east of the Manzanita Reservation) through Jacumba, to the Ensenada area in the south, then to other sacred site leading to the Milky Way, which is the bridge to heaven.

6. I was told by the elders that all of the sacred mountains listed in Paragraph 4 above are connected and have great powers. In the Kumeyaay creation story, the Serpent had a lot of knowledge and power as he was one of the oldest people. Upon his death they put him in the fire, where he did not burn, but rather exploded, and through that means distributed the knowledge and power he received from the Creator to all sacred mountains, including the mountains listed above. The knowledge of the Serpent bonded with the power and the life spirit that the mountains already possessed to give them greater power. Kumeyaay people have traveled to these mountains on pilgrimages to access the powers that Serpent bestowed on the mountains. Such powers may only be accessed through prayer, preparation and personal sacrifice before, during and after the travel to the mountains, and by significant time in prayer and fasting while on the mountain.

7. Those mountains are also sacred because when people and all beings pass on, it is believed their spirits journey to these sacred mountains. We see this in the ceremony involving burning of the remains and belongings of the deceased, from which the smoke that rises to travel

south from Manzanita to the sacred location in Mexico mentioned above in Paragraph 5 that marks the entrance into the Milky Way.

8. The Kumeyaay have historically conducted, and continue to perform, ceremonies in the sacred mountains. Kuchamaa, north of Tecate, is of highest importance to Kumeyaay people. The Kumeyaay own a parcel of land on Kuchamaa on which the Kumeyaay periodically hold ceremonies, and which the KDLC manages. The Kumeyaay also continue to visit other parts of Kuchamaa, other mountains and sacred sites, including Rumorosa, for ceremonial purposes.

9. The sacredness of these mountains begins far beneath the surface of their base and extends to the plants and earth on their peaks. The spirits of these mountains and the corridors between them generate a sacred power and force that flows between the mountains. And the height and power of these mountains makes the viewshed from one mountain to another sacred to the Kumeyaay as well. Anything that impedes that viewshed dims the sacred power of the connection between the mountains and their connection to our Kumeyaay universe. For these reasons, Manzanita fought to protect the viewshed from the Manzanita Cemetery to Pinnacle Rock and that between the geoglyph known as Spoked Wheel, Signal Mountain and Coyote Mountain. The new boundary barriers 30-foot metal structure will change the relationships between sacred places, the power that flows between them, and our people and, I fear, diminish the power of these sacred sites on which our people have relied for thousands of years.

10. Jacumba is particularly important to Kumeyaay tradition and history because it was a significant settlement and lies at the crossroads of many elements of Kumeyaay cosmology including the elements discussed above. My family goes to Jacumba for ceremony and to gather

plants and items for ceremony, and I intend to continue to go there for ceremonial purposes until they put me into the fire.

11. I have memories throughout my life of gathering plants in the Jacumba Valley near what is now the Eco Substation and the international border. The Kumeyaay believe that certain plants are sacred, and they carry blessings and healing powers. It is our sacred duty to take care of the plants, including the land in which they grow and the ecosystem that supports them. I was taught never to take a plant near a trail or road because the people passing by may have spoiled the plant through their energy and intentions and use of the area for a different purpose. As a result of the recent construction activity along the border, including the roads used by Border Patrol personnel and contractors to access the border for construction and operations, I will likely not be able to gather plants as close to the border as I have in the past.

12. I am very concerned about the impacts of the border wall construction on plants. I was recently in the Jacumba Valley providing cultural monitoring for a survey for the border construction and I saw thousands of plants of dozens of species, the majority of which I recognized as having a ceremonial or healing purpose in Kumeyaay tradition. I observed cacti that are as tall as I am. In Smith Canyon I observed a special herb, yerba santa, growing taller than my truck with big purple flowers. I don't know if these and other plants will survive, much less retain their abundance. For example, Mohave cactus that grows out of the rocks near the border east of the Jacumba airport are in the path of the project and will likely be blown up for construction of the wall.

13. Before the construction of the Eco Substation, which is an interconnection hub for renewable generation, we held a blessing for the land in the area near the border and Eco Substation. My uncle said we needed to have such a ceremony because of the development in

the area. We may need to return to that site for another blessing and to pray for healing.

Similarly, the Kumeyaay people will need to conduct a blessing ceremony in the area of the border construction activity, which has already scarred the area, and along the entire border in our territory, to address the destruction caused by the projects and the new border fence.

14. There is an important known cremation site between the border and Tabletop Mountain. It is the site of cremation of kwesiyaay, or Kumeyaay religious leaders who took care of Tabletop Mountain, and other persons. In ancient times the kwesiyaay took care of the sacred sites and also took care of the pilgrims who traveled to sacred sites.

15. Because of the historic settlements on the border in Tecate, Bell Valley and Jacumba, to name a few, there is no doubt that the construction activity impacts cremation sites. This is sacrilege to the Kumeyaay. During a Kumeyaay death ceremony we bind the body so the person's spirit can pass on to heaven in a good way. After a death ceremony is completed, if the remains are later uncovered, it disturbs the ceremonial binding that has been done for the deceased and burdens the soul. If that happens, the remains must be rebound in ceremony so the soul can be freed. I think that, in many ways, our respect for the dead, and the importance of their undisturbed resting place is akin to that of cultures who bury their dead in cemeteries.

16. Our Kumeyaay ancestors who have passed and have been here for a thousand generations are considered family, and we believe it is important to take care of them. For this reason, on July 1, 2020 I went to the border construction site near Tierra del Sol with Manzanita Chairwoman Angela Elliott Santos, another tribal leader and others to visit the site where it was said human remains had been discovered. Initially, the Border Patrol officers did not allow us access, and tribal leaders had to fight for it. The tribal leaders explained that we understood human remains had been discovered, and we needed access in order to pray over those human



remains, and, furthermore, Manzanita had requested consultation about the project without response. An official identifying himself as Mr. Williams from the U.S. Army Corps of Engineers came to the site and claiming to be in charge, and, after much intense discussion and argument and Mr. Williams making phone calls, we were finally given access. As we got to the top of a hill on the way there, I felt a strong force, and believed strongly that we had to stop and burn sage and pray. After reflecting on it, I now know why I had that feeling. I believe the presence of one bone tells us that there are many others there, as many death ceremonies across generations occurred there. I haven't been back to that location because I felt bad. But I know I need to go to back there to see if there is something I am supposed to be doing there, for our ancestors, to take care of them, as part of our family.

17. We are told that the section of the border barrier project east of Eco Substation in the mountains is planned, but it hasn't started yet. I am very concerned about the impact of building a barrier wall through those mountains because the bighorn sheep migrate north and south to Mexico and back to the United States through that range. The Kumeyaay believe that the bighorn sheep are sacred and that in ancient times the bighorn sheep traveled from the area near Laughlin, NV to Baja California and back, tracing a sacred journey. When a person passes on, the Kumeyaay believe that the sheep accompany the deceased on their sacred journey through this corridor south to the sacred in Mexico that serves as the entrance to the bridge to world.


18. In addition, several valleys in our territory run north and south, and are transected by the international border. In those valleys, such as Bell Valley and the Jacumba Valley, when a ceremony is conducted on one end of the valley, the spiritual energy it generates flows to the

other end, and to our people there. The 30-foot barrier wall will interfere with the spiritual energy flow between the northern and southern ends of those valleys.

19. I am also concerned about the impact of the increasing infrastructure at the border on the ability of Kumeyaay people to keep ties with our relatives in Baja California. The Kumeyaay Border Task Force made it easier for Kumeyaay people in Mexico to cross to the United States for cultural, family and ceremonial reasons. In my experience the Tribe must write a letter identifying all the people coming from Baja California and state the reason for the visit. I have used this procedure to organize trips for Kumeyaay relatives to travel from Mexico to Manzanita for cultural and social activities. However, it is likely that increased restrictions will follow greater infrastructure, which would interfere with the social interaction and further weaken the ties between our people.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 24, 2020



---

John Elliott

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MANZANITA BAND OF THE KUMEYAAY  
NATION, et al.,

Plaintiffs,

v.

CHAD WOLF, et al.,

Defendants.

Case No. 1:20-cv-02712 -RC

**DECLARATION OF LISA HAWS IN SUPPORT OF MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, Lisa Haws, declare as follows:

1. My declaration is based on my personal knowledge, and I am competent to testify to the contents of my declaration in this proceeding.

2. I hold a Master of Science degree in Urban and Regional Planning, Natural Resource Management from the London School of Economics (LSE), University of London, England, UK. My Bachelor of Arts is in International Affairs and French Studies from American University in Washington, D.C. I also served 2.5 years in the United States Peace Corps as an English Instructor at the Université Cadi Ayyad, Agadir, Morocco.

3. As a contractor, I conducted primary research for the National Economic Development and Law Center in Oakland, California on Public Involvement During Implementation of Base Reuse Plans: Lowry Air Force Base and Naval Air Station Alameda for

the East Bay Conversion and Reinvestment Commission report issued as: The Upside of Base Closure: Tools for Reinvestment in Communities, published in 2000. For the San Diego River Foundation, I managed the Feral Pig Intergovernmental Working Group composed of 11 state, local, federal, and tribal government agencies that manage lands and water in San Diego County. For local, state and federal agencies, I provided a variety of specialized on-call professional services focusing on working effectively with tribal governments, and conducting outreach and assistance to local indigenous tribal and disadvantaged communities.

4. I am the Tribal Historic Preservation Officer (THPO) and Tribal Administrator for the Manzanita Band of the Kumeyaay Nation (“Tribe” or “Manzanita Band”), a position I have held since June 2018. As the Tribal Administrator and THPO, I am a Manzanita Band representative to the Kumeyaay Cultural Repatriation Committee (KCRC), Kumeyaay Diegueño Land Conservancy (KDLC), Kumeyaay Heritage Preservation Committee (KHPC), Intertribal Court of Southern California, Intertribal Long-term Recovery Foundation, San Diego Association of Governments, and other local, state and federal agencies. From January 2012 to May 2018, I was the Cultural Resource Manager for the Sycuan Band of the Kumeyaay Nation. Later in 2012, I was designated the Acting Tribal Historic Preservation Officer and served in this position until May 2018. From May 1999 to July 2011, I worked for the Viejas Band of Kumeyaay Indians in a variety of roles with the final title of Director of Planning and Resource Management.

5. I have substantial experience with, and understanding of, the application of the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA) and Section 106 consultation under the National Historic Preservation Act (NHPA). Through more than 20 years working with federally-recognized tribes, I have gained extensive experience

in meaningful government-to-government consultation; preparing technical comments on a wide range of environmental and cultural resource technical reports; ensuring project proponents incorporate environmental and cultural resource best management practices in their planning and development; and ensuring compliance with local, state and federal laws and regulations.

6. I am informed that the Tribe sent Customs and Border Protection (CBP) a letter dated March 23, 2018 in response to a letter from CBP announcing future construction activities on the U.S.-Mexico border. The letter expressed concern about the damaging effects of the construction on Kumeyaay cultural resources and requested immediate consultation on all aspects of the project, including planning, design, alignment, surveys, construction, monitoring, changes in design, restoration and mitigation. It requested information about environmental reviews done and the development of a monitoring plan and tribal participation plan and full-time Kumeyaay monitoring for all surveys and ground-disturbing activities.

7. I am informed that the Tribe received no response to its March 23, 2018 letter, and I am aware of no response since I began working for the Tribe in June 2018.

8. I have been involved in the Tribe's review of planning activity along the U.S.-Mexico border since approximately March 10, 2020, when I participated in a remote meeting to discuss the U.S. Environmental Protection Agency (EPA) New Five Year Development US-Mexico Environmental Program Border 2025 Plan. The meeting involved EPA, Homeland Security, and representatives of federally-recognized tribes in the San Diego area. The tribal representatives specifically stated the meeting was informational only and did not satisfy government-to-government consultation. There was no mention of any waiver of legal requirements for the San Diego and El Centro Sectors, which were scheduled for posting in the

Federal Register on March 16, 2020, less than five business days later, and which would result in substantial construction and ground-disturbing activities.

9. The week of March 9, 2020 was the first week the Manzanita Band implemented a stay-at-home requirement for employees that could work remotely due to the COVID-19 Pandemic. From March 9 to August 12, 2020, I had no access to official mail.

10. On May 13, 2020, a colleague from the tribal government of the Campo Kumeyaay Nation notified me that Customs and Border Protection (“CBP”) had hosted a meeting the previous week with the Campo Kumeyaay Nation and the La Posta Band of Mission Indians. The Manzanita Band was not included or notified about that meeting.

11. On June 16, 2020, a colleague from the Jamul Indian Village notified me that CBP would be hosting a Border Wall Construction Project Tribal Coordination Briefing for the San Diego and Imperial Sectors at 2 PM that day. The Manzanita Band had not been notified or invited to the meeting. I emailed Paul Enriquez and requested access to the June 16, 2020 meeting and any future meetings.

12. During the June 16th WebEx meeting, CBP, represented by Paul Enriquez and an environmental consultant, presented on the screen the project maps from Tecate to the border with Arizona. The Jamul Tribal Historic Preservation Officer (THPO) requested the participation of qualified Kumeyaay cultural monitors during project surveys, before clearing or grubbing, and during all ground-disturbing work. CBP stated they had reviewed archeological surveys and site records from earlier projects and would perform new surveys in areas that were not covered by prior surveys. CBP’s failure to resurvey previously surveyed portions of the project area meant they would miss evidence of cultural resources that may have been exposed by erosion and other events subsequent to the prior survey. CBP stated that it would develop an

environmental stewardship plan for the project. CBP did not request input from the Tribes on how to mitigate impacts of the construction activity. I requested copies of the completed cultural resource surveys and confidential site records, and CBP agreed to provide them. The tribal representatives specifically stated the meeting was informational only and did not satisfy government-to-government consultation.

13. The June 16 WebEx was the first time I had access to information regarding the scope and impact of the project in San Diego County. During the WebEx I do not recall any mention of a letter that CBP had sent to the Tribe on March 16, 2020 (which the Tribe had not at that time received). Similarly, there was no discussion of the supposed waivers that had been published in the Federal Register, and no mention that ground disturbing activities were underway.

14. On June 20, 2020, I received an e-mail from an official of the Border Patrol with an attached letter thanking tribal representatives for their participation in a webinar regarding the design and construction of border barrier projects, noting that CBP is “committed to continue to share information,” and offering to schedule a site visit. See Letter from Daniel Rubio, Border Community Liaison Agent, attached as Exhibit 1.

15. On July 2, 2020, I wrote an email to Daniel Rubio of the Border Patrol, forwarding the Tribe’s March 23, 2018 letter, reporting that the Tribe had not received the information requested in its 2018 letter, and renewing the request for that information.

16. CBP apparently had outdated contact information for the Manzanita Band. This is evident from a July 4 e-mail that I received from Paul Enriquez, attaching a letter nominally addressed to Chairwoman Santos but sent to an e-mail address of the former Manzanita Chairman who passed away a number of years ago. E-mail dated July 4, 2020 to

[ljbirdsinger@aol.com](mailto:ljbirdsinger@aol.com) from Paul Enriquez, attached as Exhibit 2. The e-mail transmitted a letter, attached as Exhibit 3, stating that the purpose was to schedule a call “to discuss the Manzanita Band of Kumeyaay Nation’s interests and to clarify the tribe’s government point of contact for the project.” Due to the closure of tribal offices for a period of time as a result of the pandemic, the Tribe did not receive the hardcopy of the March 16, 2020 letter until August 13, 2020 when I opened the mailed retrieved from the Manzanita tribal office on August 12, 2020. By the time the Tribe received the letter, the 29-day comment period stated in the letter had expired.

17. On July 9, 2020, I attended the field visit to the Border Wall construction site hosted by Paul Enriquez and Darrell Williams of the U.S. Army Corps of Engineers (Corps). Mr. Williams stated he was in charge of the project. Tribal leaders requested the opportunity for Kumeyaay monitors to inspect for cultural resources at the area that tribal leaders had previously visited and they believed was culturally important and about which they were concerned because CBP had told them they planned to use explosives there. CBP did not permit monitoring at the site as tribal leaders requested, but rather took them to another location on the border wall.

18. The July 9th visit consisted mostly of driving a limited length of San Diego Sector wall. The visit included one stop to view a comparison of old wall and new wall (historical monument) and to discuss the project. The Tribes had not received the previously requested archeological survey reports and confidential site records. The tribal leaders requested delivery of those reports and records by the close of business on July 10, 2020. Further discussions were held regarding the nature and requirements of government-to-government consultations. The tribal leaders explained that meaningful government-to-government consultation must involve the individual who has the authority to bind the federal government in the decision-making process. Both Mr. Enriquez and Mr. Williams stated they were not the decision-makers for their



agencies. The Tribes requested the CBP and Corps Tribal Liaison participate in all future discussions, and they requested contact information for those officials. CBP and Corps representatives took the tribal representatives and Kumeyaay cultural monitors to another site on in the project area. While CBP and Corps representatives stated the border wall was placed 3 feet north of the southern edge of the Roosevelt Reservation boundary, soils had been cleared in places up to 5-6 feet south of the wall. The Kumeyaay cultural monitors were permitted to monitor for a period of between 45 and 60 minutes. In that short time period, the Kumeyaay cultural monitors discovered the following items in the project area within 1 to 5 feet of the newly constructed border wall: flakes, also known as debitage created in connection with tool manufacturing, broken mono, a stone grinding tool, which could be a funerary object, probable human bone, and a core, the basic material for tool manufacturing.

19. On July 10, 2020, Cogstone, an environmental consulting firm retained by CBP for the project, provided electronic access to maps and site records at 1:30 PM and requested a 3:00 PM call to discuss the records. In the file folders provided, the map files were not accessible. Tribal representatives did not have time to review the information before the 3 PM conference call, as there was not enough time to download all the files prior to the call. During the call, Cogstone discussed the list of site records. Many of the records contained a notation that additional information was needed from the Bureau of Land Management (BLM). Cogstone stated it had received the necessary information from BLM through the and the California Historical Resources Information System (CHRIS) on July 10, 2020, and that and this information was included in the documents that Cogstone had shared with the Tribes. According to Cogstone, the record search included only the Roosevelt Reservation (the 60-foot strip of land along the border) and ¼ mile to the north. The Kumeyaay representatives identified a number of

areas for additional monitoring and expressed concerns about nearby sacred sites such as Boundary Peak and Jacumba Hot Springs that could potentially be impacted by construction activities.

20. To date, neither the CBP nor Corps Tribal Liaisons have been identified, nor have these agencies' Tribal Liaisons participated in any WebEx meetings, conference calls, or other forms of communication with the impacted Tribes. The first name provided by CBP for the Army Corps Tribal Liaison was Sally Barnes. Ms. Barnes is an environmental scientist, not an expert in tribal coordination or cultural preservation. On July 10, 2020, I reached out to Katherine Bergmann, Los Angeles District Tribal Liaison for the Corps. Unfortunately, Ms. Bergmann had retired. The Los Angeles office provided contact information for Mr. Kyle Dahl, District Chief for the Corps' Carlsbad Office. On July 27, 2020, Mr. Dahl provided contact information for Ms. Abigale Fields in the Corps' San Diego Office. On July 27, 2020, I sent an email to Ms. Fields, stating:

I was provided your contact information by Mr. Kyle Dahl at the Carlsbad ACOE Office. The Manzanita Band of the Kumeyaay Nation has been trying to reach out to the Border Patrol since March 23, 2018 (letter attached). We have had recent discussions with Mr. Paul Enrique and Officer Rubio with the Border Patrol. We have also met Mr. Darrell Williams, ACOE [Army Corps of Engineers] Project Field Representative. The Manzanita Band is concerned that the information requested about the project in 2018 has yet to be provided. On July 9, 2020, the Manzanita Band and Kumeyaay leaders participated in a field visit (not consultation) and again requested access to the project documents. The Manzanita Band further requested the participation of the ACOE Tribal Liaison in all future discussions as Mr. Enrique and Mr. Williams stated they were not decision makers. It has taken 18-days to receive your contact information after many calls and emails to Albuquerque, Los Angeles, and the Carlsbad Office. Now that we have made contact, the Manzanita Band is looking forward to discussing this project with you, receiving the information requested, and to ensure the concerns of the Manzanita Band are heard and responded to through meaningful government-to-government consultation. Thank you for your time and effort in responding to our concerns. I have copied Chairwoman Angela Elliott Santos and Executive Committee Member Johnny Eagle-Spirit Elliott on this email.

On August 3, 2020, I called Ms. Fields and she stated she had no knowledge of the project and referred me to the project manager Paul Enriquez of CBP. During subsequent communication and coordination calls with Mr. Enriquez, the lack of involvement by the Corps' Tribal Liaison has remained an unresolved issue.

21. On a coordination call with CBP on September 4, 2020, Kumeyaay tribal representatives reiterated their request for government-to-government consultation. Mr. Enriquez informed the group that the coordination calls were, in CPB's view, government-to-government consultation. This assertion was a reversal of previous statements from CBP. The assertion was also contradicted by the description provided in the meeting notices sent by CBP, which stated that "[t]he purpose of this reoccurring discussion is to continue CBP's coordination efforts with interested Kumeyaay Tribes." On the same call, I clarified for Cogstone that in addition to requesting the site records for BLM projects in the affected region, it is also critical request to request any special studies that have been prepared for large infrastructure projects in San Diego and Imperial Counties, including as ethnologies, ethnographies, regional synthesis, and trails studies. I followed up on this request at another coordination meeting on September 11, 2020. Cogstone replied that they were unable to access documents from the BLM, as the responsible archeologist on staff had passed away. I found this to be a very disappointing and a disingenuous justification for the lack of follow-up with BLM. I personally knew the individual Cogstone referenced and she had passed away the first week of July 2020. Cogstone did not explain why, more than two months later, they still did not have the relevant studies or documents from BLM.

22. I am familiar with many of the prior technical studies that BLM and other government agencies have completed in southern California and the border region, which

Cogstone has failed to acquire to guide its operations on the border wall project. These studies describe multiple sites of historical, cultural, and religious importance for the Kumeyaay people. They go beyond the sterile archeological records for individual sites and document cultural lands, cultural landscapes, corridors, and special designations.

23. The Jacumba Valley Archaeological District is one such site that has been studied by the BLM within the impacted region. The BLM determined this site to be eligible for listing on the National Register of Historic Places (NHRP). According to the BLM's site determination, with which I am familiar, the District covers a 4,222-acre area encompassing the northern half of the Jacumba Valley and "provides evidence of the long occupation by the Kumeyaay of the area surrounding Jacumba, including the project site." More specifically, the BLM has determined that "the District comprises 144 prehistoric archaeological sites, which include village sites, sacred and ceremonial sites, lithic scatters, earth ovens, and a 10,000-year-old stone hearth. The District includes other culturally significant sites including plant-gathering locales and trails." Both Kumeyaay elders and non-tribal ethnographers have identified portions of the District as ethnographically significant. According to the BLM, the District would be "immediately adjacent" to the site of the new border fence near Jacumba.

24. The Yuha Basin in Imperial County, California is another area of importance studied by the BLM. The area contains the Yuha Basin Discontinuous District that was listed in the National Register of Historic Places (NRHP) in 1981, and a Traditional Cultural Property is also prosed for the area. In the early 1970s, the Yuha Pinto Wash Site was discovered in this region, as was and a burial site containing a cranium and the upper torso of what is now called the Yuha Man. In my opinion as an expert in tribal historic preservation, the site is important as it is evidence of early man in Imperial Valley. The location of the burial is only a few miles

north of the border. The BLM's site determination, with which I am familiar, explains that a survey of the Yuha District in 1977 "produced the greatest concentration of pre-contact archaeological resources in southern California to that date." More recently, the BLM's Desert Renewable Energy Conservation Plan Land Use Plan Amendment and Record of Decision describes the region as an area with Nationally Significant Cultural and Scientific Values. These documents, with which I am also familiar, note that cultural resources within the area range from "Paleoindian sites to campsites of ancestors of the Kumeyaay, Quechan, and Cocopah Indians (i.e., intaglios, temporary camps, lithic scatters, cremations loci, pottery loci, pottery loci, wells, trails, and shrines)."

25. I have extensive experience in consultation with federal agencies on construction projects. In my prior experience, I have never seen the level of disregard for tribal concerns and interests in a construction project that I have witnessed in the current border wall project. In carrying out the current project, CBP and the Corps have failed to consult with the Tribes and account for tribal interests as follows:

- a. CBP should have ensured that they had updated contact information for the Manzanita Band to ensure that the Tribe was given notice of the March 16, 2020 letter with enough time to respond.
- b. It is my understanding that construction began prior to the completion of site record review, as Cogstone still had not completed this review when it held coordination calls with tribal representatives after construction was already underway.

- c. Construction started without a complete environmental review or a full understanding of known cultural resource sites and updated records based on recent pedestrian surveys conducted by Kumeyaay Monitors.
- d. The Corps failed to communicate with the Tribes, and all efforts to identify the Tribal Liaison for the project were unsuccessful.
- e. CBP did not involve Kumeyaay monitors on construction activity until July 10, 2020, after construction was well underway.
- f. Initially, CBP funded the cost of only one Kumeyaay monitor. After several weeks, CBP added two more Kumeyaay monitors. In my opinion and based on my experience with other comparable projects, this low number of tribal monitors is extremely inadequate. It is my understanding that there have been more than three active construction sites at one time, meaning that ground-disturbing activity at some sites must have taken place without Kumeyaay monitors.
- g. Sometime in September 2020, the tribal representatives heard rumors that construction activity expanded to two shifts. Despite tribal requests for additional monitors to cover the added night shifts, CBP refused to facilitate monitoring for the night shifts unless the Tribes agreed to provide monitoring services without compensation, or unless one or more of the existing monitors were transferred from the day shift to the night shift.
- h. I am informed that, during the tribal monitoring that did occur, CBP provided the monitors no opportunity to inspect the soil that was removed in the wake

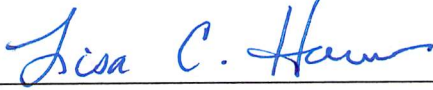
of ground-disturbing activity, and it provided no information about where the soil was to be transported.

- i. CBP provided tribal representatives with a draft document titled Cultural Resources Protocol and Communication Plan for the FY 2020 10 U.S.C. § 284 Border Barrier Project – San Diego Sector, on August 31, and CBP requested comments by September 14, 2020. In my professional opinion, the plan is inadequate, and it was created without tribal input. It was provided months after construction had begun.
- j. Based on my experience with applicable federal laws, operating this type of project through governmental waivers requires the preparation of an Environmental Stewardship Plan (ESP). On September 15, I inquired about the status of the plan. CBP responded the ESP is currently being drafted. I requested access to the draft and an opportunity to provide tribal input. CBP denied access to the draft ESP, asserting that it is not subject to public review.
- k. On September 4, 2020, I asked when work would begin on the portion of the wall in Imperial County, California. CBP replied that surveys have been conducted and construction is underway. There was no Kumeyaay participation in surveys or monitoring in Imperial County, as CBP implied it did not know of Kumeyaay interest in the area. This seemed disingenuous because the same CBP official, Paul Enriquez, is assigned to both the San Diego and Imperial County Sectors of the project, and he participated in the June 16th WebEx meeting when the Jamul Indian Village THPO requested

Kumeyaay Monitors for the entire length of the project from San Diego to the Arizona border, which includes the portion in Imperial County.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 24, 2020

  
\_\_\_\_\_  
Lisa Haws



*Manzanita Band of Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 1**

SUBJECT: Thank You for Your Participation in the Border Wall Briefing: FY20 10 U.S. Code § 284 Projects Webinar

Thank you for participating in our discussion regarding the design and construction of border barrier projects funded by Department of Defense pursuant to 10 U.S. Code § 284.

Clear and open communication with tribal nations is essential, and we are committed to continue to share information and further develop the relationship between U.S. Customs and Border Protection (CBP) and tribes. In the upcoming weeks, we will be working to finalize a communications plan that outlines how we plan to share information going forward.

Based on feedback received during the webinar, CBP is looking at ways to incorporate tribal monitoring for survey and construction work.

Additionally, webinar attendees expressed interest in participating in site visits where the border barrier is being constructed. Please contact me if you would like to schedule such a visit.

Finally, as was mentioned on the webinar, CBP would like to schedule a call to discuss the pending laydown yards and access roads in the San Diego project area. Please provide your availability over the next two weeks for this call to Amanda Roberts at [amanda.m.roberts@associates.cbp.dhs.gov](mailto:amanda.m.roberts@associates.cbp.dhs.gov).

We remain committed to sharing information with stakeholders. We appreciate the questions that were raised during the call; please feel free to reach out to me directly or to the CBP Infrastructure Portfolio team at [SanDiegoComments@cbp.dhs.gov](mailto:SanDiegoComments@cbp.dhs.gov), with any additional questions or feedback.

Thank you again for your participation.

Sincerely,

**Daniel Rubio**

BORDER COMMUNITY LIAISON AGENT

TRIBAL LANDS LIAISON AGENT

U.S. BORDER PATROL

SAN DIEGO SECTOR

CAMPO STATION

OFFICE: 619-938-8739

EMAIL: [DANIEL.RUBIO1@CBP.DHS.GOV](mailto:DANIEL.RUBIO1@CBP.DHS.GOV)

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@ CBPSanDiego - @ USBPChiefSDC

*Manzanita Band of Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 2**

New message

Reply Delete Archive Junk Move to Categorize

Favorites

Folders

Groups

New group

## San Diego Border Barrier Construction Coordination and Conference Call Request – Tuesday, July 7, 2020

You forwarded this message on Thu 9/24/2020 5:39 PM

EP

ENRIQUEZ, PAUL <paul.enriquez@cbp.dhs.gov>

Sat 7/4/2020 5:33 AM

To: ljbirdsinger@aol.com

Cc: You; RUBIO1, DANIEL

KHPCExecDirHolmtoBorderPa...

548 KB

Cultural Survey Report for 20...

6 MB

3 attachments (7 MB) Download all Save all to OneDrive

Dear Honorable Angela Elliott Santos,

Please find a letter regarding U.S. Customs and Border Protection's (CBP) San Diego border barrier construction project attached. The purpose of this correspondence is to schedule a call with you on Tuesday, July 7, 2020 to discuss the Manzanita Band of Kumeyaay Nation's interests and to clarify the tribe's government point of contact for the project.

I look forward to hearing from you.

Sincerely,

**Paul Enriquez**

Infrastructure Program

Program Management Office Directorate

United States Border Patrol

Reply

Reply all

Forward

EXH. 2 TO HAWS DECL

San Diego Border Barrier C...

Re: San Diego Border... X

*Manzanita Band of Kumeyaay Nation, et al. v. Chad Wolf, et al.*

## **Exhibit 3**



U.S. Customs and  
Border Protection

1300 Pennsylvania Avenue NW  
Washington, D.C. 20229

July 3, 2020

Manzanita Band of Kumeyaay Nation  
Attn: The Honorable Angela Elliott Santos, Chairperson  
PO Box 1302  
Boulevard, CA 91905  
BY EMAIL: [ljbirdsinger@aol.com](mailto:ljbirdsinger@aol.com)

RE: San Diego Border Barrier Construction Coordination and Conference Call Request –  
Tuesday, July 7, 2020

Dear Honorable Angela Elliott Santos:

I am contacting you in regards to the border barrier construction project being executed in eastern San Diego County within the U.S. Border Patrol's San Diego Sector. This border barrier project is being executed with the assistance of the Department of Defense under Fiscal Year 2020 funding pursuant to 10 U.S. Code § 284. On March 16, 2020, the Secretary of Homeland Security issued a waiver of environmental laws pursuant to his authorities under section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, for the expeditious construction of border barrier. These laws include the National Environmental Protection Act, National Historic Preservation Act, Native American Graves Protection and Repatriation Act and other laws, a full text of the waiver can be found in the link below:

<https://www.federalregister.gov/documents/2020/03/16/2020-05366/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility>

Although the Secretary of Homeland Security issued a waiver of environmental laws, U.S. Customs and Border Protection (CBP) is committed to responsible environmental stewardship and coordinates with interested stakeholders to identify potential biological, cultural, historical and other natural resources that may be affected by the border barrier project. In addition, CBP requires the construction contractor to implement best management practices throughout the construction process, and provides onsite cultural and biological monitors to avoid or minimize impacts to resources to the greatest extent possible.

The subject project area of interest was previously surveyed as part of the Pedestrian Fence 225 border barrier project in 2010 and no cultural sites or resources were identified through cultural surveys and consultation with interested tribes within the project area. Please find the cultural survey report for the project area attached for your reference.

**EXH. 3 TO HAWS DECL**

Honorable Angela Elliott Santos

Page 2

It is my understanding that some tribal members are requesting that a tribal monitor be present for this project, among other requests. In an effort to continue to communicate project activities with the tribe and in order to move forward and maintain the current construction schedule, we are tentatively scheduling a conference call with designated representatives of the tribal governments of the Kumeyaay Nation on Tuesday, July 7 to further discuss your interests and concerns. We respectfully request a response from you by close of business Monday, July 6 to confirm your participation in the call. I am working with our environmental contractor as the project moves forward to ensure that a tribal monitor is present for selected ground disturbing activities. Currently, a cultural monitor is present within the project area daily.

For your awareness, please find attached a letter CBP received from the Kumeyaay Heritage Preservation Council Executive Director and Principal Scientific Investigator, Tom Holm.

I would like to confirm that you are the point of contact for your tribe on this project. If there is another representative that you prefer serve as a point of contact to CBP, please let me know by close of business Monday, July 6 to ensure that we are communicating with the appropriate government point of contact.

Please feel free to reach out to me directly or U.S. Border Patrol San Diego Sector, Tribal Lands Liaison Agent Daniel Rubio at 619-938-8739 or [Daniel.Rubio1@cbp.dhs.gov](mailto:Daniel.Rubio1@cbp.dhs.gov) with any additional questions or feedback.

We look forward to coordinating with you on this project.

Sincerely,



Paul Enriquez  
Acquisition, Real Estate and Environmental Director  
Infrastructure Portfolio  
Program Management Office Directorate  
U.S. Border Patrol

Attachments: *Cultural Resources Survey Report for the 2010 Revised Gapfiller Project, San Diego County, California; Kumeyaay Heritage Preservation Council Executive Director and Principal Scientific Investigator, Tom Holm*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MANZANITA BAND OF THE KUMEYAAY  
NATION, *et al.*,

Plaintiffs,

v.

CHAD WOLF, in his official capacity as Under  
Secretary of Homeland Security for Strategy,  
Policy, and Plans, *et al.*

Defendants.

**Case No. 1:20-cv-02712 -RC**

**DECLARATION OF RICHARD CARRICO IN SUPPORT OF PLAINTIFFS'  
MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

I, Richard Carrico, declare as follows:

1. I hold degrees in anthropology and history. My M.A. degree in History is from the University of San Diego [Thesis Title: The Indians of San Diego County: Creation of a Marginal People 1850-1880]; my BA in History is from San Diego State College; and my B. A. in Anthropology is from San Diego State University.

2. I have extensive teaching experience including at San Diego State University, Department of American Indian Studies, 1990-Present, San Diego State University, Department of Anthropology 1993; Mesa Community College, Behavioral Sciences (Anthropology) 1978-1979 and 2011-2016; Ethnic Studies 1995-1998; San Diego City College Behavioral Sciences (Anthropology) 1993 and 2009-2013; Palomar Community College, Behavioral Sciences Department (Anthropology) 1978-1979.

3. Over the past three decades, I have served on the Board of Trustees for the San Diego Archaeological Center (President 2009-2013); Lifetime Member of the Society for



California Archaeology [Past Southern California Vice President]; Society for Historic Archaeology; Society for California Archaeology; American Anthropological Society; San Diego Archaeological Society; San Diego Historical Society, Advisory Board for the Ramona Pioneer Society.

4. My non-academic professional experience extends over four decades with an emphasis on conducting cultural resource management studies for a wide range of clients including the federal government, state and local governments, private developers and native Tribes. My roles in the field of cultural resources management have included: Lead archaeologist and historian and Director of Cultural Resources for WESTEC Services/Ogden Environmental 1978-1995; Mooney & Associates 1995-2004; Jones & Stokes 2003-2007; Ethnographer under contract to ESA 2012-2019; and most recently as Owner and Principal of Recuerdos Research 2008-Present. I have received numerous awards and commendations from a variety of organizations including The Association of Environmental Professionals, The San Diego Historical Society, The Society for California Archaeology, The Ramona Planning Group, and Instituto National de Antropologiae Historia of Baja, California.

5. I have an expert knowledge of California Environmental Quality Act/National Environmental Policy Act (CEQA/NEPA), and Section 106 documentation. My experience includes supervisory roles in both historic and prehistoric archaeological studies, surveys, evaluations, tests, data recovery, and mitigation monitoring projects.

6. I have been the Principal Investigator for more than 500 cultural resource projects and the Native American Coordinator/Liaison for more than 50 projects. As an educator, I am a well-known public speaker and have a long history of presentations at academic and professional conferences. In addition, I am a well-recognized authority on southern California Native

Americans and am a frequent lecturer of American Indian Studies at San Diego State University. I also have an extensive list of publications on archaeological and historical topics.

7. The following discussion is based largely on an on-going Kumeyaay ethnography being prepared for the Kumeyaay Historic Preservation Committee (KHPC) by Richard L. Carrico (Carrico 2020), a thorough review of archaeological site records for the area between Tecate and the Imperial County line, and the exhaustive study completed by Clyde Woods (1982).

### **BACKGROUND**

8. The U.S./Mexico International border corridor in California has received archaeological survey and assessment at varying levels across the corridor. It is important to note that except for the Miguel to the Colorado River and Miguel to Mission TAP project conducted for Arizona Power Services and San Diego Gas and Electric (Woods 1982), the bulk of the archaeological assessments were conducted without benefit of ethnographic research and consideration of Native American values. This is particularly true of the cultural resource studies performed specifically for the current border wall construction.

9. The Woods 1982 study was conducted by Clyde Woods in 1980-1982 for an extensive powerline project that extended generally several miles north of the border in an east/west direction. Portions, however, of the powerline did come within one-half to one-quarter of a mile from the border, particularly in the Tecate and Jacumba areas. Woods and his anthropological team conducted interviews with tens of elders and knowledgeable Kumeyaay people and amassed a large quantity of valuable information about the cultural landscape, plant usage, and sacred sites.

10. By contrast, the bulk of the archaeological assessment in the general area of the border has largely focused on material cultural (artifacts including pottery, arrowpoints, milling tools, etc.) and has rarely addressed cultural values or meaning to the artifacts or places where they were found. This approach has led to a dearth of published information about Kumeyaay cultural values and their perception of the landscape. Exceptions to this would include archaeological sites that contain burials, rock art, or other rather obvious elements of material culture that clearly have meaning to native people.

11. One of the major concerns about the level of documentation for the border wall project is that, to date, the focus has been almost entirely on archaeological rather than anthropological research. There is no evidence of substantial efforts to document and record the non-material elements of Kumeyaay culture to include sacredness, native plant usage, and Traditional Cultural Landscapes.

12. One of the results of not understanding the complex relationship between the Kumeyaay and the land is the extent to which the people moved across the land in concert with the seasons and the people's need for certain resources. Another fundamental result of the failure to grasp the importance of land is to disregard or discount the adverse effects a land-altering project such as the border wall replacements and construction can have on the Kumeyaay landscape and cosmology.

#### **KUMEYAAY ARCHAEOLOGICAL RESOURCES IN THE BORDER CONSTRUCTION PROJECT AREA**

13. In the following discussion, the resources discussed are either within the San Diego and El Centro Project Areas of the border construction projects. As such, these resources may be adversely affected by replacement of existing border fencing and construction of new

border fencing, through construction and use of access roads and laydown/staging areas, and installation of related infrastructure or through indirect visual effects.

14. Boundary Mountain is located east of the Campo Indian Reservation just north of the border. The southern flanks of the mountain are within between 650 and 780 feet of the border wall segment. One archaeological site, P-37-004466, is recorded just north of the border wall and southwest of Boundary Mountain, which according to the site record, comprised of a 40 to 50 meter area, which is located just 5 to 10 yards north of the border fence. According to Kumeyaay interviewed in the early 1980s and again in 2020, this prominent peak was a resting place for native runners as they traveled east/west from the mountains to the desert and also north/south along trails through adjacent Jewell Valley and south into what is now Mexico (Woods 1982:A2-29). The peak is also known to the Kumeyaay as Lookout Point because of the panoramic view offered from the summit. It may also be linked to other prominent peaks in the region that served as landmarks for travelers and also for positioning signal fires. The extant cultural resource studies for the border wall project fail to address this important resource.

15. More than thirty-five years ago, Jacumba Valley, a large north-south trending valley, was recommended (Woods 1982) for listing as a Multiple Resource Area (MRA). MRA's are those places that comprise several types of important resources such as village sites, sacred areas, plant gathering locales, trails, and other significant resources that collectively set the landscape or locale aside from other smaller perhaps less significant resources. More recently, (Noah 2012) recommended that the Jacumba region be included in a Cultural Landscape District because of the historical and archaeological resources in this area. Jacumba Valley extending from the north and across the international border is known as "Hametaay," meaning "pumpkin" or "pumpkin shaped," in reference to its landform. Jacumba itself probably

means “bubbling” or “roiling water” in refence to the well-known hot springs present in that area.

16. In addition to the archaeological sites associated with the hot springs and the surrounding area, Hacoom or Jacume appears in the Manzanita Band’s origin story when two brothers, Tuchaipai and Yokomatis, first appear in the area (Woods 1982: A2-10; Harrington 1925: Reel 169). Further it is documented as being a place where some Kumeyaay, including Torrie Birch’s grandfather, a traditional singer from Campo, could cleanse themselves in the hot muds and waters, a place at the base of a hill there is where the two mythical brothers, Tuchaipa and Yokomatis, emerged from the ground (DuBois 1904:229). One of the Kumeyaay songs is supposedly derived from the Kachawharr travel song about two brothers who travel long distances alone—going on past many villages and people. This song is said to have originated at Jacumba and was then sung to the Manzanita people from where it spread to other settlements and singers. Further, a hill at Jacumba is the house built by the two brothers and to the south was a hot spring and this spring represented the portal or the door to the large house (Dubois 1908). From the hill one can see Mokopá, an important landmark mountain several miles to the south in Mexico (Carrico 2020:5-19).

17. Additionally, Woods (1982:A2-10), was told and more recent research has concurred, that the Jacumba Valley is an important collecting area for junipers, white sage, greasewood, and jojoba. There is also an iron oxide scum that appears in some of the pooled ground water that, when boiled, produces a brilliant red to orange pigment that is used for rock art and face painting.

18. The Kumeyaay operated and used an extensive trail system to link their coastal villages with those of the eastern mountains and the desert. While many of the recorded trails

are associated with travel, trade and procurement of resources, some are of a more spiritual and sacred nature. Kumeyaay holy men and healers (kwesiyaay) used special trails to access mediation spots such as Kuchamaa (Tecate Peak), to travel to sacred springs, and to perform rituals that may have included painting images upon rock faces.

19. Known trail and travel corridors in proximity to the border and in some cases, crossing what is now the border (or more accurately where the border crosses them) include the Jewell Valley trail system (Woods 1982:A2-32). These trails link Jacumba (see above) to the In-ko-pah Gorges to the east and several villages to the north within what are now the Manzanita and La Posta Indian Reservations.

20. There were at least two villages that straddled what is now the U.S.-Mexico international border within the San Diego and El Centro Project Areas. Such sites are not small areas of archaeological deposits including midden features that can be easily defined on the ground. In some instances, more than one “village” might comprise a “rancheria,” as often defined by archaeologists. Often the archaeological record is skewed by the fact that a majority of field studies rarely encompass more than a square mile and the resulting site records tend to split the recorded sites into small units based on site type and proximal distance from one another. This fragmentation obscures the larger settlement pattern and fails to view the various site “types” as elements of a large settlement or ranchería.

21. In fact, rancherías might extend over several square miles and often occupied both sides of a river or drainage system for more than a mile including side canyons and feeder drainages. In his discussion of the ranchería concept White (1963:116-188) notes that such settlements were vertical rather than horizontal, meaning that the settlements encompassed differing elevations to maximize resource exploitation. Within the border construction Project

Area this settlement system would be particularly valuable given the vast resources available along the seventeen-mile long swath of land from the coast at sea level to the interior mountains.

22. Further, White suggests that rancherías would control or perceive as theirs an area of more than 30 square miles. The ranchería itself would “own” or control resources within its sphere of influence that might extend for several miles in any direction depending on the landform and types of resource. In the case of the Kumeyaay, a figure of ten square miles is probably more accurate for their rancherías.

23. Based on archaeological information and ethnographic research the important village of Jacume/Hacoom/Jacumba extended from its center near the Jacumba Hot Springs several miles in all directions including south into what is now Mexico. In fact, on the Mexican side of the border, the village is known as Jacume and there is no reasonable rationale to separate the actual village as a result of the international border. Situated in the mountains along the U.S.-Mexico border, this village appears in early Spanish records and in later Mexican and American-period documents. The name may refer to “bubbling waters.” Noted in American-period documents as the home to sometimes aggressive warriors, Santiago, the leader of this village in 1852, signed the Treaty of Santa Ysabel.

24. Tecate, a major settlement, whose name means “knife or cut,” straddled what is now the Mexico-United State border. It appears in early historical documents and was home to Kumeyaay with close ties to the village of Jamul near El Cajon. This village did not take part in the sacking of Mission San Diego. In 1852, a person listed as Kawpi, probably a misunderstanding of the term kwaapaay, signed the Treaty of Santa Ysabel.

25. Both Tecate and Jacumba had, and have great historical and cultural significance for, the Kumeyaay and at a minimum should have been addressed in the cultural resource assessments for the border barrier construction projects.

#### **KUMEYAAY BURIALS WITHIN THE PROJECT AREA**

26. I have reviewed archaeological records from the Project Area and have found only sporadic, comprehensive surveys that crossed the study area or ran along the border for short segments. When intensive studies were completed such as at Lichty Mesa, human remains were in fact encountered.

27. The sort of surface surveys and pedestrian examination that consultants for CPB have conducted on the Project Areas are not always accurate in determining the presence or absence of material cultural (as opposed to sacred sites or places of historical/cultural value that may lack surface manifestations) does not always produce accurate results. At the Jacumba San Diego Gas & Electric Substation project, it was with the aid of tribal monitors that archaeologists discovered agave roasting pits and other resources dating back 9,000 years and at a depth below three feet. This is one rationale for requiring monitoring by archaeologists and Kumeyaay consultants during earth disturbing activities for the border barrier construction Projects. However, monitoring alone, without prior evaluation of the project area and an effort to locate and delineate tribal cultural sites, is wholly insufficient given the importance of the tribal cultural resources present at the San Diego and El Centro Project Areas. Under standard Best Management Practices and within local, state, and federal regulations, monitoring, in and of itself, is not considered as mitigation but rather a step taken after mitigation, as required, has been achieved.



28. Village sites and major habitation sites throughout San Diego County typically contain human burials and associated funerary features such as cremation pits, dance circles and, of course, the burial pits themselves. General examples of villages in the border region of California that have produced burials include what is probably an extension of the village of Tijuan on Lichty Mesa that was crossed by border wall construction (Peterson, Warren, Underwood, and Shultz 2011) and Otay to the north of the border (McGowan 1997). Further north along the coast the village Ystagua in Sorrento Valley produced both inhumations and cremations (Schultze 1992). The recorded villages of Meti, one at Buckman Springs, and one at Cottonwood Creek all produced human remains (Gamble 2008) as have most of the village sites excavated in San Diego County.

29. It would be reasonable then, based on the above, that human remains would be associated with the large village complexes near Campo and Jacumba.

30. This assumption is further borne out by increasing evidence of buried sites in the region that escaped discovery during surface surveys. One example is the discovery of a piece of cremated human bone within the Project Area on the border south of Campo on July 31, 2020. As report by an official from the San Diego County Medical Examiners' Office, the bone can be associated with either a foot or a hand (Hinkes 2020). The GPS coordinates provided by a Cogstone Environmental consultant places the bone as within the United States but on the southern side of the current barrier. (Hinkes 2020). Consultation with Antonio Porcayo Michelini, lead archaeologist the Instituto Nacional de Antropologia e Historia in Baja California, also confirmed that both inhumated bone and cremated bone had been encountered on the border between Jacumé (Jacumba) and La Rumorosa (near the Imperial Valley line) and also immediately south of the border at the edge of the Algodones Dunes (Porcayo Michelini 2020).

Regardless of the exact line separating the two countries, it is clear that human remains have been discovered within or in the immediate area of the construction corridor.

31. Kumeyaay burials are cemeteries. The idea that only officially-recorded or marked cemeteries, or cemeteries that functioned in the historic period, should be protected from damage or destruction flies in the face of common sense. Human remains, for all cultures, are considered sacred and sacrosanct regarding of their age, disposition, or numbers. To treat the remains of Kumeyaay in any other way is to degrade the culture being affected and blindly adhere to bureaucratic definitions.

32. It is important that locales that will be used for access roads, staging areas, and parking lots be accurately identified, field surveyed, and cultural sites marked (and ideally avoided) prior to grading or improvements for such uses. Kumeyaay monitors should be active participants in the field surveys. As part of the assessment of these facilities, it is also important that the formal record search extend beyond the corridor to include remote facilities.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 2020

  
Richard Carrico

## REFERENCES

1. Carrico, Richard. 2020 'Ematt Kumeyaay: Putting Cultural Meaning into the Ocotillo Energy Project Archaeological Record. Prepared for the Bureau of Land Management and the Kumeyaay Historic Preservation Committee. Prepared by Recuerdos Research, San Diego, California.
2. DuBois. Constance. 1904 The Story of Chaup: A Myth of the Diegueños. *Journal of American Folklore*, 17 (67).
3. DuBois, Constance. 1908 Ceremonies and Traditions of the Diegueno Indians. *Journal of American Folklore* 21 no. 81.
4. Gamble, Lynn H. 2008 Identification and Documentation of Unassociated Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony of Late Period Kumeyaay Archaeological Collections. Prepared for the United States Department of the Interior. On file at San Diego State University.
5. Harrington, John P. 1925 Notebooks of John P. Harrington, Reel 169. Smithsonian Institution, National Anthropological Archives.
6. Hinkes, Madeleine. 2020. Personal communication via email regarding discovery of human remains within the Border Wall corridor.
7. McGowan, Charlotte. 1997 Final Report of the Excavation of Cal. F:5:1 (CA-SDI-12809). Published by Southwestern College and on file at San Diego State University.
8. Noah, Anna. 2012 Yuha-Jacumba Prehistoric Corridor Cultural Landscape: Historic Context, Research Questions, and Significance Evaluation Criteria. Prepared for Bureau of Land Management, El Centro Office.

9. Porcayo Michelini, Antonio. 2020. Personal communication via email regarding human remains discovered along the border in northern Baja California.
10. Peterson, Mark Leo, Claude N. Warren, Jackson Underwood, and Richard Shultz. 2011. Cultural Resources Services at Site CA-SDI-222 (Border Field State Park) and Site CA-SDI-4281 (Lichty Mesa) for the San Diego Barrier Project, San Diego County, California. Prepared for the US Army Corps of Engineers by the Sanberg Group, Inc and RECON Environmental Inc.
11. Schultze, Carol A. 1992 A Reconstruction of Ystagua Village. Master's thesis on file at San Diego State University.
12. White, Raymond. 1963 Luiseño Social Organization. University of California Press Berkeley.
13. Woods, Clyde 1982 Identification and Evaluation of Native American Cultural Resources Situated Within One Mile of the Proposed and Existing Rights-of Way in California. Miguel to the Colorado River and Miguel to Mission TAP. Prepared for San Diego Gas & Electric.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MANZANITA BAND OF THE KUMEYAAY  
NATION, *et al.*,

Plaintiffs,

v.

CHAD WOLF, in his official capacity as Under  
Secretary of Homeland Security for Strategy,  
Policy, and Plans, *et al.*

Defendants.

**Case No. 1:20-cv-02712-TNM**

**SECOND DECLARATION OF JOHN ELLIOTT IN SUPPORT OF  
PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, John Elliott, declare as follows:

1. My declaration is based on my personal knowledge, and I am competent to testify to the contents of my declaration in this proceeding.

2. I provided cultural monitoring on the border wall construction site in east San Diego County on July 14, 2020. I observed the trenching activity for the border wall construction as follows: first, they removed substantial topsoil, up to several feet deep, 60 feet across the entire Roosevelt Reservation. Second, using an excavator they dug out the footing of the existing wall, dug out dirt from a trench about 2 feet wide and 5 or 6 feet deep and put the soil into a dump truck and took it to another location where they treated the soil. After treating the soil, it was returned to the trench and compacted. After compacting the soil, a large machine dug a trench in the compacted soil about 18 inches wide and 6 feet deep. During the excavation, I was not provided an adequate opportunity to view the soil in order to fully evaluate whether the soil might contain artifacts or human remains. I was required to stand about 20 feet away from the excavation

activity. As shown in the attached picture marked Exhibit 1, due to the distance that I was required to stand from the digging activity, I would only be able to observe very large objects; smaller objects were undetectable. I asked to view the soil in the dump truck they were loading it, and my request was denied. As there was construction activity at so many sites, I was not able to remain at one site to monitor all excavation activity for the day; rather I was asked to go to other locations to monitor. For example, after watching the excavation shown in the attached picture for an hour, I was asked to go to a laydown yard to look for artifacts.

3. The Kumeyaay people believe, like most cultures, that our deceased should not be disturbed in their graves. We also believe that if the deceased are disturbed, then they must be reburied according to our traditions. Because of the certainty of cremation sites and other sites containing human remains in the path of construction activity of the border wall, particularly the trenching, the following measures are necessary in order to provide for the proper respect and repose of the deceased in the event of the discovery of human remains in the path of ground disturbing activity:

- a. All construction activity affecting the discovery must stop pending an assessment;
- b. An assessment should be undertaken of whether the discovery involves human remains or a cremation site, and if so, of the extent of the cremation site, through examination of the surface, cadaver dogs, test pits or other appropriate methods;
- c. If a cremation site or other human remains is confirmed, and it cannot be avoided, then there should be a plan for removal and taking care of the remains;
- d. A Kumeyaay Tribe, typically selected by the Kumeyaay Cultural Repatriation Committee, takes responsibility for appropriate disposition of the remains;

- e. A funeral ceremony would be held for the remains, consistent with the ceremony that would be held for a person recently deceased, including placement of the remains in a casket along with funerary objects, speaking over the remains, songs, perhaps a wake, meals and interment.
  - f. If the remains are buried on the Manzanita Reservation, we care for the grave of the ancestor(s) as if they were their own immediate relatives, including annual cleaning, decorating and periodic visits.
4. The measures described above are typical components of plans that the Manzanita Band has developed with federal agencies in connection with construction projects on federal lands and with developers on tribal land.
5. The U.S. Army Corps of Engineers and Customs and Border Protection have not provided the Kumeyaay people an opportunity for the steps described above in constructing the new border wall in San Diego and Imperial Counties. As a result, we have not been given the opportunity to care for our dead according to our beliefs.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 7, 2020



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John Elliott

*Manzanita Band of Kumeyaay Nation, et al. v. Chad Wolf, et al.*

**SECOND DECLARATION OF JOHN ELLIOTT IN SUPPORT OF PLAINTIFFS'  
REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

## **Exhibit 1**







**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

THE MANZANITA BAND OF THE KUMEYAAY  
NATION, *et al.*,

Plaintiffs,

v.

WOLF, *et al.*,

Defendants.

Civil Action No. 20-cv-02712 (TNM)

**DECLARATION OF PAUL ENRIQUEZ**

I, Paul Enriquez, declare as follows:

1. I am the Acquisitions, Real Estate and Environmental Director for the Border Wall Program Management Office (“Wall PMO”), U.S. Border Patrol Program Management Office Directorate, U.S. Customs and Border Protection (“CBP”), an agency of the Department of Homeland Security (“DHS”). I have held this position since August 6, 2018. From 2013 to August 2018, I was the Real Estate and Environmental Branch Chief for the Border Patrol and Air and Marine Program Management Office (“BPAM”), Facilities Management and Engineering, Office of Facilities and Asset Management (“OFAM”). From 2011 to 2013, I was employed as an Environmental Protection Specialist in the BPAM office. In that role, I performed environmental analyses for various border infrastructure projects. From 2008 to 2011, I was a contractor assigned to the BPAM office and provided environmental support on various border infrastructure projects.

2. CBP is the DHS component with primary responsibility for border security. CBP constructs, operates, and maintains border infrastructure necessary to deter and prevent illegal entry on the southern border.
3. Within CBP, the Wall PMO has expertise in managing and executing border infrastructure projects. The Wall PMO is directly tasked with managing the schedule, finances, real estate acquisition, environmental planning, and construction of the border infrastructure system along the U.S. border.
4. In my capacity as the Acquisitions, Real Estate and Environmental Director, I am responsible for overseeing all environmental planning and compliance activities as well as the real estate acquisition process for projects executed or overseen by the Wall PMO.
5. Based upon my current and past job duties, I am familiar with past and planned border infrastructure projects supporting border security. I am personally aware of the border barrier projects that have been approved for construction by the Secretary of Defense that are being executed with the assistance of the Department of Defense ("DoD") pursuant to 10 U.S.C. § 284(b)(7) in San Diego and Imperial Counties, California, that are at issue in this case.
6. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.

## BACKGROUND

7. The Secretary of DHS has determined that the United States Border Patrol San Diego and El Centro Sectors are areas of high illegal entry. Consequently, Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended (“IIRIRA”), requires DHS to construct physical barriers and roads to deter and prevent illegal entry of people and drugs into the United States.
8. To support DHS’s action under Section 102 of IIRIRA, on January 12, 2020, DHS, acting through CBP, sent DoD a request for assistance (“RFA”), requesting that the Secretary of Defense, pursuant to 10 U.S.C. § 284(b)(7), assist by constructing fences, roads, and lighting in certain locations within six United States Border Patrol Sectors, including the San Diego and El Centro Sectors. On February 13, 2020, the Secretary of Defense concluded that the support requested by DHS satisfies the statutory requirements of 10 U.S.C. § 284(b)(7) and that DoD will provide such support. The Secretary of Defense approved 31 border barrier projects for construction, including a project in the San Diego Sector within San Diego County known as “San Diego A” and a project in the El Centro Sector within Imperial County known as “El Centro A.” San Diego A and El Centro A are collectively referred to herein as the “284 Projects.”
9. Given its expertise in managing border infrastructure projects, the Wall PMO, on behalf of CBP, is working in close coordination with DoD on the 284 Projects.
10. For the 284 Projects, the Wall PMO, on behalf of CBP, among other things, reviews and approves technical specifications, reviews and approves barrier alignments and locations, and provides feedback and input on other aspects of project planning and execution. In

addition, the Wall PMO, on behalf of CBP, is responsible for all environmental planning, including stakeholder outreach and consultation, for the 284 Projects.

11. The 284 Projects are being executed on federally-owned land that is directly adjacent to the border. The project footprints, and thus the majority of the construction activities, occur within the federal Roosevelt Reservation, a 60-foot strip of land established in 1907 that parallels the international border that, consistent with the purpose for which it was established, functions primarily as a law enforcement zone. *See* 35 Stat. 2136. Each 284 Project is discussed in more detail below.

#### **San Diego A**

12. San Diego A is being carried out under a waiver issued by the Secretary of DHS pursuant to Section 102(c) of IIRIRA that was published in the Federal Register on March 16, 2020, 85 Fed. Reg. 14958 (March 16, 2020) (the “San Diego Waiver”).
13. The project area for San Diego A is in San Diego County, California, and is described in the San Diego Waiver (the “San Diego Project Area”). Attached as Exhibit A is a map depicting the areas within the San Diego Project Area where DHS and DoD will be constructing barrier as a part of San Diego A.
14. San Diego A involves the construction of border barrier along three segments of the international border. As a part of San Diego A, segment 1, DHS and DoD are replacing approximately 14 miles of existing primary pedestrian fencing with new steel bollard fencing. The 60-foot strip of federal land along the border that contains the project footprint for San Diego A, segment 1, is previously disturbed and functions as a law enforcement zone. The existing fencing that is being replaced was constructed between 2008 and 2010. There is also an existing border road that has been there for at least 30



years. As a part of San Diego A, segment 2, DHS and DoD will construct approximately two miles of new steel bollard fencing. As a part of San Diego A, segment 3, DHS and DoD will construct approximately two miles of new steel bollard fencing along two separate segments of the international border. The 60-foot strips of federal land along the border that contains the project footprints for San Diego A, segments 2 and 3, are previously disturbed, contain an existing border road that has been there for at least 30 years, and function as a law enforcement zone. The areas that surround the San Diego Project Area are largely rural, undeveloped desert and mountains. Attached as Exhibit B are photos of the San Diego Project Area and surrounding area. The new bollard fencing that is to be constructed as a part of San Diego A is 30-feet tall. It consists of steel bollards that are approximately six inches in diameter and spaced approximately four inches apart. San Diego A also includes the installation of a linear ground detection system, road construction or road improvements, and the installation of lighting, which will be supported by grid power and include embedded cameras. Substantial construction activities began on San Diego A on May 26, 2020.

### **El Centro A**

15. El Centro A is being carried out under a waiver issued by the Secretary of DHS pursuant to Section 102(c) of IIRIRA that was published in the Federal Register on March 16, 2020, 85 Fed. Reg. 14960 (March 16, 2020) (the “El Centro Waiver”).
16. The project area for El Centro A is in Imperial County, California, and is described in the El Centro Waiver (the “El Centro Project Area”). After the Secretary of Defense’s February 13, 2020, approval of El Centro A, and as a result of additional project planning by DHS and DoD, El Centro A was modified. Approximately seven miles of proposed

barrier were removed from the project, thus reducing the scope of the project to an approximately three-mile segment of border barrier. Attached as Exhibit C is a map depicting the areas within the El Centro Project Area where DHS and DoD will be constructing new barrier.

17. As a part of El Centro A, DHS and DoD will construct approximately three miles of new steel bollard fencing. The project footprint for El Centro A is within the federal Roosevelt Reservation, a 60-foot strip of land along the international border that has been set aside for law enforcement purposes. There are portions of the Roosevelt Reservation within the El Centro Project Area that have previously disturbed by illegal crossing and off road activity. The area that surrounds the El Centro Project Area is a federally protected wilderness that is devoid of any development. Attached as Exhibit D are photos of the El Centro A Project Area and surrounding area. The new bollard fencing that is to be constructed as a part of El Centro A is 30-feet tall. It consists of steel bollards that are approximately six inches in diameter and spaced approximately four inches apart. The project also includes the installation of a linear ground detection system, road construction or road improvement, including the construction of north/south access roads, and the installation of lighting, which will be supported by grid power and include embedded cameras. Substantial construction activities began on El Centro A on June 30, 2020.

#### **ENVIRONMENTAL PLANNING AND CONSULTATION**

18. CBP has long had a border security presence in the El Centro and San Diego Project Areas (collectively, the “284 Project Areas”) and their surrounding areas. Through the planning and development of past projects and activities, CBP has developed an

understanding and awareness of the natural, biological, historic, and cultural resources in the 284 Project Areas and their surrounding areas.

19. In addition, CBP has engaged in new environmental planning and consultation for the 284 Projects.

20. Consistent with its past practice for prior border infrastructure projects, and to better understand the potential impacts of the 284 Projects, CBP reviewed prior cultural survey data for projects completed in the area of the 284 Project Areas. In addition, CBP has performed new cultural resource surveys of the 284 Project Areas. For the cultural resource surveys, CBP's environmental contractor performs records reviews and literature searches for records of cultural resources within the survey areas and conducts pedestrian surveys. During the pedestrian surveys archeologists walk in parallel transects no more than 15 meters apart and visually inspect the ground for evidence of cultural resources, including artifacts, soil stains, and features such as rock piles or rock alignments. Any cultural manifestation is assessed as to its significance. Any archeological sites or isolated artifacts found within the survey area is documented in a report and site records are entered into the California Historical Resources Information System. CBP also surveyed the 284 Project Areas for biological, historic and cultural resources, and jurisdictional "Waters of the United States," which identified, among other things, vegetation communities, endangered species habitat, and lists of species, primarily common birds and plants, observed within the 284 Project Areas.

21. Also in an effort to understand and address the potential impacts of the 284 Projects, CBP has done extensive outreach and consultation with stakeholders.



22. On March 16, 2020, CBP sent consultation letters regarding San Diego A and El Centro A to a range of stakeholders and potentially interested parties, including, among others, the Department of the Interior, the United States Fish and Wildlife Service, the Bureau of Land Management, the United States Environmental Protection Agency, State authorities and resource agencies, including the California State Historic Preservation Officer, the California Department of Fish and Wildlife, and the California Environmental Protection Agency, local officials, and numerous Native American Tribes and non-governmental organizations.
23. The San Diego A and El Centro A consultations letters were also posted to CBP's website, notifying the public of projects and soliciting the public's input regarding potential impacts. See <https://www.cbp.gov/document/environmental-assessments/san-diego-county-border-barrier-projects>; <https://www.cbp.gov/document/environmental-assessments/imperial-county-border-barrier-project>.
24. In addition to soliciting input through consultation letters, CBP has met with stakeholders and interested parties. For example, CBP has engaged in an on-going dialogue regarding the 284 Projects with federal land managers and resource agencies. On February 28, 2020, CBP conducted a webinar with federal land managers and resource agencies to discuss the 284 Projects, potential impacts, and issues of concern. CBP conducted another webinar with its federal partners on March 4, 2020.
25. CBP had planned for in-person site visits of the 284 Project Areas with resource agencies; however, due to the travel restrictions resulting from the novel coronavirus, CBP conducted virtual site visits where CBP and its federal partners had targeted

discussions concerning specific issues or areas of focus within the San Diego A and El Centro A Project Areas.

26. All of the information and input CBP obtains through stakeholder consultations, the biological and cultural resource surveys, and prior environmental planning has informed project planning and execution of the 284 Projects. For example, after surveys of the El Centro Project Area revealed two archeological sites within the project footprint, CBP, in coordination with DoD, took steps to ensure that the sites would not be impacted. In one instance, CBP shifted the alignment of an access road to avoid impacts to an archeological site. In another instance, CBP and DoD required that the construction contractor find a new location for a proposed well site in order to avoid impacts to an archeological site. In addition, CBP has developed construction Best Management Practices (“BMPs”) and design modifications that were presented to DoD for incorporation into project planning and execution to minimize or avoid potential impacts to the greatest extent possible. CBP’s suite of BMPs includes, among other things, a requirement that the contractor develop a storm water pollution prevention plan, an environmental awareness briefing for the construction contractor prior to any ground disturbing activities, environmental monitors who are on site during construction, pre-construction bird surveys, a stop work requirement if federally-listed species or archeological resources are discovered or are present within a work area, measures to limit the clearing of vegetation wherever possible, and measures to prevent the introduction of invasive species and minimize noise impacts. In addition, input from stakeholders and CBP’s own analysis will be used to develop mitigation measures, which may be implemented after construction to offset or minimize unavoidable impacts.

**Tribal Consultation and Coordination**

27. CBP's environmental planning and consultation for the 284 Projects has included extensive outreach and coordination with Native American Tribes, including plaintiffs, the Manzanita Band of the Kumeyaay Nation (the "Manzanita Tribe"), the Campo Kumeyaay Nation (the "Campo Tribe"), the Ewiiapaayp Band of Kumeyaay Indians (the "Ewiiapaayp Tribe"), the Iipay Nation of Santa Ysabel (the "Iipay Tribe"), the Sycuan Band of the Kumeyaay Nation (the "Sycuan Tribe"), and the Kumeyaay Heritage Preservation Council (the "KHPC") (collectively "Plaintiffs").
28. CBP's March 16, 2020, consultation letters were sent to over 25 Native American Tribes, including Plaintiffs, requesting their input regarding the 284 Projects. The consultation letters were sent approximately two months before construction began on San Diego A and approximately three months before construction began on El Centro A. In addition to Plaintiffs, CBP sent consultation letters to numerous other Kumeyaay tribes, including the La Posta Band of Diegueño Mission Indians (the "La Posta Tribe"), the Barona Band of Mission Indians, the Cahuilla Band of Mission Indians, the Inaja-Cosmit Band of Mission Indians, the Jamul Indian Village, the Mesa Grande Band of Mission Indians, the San Pasqual Band of Diegueño Indians, and the Viejas Band of Kumeyaay Indians (collectively referred to herein as the "Kumeyaay Tribes").
29. On May 7, 2020, CBP held a tribal coordination briefing via WebEx with the Chairman of the Campo Tribe and the Director of the Campo Tribe's Environmental Protection Agency. CBP reached out to the Campo Tribe specifically due to the Campo Reservation's proximity to the San Diego Project Area. As a part of the briefing, CBP shared photos of the planned border barrier design and maps of the 284 Project Areas. In

addition, CBP shared its understanding of known biological and cultural resources within the 284 Project Areas based on the new surveys being conducted and information obtained from prior surveys. CBP also shared examples of the BMPs that would be implemented during construction. The parties also discussed the possibility of having tribal cultural monitors present during construction.

30. On June 16, 2020, CBP conducted a tribal coordination briefing with the Kumeyaay Tribes. The attendees included the Campo Tribe, the Manzanita Tribe, the La Posta Tribe, and the Jamul Indian Village. As a part of the briefing, CBP shared photos of the planned border barrier design, maps of the 284 Project Areas, CBP's understanding of known biological and cultural resources within the 284 Project Areas, and examples of the BMPs that would be implemented during construction, including having monitors on-site during construction. CBP further noted that it had reviewed survey information from previous projects within the 284 Project Areas and that new surveys were being conducted in areas that had not been previously surveyed. CBP informed the attendees that it was developing a protocol and communications plan and would continue to coordinate with tribes while the plan was being developed. The parties also discussed, among other things, the possibility of having tribal cultural monitors affiliated with the Kumeyaay Tribes on-site during construction, and CBP committed to sharing as much information as possible going forward.

31. On July 3, 2020, CBP reached out to the Chairpersons of the Kumeyaay Tribes requesting a conference call between CBP and the tribal leaders to further discuss San Diego A and the concerns that had been expressed by the Kumeyaay Tribes at the June 16<sup>th</sup> tribal coordination briefing regarding, among other things, insufficient survey data



and the need for tribal cultural monitors to be on-site during construction. CBP also planned to follow-up with the Kumeyaay Tribes regarding reports that human remains had been found in the San Diego Project Area on July 1, 2020.

32. The requested conference call took place on July 7, 2020. The attendees included the Manzanita Tribe, the La Posta Tribe, and the Jamul Indian Village. As detailed in Paragraph 86, the parties discussed a report that human remains had allegedly been found in the San Diego Project Area on July 1, 2020, and CBP's subsequent investigation of that report. The parties also discussed the Kumeyaay Tribes' concerns regarding insufficient survey data and the need for tribal cultural monitors to be on-site during construction. The Kumeyaay Tribes also requested that CBP perform additional soil sampling and that CBP have cadaver dogs on-site during construction. In addition, the Kumeyaay Tribes requested that CBP schedule a site visit to a portion of the San Diego Project Area that was scheduled to have a controlled detonation, which was of concern to the Kumeyaay Tribes. As detailed below, CBP followed-up on all of the issues or concerns expressed by the Kumeyaay Tribes.

33. Two days after the call, on July 9, 2020, CBP hosted a site visit to the portion of the San Diego Project Area where the controlled detonation was to take place. Attendees included the Manzanita Tribe, the La Posta Tribe, and the Jamul Indian Village. The attendees walked the site and the parties discussed the protocols for the detonation, including the presence of monitors during the detonation.

34. On July 10, 2020, in response to the Kumeyaay Tribes' request for further survey data, CBP's archeological contractor, Cogstone Resource Management ("Cogstone"), gave the Kumeyaay Tribes access to its online database containing information regarding the 284

Project Areas. The database includes, among other things, maps of the 284 Project Areas; KMZ files, which are interactive map files using Google Earth as a base; shapefiles, which are digital files that show or represent geographical data; site records; cultural reports; a listing of surveys of the 284 Project Areas; and survey data.

35. CBP also investigated the viability of having cadaver dogs on site during construction; however, CBP determined that it was cost prohibitive. In addition, CBP learned that average temperatures within the 284 Project Areas would hinder the dogs' ability to locate potential remains. CBP also followed-up with the Kumeyaay Tribes regarding their request for soil sampling. CBP has asked the Kumeyaay Tribes to provide additional information regarding protocols for the soil sampling; however, CBP has not received a response from the Kumeyaay Tribes regarding the desired protocols.
36. On July 10, 2020, in response to the Kumeyaay Tribes' concerns regarding insufficient monitoring in the San Diego Project Area, CBP, through Cogstone, secured the services of a tribal cultural monitor to observe certain construction activities associated with San Diego A.
37. Also on July 10, 2020, CBP and Cogstone hosted a webinar with the Manzanita Tribe, the La Posta Tribe, the Jamul Indian Village, and other Kumeyaay tribal representatives. The parties reviewed survey data from past and current cultural resource surveys of the San Diego Project Area and discussed specific areas of concern noted by the Kumeyaay Tribes. During the webinar, the Kumeyaay Tribes identified five areas within the San Diego Project Area that they believed had a high probability for cultural artifacts and other sensitive sites ("Survey Areas 1 – 5"). The Kumeyaay Tribes asked CBP to resurvey those areas. The Kumeyaay Tribes again noted their desire to have tribal

cultural monitors affiliated with the Kumeyaay Tribes on-site to monitor construction. The Kumeyaay Tribes also asserted that CBP should be responsible for the cost of the tribal cultural monitors.

38. Subsequent to the July 10<sup>th</sup> call, CBP made arrangements with Cogstone to have tribal cultural monitors affiliated with the Kumeyaay Tribes on-site during construction of San Diego A.
39. On July 13, 2020, based on a list provided to CBP by the Kumeyaay Tribes, Cogstone wrote the tribal leaders of the Kumeyaay Tribes, informing them that it would be hiring tribal cultural monitors to assist with construction monitoring. Cogstone's July 13<sup>th</sup> correspondence outlined the rate of pay for the tribal cultural monitors and the documentation that would be required for contract purposes, including work agreements, insurance certificates, W-9s, and a security screening conducted by the United States Border Patrol San Diego Sector. Cogstone made arrangements to retain tribal cultural monitors from the different Kumeyaay Tribes who expressed interest in providing monitors on-site on a rotating basis and submitted the appropriate paperwork.
40. Tribal cultural monitors from the interested tribes have been on-site to observe construction in the San Diego Project Area since July 10, 2020. At present, four tribal cultural monitors are on site each day. As set out in Paragraph 55, CBP has also made arrangements for two tribal cultural monitors to observe construction of El Centro A and expects such monitoring will begin the week of October 5<sup>th</sup>. For the San Diego Project Area, each morning the tribal cultural monitors are invited to a "tailgate meeting." At the tailgate meeting the tribal cultural monitors are told where construction activity will be occurring that day. CBP expects that similar processes will be implemented in El Centro.

The tribal cultural monitors are free to select, based on the location and type of planned construction activity, which construction activities they prefer to observe that day. Each tribal cultural monitor may choose his or her own site to observe. There is no requirement that all the tribal cultural monitors observe the same site. Similarly, there is no requirement that the tribal cultural monitors observe the same site as the Cogstone monitors.

41. On July 10, 2020, CBP received a letter from the Chairman of the Campo Tribe, Marcus Cuero, regarding San Diego A. Mr. Cuero's letter included questions concerning, among other things, the San Diego Project Area, the San Diego Waiver, CBP's consultation process, and whether any work would be occurring on the Campo Tribe's property. CBP responded to Chairman Cuero's letter on August 5, 2020. In its response CBP provided a map of the San Diego Project Area and a copy of the San Diego Waiver. CBP noted that it had not received any formal comments on San Diego A from the Campo Tribe in response to its March 2020 consultation letter. CBP also stated that it was not aware of any plans to for construction or construction-related activities on the Campo Tribe's property.

42. On July 19, 2020, the Manzanita Tribe sent an additional list of demands to CBP, including that CBP halt all ground-disturbing activities. The Manzanita Tribe's July 19<sup>th</sup> correspondence also notified CBP that it would not participate in the tribal monitoring program CBP had established, in part because the Manzanita Tribe objected to the security screening requirement for tribal cultural monitors. CBP responded to the Manzanita Tribe on July 27, 2020, noting that CBP would continue the monitoring program and it hoped the Manzanita Tribe would reconsider its position. In early-



September 2020, the Manzanita Tribe notified CBP that it would participate in the tribal monitoring program. Both CBP and Cogstone have since invited the Manzanita Tribe to participate; however, the Manzanita Tribe has not responded to the invitations.

43. On July 31, 2020, representatives from the Kumeyaay Tribes conducted a site visit to investigate reports that human remains had been found in the San Diego Project Area. As set out in more detail in Paragraph 87, the alleged remains were located in Mexico, south of the San Diego Project Area.
44. On August 3, 2020, CBP received a letter from Plaintiffs dated July 31, 2020, regarding San Diego A. Plaintiffs' July 31<sup>st</sup> letter included a detailed list of demands, including that CBP immediately stop all ground disturbing activities, engage in additional consultation with Plaintiffs, and take steps to avoid, minimize, or mitigate adverse impacts. (Santos Decl. Ex. 2.) CBP had a call with Plaintiffs on August 6, 2020, to discuss the demands in Plaintiffs' letter. Plaintiffs sent CBP a follow-up letter on August 10, 2020 (Santos Decl. Ex. 4). CBP sent an interim response on August 17, 2020. (Santos Decl. Ex. 5.) CBP formally responded to Plaintiffs' July 31<sup>st</sup> letter on August 20, 2020. (Santos Decl. Ex. 8.) In CBP's response, it explained that, given the importance of San Diego A to border security, it could not halt construction activity. CBP's response also detailed the ways in which CBP is already meeting Plaintiffs' demands, including ensuring tribal cultural monitors are present during ground-disturbing activities, sharing survey data, re-surveying areas that have been identified as areas of concern, continuing to coordinate with the tribes throughout the execution of San Diego A, memorializing processes to avoid, minimize, or mitigate impacts to cultural resources, and working closely with the tribes to ensure continued access for religious ceremonies.

45. On August 4, 2020, CBP received an inquiry from Lisa Haws, Tribal Historic Preservation Officer for the Manzanita Tribe, concerning previous site forms for areas within the San Diego Project Area that had already been surveyed and CBP's plans to survey additional areas. On August 7, 2020, Ms. Haws wrote to CBP with an inquiry regarding additional surveys in the San Diego Project Area.
46. CBP and Cogstone responded to Ms. Haws' inquiries on August 4, 2020, and August 7, 2020. The responses noted that Cogstone was preparing site forms for areas that had been surveyed. The responses also addressed the areas Ms. Haws had identified for re-survey. CBP noted that one of the areas that Ms. Haws requested that CBP re-survey was already included in Survey Area 3, the second area was added to Survey Area 5, and the third area was not added because it is outside the San Diego Project Area.
47. The week of August 10<sup>th</sup>, CBP re-surveyed Survey Areas 1 – 5, an area totaling approximately 76 acres of the San Diego Project Area, which the Kumeyaay Tribes had identified as having a high probability for cultural artifacts or other sensitive sites during the parties' July 10<sup>th</sup> meeting. CBP arranged to have tribal cultural monitors present during the re-survey of Survey Areas 1 – 5. The re-surveys indicated the presence of known and previously-unidentified individual resources or "isolates." Isolates are generally not considered significant under the National Historic Preservation Act. The re-surveys, like the earlier surveys, did not reveal the presence of cultural sites or artifacts that would be eligible for listing on the National Register of Historic Places. As detailed below, CBP shared the surveys with the Kumeyaay Tribes and discussed measures to avoid or minimize impacts to the resources found within Survey Areas 1 – 5.

48. On August 14 and 15, 2020, Ms. Haws requested additional data and information from CBP, including monitoring logs and records of past surveys. CBP, through Cogstone, responded to Ms. Haws' request and provided the additional data on August 19, 2020.
49. On August 28, 2020, CBP shared the data from the re-surveys of Survey Areas 1 – 5 with the Kumeyaay Tribes. The survey data included maps showing the pinpoint location of any newly identified isolates and previously recorded resources.
50. Also on August 28, 2020, CBP conducted the first of what has become a recurring, bi-weekly call with the Kumeyaay Tribes, including Plaintiffs. During the August 28<sup>th</sup> call, CBP provided the Kumeyaay Tribes with an update on construction and the parties reviewed the data from the re-survey of Survey Areas 1 – 5. The parties agreed that the isolates should be flagged and a buffer zone created to ensure that they were not disturbed during construction activities. Subsequent to the call, CBP implemented those protection measures. CBP and the Kumeyaay Tribes also discussed potential treatment and curation strategies for artifacts that were located in the 284 Project Areas or discovered going forward. CBP also informed the attendees that it would be circulating the draft Cultural Resource Protocol and Communications Plan (the "Protocol Plan") and seeking comments and input.
51. During the week of August 31<sup>st</sup>, at the request of the Kumeyaay Tribes, CBP re-surveyed all the remaining areas in the San Diego Project Area for which CBP had relied on prior surveys ("Survey Areas 6 – 8"). That is, CBP surveyed all the remaining areas within the San Diego Project Area, an area totaling approximately 84 acres, that had not been surveyed in 2020 prior to construction or re-surveyed at the request of the Kumeyaay

Tribes.<sup>1</sup> CBP arranged to have tribal cultural monitors present during the re-survey of Survey Areas 6 – 8. The re-surveys indicated the presence of known and previously-identified isolates. The re-surveys, like the earlier surveys, did not reveal the presence of cultural sites or artifacts that are eligible for listing on the National Register.

52. On August 31, 2020, CBP distributed the draft Protocol Plan to the Kumeyaay Tribes, including Plaintiffs, and requested their input on the draft. The Protocol Plan is a living document. It memorializes protocols that have been implemented by CBP since the 284 Projects were initiated and describes additional protocols that will be utilized going forward for avoidance, treatment, curation, and repatriation of cultural resources. For example, the Protocol Plan calls for avoiding areas where resources are found and striving to leave the resources in place wherever possible. If a resource cannot be avoided, the Protocol Plan requires an immediate halt to construction within 100 feet of the resource until it can be treated appropriately. If the resource is one that would be eligible for treatment under the Native American Graves Protection and Repatriation Act, the Protocol Plan requires that no more than 48 hours after the notification of a discovery, the tribes and CBP will complete culturally appropriate repatriation efforts to address the discovery. Additional time may be granted to secure appropriate repatriation. The tribe on whose traditional land the item is found is given the opportunity to confer with their tribal cultural leaders to determine appropriate actions. As the Protocol Plan has been developed and is being finalized, CBP has, as detailed herein, continued to share information with the Kumeyaay Tribes. To this same end, for cultural resources that are

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<sup>1</sup> CBP had planned, at the request of the Kumeyaay Tribes, to survey one additional area, known as “Survey Area 9,” that is immediately north of the San Diego Project Area. CBP was not able to re-survey Survey Area 9 because it is on private property and to date CBP has been unable to obtain access to the area.



found within the 284 Project Areas before the Protocol Plan is finalized, CBP will implement the protocols that are contained in the plan as outlined above.

53. CBP originally requested comments on the draft Protocol Plan by September 14, 2020.

After it received no tribal input or feedback on the draft Protocol Plan, CBP extended the deadline for comment to September 21, 2020.

54. On September 4, 2020, CBP held another bi-weekly call with the Kumeyaay Tribes,

including Plaintiffs. CBP provided an update on the construction schedule. The parties also discussed tribal monitoring schedules, including monitoring of night work, and CBP reminded the Kumeyaay Tribes that CBP needed their input on the draft Protocol Plan.

During the call, representatives from the Kumeyaay Tribes expressed concerns about El Centro A. The Kumeyaay Tribes stated that the measures that they had requested for San Diego A, including tribal cultural monitors, cadaver dogs, and soil sampling, should also be implemented for El Centro A. Although the Kumeyaay Tribes were given access to Cogstone's database, which includes, among other things, maps, site records, a listing of surveys, and survey data for the 284 Project Areas, in early-July, they also expressed concerns that more detailed information about El Centro A had not been included in prior discussions between the parties. This was the first time the Kumeyaay Tribes had made specific demands concerning El Centro A. CBP committed to scheduling another call to discuss the survey data for El Centro A. CBP also informed the Kumeyaay Tribes that they could send one or more tribal cultural monitors who are observing construction of San Diego A to observe El Centro A. CBP also told the Kumeyaay Tribes that, alternatively, they could send their own tribal cultural monitors to observe construction of El Centro A at their own cost.

55. Subsequent to the September 4<sup>th</sup> call, CBP made arrangements with Cogstone to retain two additional tribal cultural monitors to observe construction of El Centro A. CBP is now funding four tribal cultural monitors for San Diego A and two tribal cultural monitors for El Centro A. CBP expects that the two tribal cultural monitors for El Centro A will be on-site beginning the week of October 5<sup>th</sup>.
56. On September 9, 2020, CBP shared the survey data from the re-survey of Survey Areas 6 – 8 with the Kumeyaay Tribes. As was the case with Survey Areas 1 – 5, the survey data included maps showing the pinpoint location of any newly identified isolates and previously recorded resources.
57. On September 11, 2020, CBP had a call with the Kumeyaay Tribes, including Plaintiffs, to discuss the results of the re-survey of Survey Areas 6 – 8. The parties discussed the isolates that were identified during the re-survey. In light of the avoidance measures that had been discussed and agreed to for Survey Areas 1 – 5, CBP confirmed that the isolated artifacts had been flagged and a buffer zone was created to ensure that they were not disturbed during construction activities. CBP and the Kumeyaay Tribes also discussed potential treatment and curation strategies for artifacts that were located in the 284 Project Areas or discovered going forward.
58. On September 15, 2020, CBP had a call with Kumeyaay Tribes, including Plaintiffs, to discuss the survey data for El Centro A. The parties also discussed avoidance, treatment, and curation of resources within the El Centro Project Area.
59. On September 18, 2020, CBP held another of its bi-weekly calls with the Kumeyaay Tribes, including Plaintiffs. No tribal representatives were able to attend the call. Therefore, in lieu of a call, CBP sent an update to the Kumeyaay Tribes via email. The

update included an overview of upcoming construction activities and tribal cultural monitoring schedules. The update also noted that CBP is planning a site visit to the El Centro Project Area, as requested by the Kumeyaay Tribes. The update also requested that the Kumeyaay Tribes submit their comments on the draft Protocol Plan by September 21, 2020.

60. CBP expects to finalize the Protocol Plan by October 9, 2020. Only the La Posta Tribe provided comments on the Protocol Plan. The majority of the La Posta Tribe's comments were provided by their attorney. CBP was unable to accept or implement a substantial number of her comments because they were not appropriate to intent or purpose of the Protocol Plan.

61. On October 5, 2020, CBP provided an update to the Kumeyaay Tribes that covered tribal monitoring schedules, construction updates, including planned construction activity for the week ahead. CBP provided the update in lieu of a bi-weekly call, as my schedule did not allow for a call on October 2, 2020.

#### **Plaintiffs' Allegations**

62. As evidenced by the discussion above, CBP takes the concerns of the Kumeyaay Tribes, including Plaintiffs, very seriously. As the 284 Projects have progressed, CBP has tried to respond to their concerns to the best of its abilities. Nevertheless, given my understanding of the 284 Projects, many of Plaintiffs' allegations of harm are inaccurate, exaggerated, or misplaced.

### A. Procedural Harms

63. Plaintiffs claim that CBP first announced its plan for the 284 Projects in 2018, but there was no consultation with the Kumeyaay Tribes until March 2020. (Pls. Br. at 16; Santos Decl. ¶ 5; Haws Decl. ¶¶ 6-7). This is incorrect.
64. The 2018 “announcement” that Plaintiffs refer to was unrelated to the 284 Projects. A copy of CBP’s consultation letter dated February 23, 2018, is attached as Exhibit E is CBP’s February 2018 consultation letter concerned a project to replace approximately 14 miles of primary pedestrian barrier that is a part of CBP’s Border Infrastructure System (“BIS”). The segment of barrier at issue started near the eastern edge of Border Field State Park and extended to the base of Otay Mountain, a project area in southwestern San Diego County that is at least 20 miles west of the San Diego Project Area. As noted in Paragraph 8 above, for the 284 Projects, CBP sent a RFA to DoD on January 12, 2020, and the Secretary of Defense approved the 284 Projects on February 13, 2020.<sup>2</sup> CBP initiated consultation with the Kumeyaay Tribes and other stakeholders in March 2020.
65. Plaintiffs claim that construction on the 284 Projects started without a “full understanding of known cultural resource sites.” (Haws Decl. ¶ 25c.) This is also inaccurate.
66. As stated, CBP reviewed prior cultural survey data, conducted records reviews, and performed new cultural resource surveys of the 284 Project Areas prior to commencing construction. It also has also re-surveyed areas the Kumeyaay Tribes identified as having a high probability for cultural resources, which largely confirmed the results of the earlier review. CBP has shared all that data with the Kumeyaay Tribes and has committed to

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<sup>2</sup> Plaintiffs also allege that CBP never responded to their March 23, 2018, letter concerning the 2018 fence replacement project. (Santos Decl. ¶ 5, Exhibit 1.) This is also incorrect. A copy of CBP’s March 28, 2018, response is attached as Exhibit F.



protocols concerning avoidance, treatment, curation, and repatriation of cultural resources within the 284 Project Areas and any unanticipated discoveries.

67. Plaintiffs assert that the tribal consultation that has occurred on the 284 Projects has been “minimal,” “halting,” or “inadequate,” that CBP has tried to “downplay” tribal concerns, and that CBP has not “truly sought the Kumeyaay Tribe’s views on mitigation or avoiding impacts.” (Pl. Br. at 17; Haws Decl. ¶¶ 21, 25; Santos Decl. ¶¶ 14, 16, 19.) These claims are untrue.

68. As detailed above, CBP has made extensive efforts to not only share information with the Kumeyaay Tribes, but also take actions that are responsive to their concerns. Among other things, CBP has shared survey data, established a tribal cultural monitoring program, re-surveyed areas that were identified by the Kumeyaay Tribes as having a high probability for cultural resources, investigated the viability of having cadaver dogs on-site during construction, and sought input from the Kumeyaay Tribes regarding avoidance, treatment, curation, and repatriation of cultural resources.

69. Plaintiffs state that the number of tribal cultural monitors CBP is funding is insufficient and as a result there have been ground disturbing activities that have taken place without tribal cultural monitors on-site. (Santos Decl. ¶¶ 14, 17; Haws Decl. ¶ 25f.) This claim is overstated.

70. CBP is currently funding six tribal cultural monitors, four for San Diego A and two for El Centro A, in addition to monitors provided by Cogstone. CBP has stretched its available resources to fund tribal cultural monitors for the 284 Projects. Because CBP’s available resources are limited, and in order to accommodate the Kumeyaay Tribe’s demands for additional tribal cultural monitors, CBP has informed the Kumeyaay Tribes that it will

accommodate additional tribal cultural monitors if the Kumeyaay Tribes will provide them at their cost. The Kumeyaay Tribes, however, have never acted on that invitation. They have taken the position that CBP must bear the cost of any tribal cultural monitor who observes construction activities. In addition, CBP has placed no limits on where tribal cultural monitors can observe construction activity within the 284 Project Areas. As stated above in Paragraph 40, tribal cultural monitors are told where construction activity will be occurring and are free to select, based on the location and type of planned construction activity, which construction activities they prefer to observe. Each tribal cultural monitor may choose his or her own site to observe. There is no requirement that all the tribal cultural monitors observe the same site or that the tribal cultural monitors monitor the same site as the Cogstone monitors.

71. Plaintiffs allege CBP “refused to facilitate monitoring” for night shifts unless the tribal cultural monitors either work “without compensation” or the Kumeyaay Tribes transfer of one or more monitors from the day to the night shift. (Haws Decl. ¶ 25g.) This allegation is exaggerated.
72. As stated in Paragraph 70, CBP has stretched its available resources to fund the tribal cultural monitors that are currently on-site. In order to ensure the Kumeyaay Tribes have the opportunity to have tribal cultural monitors observe night shifts, however, it offered the Kumeyaay Tribes the option of either re-assigning one or more of the tribal cultural monitors currently funded by CBP to the night shifts or the Kumeyaay Tribes providing tribal cultural monitors for night work at their cost. As stated in Paragraph 70, however, the Kumeyaay Tribes have taken the position that CBP must bear the cost of any tribal cultural monitor who observes construction activities. In addition, CBP received little to

no response from the Kumeyaay Tribes regarding its invitation to utilize the existing tribal cultural monitors to observe night shifts. Only the Campo Tribe, after additional consultation with CBP, agreed to provide a single tribal cultural monitor to observe night shift construction activities.

73. Plaintiffs allege that tribal cultural monitors are provided no opportunity to inspect soils that have been removed as a result of ground-disturbing activities. (Haws Decl. ¶ 25h; Santos Decl. ¶ 15.) This is untrue.

74. As evidenced by the weekly monitoring logs for the weeks of July 20<sup>th</sup> and July 27<sup>th</sup> that is attached as Exhibit G, tribal cultural monitors can and do inspect soils that have been removed as a result of ground-disturbing activities.

75. Plaintiffs allege that there has been insufficient participation from the Kumeyaay Tribes concerning surveys and monitoring of El Centro A. (Haws Decl. ¶ 25k; Santos Decl. ¶ 14.) This claim is misleading.

76. CBP's outreach to the Kumeyaay Tribes began in March 2020, at which time CBP made clear that El Centro A would be one of the planned barrier projects executed by CBP and DoD. CBP has shared information about El Centro A and sought tribal input on the project. Detailed information about El Centro A is included in Cogstone's online database, which the tribes were given access to in July 2020. It was not until September 2020 that the Kumeyaay Tribes made specific demands regarding El Centro A, including that tribal cultural monitors observe construction activity. When the demands were made, CBP acted on them. It has discussed the El Centro A survey data with the Kumeyaay Tribes as well as avoidance, treatment, and curation of resources found within the El Centro Project Area. In addition, CBP has made arrangements with Cogstone to

fund two additional tribal cultural monitors to observe construction of El Centro A. CBP is also planning a site visit to the El Centro Project Area for Kumeyaay representatives.

77. Plaintiffs allege that the Protocol Plan was “created without tribal input.” (Haws Decl. ¶ 25i.) This is inaccurate.

78. Despite circulating the draft Protocol Plan for comment, CBP received little to no input from the Kumeyaay Tribes. Only the La Posta Tribe commented on the draft Protocol and Plan. Plaintiffs provided no comments or input.

79. Although Plaintiffs did not avail themselves of the opportunity to comment on the draft Protocol Plan, they assert that CBP is “required by federal law” to draft an Environmental Stewardship Plan (“ESP”) and complain that a draft ESP has not been made available for review. (Pl. Br. at 44; Haws Decl. ¶ 25j.) Federal law imposes no such requirement.

80. CBP developed the ESP as a means of abiding by its commitment to responsible environmental stewardship for projects covered by an IIRIRA waiver. ESPs typically examine a range of potential impacts, including potential impacts to wildlife, vegetation, surface and groundwater, and existing land use, and the steps CBP can and will take to minimize impacts. ESPs are made publicly available when they are complete. CBP is developing ESPs for the 284 Projects.

#### **B. Alleged Impacts to Cultural Resources and Sacred Sites**

81. Plaintiffs allege that historic village sites may be adversely affected by the 284 Projects (Pls. Br. at 6; Carrico Decl. ¶¶ 13, 20, 23, 24; Elliott Decl. ¶ 10.) This is inaccurate.

82. None of CBP’s surveys, including the re-surveys of areas specifically identified by the Kumeyaay Tribes as having a high probability for cultural resources, or CBP’s record searches have indicated the presence of historical village sites within the 284 Project



Areas. Further, there have been no unanticipated discoveries during construction or evidence of a historic village site within the 284 Project Areas. No such sites have been identified by tribal cultural monitors either during construction or as a part of re-survey of Survey Areas 1 – 8.

83. Plaintiffs further assert that there is “no question that there are cremation sites and human remains” in the 284 Project Areas and “no doubt that construction activity” is impacting such sites. (Santos Decl. ¶ 16; Elliott Decl. ¶ 15; Carrico Decl. ¶ 29.) These allegations are untrue.

84. CBP’s surveys and record searches do not indicate the presence of any known burial sites within the 284 Project Areas. No such sites have been revealed during construction or discovered by the tribal cultural monitors.

85. Plaintiffs attempt to bolster their allegation that cremation sites or human remains are being impacted by the 284 Projects by highlighting two alleged incidents where human remains were alleged to have been found within the San Diego Project Area. The first alleged incident occurred on July 1, 2020. (Elliott Decl. ¶ 16). The second alleged incident occurred on July 31, 2020. (Pl. Br. at 10; Carrico Decl. ¶ 30; Haws Decl. ¶ 18.) In neither instance where human remains found in the San Diego Project Area.

86. On July 1, 2020, CBP received reports that human remains had been found in the San Diego Project Area. After learning of these reports, CBP alerted Cogstone, and on July 2, 2020, Cogstone sent a monitor to the site of the alleged discovery. The July 2, 2020, Monitoring Report is attached as Exhibit H. As reflected in the attached Monitoring Report, when Cogstone examined the site where the human remains had allegedly been found, Cogstone found only PVC pipe. As detailed in Paragraph 32, CBP had a

conference call with the Kumeyaay Tribes on July 7<sup>th</sup> and among the topics discussed was the alleged discovery of human remains. On the July 7<sup>th</sup> conference call the Kumeyaay representative who allegedly made the discovery told CBP that he never stated that what he had found was in fact human bone. In a subsequent recounting of the incident, he stated that he reburied the alleged remain.

87. On July 31<sup>st</sup>, CBP and Cogstone were informed that a group of Kumeyaay representatives would be arriving on site to relocate a fragment of what may be human remains. The alleged fragment was located in Mexico, south of the San Diego Project Area. Upon arrival, the Kumeyaay representatives traversed into Mexico to examine the item. CBP personnel did not explicitly authorize Kumeyaay representatives traversing into Mexico, but also did not actively thwart them from doing so. Once in Mexico, the Kumeyaay representatives conducted a pedestrian survey. Once they located the alleged fragment, they relocated it to the base of a tree and then made their way back across the border into the United States. The Incident Report prepared by Cogstone that details the July 31<sup>st</sup> site visit by the Kumeyaay representatives is attached as Exhibit I.

88. Plaintiffs also attempt to bolster their allegation that cremation sites and human remains are within the 284 Project Areas and are being impacted by construction by pointing to such discoveries on other border barrier projects. (Pl. Br. at 10; Carrico Decl. ¶ 26.) Plaintiffs state that human remains were found at site SDI-4281, which is “just north of the Project site,” during the construction of another border fence in west San Diego. (Id.) Plaintiffs further assert that the remains “were not and are not treated by Defendants as subject to the requirements of NAGPRA.” (Pls. Br. at 10.) These allegations are untrue.

89. The site referred to by Plaintiffs, SDI-4281, is not “just north of the Project site.” The site was discovered as a part of CBP’s work on the BIS. As alluded to above, the BIS is an approximately fourteen-mile stretch of border barriers and roads in southwestern San Diego County. The BIS starts near the Pacific Ocean and extends 14 miles east. The BIS is located more than 20 miles west of the San Diego Project Area. Further, Plaintiffs characterization of CBP’s treatment of SDI-4281 is incorrect. Relevant portions of a survey that documents SDI-4281, entitled “A Cultural Resources Survey of Fourteen Miles of Existing Primary Border Fence in the San Diego Border Infrastructure System, San Diego California” (the “BIS Survey”), is attached as Exhibit J. As noted in the BIS Survey, the site was “previously the subject of a 100% surface collection, archeological testing, and data recovery to mitigate the impacts from border infrastructure development.” BIS Survey at 25. As is also noted in the BIS Survey, when the site was first discovered during initial construction in 2008, CBP worked very closely with the Kumeyaay Cultural Repatriation Committee (“KCRC”) and Kumeyaay tribal archaeological monitors to preserve and protect human remains and other artifacts that were discovered during work on the BIS. (BIS Survey at 26.) In coordination with the San Diego County Medical Examiner’s Office, the KCRC, and the monitors, CBP conducted a detailed assessment of the human remains that were found at the site. After that assessment, CBP executed a repatriation agreement with the Jamul Indian Village, through which the human remains are to be returned to the Jamul Indian Village. CBP is currently coordinating with the KCRC and the Barona Cultural Center and Museum on a curation agreement that will provide for the appropriate treatment and storage of artifacts found within the BIS project area.

90. Plaintiffs suggest that San Diego A may harm their ability to access, use, and practice their religion at sacred sites near the San Diego Project Area. These claims are inaccurate.
91. Plaintiffs express concerns about Tecate Peak, noting that it is an important ceremonial location and sacred site that Plaintiffs continue to visit to conduct ceremonies and religious practices. (Pls. Br. at 5; Carrico Decl. ¶ 18, 24, Elliott Decl. ¶ 8), Tecate Peak is located seven miles north and west of the San Diego Project Area. It will be unaffected by the construction of San Diego A and will continue to be accessible to Plaintiffs after the project is complete.
92. Similarly, Plaintiffs express concerns about Boundary Mountain, stating that it was a resting place for native runners and is valued for its panoramic views from the summit. (Pls. Br. at 6; Elliott Decl. ¶¶ 4, 6; Carrico Decl. ¶ 14.) Plaintiffs further state that the Kumeyaay people's use and occupancy of the area is confirmed by an archeological site, P-37-004466, southwest of Boundary Mountain. Boundary Mountain is north of the San Diego Project Area. Like Tecate Peak, Boundary Mountain will be unaffected by construction and will continue to be accessible to Plaintiffs after construction is complete. Further, CBP is aware of the adjacent archeological site P-37-004466, which is also located north of the San Diego Project Area and will be unaffected by construction.
93. Plaintiffs make similar assertions regarding Jacumba Hot Springs (Carrico Decl. ¶ 16), Jacumba Valley (Pls. Br. at 7, 9; Carrico Decl. ¶¶ 15-17; Elliott Decl. ¶¶ 4, 5, 10), and Table Mountain (Elliott Decl. ¶ 4). These sites are also outside the San Diego Project Area. Jacumba Hot Springs is approximately one-half mile north of the San Diego Project Area. Jacumba Valley is situated between San Diego A, segment 2, and San



Diego A, segment 3, in an area where no construction is occurring. Table Mountain is in the Jacumba Valley and is situated at least two miles north of the international border.

(Elliot Decl. ¶ 4). Because they are not in the San Diego Project Area, Jacumba Hot Springs, Jacumba Valley, and Table Mountain will be unaffected by construction. They will also remain accessible to Plaintiffs after construction is complete.

94. Plaintiffs assert that San Diego A may impact the viewshed from Table Mountain, Tecate Peak, and Boundary Mountain. (Elliott Decl. ¶ 9.) However, 14 of the 18 miles of border barrier that will be constructed as a part of San Diego A simply replace existing border fencing. San Diego A is therefore unlikely to have significant impacts on the viewshed.

95. Plaintiffs also suggest that the 284 Projects will either damage historic trails that have traditionally been used by the Kumeyaay people or somehow preclude the Kumeyaay Tribes from continuing to use such trails. (Pls. Br. at 8 – 9; Carrico Decl. ¶ 18.) These allegations are inaccurate.

96. As stated above, the project footprints for the 284 Project and thus the majority of the construction activity, occur within the federal Roosevelt Reservation, a 60-foot strip of land established in 1907 that parallels the international border that functions primarily as a law enforcement zone. The 284 Projects will continue to function as a law enforcement zone, as they have prior to the construction of San Diego A and El Centro A. Plaintiffs may use the areas in and around the 284 Project Areas, including any historic trails, in the same manner as they did before construction. Not only will the 284 Projects not impact Plaintiffs' continued use of historic trails, the 284 Projects will not alter their orientation on the landscape; thus, the 284 Projects will not preclude future study or use of the trails.

97. Although none of the sites or resources discussed above will be impacted by the 284 Projects, Plaintiffs nevertheless assert that CBP's cultural surveys were flawed because they failed to properly account for such sites or resources and how they may be impacted by the 284 Projects. (Carrico Decl. ¶¶ 14, 21, 22, 25.) This assertion is misplaced.
98. In making this assertion, Plaintiffs suggest that CBP should have been required to survey any areas that might have been used or occupied by the Kumeyaay Tribes even if they are outside the 284 Project Area and unaffected by the 284 Projects. (Id.) In fact, Plaintiffs go so far as to suggest that CBP should have been required to survey areas up to ten square miles beyond the boundaries of the 284 Project Areas. (Carrico Decl. ¶ 22.)
99. Plaintiffs express concerns about impacts to plants from San Diego A. (Elliot Decl. ¶¶ 11 – 12.) For example, John Elliott states that throughout his life he has been gathering plants in the Jacumba Valley that are used for ceremonial purposes. (Id. ¶ 11.) He asserts that as a result of the 284 Projects, he “will likely not be able to gather plants as close to the border as [he] has in the past.” (Id.) He also alleges that dozens of species of plants that are recognized as having ceremonial or healing purposes may not survive or retain their abundance. (Id.) These claims are inaccurate and overstated.
100. The Jacumba Valley is not within the San Diego Project Area. Thus, Mr. Elliott's ability to gather plants in the Jacumba Valley will be unaffected by San Diego A. Further, to the extent that Plaintiffs have gathered plants near the border in areas in or adjacent to the San Diego Project Area, they may continue to do so after construction is complete. San Diego A will not affect any of the existing land uses in or around the San Diego Project Area. As stated above, the project footprint for San Diego A, and thus the majority of the construction activity, occurs within the federal Roosevelt Reservation, a

60-foot strip of land along the border that functions primarily as a law enforcement zone.

The San Diego Project Area will continue to function as a law enforcement zone, as it has prior to the construction of San Diego A, and Plaintiffs may use the areas in and around the San Diego Project Area in the same manner as they did before San Diego A's construction.

101. Additionally, while construction is on-going Plaintiffs are free to access areas immediately adjacent to or even within the 284 Project Areas to observe construction activities or, should they choose, engage in religious activities. CBP does not prevent or interfere with individuals who access these areas to observe construction, recreate, pray, or hold religious ceremonies so long as the activities do not pose an immediate threat to border security or public safety.

102. As to the allegation that valuable plant species may not survive or retain their abundance, the majority of construction activity for San Diego A is areas that are previously disturbed. Fourteen of the 18 miles of border barrier that will be constructed as a part of San Diego A will replace existing border fencing. The existing fencing was constructed between 2008 and 2010. The existing border road has been there for 30 years. Further, BMPs for San Diego A include measures to limit the clearing of vegetation wherever possible and measures to prevent the introduction of invasive species. Thus, it is unlikely that San Diego A will result in significant impacts to plant species that occur in or adjacent to the San Diego Project Area.

103. Plaintiffs also allege that El Centro A will irreparably harm Peninsular bighorn sheep, a species that has special cultural significance, because it will disrupt a critical migration

path for the species into Mexico. (Pls. Br. at 9; Elliot Decl. ¶ 17.) This claim is overstated.

104. A map of El Centro A is attached as Exhibit C. As depicted in the attached map, after El Centro A is complete, there will continue to be large unfenced areas to the east and west of the planned barrier. There will be an approximately six and one-half mile gap between the western terminus of El Centro A and the nearest existing or planned barrier segment to the west. On the eastern side, there will be an approximately one-half mile gap between the eastern terminus of El Centro A and western terminus of El Centro Project 1. Peninsular bighorn sheep will continue to be able to cross into Mexico after the completion of El Centro A.

105. Not only will Peninsular bighorn sheep continue to be able to cross into Mexico, the species will continue to be able to use known movement corridors it has relied on historically for such movement. According to the 2014 California Department of Fish and Wildlife Peninsular Bighorn Sheep Annual Report (the “Annual Report”), there are nine recovery regions for Peninsular bighorn sheep within the Peninsular Ranges.

*California Department of Fish and Wildlife, Peninsular Bighorn Sheep 2014 Annual Report* at 2, available at

<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=97891&inline>. El Centro A

occurs within the Carrizo Canyon recovery region. *Id.* As depicted on the map attached as Exhibit C, El Centro A will be constructed primarily in low-lying Davies and Skull Valleys, which are situated between the surrounding mountains. Therefore, El Centro A will not block the known movement corridors in the East Jacumba Mountains or in the mountains to the west of the Davies Valley that are depicted on Map 10 at page 12 of the



Annual Report. Accordingly, contrary to Plaintiffs' assertion, El Centro A will not significantly disrupt migration of Peninsular bighorn sheep into Mexico.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on this 5<sup>th</sup> day of October, 2020.



Paul Enriquez  
Acquisitions, Real Estate and Environmental Director  
Border Wall Program Management Office  
U.S. Border Patrol

# **EXHIBIT I**



## INCIDENT REPORT

July 31, 2020

### FY2020 Border Wall 284 Project San Diego Sector

Cogstone Resource Management's (Cogstone) Environmental Monitor Arthur Ramcharan was contacted by local cultural resource management operators about a possible jobsite visit with intent of relocating possible human remains south of USA jurisdiction. Ramcharan told them that he could not physically or technically involve himself, but he would put them in touch with project personnel that could hear their requests.

On July 31, 2020, a group of Kumeyaay representatives arrived at roughly 1230 by the TDS entrance. After a brief security check, a train of a Jeeps, a Range Rover and two other vehicles that were recognized as being associated with sporadic protesting followed Ramcharan to the Redshank area. They parked and waited for USACE and CBP to arrive. Once there, the cultural resources team and associates (Ed and wife Gwen, Dr. Hinkes [coroner], Tom Hulm, Cynthia Prada, and Brooke Baines) met with Mr. Williams, Mr. Rubio, Capt. Greenway, Alan Deleon, and one other USACE person. USACE explained that Barnard will not remove any barriers. USACE said that they cannot allow them on or through and that if they did so, they were on their own. Also Mr. Williams added that there was an open hole to navigate. Ramcharan added to please be careful. Mr. Rubio said that when they are finished, he will oversee them coming back. Ramcharan began recording on his phone as the team approached the break in construction at the base of the hill. There a 100 ft span of border wall is secured with the vehicle barriers and 30 ft barriers east and west.

After some difficulty Tom managed to find a way in and helped Hinkes, Cynthia, and Ed beyond the vehicle barriers. These four made their way west along the wall a few hundred feet or so when they reached the area in question. They conducted a pedestrian survey approximately 50 feet south from the bollards but apparently well into Mexico when the team relocated the remain discovery (ankle or wrist fragment per Hinkes). Once found, Ed volunteered to repatriate the fragment to the base of a Manzanita tree. The team then regrouped at the wall and made their way east to the vehicle barriers and safely re-entered the project area, USA side. They then met with USACE and CBP to discuss the findings and to schedule procedures moving forward. After the meeting Ramcharan escorted the vehicles toward the Redshank exit and returned to monitor.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MANZANITA BAND OF THE  
KUMEYAAY, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, *et al.*,

Defendants.

Civil Action No. 1:20-cv-02712

DECLARATION OF NEAL J. SWARTZ

I, Neal J. Swartz, make the following declaration.

1. I am the Associate General Counsel for General Law, Office of the General Counsel for the U.S. Department of Homeland Security (DHS). I have held this position since June 2013. One of my responsibilities is to advise and assist in matters involving the Department's orders of succession. This includes reviewing and signing Federal Vacancy Reform Act notifications that are sent to both Houses of Congress, the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Homeland Security of the House of Representatives, and the Comptroller General of the Government Accountability Office, in accordance with provisions of section 113(g)(3) of title 6, United States Code, and section 3349 of title 5, United States Code. This declaration is based on my personal knowledge and on information that I have obtained in the course of my official duties as the Associate General Counsel for General Law, DHS.
2. Pursuant to 6 U.S.C. § 113(g)(2) the Secretary of Homeland Security may designate officers of the Department in further order of succession to serve as Acting Secretary.



3. Then-Secretary Nielsen was presented with a memorandum titled “Designation of an Order of Succession for the Secretary,” dated April 9, 2019, that included a proposed new Annex A. (This document is attached as Exhibit 1 to the declaration of Juliana Blackwell, signed October 5, 2020, which is simultaneously being filed on the docket in this case.) The memorandum and its attachment proposed amending the DHS order of succession to designate officials to serve as Acting Secretary, pursuant to the Secretary’s authority under 6 U.S.C. § 113(g)(2). Then-Secretary Nielsen approved the proposed modification by affixing her signature at the bottom of the memorandum. As explained in that memorandum, her signature below the action line represented that she approved the attached document that modified the order of succession for the Secretary of Homeland Security. The memorandum’s attachment established an order of succession for the position of Secretary of Homeland Security, without exceptions or limitations. Specifically, the memorandum’s attachment, titled “Amending the Order of Succession in the Department of Homeland Security,” stated that then-Secretary Nielsen had “designat[ed] the order of succession for the Secretary of Homeland Security as follows:”. The list approved by the then-Secretary set out the order of succession for the officials who may serve as Acting Secretary. The list controlled the succession order for every vacancy in the office of the Secretary, no matter the reason for the vacancy.
4. The following day, DHS Delegation No. 00106 was amended to reflect and implement then-Secretary Nielsen’s change to the order of succession for the Secretary of Homeland Security. The amendment was executed by placing a new Annex A in DHS Delegation No. 00106. The amended DHS Delegation No. 00106 was then reissued as DHS Delegation No. 00106, Revision No. 8.5 titled “DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS,” issued December

15, 2016, and updated April 10, 2019. (This document is attached as Exhibit 2 to the declaration of Juliana Blackwell, signed October 5, 2020, which is simultaneously being filed on the docket in this case.). DHS Delegation No. 00106 is an administrative document that is periodically updated to consolidate and maintain in a single document the orders of succession for many senior positions in DHS. Modifications to an order of succession are effective immediately upon the Secretary's approval and signature, and not when those decisions are transposed into DHS Delegation No. 00106 at a later time. As an internal administrative document that is meant to collect the orders of succession, DHS Delegation No. 00106 itself cannot override or change official action taken by the Secretary.

5. When then-Secretary Nielsen resigned, both the Department of Homeland Security Deputy Secretary and the Under Secretary for Management positions were vacant.
6. Therefore, then-Secretary Nielsen's signed order designating the DHS order of succession for Acting Secretary, pursuant to her authority under 6 U.S.C. § 113(g)(2), was effective when she signed the order on April 9, 2019, and controls the order of succession should a discrepancy or conflict exist between her signed order and DHS Delegation No. 00106, Revision No. 8.5. In fact, the April 9, 2019 signed order would have controlled the order of succession even if DHS Delegation No. 00106 was never updated to reflect the April 9, 2019 change.
7. The document attached as Exhibit 1 is a true and correct copy of a memorandum titled "Federal Vacancies Reform Act Submission," issued by the Associate General Counsel for General Law, dated April 11, 2019 with an attachment "Vacancy and Designation of an acting officer, DHS – Secretary."


8. The document attached as Exhibit 2 is a true and correct copy of an “Order Designating the Order of Succession for the Secretary of Homeland Security” issued by Peter T.

Gaynor on September 10, 2020.

In accordance with 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 5th day of October, 2020 in Bethesda, MD.

NEAL J  
SWARTZ

 Digitally signed by NEAL J  
SWARTZ  
Date: 2020.10.05 17:50:25  
-04'00'

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Neal J. Swartz  
Associate General Counsel for General Law  
Office of the General Counsel  
Department of Homeland Security

## **EXHIBIT 2**



Order Designating the Order of Succession  
for the Secretary of Homeland Security

(a) By any authority vested in me as Acting Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), and notwithstanding any Department of Homeland Security (DHS) prior delegation, directive, instruction, policy, or other document of any kind, including without limitation DHS Delegation No. 00106, I hereby designate the order of succession for the Secretary of Homeland Security as follows:

Order of Succession for the Secretary of Homeland Security  
*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security;
2. Under Secretary for Management;
3. Commissioner of the U.S. Customs and Border Protection
4. Under Secretary for Strategy, Policy, and Plans;
5. Administrator and Assistant Secretary of the Transportation Security Administration; and
6. Administrator of the Federal Emergency Management Agency.

(b) No individual who is serving in an office listed in paragraph (a) in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this order.

(c) I am issuing this Order out of an abundance of caution and to minimize any disruption occasioned by a recent Government Accountability Office (GAO) opinion (B-331650 (Comp. Gen., Aug. 14, 2020)) and recent challenges filed in Federal court alleging that the November 8, 2019, order of succession issued by then-Acting Secretary Kevin McAleenan was not valid. I believe that the GAO's opinion and the plaintiff's arguments in those court cases are incorrect and present an unnecessary distraction to the mission of the Department of Homeland Security. Nevertheless, under GAO's view, no Secretary has ever properly invoked 6 U.S.C. § 113(g)(2) "[to] designate such other officers of the Department in further order of succession to serve as Acting Secretary." In that case, the Federal Vacancies Reform Act (FVRA) would provide an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. As the most senior successor listed in Executive Order 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016), in accordance with the President's advance exercise of his authority to name an Acting Secretary under the FVRA, and without casting doubt on the continued validity of the Amendment to the Order of Succession for the Secretary of Homeland Security issued by Acting Secretary McAleenan on November 8, 2019, I am relying on any authority I may have been granted by the FVRA to designate the order of succession for the Secretary of Homeland Security pursuant to 6 U.S.C. § 113(g)(2), as specified and directed in paragraph (a) of this Order. Upon my signature, any authority that I may have been granted by the FVRA will terminate because 6 U.S.C. § 113(g)(2) applies "[n]otwithstanding chapter 33 of title 5."

(d) This Order Designating the Order of Succession for the Secretary of Homeland Security shall be effective immediately upon the affixing of the signature of the undersigned.

Dated: 10 SEPT 2020



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Peter T. Gaynor  
Department of Homeland Security

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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MANZANITA BAND OF THE  
KUMEYAAAY, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, *et al.*,

Defendants.

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Civil Action No. 1:20-cv-02712

**DECLARATION OF JULIANA BLACKWELL**

I, Juliana Blackwell, make the following declaration.

1. I am the Deputy Executive Secretary, within the Office of the Executive Secretary, U.S. Department of Homeland Security (DHS). I have worked in this office since February 2007. I am responsible for maintaining official documents approved or signed by the Secretary and Deputy Secretary of Homeland Security. I also know when a Secretary of Homeland Security vacates the office, and when a new Secretary of Homeland Security begins service as the Secretary. This declaration is based on my personal knowledge and on information that I reviewed in the course of my official duties as an employee of DHS.
2. The document attached as Exhibit 1 is a true and correct copy of a memorandum titled “Designation of an Order of Succession for the Secretary,” issued by then General Counsel John M. Mitnick and dated April 9, 2019, signed by then Secretary Kirstjen Nielsen on April 9, 2019.
3. The document attached as Exhibit 2 is a true and correct copy of DHS Delegation Number 00106, Revision Number 08.5 titled “DHS ORDERS OF SUCCESSION AND




DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS,” issued December 15, 2016, and updated April 10, 2019.

4. The document attached as Exhibit 3 is a true and correct copy of the “Amendment to the Order of Succession for the Secretary of Homeland Security” issued by then Acting Secretary Kevin K. McAleenan and dated November 8, 2019.
5. The document attached as Exhibit 4 is a true and correct copy of an internal DHS email from then Secretary Kirstjen Nielsen titled “Farewell Message from Secretary Kirstjen M. Nielsen” announcing that April 10, 2019 was her final day at DHS and announcing that then Customs and Border Protection Commissioner Kevin McAleenan would succeed her as Acting Secretary, dated April 10, 2019.
6. The document attached as Exhibit 5 is a true and correct copy of DHS Delegation Number 00106, Revision Number 08 titled “DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS,” issued and signed by then Secretary Jeh Johnson December 15, 2016.
7. Kirstjen Nielsen was confirmed as the Secretary of Homeland Security on December 5, 2017 and remained as the Secretary until she vacated the position on April 10, 2019.
8. Kevin K. McAleenan resigned as Acting Secretary of Homeland Security on November 13, 2019.

In accordance with 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 5th day of October, 2020 in Washington, D.C.

  
Juliana Blackwell  
Deputy Executive Secretary  
Office of the Executive Secretary  
Department of Homeland Security



# **EXHIBIT 1**

**Homeland  
Security**

April 9, 2019

**MEMORANDUM FOR THE SECRETARY****FROM:**John M. Mitnick  
General Counsel**SUBJECT:**

Designation of an Order of Succession for the Secretary

**Summary:** Pursuant to your authority set forth in section 113 of title 6, United States Code, you have expressed your desire to designate certain officers of the Department of Homeland Security (DHS) in order of succession to serve as Acting Secretary. Your approval of the attached document will accomplish such designation.

**Discussion:**

[REDACTED]

[REDACTED]

The redacted information contains attorney-client communications and attorney work product which is privileged and not subject to disclosure.

**Action:** By approving the attached document, you will designate your desired order of succession for the Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code.

Approve/date

Disapprove/date

Modify/date

Needs discussion/date

Attachment: Annex A

### **Amending the Order of Succession in the Department of Homeland Security**

By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows:

Annex A of DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

Annex A. Order for Delegation of Authority by the Secretary of the Department of Homeland Security.

1. Deputy Secretary of Homeland Security;
2. Under Secretary for Management;
3. Commissioner of U.S. Customs and Border Protection;
4. Administrator of the Federal Emergency Management Agency;
5. Director of the Cybersecurity and Infrastructure Security Agency;
6. Under Secretary for Science and Technology;
7. Under Secretary for Intelligence and Analysis
8. Administrator of the Transportation Security Administration;
9. Director of U.S. Immigration and Customs Enforcement;
10. Director of U.S. Citizenship and Immigration Services;
11. Under Secretary for Strategy, Policy, and Plans;
12. General Counsel;
13. Deputy Under Secretary for Management;
14. Deputy Commissioner of U.S. Customs and Border Protection;
15. Deputy Administrator of the Transportation Security Administration;
16. Deputy Director of U.S. Immigration and Customs Enforcement;
17. Deputy Director of U.S. Citizenship and Immigration Services;
18. Director of the Federal Law Enforcement Training Center.

No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

# **EXHIBIT 2**



Department of Homeland Security

DHS Delegation Number: 00106

Revision Number: 08.5

Issue Date: 12/15/2016

Updated Date: 04/10/2019

## **DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS**

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### **I. Purpose**

This is a succession order for named positions and a delegation of authority for the continuity of essential functions of officials at the Department of Homeland Security (DHS) in case of absence, the inability of the incumbent to act during disasters or catastrophic emergencies, or vacancies in offices.

### **II. Succession Order/Delegation**

A. In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.

B. I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, in the event I am unavailable to act during a disaster or catastrophic emergency.

C. The order of succession for the named positions, other than the Office of the Secretary, are provided in Annexes B through AC.

D. I hereby delegate authority to the officials occupying the identified positions in the orders listed in Annexes B through AC to exercise the powers and perform the functions and duties of the named positions in case of death, resignation, inability to perform, absence, or inability to act during a disaster or catastrophic emergency until that condition ceases.

E. In terms of named positions in which appointment is required to be made by the President, by and with the advice and consent of the Senate (PAS), if positions are vacant as that term is used in the Federal Vacancies Reform Act of 1998, the First Assistant shall act as the incumbent until a successor is appointed, unless otherwise designated by the President. The individual serving in the position identified as the first to succeed is designated the “First Assistant” for the purposes of the Federal Vacancies Reform Act of 1998. If the First Assistant position is vacant, the next designated official in the order of succession may exercise all the powers, duties, authorities, rights, and functions authorized by law to be exercised by the incumbent, but may not perform any function or duty required by law to be performed exclusively by the office holder.

F. For all other positions that are not subject to the Federal Vacancies Reform Act of 1998, any official in the order provided for in the succession order may exercise all the powers, duties, authorities, rights, and functions authorized to be performed by the incumbent, to the extent not otherwise limited by law.

G. Only officials specifically designated in the order of succession for each of the named positions in Annexes B through AC are eligible, subject to modification in accordance with Section II.I. Unless formally appointed by the Secretary, persons appointed on an acting basis, or on some other temporary basis, are ineligible to serve as a successor; therefore, the order of succession would fall to the next designated official in the approved order of succession.

H. The prohibition on any re-delegation of powers, authorities, functions, and duties contained in Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents is not applicable to restrict the authority of any individual who is exercising the authority of a vacant position under this Delegation. Such an individual shall, however, be bound by such Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents, and shall not further re-delegate powers to any individual.

I. Each Annex may be updated separately. A Component Head seeks modification of his/her order of succession by forwarding a proposed updated Annex to the Office of Operations Coordination (OPS), Continuity Division and the Office of the Under Secretary for Management (MGMT), Program Manager, Delegations and Directives; Annexes are processed by MGMT, in consultation with the Office of the General Counsel (OGC), for approval of the Secretary. At a minimum, the Annex is coordinated with OGC and the White House Liaison. Where possible, Component orders of succession should be at least three positions deep and geographically dispersed.

J. The Office of the Executive Secretary, MGMT, and OPS are responsible for maintaining a current list of incumbents holding all positions identified in Annexes B through AC.

K. Nothing in this delegation is intended to limit my discretion as Secretary to depart from this delegation.


### III. Authorities

A. Title 5, United States Code (U.S.C.) §§ 3345-49 (Federal Vacancies Reform Act of 1998, as amended)

B. Title 6, U.S.C., § 112 (Secretary; functions)

### IV. Office of Primary Interest

OPS and MGMT is the office of primary interest for maintaining and updating the Annexes to this Delegation.



Jeh Charles Johnson  
Secretary of Homeland Security

Dec 15 2016  
Date

#### Legend

Career	C
Limited Term Appointment	L
Military Officer	M
Non-Career in the Senior Executive Service or Schedule C	N
Presidential Appointee	P
Presidential Appointee with Senate Confirmation	S
Scientific Professional	T
First Assistant pursuant to the Federal Vacancies Reform Act	*

**DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS  
OF AUTHORITIES**

<b>Annex</b>	<b>Title</b>	<b>Issue Date</b>
Annex A	Order For Delegation of Authority by the Secretary of the Department of Homeland Security	Revision 08.5, 04/10/2019
Annex B	Deputy Secretary, Office of the	Revision 08.5, 04/10/2019
Annex C	Citizenship and Immigration Service Ombudsman	Revision 06, 09/14/2016
Annex D	Citizenship and Immigration Services, United States	Revision 06, 09/14/2016
Annex E	Civil Rights and Civil Liberties, Office for	Revision 06, 09/14/2016
Annex F	Coast Guard, United States	Revision 06, 09/14/2016
Annex G	Countering Weapons of Mass Destruction Office	Revision 08.2, 05/21/2018
Annex H	Customs and Border Protection, United States	Revision 06, 09/14/2016
Annex I	Executive Secretariat	Revision 06, 09/14/2016
Annex J	Federal Emergency Management Agency	Revision 06, 09/14/2016
Annex K	Federal Law Enforcement Training Center	Revision 06, 09/14/2016
Annex L	General Counsel, Office of the	Revision 06, 09/14/2016
Annex M	Immigration and Customs Enforcement, United States	Revision 06, 09/14/2016
Annex N	Inspector General, Office of	Revision 06, 09/14/2016
Annex O	Intelligence and Analysis, Office of	Revision 06, 09/14/2016
Annex P	Legislative Affairs, Office of	Revision 06, 09/14/2016
Annex Q	Management Directorate	Revision 06, 09/14/2016
Annex R	National Protection and Programs Directorate	Revision 08, 07/11/2017
Annex S	Operations Coordination, Office of	Revision 06, 09/14/2016
Annex T	Partnership and Engagement, Office of	Revision 06, 09/14/2016
Annex U	Strategy, Policy, and Plans, Office of	Revision 08.4, 02/15/2019
Annex V	Privacy Office, Chief	Revision 06, 09/14/2016
Annex W	Public Affairs, Office of	Revision 06, 09/14/2016
Annex X	Science and Technology	Revision 07, 01/19/2017
Annex Y	Secret Service, United States	Revision 06, 09/14/2016
Annex Z	Transportation Security Administration	Revision 08.3, 10/23/2018
Annex AA	Chief Financial Officer (DHS)	Revision 06, 09/14/2016
Annex AB	Deputy Administrator, Federal Emergency Management Agency (FEMA)	Revision 06, 09/14/2016
Annex AC	Protection and National Preparedness (FEMA)	Revision 06, 09/14/2016



## **ORDER FOR DELEGATION OF AUTHORITY BY THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY**

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security
2. Under Secretary for Management
3. Commissioner of U.S. Customs and Border Protection
4. Administrator of the Federal Emergency Management Agency
5. Director of the Cybersecurity and Infrastructure Security Agency
6. Under Secretary for Science and Technology
7. Under Secretary for Intelligence and Analysis
8. Administrator of the Transportation Security Administration
9. Director of U.S. Immigration and Customs Enforcement
10. Director of U.S. Citizenship and Immigration Services
11. Under Secretary for Strategy, Policy, and Plans
12. General Counsel
13. Deputy Under Secretary for Management
14. Deputy Commissioner of U.S. Customs and Border Protection
15. Deputy Administrator of the Transportation Security Administration
16. Deputy Director of U.S. Immigration and Customs Enforcement
17. Deputy Director of U.S. Citizenship and Immigration Services
18. Director of the Federal Law Enforcement Training Centers

## ANNEX B

ISSUE DATE: 04/10/2019

APPROVAL: 04/10/2019

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position	Career Status
<b>Deputy Secretary, Office of the</b>	
1 Deputy Secretary	S
2 Under Secretary for Management*	S
3 Administrator, Transportation Security Administration	S
4 Administrator, Federal Emergency Management Agency	S
5 Under Secretary, National Programs and Protection Directorate	S
6 Under Secretary, Science and Technology	S
7 Under Secretary, Intelligence and Analysis	S
8 Commissioner, U.S. Customs and Border Protection	S
9 Director, U.S. Immigration and Customs Enforcement	S
10 Director, U.S. Citizenship and Immigration Services	S
11 Under Secretary, Office of Strategy, Policy, and Plans	S
12 General Counsel	S
13 Deputy Under Secretary for Management	C
14 Deputy Commissioner, U.S. Customs and Border Protection	C
15 Deputy Administrator, Transportation Security Administration	C
16 Deputy Director, U.S. Immigration and Customs Enforcement	C
17 Deputy Director, U.S. Citizenship and Immigration Services	C
18 Director, Federal Law Enforcement Training Centers	C

ANNEX C

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position		Career Status
<b>Citizenship and Immigration Services Ombudsman</b>		
1	Ombudsman	N
2	Deputy Director	C
3	Senior Advisor	L
4	Chief of Staff	C
5	Director of Operations	C
6	Chief of Casework	C

ANNEX D

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Citizenship and Immigration Services, United States		
1	Director	S
2	Deputy Director*	C
3	Associate Director, Management Directorate	C
4	Associate Director, Refugee Asylum and International Operations Directorate	C
5	Associate Director, Service Center Operations Directorate	C
6	Associate Director, Field Operations Directorate	C
7	Director, National Benefits Center	C

ANNEX E

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Civil Rights and Civil Liberties, Office for**

1	Civil Rights and Civil Liberties Officer	P
2	Deputy Officer, Programs and Compliance	C
3	Deputy Officer, Equal Employment Opportunity Programs	C
4	Executive Officer	C



## ANNEX F

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Coast Guard, United States**

1	Commandant	M
2	Vice Commandant	M
	Deputy Commandant for Mission Support or Deputy Commandant for Operations	
3-4	in precedence of their grade	M
5-6	Other Vice Admirals in precedence of their grade	M

ANNEX G

ISSUE DATE: 05/21/2018

APPROVAL: 05/21/2018

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Countering Weapons of Mass Destruction Office**

1	Assistant Secretary	P
2	Deputy Assistant Secretary	C
3	Chief of Staff	C
4	Deputy Director, Domestic Nuclear Detection Office	C
5	Deputy Director, Office of Health Affairs	C

ANNEX H

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Customs and Border Protection, United States**

1	Commissioner	S
2	Deputy Commissioner*	C
3	Executive Assistant Commissioner, Office of Field Operations	C
4	Chief, U.S. Border Patrol	C
5	Executive Assistant Commissioner, Air and Marine Operations	C
6	Executive Assistant Commissioner, Trade	C
7	Executive Assistant Commissioner, Operations Support	C
8	Executive Assistant Commissioner, Enterprise Services	C

ANNEX I

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Executive Secretariat**

1	Executive Secretary	N
2	Deputy Executive Secretary	C
3	Assistant Executive Secretary, Briefing Books/Interagency Coordination	C

ANNEX J

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Federal Emergency Management Agency		
1	Administrator	S
2	Deputy Administrator*	S
3	Deputy Administrator, Protection and National Preparedness	S
4	Associate Administrator, Response and Recovery	N
5	FEMA Region IX Administrator	C
6	FEMA Region VI Administrator	C



ANNEX K

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Federal Law Enforcement Training Centers**

1	Director	C
2	Deputy Director for Training	C
3	Deputy Director for Management	C
4	Assistant Director, Mission and Readiness Support	C
5	Assistant Director, Regional and International Training	C
6	Assistant Director, Chief Financial Officer	C
7	Assistant Director, Glynco Training	C
8	Assistant Director, Centralized Training Management	C
8	Assistant Director, Washington Operations	C
9	Assistant Director, Chief Information Officer	C
10	Chief of Staff	C

ANNEX L

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

### General Counsel, Office of the

1	General Counsel	S
2	Principal Deputy General Counsel*	C
3	Deputy General Counsel [Senior ranking by time in position and in DHS] <sup>1</sup>	N
4	Deputy General Counsel [Senior ranking by time in position and in DHS]	N
5	Deputy General Counsel [Senior ranking by time in position and in DHS]	N
6	Chief of Staff	C
7	Associate General Counsel, Operations and Enforcement	C
8	Associate General Counsel, General Law	C
9	Chief Counsel, Transportation Security Administration	C
10	Chief Counsel, Federal Law Enforcement Training Center	C

<sup>1</sup> For the Deputy General Counsel positions identified in lines 3-5, seniority is determined by length of time in the position. In the event more than one Deputy General Counsel has the same appointment date, time in service in the Department is the second determining factor for seniority.

ANNEX M

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Immigration and Customs Enforcement, United States**

1	Assistant Secretary	S
2	Deputy Director*	C
3	Executive Associate Director, Homeland Security Investigations	C
4	Executive Associate Director, Enforcement and Removal Operations	C
5	Executive Associate Director, Management and Administration	C
6	Principal Legal Advisor	N
7	Special Agent in Charge – Denver	C
8	Field Officer Director – San Antonio	C

ANNEX N

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

<b>Inspector General, Office of</b>		
1	Inspector General	S
2	Deputy Inspector General*	C
3	Counsel to the Inspector General	C
4	Assistant Inspector General, Audits	C
5	Assistant Inspector General, Inspections	C
6	Assistant Inspector General, Emergency Management Oversight	C

ANNEX O

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

**Intelligence and Analysis, Office of**

1	Under Secretary for Intelligence and Analysis/DHS Chief Intelligence Officer	S
2	Principal Deputy Under Secretary for Intelligence and Analysis*	C
3	Deputy Under Secretary for Intelligence Operations	C
4	Deputy Under Secretary for Mission Support	C
5	Associate Deputy Director, El Paso Intelligence Center/ Strategic Analysis Section	C



ANNEX P

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Legislative Affairs, Office of**

1	Assistant Secretary for Legislative Affairs	P
2	Deputy Assistant Secretary (Senate)	N
3	Deputy Assistant Secretary (House)	N
4	Chief of Staff	C
5	Director, Management Team	C
6	Director, FEMA Team	C
7	Director, Borders and Immigration	C

ANNEX Q

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Management Directorate**

1	Under Secretary for Management	S
2	Deputy Under Secretary for Management*	C
3	Chief Financial Officer	S
4	Chief Information Officer	P
5	Chief Human Capital Officer	C
6	Chief Procurement Officer	C
7	Chief Readiness Support Officer	C
8	Chief Security Officer	C
9	Chief of Staff	C
10	Deputy Director, Federal Law Enforcement Training Center	C

ANNEX R

ISSUE DATE: 07/11/2017

APPROVAL: 07/11/2017

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position		Career Status
<b>National Protection and Programs Directorate</b>		
1	Under Secretary	S
2	Deputy Under Secretary for NPPD*	N
3	Assistant Secretary, Office of Infrastructure Protection	P
4	Assistant Secretary, Office of Cybersecurity and Communications	N
5	Deputy Assistant Secretary, Office of Infrastructure Protection	C
6	Deputy Assistant Secretary, Office of Cybersecurity and Communications	C
7	Director, Management	C
8	Office of Infrastructure Protection, Regional Director for Region 8	C

ANNEX S

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Operations Coordination, Office of		
1	Director	C
2	Deputy Director	C
3	Director, Current Operations Division	C
4	Director, National Operations Center	C
5	Chief of Staff	C

ANNEX T

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Partnership and Engagement, Office of		
1	Assistant Secretary	N
2	Assistant Secretary for State and Local Law Enforcement	N
3	Deputy Assistant Secretary, Intergovernmental Affairs	C
4	Deputy Assistant Secretary, Private Sector Office	N
5	Director of Local Affairs	C



ANNEX U

ISSUE DATE: 2/15/2019

APPROVAL: 2/15/2019

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Strategy, Policy, & Plans, Office of		
1	Under Secretary	S
2	Assistant Secretary for Strategy, Plans, Analysis, and Risk*	N
3	Deputy Under Secretary	C
4	Assistant Secretary for International Affairs	N
5	Assistant Secretary for Threat Prevention and Security Policy	N
6	Assistant Secretary for Border, Immigration, and Trade	N
7	Assistant Secretary for Cyber, Infrastructure, and Resilience	N
8	Deputy Assistant Secretary for Screening Coordination Office	C
9	Deputy Assistant Secretary for International Affairs	C

ANNEX V

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Privacy Officer, Chief**

1	Chief Privacy Officer	N
2	Deputy Chief Privacy Officer	C
3	Deputy Chief FOIA Officer	C
4	Senior Director, Privacy Compliance	C
5	Chief of Staff	C

ANNEX W

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Public Affairs, Office of**

1	Assistant Secretary	P
2	Principal Deputy Assistant Secretary	C
3	Deputy Assistant Secretary for Media Operations/Press Secretary	N
4	Deputy Assistant Secretary for Strategic Communications	N
5	Director of Communications	N
6	Chief of Staff	C
7	Director, Incident Communications	C

W-1

Delegation # 00106  
Revision # 06

ANNEX X

ISSUE DATE: 1/19/2017

APPROVAL: 1/19/2017

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Science and Technology**

1	Under Secretary	S
2	Deputy Under Secretary*	C
3	Chief of Staff	C
4	Director, Homeland Security Advanced Research Projects Agency	C
5	Director, Office of Support to the Homeland Security Enterprise and First Responders Division	C
6	Director, Capability Development Support Division	C
7	Director, Research and Development Partnerships	C
8	Director, Finance and Budget Division	C
9	Director, Administrative Support Division	C

ANNEX Y

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

Secret Service, United States		
1	Director	P
2	Deputy Director	C
3	Chief Operating Officer	C
4	Assistant Director - Protective Operations	C
5	Assistant Director - Investigations	C
6	Assistant Director - Government and Public Affairs	C
7	Assistant Director - Human Resources	C
8	Assistant Director - Professional Responsibility	C
9	Assistant Director - Strategic Intelligence and Information	C
10	Assistant Director - Training	C
11	Chief - Uniformed Division	C
12	Chief Counsel	C
13	Chief Technology Officer	C
14	Chief Financial Officer	C
15	Chief - Strategic Planning and Policy	C
16	Deputy Assistant Director(s) - Protective Operations	C
17	Deputy Assistant Director(s) - Investigations	C
18	Deputy Assistant Director(s) - Government and Public Affairs	C
19	Deputy Assistant Director(s) - Human Resources	C
20	Deputy Assistant Director(s) - Professional Responsibility	C
21	Deputy Assistant Director(s) - Strategic Intelligence and Information	C
22	Deputy Assistant Director(s) - Training	C
23	Deputy Assistant Director(s) - Technical Development and Mission Support	C
24	Deputy Assistant Director(s) - Strategic Planning and Policy	C
25	Special Agent in Charge - Washington	C
26	Special Agent in Charge - New York	C
27	Special Agent in Charge - Miami	C
28	Special Agent in Charge - Los Angeles	C



ANNEX Z

ISSUE DATE: 10/23/2018

APPROVAL: 10/23/2018

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position	Career Status
<b>Transportation Security Administration</b>	
1 Administrator	S
2 Deputy Administrator	P
3 Chief of Staff	N
4 Executive Assistant Administrator, Security Operations	C
5 Executive Assistant Administrator, Operations Support	C
6 Executive Assistant Administrator, Law Enforcement/Federal Air Marshal Service	C
7 Executive Assistant Administrator, Enterprise Support	C
8 Regional Director, Atlanta, Security Operations	C
9 Regional Director, Dallas, Security Operations	C

ANNEX AA

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position		Career Status
<b>Chief Financial Officer (DHS)</b>		
1	Chief Financial Officer	S
2	Deputy Chief Financial Officer*	C

ANNEX AB

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position Career Status

**Deputy Administrator, Federal Emergency Management Agency  
(FEMA)**

1	Deputy Administrator, FEMA	S
2	Deputy Administrator, Protection and National Preparedness*	S
3	Associate Administrator, Mission Support	C
4	Deputy Associate Administrator, Office of Policy and Program Analysis	C
5	Region IX Administrator	C
6	Region VI Administrator	C

ANNEX AC

ISSUE DATE: 09/14/2016

APPROVAL: 09/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position Career Status

**Protection and National Preparedness (FEMA)**

1	Deputy Administrator, Protection and National Preparedness	S
2	Assistant Administrator, National Preparedness Directorate*	C
3	Assistant Administrator, Grant Programs	P
4	Assistant Administrator, National Continuity Programs	N

AC-1

Delegation # 00106  
Revision # 06

# **EXHIBIT 3**



## Amendment to the Order of Succession for the Secretary of Homeland Security

Section II.A of DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, is amended hereby to state as follows: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A."

By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security by amending Annex A of *DHS Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106. Annex A is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

Annex A, Order for Delegation of Authority by the Secretary of the Department of Homeland Security

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security;
2. Under Secretary for Management;
3. Commissioner of the U.S. Customs and Border Protection;
4. Under Secretary for Strategy, Policy, and Plans;
5. Administrator and Assistant Secretary of the Transportation Security Administration;
6. Administrator of the Federal Emergency Management Agency;

No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

Dated: 11/08/19

  
\_\_\_\_\_  
Kevin K. McAleenan

Acting Secretary of Homeland Security

# **EXHIBIT 5**

Department of Homeland Security

DHS Delegation Number: 0106

Revision Number: 08

Issue Date: 12/15/2016

## **DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS**

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### **I. Purpose**

This is a succession order for named positions and a delegation of authority for the continuity of essential functions of officials at the Department of Homeland Security (DHS) in case of absence, the inability of the incumbent to act during disasters or catastrophic emergencies, or vacancies in offices.

### **II. Succession Order/Delegation**

A. In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.

B. I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, in the event I am unavailable to act during a disaster or catastrophic emergency.

C. The order of succession for the named positions, other than the Office of the Secretary, are provided in Annexes B through AD.

D. I hereby delegate authority to the officials occupying the identified positions in the orders listed in Annexes B through AD to exercise the powers and perform the functions and duties of the named positions in case of death, resignation, inability to perform, absence, or inability to act during a disaster or catastrophic emergency until that condition ceases.

E. In terms of named positions in which appointment is required to be made by the President, by and with the advice and consent of the Senate (PAS), if positions are vacant as that term is used in the Federal Vacancies Reform Act of 1998, the First Assistant shall act as the incumbent until a successor is appointed, unless otherwise designated by the President. The individual serving in the position identified as the first to succeed is designated the "First Assistant" for the purposes of the Federal Vacancies Reform Act of 1998. If the First Assistant position is vacant, the next designated official in the order of succession may exercise all the powers, duties, authorities, rights, and functions authorized by law to be exercised by the incumbent, but may not perform any function or duty required by law to be performed exclusively by the office holder.

F. For all other positions that are not subject to the Federal Vacancies Reform Act of 1998, any official in the order provided for in the succession order may exercise all the powers, duties, authorities, rights, and functions authorized to be performed by the incumbent, to the extent not otherwise limited by law.

G. Only officials specifically designated in the order of succession for each of the named positions in Annexes B through AD are eligible, subject to modification in accordance with Section II.I. Unless formally appointed by the Secretary, persons appointed on an acting basis, or on some other temporary basis, are ineligible to serve as a successor; therefore, the order of succession would fall to the next designated official in the approved order of succession.

H. The prohibition on any re-delegation of powers, authorities, functions, and duties contained in Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents is not applicable to restrict the authority of any individual who is exercising the authority of a vacant position under this Delegation. Such an individual shall, however, be bound by such Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents, and shall not further re-delegate powers to any individual.

I. Each Annex may be updated separately. A Component head seeks modification of his/her order of succession by forwarding a proposed updated Annex to the Office of Operations Coordination (OPS), Continuity Division and the Office of the Under Secretary for Management (MGMT), Program Manager, Delegations and Directives; Annexes are processed by MGMT, in consultation with the Office of the General Counsel (OGC), for approval of the Secretary. At a minimum, the Annex is coordinated with OGC and the White House Liaison. Where possible, Component orders of succession should be at least three positions deep and geographically dispersed.

J. The Office of the Executive Secretary, MGMT, and OPS are responsible for maintaining a current list of incumbents holding all positions identified in Annexes B through AD.

K. Nothing in this delegation is intended to limit my discretion as Secretary to depart from this delegation.


### III. Authorities

A. Title 5, United States Code (U.S.C.) §§ 3345-49 (Federal Vacancies Reform Act of 1998, as amended)

B. Title 6, U.S.C., § 112 (Secretary; functions)

### IV. Office of Primary Interest

OPS and MGMT is the office of primary interest for maintaining and updating the Annexes to this Delegation.

  
\_\_\_\_\_  
Jeh Charles Johnson  
Secretary of Homeland Security  
\_\_\_\_\_  
Date

#### Legend

Career	C
Limited Term Appointment	L
Military Officer	M
Non-Career in the Senior Executive Service or Schedule C	N
Presidential Appointee	P
Presidential Appointee with Senate Confirmation	S
Scientific Professional	T
First Assistant pursuant to the Federal Vacancies Reform Act	*



**DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS  
OF AUTHORITIES**

<b>Annex</b>	<b>Title</b>	<b>Issue Date</b>
Annex A	Order For Delegation of Authority by the Secretary of the Department of Homeland Security	Revision 06, 12/15/2016
Annex B	Deputy Secretary, Office of the	Revision 06, 09/14/2016
Annex C	Citizenship and Immigration Service Ombudsman	Revision 06, 09/14/2016
Annex D	Citizenship and Immigration Services, United States	Revision 06, 09/14/2016
Annex E	Civil Rights and Civil Liberties, Office for	Revision 06, 09/14/2016
Annex F	Coast Guard, United States	Revision 06, 09/14/2016
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Annex K	Federal Law Enforcement Training Center	Revision 06, 09/14/2016
Annex L	General Counsel, Office of the	Revision 06, 09/14/2016
Annex M	Health Affairs, Office of	Revision 06, 09/14/2016
Annex N	Immigration and Customs Enforcement, United States	Revision 06, 09/14/2016
Annex O	Inspector General, Office of	Revision 06, 09/14/2016
Annex P	Intelligence and Analysis, Office of	Revision 06, 09/14/2016
Annex Q	Legislative Affairs, Office of	Revision 06, 09/14/2016
Annex R	Management Directorate	Revision 06, 09/14/2016
Annex S	National Protection and Programs Directorate	Revision 08, 07/11/2017
Annex T	Operations Coordination, Office of	Revision 06, 09/14/2016
Annex U	Partnership and Engagement, Office of	Revision 06, 09/14/2016
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Annex W	Privacy Office, Chief	Revision 06, 09/14/2016
Annex X	Public Affairs, Office of	Revision 06, 09/14/2016
Annex Y	Science and Technology	Revision 07, 01/19/2017
Annex Z	Secret Service, United States	Revision 06, 09/14/2016
Annex AA	Transportation Security Administration	Revision 08, 07/11/2017
Annex AB	Chief Financial Officer (DHS)	Revision 06, 09/14/2016
Annex AC	Deputy Administrator, Federal Emergency Management Agency (FEMA)	Revision 06, 09/14/2016
Annex AD	Protection and National Preparedness (FEMA)	Revision 06, 09/14/2016

## **ORDER FOR DELEGATION OF AUTHORITY BY THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY**

*Pursuant to Executive Order 13753 (December 9, 2016)*

1. Deputy Secretary of Homeland Security
2. Under Secretary for Management
3. Administrator of the Federal Emergency Management Agency
4. Under Secretary for National Protection and Programs
5. Under Secretary for Science and Technology
6. Under Secretary for Intelligence and Analysis
7. Commissioner of U.S. Customs and Border Protection
8. Administrator of the Transportation Security Administration
9. Director of U.S. Immigration and Customs Enforcement
10. Director of U.S. Citizenship and Immigration Services
11. Assistant Secretary for Policy
12. General Counsel
13. Deputy Under Secretary for Management
14. Deputy Commissioner of U.S. Customs and Border Protection
15. Deputy Administrator of the Transportation Security Administration
16. Deputy Director of U.S. Immigration and Customs Enforcement
17. Deputy Director of U.S. Citizenship and Immigration Services
18. Director of the Federal Law Enforcement Training Center

## ANNEX B

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position	Career Status
<b>Deputy Secretary, Office of the</b>	
1 Deputy Secretary	S
2 Under Secretary for Management*	S
3 Administrator, Federal Emergency Management Agency	S
4 Under Secretary, National Programs and Protection Directorate	S
5 Under Secretary, Science and Technology	S
6 Under Secretary, Intelligence and Analysis	S
7 Commissioner, U.S. Customs and Border Protection	S
8 Assistant Secretary/Administrator, Transportation Security Administration	S
9 Assistant Secretary, U.S. Immigration and Customs Enforcement	S
10 Director, U.S. Citizenship and Immigration Services	S
11 Assistant Secretary, Office of Policy	S
12 General Counsel	S
13 Deputy Under Secretary for Management	C
14 Deputy Commissioner, U.S. Customs and Border Protection	C
15 Deputy Administrator, Transportation Security Administration	C
16 Deputy Director, U.S. Immigration and Customs Enforcement	C
17 Deputy Director, U.S. Citizenship and Immigration Services	C
18 Director, Federal Law Enforcement Training Center	C

## ANNEX C

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position		Career Status
<b>Citizenship and Immigration Services Ombudsman</b>		
1	Ombudsman	N
2	Deputy Director	C
3	Senior Advisor	L
4	Chief of Staff	C
5	Director of Operations	C
6	Chief of Casework	C

## ANNEX D

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Citizenship and Immigration Services, United States		
1	Director	S
2	Deputy Director*	C
3	Associate Director, Management Directorate	C
4	Associate Director, Refugee Asylum and International Operations Directorate	C
5	Associate Director, Service Center Operations Directorate	C
6	Associate Director, Field Operations Directorate	C
7	Director, National Benefits Center	C



ANNEX E

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Civil Rights and Civil Liberties, Office for**

1	Civil Rights and Civil Liberties Officer	P
2	Deputy Officer, Programs and Compliance	C
3	Deputy Officer, Equal Employment Opportunity Programs	C
4	Executive Officer	C

## ANNEX F

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Coast Guard, United States**

1	Commandant	M
2	Vice Commandant	M
	Deputy Commandant for Mission Support or Deputy Commandant for Operations	
3-4	in precedence of their grade	M
5-6	Other Vice Admirals in precedence of their grade	M

## ANNEX G

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Customs and Border Protection, United States**

1	Commissioner	S
2	Deputy Commissioner*	C
3	Executive Assistant Commissioner, Office of Field Operations	C
4	Chief, U.S. Border Patrol	C
5	Executive Assistant Commissioner, Air and Marine Operations	C
6	Executive Assistant Commissioner, Trade	C
7	Executive Assistant Commissioner, Operations Support	C
8	Executive Assistant Commissioner, Enterprise Services	C

ANNEX H

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Domestic Nuclear Detection Office**

1	Director	P
2	Deputy Director	C
3	Assistant Director, Assessments Directorate	C
4	Assistant Director, Operations Support Directorate	C
5	Chief of Staff	C
6	Assistant Director, Transformational and Applied Research	C

ANNEX I

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Executive Secretariat**

1	Executive Secretary	N
2	Deputy Executive Secretary	C
3	Assistant Executive Secretary, Briefing Books/Interagency Coordination	C



ANNEX J

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

<b>Federal Emergency Management Agency</b>		
1	Administrator	S
2	Deputy Administrator*	S
3	Deputy Administrator, Protection and National Preparedness	S
4	Associate Administrator, Response and Recovery	N
5	FEMA Region IX Administrator	C
6	FEMA Region VI Administrator	C

ANNEX K

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Federal Law Enforcement Training Center**

1	Director	C
2	Deputy Director for Training	C
3	Deputy Director for Management	C
4	Assistant Director, Mission and Readiness Support	C
5	Assistant Director, Regional and International Training	C
6	Assistant Director, Chief Financial Officer	C
7	Assistant Director, Glynco Training	C
8	Assistant Director, Centralized Training Management	C
8	Assistant Director, Washington Operations	C
9	Assistant Director, Chief Information Officer	C
10	Chief of Staff	C

ANNEX L

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

### General Counsel, Office of the

1	General Counsel	S
2	Principal Deputy General Counsel*	C
3	Deputy General Counsel [Senior ranking by time in position and in DHS] <sup>1</sup>	N
4	Deputy General Counsel [Senior ranking by time in position and in DHS]	N
5	Deputy General Counsel [Senior ranking by time in position and in DHS]	N
6	Chief of Staff	C
7	Associate General Counsel, Operations and Enforcement	C
8	Associate General Counsel, General Law	C
9	Chief Counsel, Transportation Security Administration	C
10	Chief Counsel, Federal Law Enforcement Training Center	C

<sup>1</sup> For the Deputy General Counsel positions identified in lines 3-5, seniority is determined by length of time in the position. In the event more than one Deputy General Counsel has the same appointment date, time in service in the Department is the second determining factor for seniority.

ANNEX M

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

**Health Affairs, Office of**

1	Assistant Secretary for Health Affairs and Chief Medical Officer	P
2	Principal Deputy Assistant Secretary and Deputy Chief Medical Officer	C
3	Associate Chief Medical Officer and Division Director, Workforce Health and Medical Support	C
4	Deputy Assistant Secretary and Division Director, Health Threats Resilience	C

ANNEX N

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Immigration and Customs Enforcement, United States**

1	Assistant Secretary	S
2	Deputy Director*	C
3	Executive Associate Director, Homeland Security Investigations	C
4	Executive Associate Director, Enforcement and Removal Operations	C
5	Executive Associate Director, Management and Administration	C
6	Principal Legal Advisor	N
7	Special Agent in Charge – Denver	C
8	Field Officer Director – San Antonio	C



ANNEX O

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

<b>Inspector General, Office of</b>		
1	Inspector General	S
2	Deputy Inspector General*	C
3	Counsel to the Inspector General	C
4	Assistant Inspector General, Audits	C
5	Assistant Inspector General, Inspections	C
6	Assistant Inspector General, Emergency Management Oversight	C

ANNEX P

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Intelligence and Analysis, Office of**

1	Under Secretary for Intelligence and Analysis/DHS Chief Intelligence Officer	S
2	Principal Deputy Under Secretary for Intelligence and Analysis*	C
3	Deputy Under Secretary for Intelligence Operations	C
4	Deputy Under Secretary for Mission Support	C
5	Associate Deputy Director, El Paso Intelligence Center/ Strategic Analysis Section	C

ANNEX Q

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Legislative Affairs, Office of**

1	Assistant Secretary for Legislative Affairs	P
2	Deputy Assistant Secretary (Senate)	N
3	Deputy Assistant Secretary (House)	N
4	Chief of Staff	C
5	Director, Management Team	C
6	Director, FEMA Team	C
7	Director, Borders and Immigration	C

ANNEX R

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Management Directorate**

1	Under Secretary for Management	S
2	Deputy Under Secretary for Management*	C
3	Chief Financial Officer	S
4	Chief Information Officer	P
5	Chief Human Capital Officer	C
6	Chief Procurement Officer	C
7	Chief Readiness Support Officer	C
8	Chief Security Officer	C
9	Chief of Staff	C
10	Deputy Director, Federal Law Enforcement Training Center	C

ANNEX S

ISSUE DATE: 07/11/2017

APPROVAL: 07/11/2017

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position		Career Status
<b>National Protection and Programs Directorate</b>		
1	Under Secretary	S
2	Deputy Under Secretary for NPPD*	N
3	Assistant Secretary, Office of Infrastructure Protection	P
4	Assistant Secretary, Office of Cybersecurity and Communications	N
5	Deputy Assistant Secretary, Office of Infrastructure Protection	C
6	Deputy Assistant Secretary, Office of Cybersecurity and Communications	C
7	Director, Management	C
8	Office of Infrastructure Protection, Regional Director for Region 8	C



ANNEX T

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position		Career Status
<b>Operations Coordination, Office of</b>		
1	Director	C
2	Deputy Director	C
3	Director, Current Operations Division	C
4	Director, National Operations Center	C
5	Chief of Staff	C

ANNEX U

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Partnership and Engagement, Office of**

1	Assistant Secretary	N
2	Assistant Secretary for State and Local Law Enforcement	N
3	Deputy Assistant Secretary, Intergovernmental Affairs	C
4	Deputy Assistant Secretary, Private Sector Office	N
5	Director of Local Affairs	C

## ANNEX V

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

Policy, Office of		
1	Assistant Secretary	S
2	Assistant Secretary for International Affairs and Chief Diplomatic Officer*	N
3	Principal Deputy Assistant Secretary	N
4	Assistant Secretary for Threat Prevention and Security Policy	N
5	Assistant Secretary for Border, Immigration, and Trade	N
6	Assistant Secretary for Cyber, Infrastructure, and Resilience	N
7	Assistant Secretary for Strategy, Plans, Analysis, and Risk	C
8	Deputy Assistant Secretary for Screening Coordination Office	C
9	Deputy Assistant Secretary for International Affairs	C

ANNEX W

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Privacy Officer, Chief**

1	Chief Privacy Officer	N
2	Deputy Chief Privacy Officer	C
3	Deputy Chief FOIA Officer	C
4	Senior Director, Privacy Compliance	C
5	Chief of Staff	C

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Delegation # 0106  
Revision # 08

ANNEX X

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Public Affairs, Office of**

1	Assistant Secretary	P
2	Principal Deputy Assistant Secretary	C
3	Deputy Assistant Secretary for Media Operations/Press Secretary	N
4	Deputy Assistant Secretary for Strategic Communications	N
5	Director of Communications	N
6	Chief of Staff	C
7	Director, Incident Communications	C



ANNEX Y

ISSUE DATE: 1/19/2017

APPROVAL: 1/19/2017

**DHS ORDERS OF SUCCESSION AND  
ORDERS FOR DELEGATIONS OF AUTHORITIES**

Position

Career Status

**Science and Technology**

1	Under Secretary	S
2	Deputy Under Secretary*	C
3	Chief of Staff	C
4	Director, Homeland Security Advanced Research Projects Agency	C
5	Director, Office of Support to the Homeland Security Enterprise and First Responders Division	C
6	Director, Capability Development Support Division	C
7	Director, Research and Development Partnerships	C
8	Director, Finance and Budget Division	C
9	Director, Administrative Support Division	C

ANNEX Z

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position

Career Status

<b>Secret Service, United States</b>		
1	Director	P
2	Deputy Director	C
3	Chief Operating Officer	C
4	Assistant Director - Protective Operations	C
5	Assistant Director - Investigations	C
6	Assistant Director - Government and Public Affairs	C
7	Assistant Director - Human Resources	C
8	Assistant Director - Professional Responsibility	C
9	Assistant Director - Strategic Intelligence and Information	C
10	Assistant Director - Training	C
11	Chief - Uniformed Division	C
12	Chief Counsel	C
13	Chief Technology Officer	C
14	Chief Financial Officer	C
15	Chief - Strategic Planning and Policy	C
16	Deputy Assistant Director(s) - Protective Operations	C
17	Deputy Assistant Director(s) - Investigations	C
18	Deputy Assistant Director(s) - Government and Public Affairs	C
19	Deputy Assistant Director(s) - Human Resources	C
20	Deputy Assistant Director(s) - Professional Responsibility	C
21	Deputy Assistant Director(s) - Strategic Intelligence and Information	C
22	Deputy Assistant Director(s) - Training	C
23	Deputy Assistant Director(s) - Technical Development and Mission Support	C
24	Deputy Assistant Director(s) - Strategic Planning and Policy	C
25	Special Agent in Charge - Washington	C
26	Special Agent in Charge - New York	C
27	Special Agent in Charge - Miami	C
28	Special Agent in Charge - Los Angeles	C

ANNEX AA

ISSUE DATE: 07/11/2017

APPROVAL: 07/11/2017

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Position Career Status

### Transportation Security Administration

1	Assistant Secretary/ Administrator	S
2	Deputy Administrator*	C
3	Chief of Staff	C
4	Chief of Operations	C
5	Assistant Administrator, Office of Security Operations	C
6	Assistant Administrator, Office of Law Enforcement/Federal Air Marshal Service	C
7	Assistant Administrator, Office of Global Strategies	C
8	Regional Director, Atlanta, Office of Security Operations	C
9	Regional Director, Dallas, Office of Security Operations	C
10	Federal Security Director, Denver International Airport	C
11	Federal Air Marshal/Supervisory Air Marshal in Charge, Los Angeles	C

ANNEX AB

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position		Career Status
<b>Chief Financial Officer (DHS)</b>		
1	Chief Financial Officer	S
2	Deputy Chief Financial Officer*	C

ANNEX AC

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position Career Status

**Deputy Administrator, Federal Emergency Management Agency  
(FEMA)**

1	Deputy Administrator, FEMA	S
2	Deputy Administrator, Protection and National Preparedness*	S
3	Associate Administrator, Mission Support	C
4	Deputy Associate Administrator, Office of Policy and Program Analysis	C
5	Region IX Administrator	C
6	Region VI Administrator	C



ANNEX AD

ISSUE DATE: 9/14/2016

APPROVAL: 9/14/2016

**DESIGNATION OF FIRST ASSISTANTS FOR NON-COMPONENT HEAD PRESIDENTIAL  
APPOINTEES WITH SENATE CONFIRMATION POSITIONS**

Position	Career Status
<b>Protection and National Preparedness (FEMA)</b>	
1 Deputy Administrator, Protection and National Preparedness	S
2 Assistant Administrator, National Preparedness Directorate*	C
3 Assistant Administrator, Grant Programs	P
4 Assistant Administrator, National Continuity Programs	N

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Delegation # 0106  
Revision # 08