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14 **UNITED STATES DISTRICT COURT**
 15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 LA POSTA BAND OF DIEGUENO
 MISSION INDIANS OF THE
 17 LA POSTA RESERVATION, ON
 18 BEHALF OF ITSELF AND ON
 19 BEHALF OF ITS MEMBERS AS
PARENS PATRIAE

20 Plaintiffs,
 21

22 v.

23 DONALD J. TRUMP, *et al.*,
 24 Defendants.
 25

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

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' EX PARTE MOTION FOR
 RECONSIDERATION OF TEMPORARY
 RESTRAINING ORDER**

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INTRODUCTION

1 The Court’s Order denying Plaintiffs’ second motion for a temporary restraining order
2 correctly concluded that Plaintiffs had not carried their burden of establishing an irreparable
3 injury in the absence of an emergency injunction. *See* Order Denying Plaintiffs’ Second
4 Motion for Temporary Restraining Order at 8–14 (ECF No. 60) (Second TRO Order).
5 Plaintiffs’ motion for reconsideration asks the Court to disturb that decision based on
6 purported newly discovered evidence that is simply more of the same speculative and
7 disputed allegations that the Court previously rejected on two occasions. Further, Plaintiffs’
8 motion does nothing to undermine the effective mitigation measures that Defendants have
9 put in place to prevent harm if cultural resources are found. For these reasons, as set forth
10 below, Plaintiffs’ motion for reconsideration should be denied.

LEGAL STANDARD

11 “Reconsideration is appropriate if the district court (1) is presented with newly
12 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
13 or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah Cty.,*
14 *Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). “A motion for reconsideration cannot
15 be used to ask a court to rethink what the court has already thought through merely because
16 a party disagrees with the Court’s decision.” *In re: Incretin Mimetics Prod. Liab. Litig.*, No. 13-
17 MD-2452-AJB (MDD), 2014 WL 12539702, at *1 (S.D. Cal. Dec. 9, 2014). Additionally, “a
18 court should generally leave a previous decision undisturbed absent a showing that it either
19 represented clear error or would work a manifest injustice.” *Id.* (quoting *Labastida v. McNeil*
20 *Technologies, Inc.*, No. 10-CV-1690, 2011 WL 767169, at *1 (S.D. Cal. Feb. 25, 2011)). That
21 principle of finality applies with particular force in this case, where the parties have engaged
22 in multiple rounds of briefing over the same issues related to the construction of border
23 barriers in both this Court and the Ninth Circuit. Reconsideration by itself is an
24 “extraordinary remedy, to be used sparingly[.]” *Stafford v. Rite Aid Corp.*, No. 17-CV-01340-
25 AJB-JLB, 2020 WL 6018941, at *2 (S.D. Cal. Sept. 29, 2020), and Plaintiffs have an even
26 higher burden in this context where they seek reconsideration of a decision not to grant the
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1 “extraordinary and drastic” remedy of emergency injunctive relief. *Munaf v. Geren*, 553 U.S.
2 674, 689 (2008); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

3 ARGUMENT

4 Plaintiffs cannot satisfy the demanding standard required for reconsideration because
5 their new allegations of harm once again fall short of establishing an irreparable injury, let
6 alone that the Court’s decision to deny a temporary restraining order was clearly erroneous
7 or manifestly unjust.

8 **A. The Factual Dispute About Whether Two Bone Fragments Are Of Human** 9 **Origin Warrants Denial of Plaintiffs’ Motion.**

10 Plaintiffs contend that Defendants have recently conceded that two tiny bone
11 fragments—each less than 6mm in diameter—found in the El Centro A project area are of
12 human origin. *See* Pls.’ Mot. at 1. The record refutes that assertion. *See* Fourth Declaration
13 of Paul Enriquez ¶¶ 7–17 (filed under seal herewith). In fact, Defendants agreed to treat the
14 bone fragments *as if they were human*, notwithstanding the factual dispute about whether the
15 bones are from a human or an animal. *See id.* ¶¶ 8–13. As explained previously, the parties’
16 respective experts disagree over the origin of the bones and it is impossible to determine
17 whether the fragments are human or animal absent laboratory testing, which would likely
18 destroy the fragments given their small size. *See* Third Declaration of Paul Enriquez ¶¶ 68,
19 73–76 (ECF No. 48-2); Second TRO Order at 12–13. In recognition of that uncertainty and
20 out of respect for the Kumeyaay Tribes, Defendants agreed to treat the indeterminate
21 fragments as if they were human and the site in which they were found as a cremation site.
22 *See* Third Enriquez Decl. ¶ 76; Fourth Enriquez Decl. ¶¶ 11–12. Thereafter, Defendants
23 worked with the Tribes to develop appropriate protection measures in accordance with the
24 Cultural Resources Protocol and Communications Plan (Protocol Plan). *See id.* The Court
25 evaluated this evidence in denying Plaintiffs’ second motion for a temporary restraining order
26 and concluded that Plaintiffs could not meet their burden of establishing irreparable harm in
27 light of these factual disputes and mitigation procedures. *See* Second TRO Order at 12–13.

28 Since the Court issued its Order, Defendants agreed to the Tribes’ request to repatriate

1 the bone fragments and completed that process by providing them to a designated Tribal
2 representative. *See* Fourth Enriquez Decl. ¶¶ 14–17. Plaintiffs’ motion raises no objection
3 to the treatment of the fragments or the manner in which they were returned. Instead,
4 Plaintiffs’ purported new evidence to support reconsideration is a single reference in an email
5 from Mr. Enriquez to various Tribal representatives discussing logistics for repatriation of
6 the fragments in which Mr. Enriquez refers to “human remains.” *See* Declaration of Simon
7 Gertler, Ex. A at 4. But that reference is simply a respectful acknowledgement of what Mr.
8 Enriquez said in his prior declaration, namely, that Defendants would treat the fragments as
9 if they were human and derived from a Kumeyaay cremation site. *See* Third Enriquez Decl.
10 ¶ 76; Fourth Enriquez Decl. ¶¶ 11–12. Referring to the bones as human out of respect for
11 the Tribes was not a concession by Defendants that bone fragments are, in fact, human.
12 Fourth Enriquez Decl. ¶ 12.

13 In any event, any conceivable doubt about the status of the fragments is resolved by
14 the acknowledgment form signed by both the Kumeyaay Tribal representative and Mr.
15 Enriquez formally transferring custody of the fragments. *See* Fourth Enriquez Decl. ¶ 17 &
16 Ex. C. The acknowledgement form, which was executed after Mr. Enriquez sent his email,
17 expressly states: “Out of respect for the Kumeyaay Tribes, CBP has agreed to treat *the*
18 *indeterminate calcined bone* as human and Feature 3 as a cremation site.” *Id.*, Ex. 3 at ¶ 4
19 (emphasis added); *see also id.* ¶ 10 (referencing the transfer of “two pieces of indeterminate
20 calcined bone”). The form was signed by the designated representative of the Kumeyaay
21 Cultural Repatriation Committee, a tribal consortium that includes La Posta and is charged
22 with protecting Kumeyaay cultural items. *Id.* ¶ 15; *see White v. Univ. of California*, 765 F.3d
23 1010, 1018, 1025 (9th Cir. 2014) (holding that the Kumeyaay Cultural Repatriation
24 Committee, of which La Posta is a member, is an “arm of the tribe” for purposes of tribal
25 sovereign immunity). Far from warranting reconsideration, this document reinforces the
26 Court’s conclusion that factual disputes about the origin of the fragments prevent Plaintiffs
27 from obtaining immediate injunctive relief. *See* Second TRO Order at 12–13.

28 There also is no basis for Plaintiffs’ assertion that the Court should “reconsider

1 overriding the formal conclusion of the Medical Examiner/Coroner’s office in favor of
2 Defendant’s archaeologist.” *See* Pls.’ Mot. at 1. The Court made no such comparative factual
3 finding in favor of Defendants’ position that the bone fragments are more likely from an
4 animal than a human. Instead, the Court merely acknowledged a factual dispute between the
5 parties about the origin of the bones and, in accordance with well-established legal principles,
6 concluded that those disputed facts prevented Plaintiffs from establishing the clear showing
7 required for a temporary restraining order. Second TRO Order at 12–13; *see Lopez v. Brewer*,
8 680 F.3d 1068, 1072 (9th Cir. 2012). That conclusion was correct.

9 Plaintiffs also seek to clarify that Dr. Madeline Hinkes is not “La Posta’s medical
10 examiner” because she is employed by the San Diego County Medical Examiner’s Office, *see*
11 Pls.’ Mot. at 1, but Plaintiffs proffered Dr. Hinkes as an expert in support of their position in
12 this litigation and nothing about her employment status, which was previously before the
13 Court, warrants reconsideration of the Court’s Order. The fact remains that there is a dispute
14 about the origin of the bones between experts in relevant fields. The archeologist contracted
15 by the U.S. Customs and Border Protection (CBP) has concluded that the bones are more
16 likely from an animal. *See* Declaration of Nick Billstrand ¶ 4. Even accepting Dr. Hinkes’s
17 disagreement with that assessment, the net result is a clash of expert opinions that undercuts
18 Plaintiffs’ ability to establish a clear entitlement to a temporary restraining order and the
19 extraordinary remedy of reconsideration.

20 **B. Defendants Have Implemented Effective Measures To Mitigate Potential** 21 **Harm to Cultural Items.**

22 Plaintiffs cannot establish irreparable injury from the recent discovery of a fire feature
23 near the other similar features that the Court previously addressed in the Second TRO Order.
24 *See* Pls.’ Mot. at 2; Second TRO Order at 11–12. As explained in Defendants prior filings,
25 CBP has in place—and follows—highly effective avoidance and mitigation measures to
26 prevent harm from occurring to cultural resources in the project areas. *See* Defs.’ Opp’n to
27 Pls.’ Second Mot. for TRO and PI at 6–10 (ECF No. 47). The Court has further correctly
28 recognized that “the extensive mitigation efforts and protocols in place substantially undercut

1 La Posta’s ability to establish both irreparable and imminent harm.” Second TRO Order at
2 14. CBP applied to the recently-discovered fire feature the same mitigation procedures and
3 protocols that the Court credited in denying Plaintiffs’ second TRO motion. *See* Fourth
4 Enriquez Decl. ¶¶ 18–27 (feature was immediately protected within a buffer zone, and
5 mitigation work overseen by tribal cultural monitors). Accordingly, the Court’s conclusion
6 should stand; these measures thoroughly undermine Plaintiffs’ ability to establish both
7 irreparable and imminent harm necessary for a temporary restraining order. *See* Second TRO
8 Order at 12 (“As to these three fire features, extensive mitigation efforts implemented by
9 Defendants’ alleviate any immediate threat of irreparable harm”).

10 Specifically, on December 17, 2020, a tribal cultural monitor discovered a feature
11 consisting of fire affected rock, darker ash, and sediments. *See* Fourth Enriquez Decl. ¶¶ 20–
12 21. The feature is located 55 feet away from the buffer zone that was previously created to
13 protect the three nearby features discussed in the Second TRO Order. *See id.* ¶ 21; Second
14 TRO Order at 11–12. Notably, no artifacts or remains have been found within or near the
15 new feature. *See* Fourth Enriquez Decl. ¶ 21. Consequently, the feature is mostly likely a
16 small fire pit or roasting feature, not a cremation site. *See id.*

17 After the tribal cultural monitor discovered the feature, CBP notified the Tribes of the
18 discovery that same day and explained the mitigation measures that would be implemented
19 to protect it from harm. *See id.* ¶ 20; Gertler Decl., Ex. A. Specifically, CBP extended the
20 size of the buffer zone that had already been established to protect the other features to
21 ensure protection of the additional feature. *See* Fourth Enriquez Decl. ¶ 21. Consistent with
22 past practice, tribal cultural monitors were present to supervise the placement of the
23 temporary concrete barriers that were put in place to protect the feature. *Id.* Additionally,
24 CBP reassigned an additional environmental monitor to the El Centro A project area to
25 protect the features. *Id.*

26 CBP has proposed that the latest fire feature be treated the same way as the other
27 nearby fire features. *Id.* CBP has been engaged in ongoing consultation with the Tribes,
28 including Plaintiffs, about an appropriate treatment plan for the features. *Id.* On December

1 2, 2020, CBP distributed a draft treatment plan to the Tribes for comment and, after receiving
2 written and oral feedback, CBP distributed a revised treatment plan on December 17. *See id.*;
3 Gertler Decl., Ex. B. The revised treatment plan proposes a surface investigation of the area
4 in order to record, map, and photograph any additional surface features; excavation of the
5 features to determine if any artifacts or intact cultural deposits are present and to radiocarbon
6 date the materials; and investigation to determine evidence of food preparation and
7 processing as well as native plants and animals. *See* Fourth Enriquez Decl. ¶ 21. Although
8 consultation remains ongoing, Plaintiffs have thus far offered input only on specific aspects
9 of the proposed treatment of the features and have not objected to the fundamentals of the
10 proposed treatment. *Id.*

11 Indeed, CBP has gone beyond the requirements of the Protocol Plan to protect the
12 fire features from harm. *See* Fourth Enriquez Decl. ¶¶ 24–25. Although the Protocol Plan
13 requires work to be stopped within 100 feet of a cultural resource, CBP established a 100
14 meter buffer zone around the features and all construction activity and vehicle traffic within
15 that area was immediately halted. *Id.* ¶ 25. Plaintiffs suggest that a “100-meter buffer” is
16 required at all times, *see* Pls.’ Mot. at 4, but the Protocol Plan does not support that
17 requirement. *See* Fourth Enriquez Decl. ¶ 24. To the contrary, the Protocol Plan expressly
18 contemplates that the Tribes and CBP will consult about appropriate mitigation measures
19 shortly after work within 100 feet of the discovery is stopped. *Id.* As explained previously,
20 that process was followed here, as CBP arranged for multiple site inspections of the area by
21 Tribal representatives that culminated in an agreement to reduce the size of the 100-meter
22 buffer zone to allow for construction traffic along the southern portion of the Roosevelt
23 Reservation and to install concrete barriers around the features. *See* Fourth Enriquez Decl.
24 ¶ 25. No construction traffic or construction activity is permitted in the buffer area, which
25 now also protects the recently-discovered feature. *Id.* ¶¶ 25–26.

26 In light of the robust protections in place to prevent harm to cultural items, Plaintiffs
27 cannot establish a likelihood of irreparable harm. *See* Second TRO Order at 12. This Court
28 has ably sifted through the record in this case on two prior occasions, distinguished

1 unfounded allegations of harm from statements with actual evidentiary support, and twice
2 held that Plaintiffs have failed to show irreparable harm. Reconsideration is simply not
3 warranted. The evidence amply supports that CBP has surveyed and re-surveyed the project
4 areas; that tribal cultural monitors and CBP's own environmental monitors are actively
5 observing construction; and that CBP has procedures in place to avoid and protect cultural
6 resources if they are found in the project areas. *See generally* First, Second, and Fourth
7 Enriquez Decls. The record here establishes that these procedures are in fact followed when
8 a discovery is made to avoid harmful impacts to cultural resources, and that they are effective.
9 *See* Fourth Enriquez Decl. ¶ 29. Consequently, there is no evidence that irreparable harm is
10 certain to occur in the near future, such that the extraordinary remedy of a temporary
11 restraining order should issue based on the insufficient evidence Plaintiffs have offered in
12 their reconsideration motion.

13 **CONCLUSION**

14 For these reasons, the Court should deny Plaintiffs' ex parte motion for
15 reconsideration of a temporary restraining order.

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17 Dated: December 30, 2020

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