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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LA POSTA BAND OF DIEGUEÑO
MISSION INDIANS OF THE LA
POSTA RESERVATION, ON BEHALF
OF ITSELF AND ON BEHALF OF ITS
MEMBERS AS PARENS PATRIAE,
Plaintiffs,
v.
DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, IN HIS
OFFICIAL CAPACITY, et al.,
Defendants.

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

ORDER:

**(1) GRANTING PLAINTIFFS’
MOTIONS TO SEAL, (Doc. Nos. 41,
49);**

**(2) DENYING DEFENDANTS’ EX
PARTE MOTION FOR LEAVE TO
FILE A SUR-REPLY, (Doc. No. 57);
AND**

**(3) DENYING PLAINTIFFS’ SECOND
MOTION FOR TEMPORARY
RESTRAINING ORDER, (Doc. No. 40)**

1 Presently before the Court are: (1) the La Posta Band of the Diegueño Mission
2 Indians’ (“La Posta” or “the Tribe”) motions to seal, (Doc. Nos. 41, 49); (2) La Posta’s
3 second motion for a temporary restraining order (“TRO”), (Doc. No. 40); and (3)
4 Defendants Donald J. Trump, Mark T. Esper, Chad F. Wolf, and Todd T. Semonite’s
5 (“Defendants” or “the Government”) *ex parte* motion for leave to file a sur-reply, (Doc.
6 No. 57). For the reasons set forth below, the Court (1) **GRANTS** La Posta’s motions to
7 seal, (Doc. Nos. 41, 49); (2) **DENIES** La Posta’s second motion for TRO, (Doc. No. 40);
8 and (3) **DENIES** Defendants’ *ex parte* motion for leave to file a sur-reply, (Doc. No. 57).

9 **I. FACTUAL BACKGROUND**

10 The facts of this case were recounted at length in this Court’s September 9, 2020
11 order. (Doc. No. 26.) As such, the Court will incorporate those facts into this order. For the
12 purposes of this instant motion, La Posta presents the following additional facts to support
13 their second request for a TRO and preliminary injunction:

14 La Posta’s traditional territory, which encompasses the areas impacted by barrier
15 construction within eastern San Diego and Imperial Counties (“Project Area”), is sacred to
16 the Tribe. (*See* Second Declaration (“Decl.”) of Cynthia Parada (“Second Parada Decl.”)
17 ¶ 11.) Thomas Holm, the director of the Kumeyaay Historic Preservation Council,
18 “recently discovered that the El Centro section of the border wall cuts directly through a
19 sacred site in Davies Valley.” (Second Decl. of Thomas Holm (“Second Holm Decl.”) ¶ 4.)
20 The Davies Valley site features a “circle approximately 120 ft in diameter, marked clearly
21 with a perimeter of stones and containing rock cairns.” (*Id.* ¶¶ 3–4.) The circle is
22 surrounded by smaller circle features and trails. (*Id.*) On November 10, 2020, a Kumeyaay
23 group attempted to visit and pray at the site but Customs and Border Patrol (“CBP”)
24 officers did not allow access. (*Id.* ¶ 6.) The Tribe alleges other similar circle complexes
25 have been identified in the Project Area. (*Id.*) Additionally, Mr. Holm “encountered a site
26 about which contains a rock alignment that appears to be a Kumeyaay cultural site.” (*Id.*
27 ¶ 7.) The site allegedly contains numerous “ceramic sherds indicative of cremation vessels
28 within the site.” (*Id.*)

1 On November 17, 2020, CBP notified various Kumeyaay-affiliated tribes of an
2 “unanticipated discovery” in the El Centro Project site when a tribal cultural monitor
3 identified a Kumeyaay archaeological site adjacent to the newly constructed border wall in
4 a “laydown yard.” (*Id.* ¶ 8.) CBP identified three discoveries at this location: two “small
5 fire pits or roasting features” and one “possible cremation site.” (Second Decl. of Michelle
6 LaPena (“Second LaPena Decl.”) ¶ 5.) Tribal experts later visited the location and
7 identified 18 separate fire features “approximately 100m north of the wall and extending
8 south into the road adjacent to the border wall, indicating other features have already been
9 destroyed and obscured by construction.” (Second Holm Decl. ¶ 9; Second Parada Decl.
10 ¶ 8.) A forensic anthropologist inspected the site and found “two small bone fragments,
11 one 2 millimeters and one 6 millimeters, that could be human neck or face bones.” (Second
12 Holm Decl. ¶ 9, Ex. D.)

13 La Posta also maintains that the Project interferes with the Tribe’s ability to stargaze.
14 (Doc. No. 40-1 at 7.) The Tribe explains that astronomy is an integral part of Kumeyaay
15 religion and cultural practice, with tribal citizens stargazing throughout the Project Area.
16 (*See* Second Parada Decl. ¶¶ 13–14.) According to La Posta, the installation of lighting on
17 the border wall will cause light pollution that will hinder the Tribe’s ability to properly
18 stargaze. (*Id.*)

19 Defendants maintain as of the date of the filing of their opposition brief, the bollards
20 comprising the wall are completely installed for the El Centro A project (approximately
21 3.17 total miles), and approximately 14.3 of 15 miles are installed for the San Diego A
22 project. (*See* Second Decl. of Antoinette Gant (“Second Gant Decl.”) ¶ 8.) After the
23 expected completion of the bollards on December 21, 2020, Defendants plan to begin
24 construction of the “linear ground detection system” adjacent to the 20 miles of new barrier
25 construction. (*Id.*) Defendants have also yet to install security features, such as lighting,
26 cameras, and patrol roads in much of the Project Area. (*Id.*) Expected completion for the
27 Project is late June 2021. (*Id.* ¶ 6.)

28 II. PROCEDURAL HISTORY

1 La Posta first commenced this action on August 11, 2020. (Doc. No. 1.) The action
2 was accompanied by an *ex parte* motion for TRO and preliminary injunction. (Doc. Nos.
3 13–14.) The Court held a hearing on both motions and denied both motions on August 27,
4 2020. (Doc. No. 24.) La Posta subsequently appealed the Court’s decision to deny the
5 preliminary injunction to the Ninth Circuit. (Doc. No. 25.) On November 4, 2020, the Ninth
6 Circuit affirmed this Court’s denial of La Posta’s first motion for a preliminary injunction.
7 *See La Posta Band of Diegueno Mission Indians of La Posta Reservation v. Trump*, No.
8 20-55941, 2020 WL 6482173 (9th Cir. Nov. 4, 2020). Following the resolution of the
9 appeal, the parties jointly moved for, and the Court approved, a briefing schedule for the
10 filing of an Amended Complaint, as well as renewed motions for TRO and preliminary
11 injunction. (Doc. Nos. 37–38.) On November 24, 2020, La Posta filed their second motion
12 for TRO and preliminary injunction and accompanying motions to seal. (Doc. Nos. 40, 43.)
13 Pursuant to the parties’ joint briefing schedule, Defendants filed an opposition to both
14 motions on December 4, 2020. (Doc. Nos. 47–48.) La Posta replied on December 9, 2020.
15 (Doc. No. 55.) On December 11, 2020, Defendants filed an *ex parte* motion for leave to
16 file a sur-reply, (Doc. No. 57), and La Posta opposed the motion, (Doc. No. 58). Currently,
17 the hearing on La Posta’s motion for preliminary injunction is set for January 14, 2021.
18 (Doc. No. 45.) This order follows.

19 **III. LA POSTA’S MOTIONS TO SEAL**

20 The Court will first address La Posta’s motions to seal the following declarations
21 filed in connection with La Posta’s second motion for TRO and preliminary injunction:

- 22 • The Second Declaration of Thomas Holm, (Doc. No. 42);
- 23 • The Third Declaration of Thomas Holm, (Doc. No. 50);
- 24 • The Declaration of Carmen Lucas, (Doc. No. 51);
- 25 • The Declaration of Madeleine Hinkes, (Doc. No. 52);
- 26 • The Declaration of David Toler, (Doc. No. 53);
- 27 • The Third Declaration of Cynthia Parada, (Doc. No. 54); and
- 28

- 1 • The Declaration of Paul Enriquez, (Doc. Nos. 47-2, 48-2).

2 La Posta urges the sealing of the foregoing declarations because they contain
3 “confidential research” and exact locations of Kumeyaay sacred archaeological sites within
4 the area of construction. (Doc. Nos. 41, 49.) Because the declarations include photographs
5 and depictions of the locations of the sites, La Posta explains the public filing of these
6 declarations could cause the location to be looted or damaged by unknown individuals.
7 (*Id.*) The Tribe asks the Court to allow these declarations to be filed under seal to protect
8 the integrity of the sites and the items contained therein.

9 **A. Legal Standard for Motions to Seal**

10 All documents filed with the Court are presumptively public. *See San Jose Mercury*
11 *News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (“It is well-established
12 that the fruits of pretrial discovery are, in the absence of a court order to the contrary,
13 presumptively public.”). “Historically, courts have recognized a ‘general right to inspect
14 and copy public records and documents, including judicial records and documents.’”
15 *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon*
16 *v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). Two standards generally
17 govern requests to seal documents. *See Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 677
18 (9th Cir. 2010):

19 [J]udicial records attached to dispositive motions [are treated] differently from
20 records attached to non-dispositive motions. Those who seek to maintain the
21 secrecy of documents attached to dispositive motions must meet the high
22 threshold of showing that “compelling reasons” support secrecy. A “good
23 cause” showing under Rule 26(c) will suffice to keep sealed records attached
24 to non-dispositive motions.

24 *Kamakana*, 447 F.3d at 1180 (citations omitted). The reason for the two different standards
25 is that “[n]on-dispositive motions are often unrelated, or only tangentially related, to the
26 underlying cause of action, and, as a result, the public’s interest in accessing dispositive
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1 materials does not apply with equal force to non-dispositive materials.” *Pintos*, 605 F.3d
2 at 678 (quotations omitted).

3 A party seeking to seal materials related to non-dispositive motions must show good
4 cause by making a “particularized showing” that “specific prejudice or harm will result”
5 should the information be disclosed. Fed. R. Civ. P. 26(c). “[B]road, conclusory allegations
6 of potential harm” will not suffice. *Foltz*, 331 F.3d at 1131. By contrast, under the
7 “compelling reasons” standard applicable to dispositive motions, the Court must balance
8 the competing interests of the public and the party who seeks to keep certain judicial
9 records secret. After considering these interests, “if the court decides to seal certain judicial
10 records, it must base its decision on a compelling reason and articulate the factual basis for
11 its ruling, without relying on hypothesis or conjecture.” *Kamakana*, 447 F.3d at 1178–79
12 (internal quotation marks, omissions, and citations omitted). The party seeking to seal a
13 judicial record bears the burden of meeting the “compelling reasons” standard. *Id.* at 1178;
14 *Foltz*, 331 F.3d at 1135.

15 While La Posta moves to seal documents based on the “good cause” standard, the
16 Court concludes the “compelling reasons” standard applies here. The Ninth Circuit has
17 clarified that the “compelling reasons” standard applies whenever the motion at issue “is
18 more than tangentially related to the merits of a case.” *Center for Auto Safety v. Chrysler*
19 *Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). In some instances, the proposed filing of
20 documents under seal in connection with motions for preliminary injunction—though such
21 motions are not dispositive—may be governed by the “compelling reasons” test. *Id.* at
22 1097–1101 (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161
23 (3d Cir. 1993)). In keeping with this principle, requests to seal documents relating to
24 motions for a preliminary injunction have been found by the Ninth Circuit to “more than
25 tangentially relate[] to the merits” because success on the motion for a preliminary
26 injunction could resolve a portion of the claims in the underlying complaint. *See Center*
27 *for Auto Safety, LLC*, 809 F.3d at 1102. Here, La Posta’s motion for TRO and preliminary
28 injunction is certainly “more than tangentially related to the merits of the case” because La

1 Posta’s Amended Complaint ultimately seeks injunctive relief that is not substantially
2 different than the relief requested in this instant motion. As such, the “compelling reasons”
3 standard governs the proposed sealing of the records.

4 **B. Discussion**

5 “In general, ‘compelling reasons’ sufficient to . . . justify sealing court records exist
6 when such ‘court files might . . . become a vehicle for improper purposes,’ such as the use
7 of records to gratify private spite, promote public scandal, circulate libelous statements, or
8 release trade secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). “The
9 mere fact that the production of records may lead to a litigant’s embarrassment,
10 incrimination, or exposure to further litigation will not, without more, compel the court to
11 seal its records.” *Id.* “The ‘compelling reasons’ standard is invoked even if the dispositive
12 motion, or its attachments, were previously filed under seal or protective order.” *Id.* at
13 1178–79.

14 Two compelling reasons exist to justifying the sealing of the aforementioned
15 declarations. First, the Court notes that locations of tribal cultural sites are kept confidential
16 by Kumeyaay tribes and revealed only to qualified recipients. (*See* Second Parada Decl.
17 ¶ 7.) La Posta explains the policy behind the confidentiality of archaeological and sacred
18 sites is “to protect them from physical and spiritual vandalism and looting. If the
19 confidential information in these declarations is publicly disclosed, it could be exploited,
20 causing harm to the Tribe. . . .” (Doc. No. 49 at 4.)

21 Second, sealing of the declarations is appropriate because both California and federal
22 public records law exempt the particular records from disclosure. Indeed, California public
23 records law exempts from disclosure “[r]ecords of Native American graves, cemeteries,
24 and sacred places and records of Native American places, features, and objects . . .
25 maintained by, or in the possession of, the Native American Heritage Commission, another
26 state agency, or a local agency.” Cal. Gov’t Code § 6254. Similarly, the federal
27 Archaeological Resources Protection Act prevents from public disclosure information
28 concerning the “nature and location” of archaeological resources. 16 U.S.C. § 470hh. Thus,

1 the sealing of the records is appropriate to protect the integrity of La Posta’s cultural and
 2 sacred sites. Accordingly, the Court finds that compelling reasons justify sealing the
 3 declaration as “court files might . . . become a vehicle for improper purposes.” The Court
 4 thus **GRANTS** La Posta’s motions to seal. (Doc. Nos. 41, 49.)

5 **IV. DEFENDANTS’ EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY**

6 Next, Defendants asks the Court for permission to file a sur-reply in connection with
 7 La Posta’s motions for TRO and preliminary injunction. (Doc. No. 57.) The Government
 8 argues “Plaintiffs advance two new, affirmative arguments that Acting Secretary of
 9 Homeland Security Chad Wolf lacked authority to authorize the border barrier projects and
 10 waivers at issue in this case.” (*Id.* at 2.) In response, La Posta asserts “[t]he arguments
 11 Defendants refer to are neither new nor affirmative, but rather are rebuttals to the
 12 Defendants’ opposition arguments, which the Tribe referenced in its opening brief.” (Doc.
 13 No. 58.)

14 The Court agrees with La Posta that a sur-reply is not warranted in this situation. Of
 15 course, a “district court need not consider arguments raised for the first time in a reply
 16 brief.” *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). However, the arguments
 17 Defendants challenge here are certainly related to the line of reasoning set forth in La
 18 Posta’s opening brief. Furthermore, the points made by La Posta in their reply brief are in
 19 direct response to arguments advanced by Defendants in the opposition. Therefore, the
 20 Court **DENIES** Defendants’ *ex parte* request.

21 **V. LA POSTA’S SECOND MOTION FOR TEMPORARY RESTRAINING** 22 **ORDER¹**

23 **A. Legal Standard for TRO and Preliminary Injunction**

24 The standard for issuing a TRO is the same as that for the issuance of a preliminary
 25 injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347

27 ¹ In support of their second motion for TRO, La Posta requests judicial notice of: (1) an excerpt of
 28 Delegation 00106, Rev. 08.5, signed by Kristjen Nielsen on April 10, 2019; (2) an amendment to

1 n.2 (1977). Thus, much like a preliminary injunction, a TRO is “an extraordinary remedy
2 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
3 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Whether to grant
4 or deny a TRO or preliminary injunction is a matter within the Court’s discretion. *See Miss*
5 *Universe, Inc. v. Flesher*, 605 F.2d 1130, 1132–33 (9th Cir. 1979).

6 To obtain a TRO or preliminary injunction, “the moving party ‘must establish that:
7 (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the
8 absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an
9 injunction is in the public interest.’” *Idaho v. Coeur D’Alene Tribe*, 794 F.3d 1039, 1046
10 (9th Cir. 2015) (quoting *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir.
11 2014)). Alternatively, “‘serious questions going to the merits’ and a hardship balance that
12 tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long
13 as the plaintiff also shows that there is a likelihood of irreparable injury and that the
14 injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
15 1127, 1135 (9th Cir. 2011). This articulation represents “one alternative on a continuum”
16 under the “‘sliding scale’ approach to preliminary injunctions employed” by the Ninth
17 Circuit. *Id.* at 1131–32. But “[t]he critical element in determining the test to be applied is
18 the relative hardship to the parties.” *Benda v. Grand Lodge of the Int’l Ass’n of Machinists*
19 *& Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). “If the balance of harm tips
20 decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of
21 success on the merits as when the balance tips less decidedly.” *Id.*

22 **B. Discussion**

23 Irreparable harm has always served as the “basis of injunctive relief in the federal
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26 Delegation 00106 which was signed by Kevin McAleenan on November 8, 2019; and (3) an affidavit of
27 Juliana Blackwell, which the Department of Homeland Security filed in proceedings in *Casa de Maryland,*
28 *Inc. v. Wolf*, No. 8:20-cv-02118 (D. Md. Sept. 11, 2020). Because all these documents are either records
signed by government officials or records filed in other court proceedings, the Court concludes that all
three documents are appropriate subjects for judicial notice. *See Fed. R. Civ. P. 201(b).*

1 courts.” *Sampson v. Murray*, 415 U.S. 61, 88 (1974). In their renewed motion for TRO, the
2 Tribe asserts new allegations of harm associated with recent discoveries of cultural sites
3 and items in the El Centro A Project Area. The Court will address each new allegation
4 below. But upon close review of these new allegations, the Court concludes that La Posta
5 has not met their high burden for the extraordinary relief of a TRO. Accordingly, the Court
6 need not review the other three factors because the Tribe has not established irreparable
7 harm in the absence of injunctive relief.

8 **1. Circle Rock Alignments**

9 First, to demonstrate irreparable harm, La Posta contends that barrier construction
10 will cut through various circular rock formations, indicative of tribal cultural sites.
11 Specifically, the Tribe points out the El Centro section of the border wall intrudes upon a
12 centuries-old sacred rock circle formation in Davies Valley. (*See* Second Holm Decl. ¶ 4.)
13 The site features a circle approximately 120 feet in diameter, marked with a perimeter of
14 stones and containing rock cairns. (*Id.* ¶¶ 3–4.) The circle is surrounded by smaller circle
15 features and trails. (*Id.*) In opposition, Defendants respond that the circular feature is a
16 modern construct, and that satellite imagery of the area shows no evidence of the circular
17 feature before 2016. (*See* Third Decl. of Paul Enriquez (“Third Enriquez Decl.”) ¶ 78.) In
18 reply, La Posta states that “[w]hile one of the larger circles was not visible from satellite
19 images before 2016, this is likely due to poor resolution and vegetation.” (Doc. No. 55 at
20 9.) Regardless of whether the circle formation was visible by satellite prior to 2016, this
21 factual dispute again undercuts La Posta’s showing of a concrete, irreparable harm
22 necessary for a TRO. Indeed, while La Posta claims the circle complexes as ancient
23 Kumeyaay cultural sites, Defendants argue that other representatives of the Kumeyaay
24 tribes examined the site in November 2020 and questioned whether the formations were
25 the result of “ATV enthusiasts.”² (Third Enriquez Decl. ¶ 79.) With directly competing
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28 ² La Posta objects to these statements in Mr. Enriquez’s declaration as hearsay. (Doc. No. 55 at 9.) The Court, however, may consider inadmissible evidence, including hearsay evidence, in determining whether

1 evidence once again, the Court cannot simply conclude La Posta has established the
2 necessary evidence for immediate relief based on this discovery.

3 La Posta next argues there is evidence of various other circular rock formations
4 discovered by Mr. Holms, the director of the Kumeyaay Historic Preservation Council.
5 (*See* Doc. No. 40-1 at 6–7; Second Holm Decl. ¶¶ 6–7.) However, these other locations
6 cannot serve as the basis for irreparable injury because the “rock cairn and trail intersection
7 that is referred to in Mr. Holm’s declaration is approximately 700 feet north of the El
8 Centro Project Area.” (Third Enriquez Decl. ¶ 81.) To explain why this discovery was
9 made, the Government adds that “Kumeyaay representatives were permitted to explore
10 areas outside the El Centro Project Area, which is where Mr. Holm claims to have seen the
11 trail intersection and rock cairn.” (Third Enriquez Decl. ¶ 81.) As such, these circular rock
12 formations will not be impacted by construction as they lay outside the El Centro A Project
13 Area. (*See id.* ¶¶ 81–84.)

14 Additionally, La Posta highlights another rock alignment near the Skull Valley
15 access road. (*See* Second Holm Decl. ¶ 6.) However, the road alignment for the Skull
16 Valley access road was specifically shifted west to avoid the rock alignment identified by
17 CBP during pre-construction surveys, thereby abating any irreparable injury that might
18 occur to the Tribe in this area. (*See* Third Enriquez Decl. ¶ 83.) Therefore, these discoveries
19 related to rock circle alignments may not serve as a basis for immediate injunctive relief as
20 they are either factually disputed or fall outside of the area of construction.

21 **2. Fire Features and Bone Fragments**

22 Second, to further establish irreparable damage, the Tribe asserts that “18 separate
23 fire features” and two bone fragments were found by a tribal cultural monitor near the El
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27 to issue a temporary restraining order or preliminary injunction. *See Houdini Inc. v. Goody Baskets LLC*,
28 166 F. App’x 946, 947 (9th Cir. 2006) (“[T]he district court did not abuse its discretion in considering
hearsay and biased evidence of actual confusion because the rules of evidence do not strictly apply to
preliminary injunction proceedings.”).

1 Centro Project Area. (Doc. No. 40-1 at 20; Second Holm Decl. ¶¶ 8–9.) In opposition,
2 Defendants argue that the number of features inside the Project Area are overstated.
3 Instead, only three cultural fire features were discovered within the El Centro Project Area
4 during the week of November 16, 2020. (See Third Enriquez Decl. ¶¶ 60–65.) The other
5 fifteen fire features were found outside the Project Area. (*Id.*)

6 As to these three fire features, extensive mitigation efforts implemented by
7 Defendants alleviate any imminent threat of irreparable harm. Upon discovery of the fire
8 features, Defendants stated they “stopped construction in the area and immediately
9 instituted mitigation measures to avoid any damage to the items, arranged for Plaintiffs to
10 examine the features, and are working with Plaintiffs to implement a mutually-agreeable
11 treatment plan.” (See Third Enriquez Decl. ¶¶ 61–76.) In fact, after a tribal cultural monitor
12 discovered the items, “CBP immediately created a 100-meter buffer zone around all three
13 features and ceased all construction activity and vehicular traffic within that area.” (*Id.*
14 ¶ 65.) CBP then arranged for La Posta and other representatives from the Kumeyaay Tribes
15 to conduct a site inspection of the area on November 19, 2020. (*Id.* ¶ 66–76.) As further
16 evidence of the Government’s cooperation to prevent irreparable harm, CBP circulated a
17 “draft plan in early December that calls for capping—a means of protecting cultural
18 resources in place—the cremation site and performing additional testing on the other two
19 features.” (*Id.* ¶ 76.) Pending implementation of this plan, CBP and the Kumeyaay tribes
20 have agreed that “temporary concrete barriers would be placed around the features and no
21 construction traffic or activity would be allowed within that buffer zone.” (*Id.*)

22 As for the discovery of bone fragments near this site, even if mitigation procedures
23 were not in place to prevent irreparable damage, factual disputes hinder La Posta’s ability
24 to obtain immediate injunctive relief. In particular, La Posta’s medical examiner stated the
25 bone fragments are likely human bones, (Doc. No. 40-1 at 20), whereas CBP’s archeologist
26 concluded that the bones are more likely to belong to an animal, (Doc. No. 48 at 12).
27 Defendants also point out that determining whether the fragments are human, or animal
28 would require laboratory testing, which would likely destroy the fragments given their

1 small size. (*Id.*) Thus, with these factual disputes and mitigation procedures, La Posta has
2 fallen short of their burden of establishing irreparable harm based on these fire features and
3 bone fragments.

4 **3. Interference with Stargazing**

5 La Posta next cites to interference with stargazing as another source of irreparable
6 harm. (Doc. No. 40-1 at 7.) La Posta explains tribal citizens practice stargazing throughout
7 the Project Area, and so, installation of lighting on the border wall will cause light
8 pollution, obscuring the tribal citizens' view of the night sky. (*Id.*) As with the fire features
9 discussed above, the Government has indicated it can take “steps to minimize light spillage,
10 including through the installation of light shields that allow the light to spill downward, not
11 upwards or horizontally.” (*See* Third Enriquez Decl. ¶ 93.) With these mitigation measures,
12 the Court cannot deem that the installation of lighting would cause irreparable harm
13 sufficient for a TRO.

14 **4. Inability to Survey Project Area**

15 Lastly, La Posta appears to also characterize their irreparable harm as the inability
16 to adequately survey the Project Area. But the mitigation efforts undertaken by the
17 Government to date undermines this claim. Indeed, La Posta does not dispute that five
18 tribal cultural monitors have been permitted on-site to observe construction activities in the
19 Project Area, “in addition to the monitors CBP itself is providing.” (*See* Third Enriquez
20 Decl. ¶ 37.) CBP also has notified the Tribe that they are permitted to provide additional
21 tribal cultural monitors at their own expense, but there is no evidence that La Posta has
22 elected to do so. (Doc. No. 48 at 14). “To be sure, the Kumeyaay are under no legal
23 obligation to provide monitors. Their decision not to do so, however, weakens their claim
24 that they cannot oversee construction activities to mitigate potential damage.” *Manzanita*
25 *Band of Kumeyaay Nation v. Wolf*, No. 1:20-CV-02712 (TNM), 2020 WL 6118182, at *8
26 (D.D.C. Oct. 16, 2020).

27 In addition, CBP has reviewed prior survey data, conducted record searches of the
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1 Project Area, and performed new surveys of the Project Areas specifically identified by La
2 Posta as having a high likelihood of containing cultural artifacts. (See Third Enriquez Decl.
3 ¶¶ 34, 40–43.) The record here also establishes that Defendants have immediately notified
4 La Posta about newly discovered items, stopped construction upon detection of such items,
5 implemented measures to create a buffer zone around the areas, and agreed to La Posta’s
6 recommended protection measures.

7 Whether these measures are in fact sufficient is not the question before the Court
8 today. For today, the extensive mitigation efforts and protocols in place substantially
9 undercut La Posta’s ability to establish both irreparable and imminent harm. See *Lyng v.*
10 *Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454 (1988) (“It is worth emphasizing
11 . . . that the Government has taken numerous steps in this very case to minimize the impact
12 that construction of the [] road will have on the Indians’ religious activities.”); see *Quechan*
13 *Tribe of the Ft. Yuma Indian Reservation v. U.S. Dep’t of the Interior*, No. 12-CV-1167-
14 WQH-MDD, 2012 WL 1857853, at *7 (S.D. Cal. May 22, 2012) (finding no likelihood of
15 irreparable harm related to discovery of cultural and burial items where plaintiff failed to
16 show that mitigation procedures were “not adequate to guard against irreparable injury to
17 items discovered on public land”); *Manzanita Band of Kumeyaay Nation*, 2020 WL
18 6118182, at *5 (“For now, the mitigation efforts in place undermine the Kumeyaay’s
19 burden to establish both irreparable and imminent harm, especially given their own
20 evidentiary shortcomings.”).

21 VI. CONCLUSION

22 Against the backdrop of this evidence and Defendants’ mitigation procedures, the
23 Tribe has not met their burden of establishing irreparable injury in the absence of an
24 immediate injunction. Unable to meet this requirement, the Court need not address the

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1 other three factors for a TRO. Based on all the reasons stated above, the Court (1)
2 **GRANTS** La Posta’s motions to seal, (Doc. Nos. 41, 49); (2) **DENIES** Defendants’ *ex*
3 *parte* motion for leave to file a sur-reply, (Doc. No.57); and (3) **DENIES** La Posta’s second
4 motion for TRO, (Doc. No. 40).

5
6 **IT IS SO ORDERED.**

7 Dated: December 16, 2020

8 
9 Hon. Anthony J. Battaglia
United States District Judge

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