United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5333 **September Term, 2020**

1:20-cv-02712-TNM

Filed On: November 23, 2020

Manzanita Band of the Kumeyaay Nation, et al.,

Appellants

Iipay Nation of Santa Ysabel,

Appellee

v.

Chad F. Wolf, in his official capacity as Under Secretary of Homeland Security for Strategy, Policy and Plans, et al.,

Appellees

Consolidated with 20-5335

BEFORE: Millett*, Pillard, and Rao, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunction pending appeal and for expedited appeal, the opposition thereto, and the reply, it is

ORDERED that the emergency motion for injunction pending appeal be denied. Appellants have not satisfied the stringent requirements for an injunction pending appeal. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). It is

* A statement by Circuit Judge Millett, dissenting in part from this order, is attached.

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FURTHER ORDERED that the following briefing schedule will apply in these consolidated cases:

Appellants' Brief	November 30, 2020
Joint Appendix	November 30, 2020
Appellees' Brief	December 14, 2020
Appellants' Reply Brief	December 21, 2020

The Clerk is directed to calendar this case for oral argument on the first appropriate date following the completion of briefing. The parties will be informed later of the date of oral argument and the composition of the merits panel.

All issues and arguments must be raised by appellants in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2019); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

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Millett, Circuit Judge, *dissenting in part*: I agree with the order expediting the appeal, but I would also grant an injunction against further construction pending appeal—at least in the absence of further protective measures being instituted by the government, in coordination with the Tribes, to prevent the destruction of burial sites and remains.

The plaintiffs have demonstrated a likelihood of success at least on their claim that the government invalidly waived the statutory protections of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq*., the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq*., the Endangered Species Act, 16 U.S.C. § 1531, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., on the ground that Chad Wolf was not lawfully acting as the Acting Secretary of DHS when he made that waiver (assuming that an Acting Secretary can effectuate a waiver under the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1103 note. While the issue is complex and the outcome remains an open question, every district court to confront the decision has ruled through careful analyses that Chad Wolf likely never lawfully assumed the authority of Acting Secretary. *See Northwest Immigrant Rights Project v. United States Citizen and Immigration Servs.*, No. 19 Civ. 3283, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020); *Batalla Vidal v. Wolf*, Nos. 16-CV-4756, 17-CV-5228, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020); *Immigrant Legal Res. Ctr. v. Wolf,* No. 20-CV-05883, 2020 WL 5798269, at *9 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Wolf*, No. 20-CV-02118, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020), *appeal docketed*, 20-CV-2217 (4th Cir. filed Nov. 12, 2020); *cf.* Oct. 9, 2020 Oral Arg. Tr. 55, *Manzanita Ban of the Kumeyaay Nation v. Wolf*, No. 20-CV-2712 (D.D.C. Oct. 15, 2020), ECF No. 22 ("THE COURT: *** I mean, I will tell you, it looks to me like [Secretary Kirstjen Nielsen] messed up.").

The district court erred in finding no likelihood of irreparable harm. The district court framed the question far too narrowly, and the supporting record demonstrates irreparable harm.

For starters, the district court relied on the absence of evidence of burial sites or remains "within the narrow strip of federal land where construction is taking place[.]" Op. at 7. There are three problems with that. First, the focus is too cramped. The disturbances of land associated with a construction site are far broader than just the strip where fencing would go. Large, heavy equipment moves and operates across a much broader swath of land, and parking, access roads, and other facilities for workers are required. Carrico Decl. 11, ¶ 32.

Second, viewing the construction area as a whole, there is no dispute that the land on which the construction is occurring and the closely surrounding area is of great cultural, religious, and historic significance to the Tribes. *See* Carrico Decl. 9–11. Nor is there any dispute that artifacts, human remains, and burial sites have been found there. *See id.*; *id*. at 11, ¶ 30 ("[I]t is clear that human remains have been discovered within or in the immediate area of the construction corridor."); Santos Decl. at 6, ¶ 16 ("[T]here 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."). Determining their locations and means of protection are exactly what NEPA and the other likely improperly waived statutes are designed to do.

Third, even taking the narrow construction-strip vantage point, several artifacts were already found within one to five feet of newly constructed border wall. Haws Decl. at 7, ¶ 18. Protected material found so close to the area of actual construction materially increases the prospect that additional artifacts will be in the construction path. The government's and district court's reliance on visual monitoring by a handful of tribal representatives is not reasonable. Human remains and other aspects of burial sites will not commonly appear on the surface of the land. They are buried underneath. But the trench digging and other construction activities are undertaken by large machines and vehicles moving massive loads of dirt at once. For safety reasons, the monitors must stand twenty feet away from the trenches and the heavy equipment, and so are not capable of examining the ground as it is broken up and as those large amounts of dirt are scooped up and dumped into trucks. Second Elliott Decl. at 1–2, ¶ 2. An individual cannot feasibly monitor for the usually small items of a burial site when standing twenty feet away from the large scoop of a backhoe. And according to Mr. Elliott, one of the monitors, he was not allowed to examine the dirt when it was deposited into a truck to be hauled away. *Id*. at 2, ¶ 2.

Because of the evidence that the relevant area (which is broader than the actual trench) contains archaeological remains, burial sites, and other significant aspects of tribal culture, and because the heavy-equipment construction process with a handful of distanced visual monitors cannot reasonably be expected to protect those sites against irremediable destruction—and certainly not in the way that a NEPA and NAGPRA process would require—irreparable harm has been shown and is occurring.