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10
11 **UNITED STATES DISTRICT COURT**
12
13 **SOUTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

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

Defendants.

Case No.: '20CV1552 AJB MSB

**COMPLAINT FOR INJUNCTIVE
RELIEF**

I. INTRODUCTION

1
2 1. Since time immemorial, the Kumeyaay people have lived in the area near
3 San Diego and Imperial Counties surrounding what is now the United States-Mexico
4 border. Since the arrival of Europeans in the region, the Kumeyaay territory, culture,
5 religion, and very existence have been under attack to make way for non-Indian
6 settlement. In the most recent episode of Indigenous erasure, the President of the
7 United States and his administration are desecrating Kumeyaay ancestral burial and
8 sacred sites to make way for a wall along the United States’ southern border. The La
9 Posta Band of the Diegueño Mission Indians (“La Posta”), in its own capacity and
10 as *parens patriae* on behalf of its citizens, bring this complaint to halt the construction
11 of the border wall—a project being funded and constructed without authorization
12 from Congress and which is violating the constitutional rights of the La Posta
13 citizens—until the Defendants can guarantee adequate consultation and protection
14 of La Posta religious practices and cultural heritage.

II. JURISDICTION AND VENUE

15
16 2. This case arises under the Administrative Procedures Act, 5 U.S.C. §§ 701-
17 706 (“APA”), Article I (Appropriations and Presentment Clauses) and the First (Free
18 Exercise Clause) and Fifth (Due Process Clause) Amendments of the U.S.
19 Constitution, the Consolidated Appropriations Act of 2020, Pub. Law No. 116-93, 8
20 U.S.C. § 1103 (“CAA”), and other acts of Congress.

21 3. This court has subject matter jurisdiction under 28 U.S.C. § 1362 (district
22 courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe
23 or band with a governing body duly recognized by the Secretary of the Interior,
24 wherein the matter in controversy arises under the Constitution, laws, or treaties of
25 the United States”); § 1331 (general federal question jurisdiction); § 1346(a)(2)
26 (civil action against the United States); and § 2202 (injunctive relief).

1 4. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because it is
2 the district in which “a substantial part of the events or omissions giving rise to the
3 claim occurred,” the property that is the subject of the action is situated here, and La
4 Posta resides here.

5 **III. PARTIES**

6 5. La Posta is a federally recognized Indian tribe. 84 FR 1200, 1202. La Posta
7 brings this action on behalf of itself, as a sovereign tribal nation, and on behalf of
8 its members.

9 6. Defendant DONALD J. TRUMP is the President of the United States and
10 is sued in his official capacity.

11 7. Defendant MARK T. ESPER, Secretary of Defense, is sued in his official
12 capacity. Secretary Esper’s role is to ensure that Department of Defense actions are
13 in compliance with applicable laws. Secretary Esper is responsible for carrying out
14 the diversion of military construction funds for the construction of the border wall
15 under President Trump’s national emergency declaration.

16 8. Defendant CHAD F. WOLF, Acting Secretary of Homeland Security is
17 sued in his official capacity. Acting Secretary Wolf’s role is to ensure that
18 Department of Homeland Security actions are in compliance with applicable laws.
19 Acting Secretary Wolf is responsible for carrying out the construction of the border
20 wall and otherwise implementing President Trump’s national emergency
21 declaration.

22 9. Defendant LIEUTENANT GENERAL TODD T. SEMONITE,
23 Commanding General of the Army Corps of Engineers is sued in his official capacity.
24 Lieutenant General Semonite is responsible for carrying out the construction of the
25 border wall and otherwise implementing President Trump’s declaration of a national
26 emergency.

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1 **IV. FACTUAL ALLEGATIONS**

2 **A. La Posta and the Land**

3 10. La Posta is one of twelve bands of Kumeyaay people. The La Posta
4 Reservation spans 3,556.49 acres and is located in the Laguna Mountains, 56 miles
5 east of San Diego and 46 miles west of El Centro. Kumeyaay people lived
6 throughout the border area in San Diego and Imperial Counties for over 12,000 years.
7 Many of these village sites are sacred to La Posta citizens and contain human burial
8 grounds and other important cultural and archaeological artifacts.

9 11. Historically, the Kumeyaay moved through their ancestral territory via a
10 system of trails, many of which are still known and used by the Kumeyaay today.
11 While most of these trails served commercial and social purposes, some trails have
12 religious significance. Many of these trails run in proximity to and across the
13 United States-Mexico border in San Diego and Imperial Counties.

14 12. The La Posta tribal citizens practice a religion that is based on oral tradition.
15 The Kumeyaay creation story tells of the creation of the universe, similar to Genesis.
16 The creation story features many landmarks within the traditional Kumeyaay
17 territory that La Posta citizens hold sacred today, such as Tecate Peak, Jacumba Hot
18 Springs, and Table Mountain, among others. La Posta citizens hold ceremonies and
19 gatherings at these places, and without access to them, the Kumeyaay people are
20 not able to practice their religion.

21 13. The Kumeyaay creation story also provides very specific instructions
22 regarding burial practices. The handling and treatment of Kumeyaay remains is a
23 key component of Kumeyaay religion which, like other organized religions, places
24 great emphasis on burial rites. For example, Kumeyaay burial practices call for
25 certain songs to be sung for the dead. Similar to mainstream religious dogma, an
26 important Kumeyaay burial rule requires all parts of one's body to remain together
27 after death. Kumeyaay religious rites require the proper treatment of Kumeyaay

1 ancestors in the event of exhumation. Such treatment requires a properly trained
2 and certified Kumeyaay person, and the human remains must be treated with respect,
3 including the practice of smudging and singing to ensure proper reburial.

4 14. In addition to a complex oral tradition, Kumeyaay values and heritage are
5 transmitted through participation in traditional cultural and religious ceremonies.
6 Kumeyaay people typically begin learning about these ceremonies and traditions at
7 a young age. Because of the close connection between traditional Kumeyaay
8 cultural and religious practices and the land itself, sacred sites and trails play an
9 essential role. When contemporary Kumeyaay people hold ceremonies and
10 gatherings at traditional sacred places, they typically do not remove cultural items
11 or remains from these sites when they visit, though they are aware of their presence.

12 15. If these sacred places are allowed to be desecrated, Kumeyaay children will
13 never be able to learn about these places, and thus would be deprived the
14 opportunity to fully understand their cultural and religious heritage.

15 16. Defendants are currently constructing the border wall directly through
16 Kumeyaay burial sites and sacred lands, causing irreversible and easily avoidable
17 damage to Kumeyaay remains, cultural items, history, and religious practices. For
18 example, Jacumba, known to contain an ancient tribal cemetery, and Tecate, a
19 historical Kumeyaay village site, are located within the path of the border wall
20 project. Prior cultural resources surveys and Kumeyaay historians have noted the
21 existence of human remains, burial sites, and Kumeyaay archaeological sites within
22 the path of construction.

23 **B. Unlawful Border Wall Funding and Construction**

24 17. A refrain of President Trump's 2016 election campaign was his promise to
25 build a U.S.-Mexico border wall. Since taking office in 2017, the President
26 repeatedly sought appropriations from Congress for border barrier construction, yet
27 Congress repeatedly denied his requests.

1 18. In Fiscal Year (“FY”) 2019, the President again requested billions in border
2 wall funding, which Congress refused to appropriate. The impasse triggered the
3 nation’s longest partial government shutdown, and ultimately, Congress
4 appropriated only \$1.375 billion of the President’s request for \$5.7 billion for border
5 wall funding. To ensure funding for the wall, the Defendants reprogrammed \$1.5
6 billion of Department of Defense (“DoD”) funds toward border wall construction.
7 The Ninth Circuit held that such reprogramming was unlawful and affirmed an
8 injunction preventing the Defendants from using the funds for border wall
9 construction. *Sierra Club v. Trump*, 929 F.3d 670, 678 (9th Cir. 2019).

10 19. Similar to FY 2019, the FY 2020 budget negotiations were contentious
11 regarding the border wall. President Trump requested \$5 billion, and DoD requested
12 \$9.2 billion, for construction of the border wall. Congress rejected both the
13 President’s and DoD’s FY 2020 budget requests and allocated only \$1.375 billion
14 for border wall construction. Congress further prohibited the use of any appropriated
15 funds to “increase...funding for a program, project, or activity as proposed in the
16 President’s budget request for a fiscal year until such proposed change is
17 subsequently enacted in an appropriation Act...” CAA Div. C § 739.

18 20. Unhappy with the result, Defendants replicated the FY 2019 conduct that
19 the Ninth Circuit found to be illegal. First, after Congress denied Defendants’ request
20 for funding for hundreds of miles in wall construction, the Department of Homeland
21 Security (“DHS”) initiated a request to DoD for funds for wall construction across
22 “approximately 271 miles.” On February 13, 2020, Secretary of Defense Esper
23 announced that DoD would transfer and spend \$3.831 billion in funds Congress had
24 appropriated for other purposes on border wall construction pursuant to §§ 8005 and
25 9002 of the CAA. This funding was intended for other purposes but transferred into
26 DoD’s Drug Interdiction and Counter-Narcotics Activities (“Drug Interdiction”)
27

1 fund to assist DHS with border wall construction pursuant to 10 U.S.C. § 284 and
2 then subsequently transferred for use by the Army Corps to construct the border wall.

3 21. These unlawfully reprogrammed funds are funding the construction of
4 approximately fourteen miles of a replacement border wall and seven miles of new
5 border wall (the “Project”) in San Diego and Imperial Counties (the “Project Area”).

6 22. Acting Secretary of Homeland Security Wolf invoked section 102 of the
7 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended,
8 codified at 8 U.S.C. § 1103 note, (“IIRIRA”) as authority for construction of the
9 Project. 85 FR 14958-60 (“IIRIRA Waiver”). To avoid having to account for the
10 significant cultural, historical, religious, and environmental impacts of his rash
11 actions, Acting Secretary Wolf waived multiple federal laws designed to protect
12 historical, religious, and cultural resources, the environment, and the rights of Indian
13 tribes and their members.

14 23. A recent audit from the Office of the Inspector General (“OIG”), however,
15 concluded that CBP has not adequately justified the need for a physical barrier in the
16 Project Area. OIG Report 20-52.¹ In fact, the audit concludes “the likelihood that
17 CBP will be able to obtain and maintain complete operational control of the southern
18 border with mission effective, appropriate, and affordable solutions is diminished.”
19 *Id.* at 6-7. In particular, the audit found CPB did not adequately justify its decisions
20 to prioritize “certain southern border locations over others for wall construction”—
21 citing the Project as an example of particularly arbitrary decision making. *Id.* at 9.
22 The CBP ignored the results of its own algorithm to expedite Project construction
23 and could offer no rationale when asked by OIG.

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27 ¹ Available at <https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-52-Jul20.pdf>.

1 **C. Defendants’ Failure to Provide Notice to or Consult with La Posta**

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

14 25. La Posta has requested formal consultation with CBP on numerous
15 occasions both orally and in writing. Additionally, both CBP and Army Corps
16 representatives were informed about the presence of Kumeyaay human remains and
17 burials in the line of construction. CBP has failed to stop construction to investigate
18 any of the human remains, despite pleas from La Posta. Due to this lack of
19 consultation, La Posta has been unable to secure the location of its relatives’ burial
20 grounds.

21 **V. INJUNCTIVE RELIEF**

22 26. La Posta will suffer irreparable injury if Defendants continue construction
23 on the Project and La Posta has no adequate remedy at law.

24 **VI. CAUSES OF ACTION**

25 **FIRST CAUSE OF ACTION**

26 **(Ultra Vires) (The CAA does not authorize Defendants’ transfer of funds to**
27 **the to the Drug Interdiction account)**

1 27. All the foregoing allegations are repeated and realleged as if fully set forth
2 herein.

3 28. CAA § 8005 authorizes the Secretary of Defense to transfer funds “between
4 such appropriations or funds or any subdivision thereof, to be merged with and to be
5 available for the same purposes, and for the same time period, as the appropriation
6 or fund to which transferred.”

7 29. Subject to the same terms and conditions as § 8005, CAA § 9002 authorizes
8 the Secretary to transfer additional funds only with the approval of the Office of
9 Management and Budget.

10 30. CAA § 8005 contains restrictions on the transfer of funds including that the
11 use must be “for higher priority items, based on unforeseen military requirements,
12 than those for which originally appropriated and in no case where the item for which
13 funds are requested has been denied by the Congress.”

14 31. Finally, CAA § 739 contains the following overarching prohibition on use
15 of funds under the Act:

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

22 32. The requirement to build the Project was neither unforeseen nor a military
23 requirement; and the funds were included in the President’s proposed budget but
24 denied by Congress.

25 33. Defendants have thus acted ultra vires by reprogramming funds to the
26 Drug Interdiction account.
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1 **SECOND CAUSE OF ACTION**

2 **(Ultra Vires) (CAA does not authorize Defendants’ use of the \$1.375 billion**
3 **for the Project)**

4 34. All the foregoing allegations are repeated and realleged as if fully set forth
5 herein.

6 35. Defendants failed to meet the terms and conditions required to perfect
7 Congress’ appropriation of \$1.375 billion for a border barrier system.

8 36. CAA Div. D § 210 prevents the use of funds “for the construction of
9 fencing ... within historic cemeteries.”

10 37. Construction has already uncovered historic tribal burials in the Project
11 Area and threatens to excavate a tribal historic cemetery in Jacumba.

12 38. By using the funding to build a wall directly through La Posta’s ancestral,
13 historic burial grounds, Defendants violate the CAA and thus lack authority to use
14 those funds.

15 **THIRD CAUSE OF ACTION**

16 **(Ultra Vires) (CAA funds; Failure to consult with La Posta)**

17 39. All the foregoing allegations are repeated and realleged as if fully set forth
18 herein.

19 40. CAA Div. D § 8129 prevents Defendants from using CAA funds “in
20 contravention of ... Executive Order No. 13175.”

21 41. Executive Order 13175 requires both meaningful consultation and input
22 from Indian tribes when federal agencies implement “policies that have tribal
23 implications.” 65 Fed. Reg. 67249. Agencies are required to engage in
24 consultation prior to implementing such policies and to look to “alternatives that
25 would limit the scope of Federal standards or otherwise preserve the prerogatives
26 and authority of Indian tribes.” *Id.* At 67250. .

27 42. Defendants failed to formally consult with La Posta regarding the Project.
Defendants have shared limited Project details with La Posta. CBP engaged with

1 tribal representatives via a phone call in early June, a webinar on July 8, and a field
2 visit on July 10. However, to date, CBP has not provided sufficient information
3 about the construction plans and schedule to permit La Posta to evaluate the Projects’
4 impacts on religious and cultural resources, nor has CBP provided a comprehensive
5 evaluation of such impacts.

6 43. Because the Defendants have not adequately consulted with La Posta, their
7 use of reprogrammed funds for the border wall is “in contravention of” Executive
8 Order 13175 and ultra vires.

9 **FOURTH CAUSE OF ACTION**

10 **(Ultra Vires) (Defendants’ construction of the Project pursuant to IIRIRA
11 Section 102 is ultra vires because they failed to consult with La Posta)**

12 44. All the foregoing allegations are repeated and realleged as if fully set forth
13 herein.

14 45. Defendants invoked section 102 of IIRIRA as authority for construction of
15 the Project. However, the Defendants violated the prerequisite conditions for
16 exercise of the authority under the statute.

17 46. IIRIRA Section 102(b)(1)(C) requires the Secretary of Homeland Security
18 to consult with Indian tribes “to minimize the impact on the environment, culture,
19 commerce, and quality of life for the communities and residents located near the
20 sites at which such fencing is to be constructed.”

21 47. Defendants have not consulted with La Posta prior to construction to
22 minimize the impact on the environment, culture, commerce, and quality of life for
23 La Posta, which is located near the Project Area. Because the Secretary failed to
24 meet the prerequisite to exercise authority under Section 102(a) and (b), the
25 Defendants’ actions to construct the Project were, and are, ultra vires.

26 48. Defendants have not consulted with La Posta prior to construction to
27 minimize the impact on the environment, culture, commerce, and quality of life for

1 La Posta, which is located near the Project Area. Because the Secretary failed to
2 meet the prerequisite to exercise authority under Section 102(a) and (b), the
3 Defendants' actions to construct the Project were, and are, ultra vires.

4 **FIFTH CAUSE OF ACTION**
5 **(Appropriations Clause, Article I, Section 9, Clause 7 of the Constitution)**

6 49. All the foregoing allegations are repeated and realleged as if fully set forth
7 herein.

8 50. Article I, Section 9, Clause 7, known as the Appropriations Clause, states
9 that “[n]o Money shall be drawn from the Treasury, but in Consequence of
10 Appropriations made by Law.” Only Congress has the authority to appropriate
11 funds out of the Treasury.

12 51. Defendants transferred \$3.831 billion from various other accounts to the
13 Drug Interdiction account and used \$1.375 billion for border wall construction
14 without authorization. Such unauthorized withdrawals by the executive violate the
15 Appropriations Clause of the Constitution.

16 **SIXTH CAUSE OF ACTION**
17 **(Presentment Clause, Article I, Section 7, Clause 2)**

18 52. All of the foregoing allegations are repeated and realleged as if fully set
19 forth herein.

20 53. The Presentment Clause of the Constitution provides the President the
21 option to sign a bill or send it back to Congress with objections once it is received
22 for his signature.

23 54. When President Trump received the CAA, he chose to sign the act into
24 law, despite his previously voiced objections. He then attempted to circumvent the
25 act he had just signed by reprogramming funds for the construction of the border
26 wall.

1 55. This executive action violates the Presentment Clause as an attempt to
2 modify or repeal the CAA and bypass the restrictions Congress set in place therein.

3 **SEVENTH CAUSE OF ACTION**
4 **(Violations of the Administrative Procedures Act)**

5 56. All of the foregoing allegations are repeated and realleged as if fully set
6 forth herein.

7 57. Under the APA, a court may enjoin a final agency action that is “arbitrary,
8 capricious, an abuse of discretion, or otherwise not in accordance with law,” or “in
9 excess of statutory jurisdiction, authority, or limitations, or short of statutory
10 right.” 5 U.S.C. §§ 704, 706(2)(A), (C).5 U.S.C. § 706(2)(A), (C).

11 58. Defendants transferred \$3.831 billion from various other accounts to the
12 Drug Interdiction account and used \$1.375 billion for border wall construction in
13 violation of, and without authorization from, the CAA.

14 59. Defendants are constructing the Project in violation of IIRIRA Section
15 102(b)(1)(C) and in excess of the authority granted therein.

16 **EIGHTH CAUSE OF ACTION**
17 **(Violation of First Amendment of the U.S. Constitution)**

18 60. All of the foregoing allegations are repeated and realleged as if fully set
19 forth herein.

20 61. “Congress shall make no law respecting an establishment of religion, or
21 prohibiting the free exercise thereof...” U.S. Const. amend. I.

22 62. La Posta citizens hold sincere religious beliefs that exhumed burials must
23 be properly handled and reburied. They also hold sincere beliefs that various
24 natural landmarks within the path of the border wall projects are sacred places; and
25 engage in ceremonies and rituals there.

26 63. The Defendants are excavating and desecrating Kumeyaay burials without
27 allowing La Posta access to properly treat the exhumed remains. While the

1 Defendants are now allowing one cultural monitor from La Posta within the 21-mile
2 Project Area, such an arrangement does not permit sufficient coverage to monitor
3 every exhumation. Even when a cultural monitor does observe an exhumation, she
4 is not permitted access to properly treat the remains in a culturally appropriate
5 manner.

6 64. The border wall has made and will continue to make Kumeyaay sacred sites
7 that lie within and south of the Project Area inaccessible. La Posta citizens are not
8 and will not be able to access Table Mountain, Jacumba Hot Springs, and Tecate
9 Peak for religious ceremonies. These sites lie within the Project Area and the
10 Defendants' continued construction will prevent access to these sites by La Posta
11 citizens.

12 65. Defendants have threatened La Posta citizens with arrest and criminal
13 trespass charges while attempting to access sites to pray and engage in religious
14 ceremonies within the Project Area.

15 66. The Project prohibits members of La Posta from properly treating their
16 exhumed relatives and participating in religious ceremonies at their sacred sites.

17 67. The Defendants' offers of inadequate cultural monitoring also forces La
18 Posta and its members to choose between two untenable courses of action—either
19 (a) participating in such limited cultural monitoring as CBP may choose to offer
20 (while at the same time the ongoing construction is damaging and destroying La
21 Posta's religious and cultural resources), or (b) refusing to be an active participant
22 in a process that will damage and destroy La Posta's physical, spiritual, and cultural
23 footprint in the Project Area.

24 68. Defendants' actions prohibit La Posta citizens' free exercise of their religion.

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1 **NINTH CAUSE OF ACTION**

2 **(Religious Freedom Restoration Act of 1993)**

3 69. All of the foregoing allegations are repeated and realleged as if fully set
4 forth herein.

5 70. RFRA requires the government to demonstrate that any government action
6 that “substantially burdens” a person’s “exercise of religion” is in “is in
7 furtherance of a compelling governmental interest” and “is the least restrictive
8 means of furthering that compelling governmental interest.”42 U.S.C. § 2000bb

9 71. As explained above, Defendant’s actions related to the Project prohibit,
10 and therefore substantially burden, La Posta citizens’ exercise of religion.

11 72. The Project is not the least restrictive means to further the government’s
12 interest in border security. The construction process could accommodate La Posta
13 citizens’ religious practices or forgo construction of a barrier altogether, in favor of
14 increased border patrol presence, for example.

15 73. The Project violates La Posta citizens’ rights under RFRA.

16 **TENTH CAUSE OF ACTION**

17 **(Violation of Fifth Amendment Procedural Due Process Rights)**

18 74. All of the foregoing allegations are repeated and realleged as if fully set
19 forth herein.

20 75. La Posta citizens have a constitutionally-protected property interest in their
21 ancestral remains, *see* 25 U.S.C. section 3002(a) (recognizing tribal property right
22 in cultural items excavated or discovered on Federal lands after November 16, 1990),
23 a liberty interest in their right to access historical and cultural sites affected by the
24 Project, *see Kent v. Dulles*, 357 U.S. 116, 125 (1958), and a liberty interest in raising
25 their children in the Kumeyaay tradition. *See Pierce v. Soc’y of the Sisters of the*
26 *Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35, (1925).

1 76. Defendants’ construction activities within the Project Area have damaged
2 and destroyed Plaintiffs’ property, and, if allowed to continue, further construction
3 activities in the Project Area will continue to irreparably damage and destroy
4 property of Plaintiffs known to rest within the Project Area.

5 77. Project activities also prevent La Posta citizens from accessing sacred sites,
6 and raising their children in the Kumeyaay tradition.

7 78. Defendants have not provided La Posta citizens due process. Defendants
8 gave no formal notice to Plaintiffs regarding the timing, sites, or manner of
9 construction activities for the Projects. Instead, Defendants have refused to provide
10 this information or engage in formal consultation despite repeated requests. The lack
11 of any meaningful notice before Defendants began destroying Plaintiffs’ property
12 and violating their significant liberty interests and religious freedom falls far below
13 the constitutional standard for due process.

14 79. Defendants’ non-process carries an enormous risk of the erroneous
15 deprivation of constitutionally-protected property and liberty interests—it already
16 has. Although tribal cultural sites and ancestral cemeteries were identified in prior
17 surveys, and are known to many Kumeyaay people, those sites were not avoided,
18 and no advance opportunity to protect them was afforded. Instead, Plaintiffs are
19 becoming aware of violations of their interest only after it is too late to protect them,
20 such as when CBP knew that human remains were found on July 10, 2020, yet the
21 CBP *did nothing* to protect them from the path of a heavy construction equipment.

22 80. The standard for the process due when government actions threaten to
23 destroy Tribal cultural property is embodied by Native American Graves Protection
24 and Repatriation Act (“NAGPRA”) and its implementing regulations, 45 C.F.R. Pt.
25 10. Plaintiffs, however, are willing to consult with Defendants to find a mutually-
26 agreeable procedure which affords the basic protections consistent with Defendant’s
27 legal obligations. While these safeguards would impose administrative and financial

1 burden on Defendants, temporarily ceasing the Project would, according to the
2 CBP's own algorithm, actually allow CBP to use its resources more effectively in
3 other areas. Moreover, pausing construction activities to afford time to take the steps
4 necessary would provide due process to foundational rights as the Constitution
5 requires.

6 **ELEVENTH CAUSE OF ACTION**
7 **(Violation of Fifth Amendment Substantive Due Process Rights)**

8 81. All of the foregoing allegations are repeated and realleged as if fully set forth
9 herein.

10 82. Border wall construction in the Project Area does not serve a compelling
11 state interest and it is not narrowly-tailored to achieve that interest.

12 **PRAYER FOR RELIEF**

13 La Posta requests the following relief:

14 (A) Temporarily, preliminarily, and permanently enjoin the Defendants
15 from using for the Project funds that they transferred to the Drug
16 Interdiction account and the \$1.375 billion that Congress appropriated
17 for a border barrier system;

18 (B) Temporarily, preliminarily, and permanently enjoin Defendants from
19 all construction activity on the Project unless the Defendants:

20 a. Adequately consult with La Posta regarding cultural items, sacred
21 sites, and historical sites which may be adversely impacted by the
22 Project;

23 b. Take appropriate, respectful measures to mitigate the adverse
24 impacts, including

25 i. Establishing a formal tribal monitoring program with at least
26 two tribal monitors at every construction site along the
27

1 project route at any time (with authority to stop work until
2 the cultural item/and or human remains can be properly
3 removed and repatriated).

4 ii. Allowing Tribal monitors to be in close enough proximity
5 ground disturbing construction to witness the uncovering of
6 potential cultural materials.

7 iii. Modification of proposed border security measures to
8 alleviate impacts to tribal cultural sites and burial sites,
9 which might include pre-construction archaeological testing
10 to fully determine site boundaries and appropriate mitigation
11 measures for each site.

12 iv. Where there is reasonable suspicion of cultural materials
13 present, the avoidance of using heavy machinery or
14 explosives that precludes the ability for Tribal monitors to
15 view and recover uncovered materials.

16 v. Cataloguing and repatriating all recovered cultural items,
17 including human within the Project Area; and

18 vi. Developing an Environmental Stewardship Summary and a
19 full Cultural Survey of the Project Area that allows for
20 registration of all sites eligible for listing on an appropriate
21 registry.

22 c. Permit access to Kumeyaay sacred sites, as identified by La Posta.

23 (C) Award Plaintiffs their reasonable costs of litigation; and

24 (D) Grant such other and further relief as the Court may deem just and
25 proper.

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RESPECTFULLY SUBMITTED this 10th day of August, 2020.



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