

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD KAMMEYER, and
MURAL CONSERVANCY OF LOS
ANGELES

Plaintiffs,

v.

ONEIDA TOTAL INTEGRATED
ENTERPRISES, UNITED
STATES ARMY CORPS OF
ENGINEERS, JOHN MCHUGH,
THOMAS BOSTICK, JO-ELLEN
DARCY, and KIMBERLY
COLLTON

Defendants.

) Case No.
) EDCV 15-869-JGB (KKx)

) **ORDER: GRANTING**
) **Plaintiff's Motion for**
) **Preliminary Injunction**
) **(Doc. No. 19.)**

) **[Motion filed June 2,**
) **2015]**

On June 15, 2015, the Court granted a Temporary Restraining Order which enjoined Defendant United States Army Corps of Engineers ("USACE") from altering or destroying the Bicentennial Freedom Mural in Corona, California. Now before the Court is Plaintiffs' Motion for a Preliminary Injunction. The Court has considered all papers filed in support of and in opposition to the Application as well as the arguments presented at the

1 August 19, 2015 hearing. For the reasons expressed
2 below, the Court GRANTS the Motion.

3
4 **I. BACKGROUND**

5
6 Plaintiffs Ronald Kammeyer and the Mural Conservancy
7 of Los Angeles ("Plaintiffs") seek to halt the
8 destruction of the "Bicentennial Freedom Mural" (the
9 "Mural") that is displayed on the spillway of the Prado
10 Dam in Corona, California.

11
12 Plaintiffs filed their Complaint on May 4, 2015.
13 (Doc. No. 1.) On June 2, 2015, Plaintiffs filed a First
14 Amended Complaint ("FAC") against Defendants USACE and
15 Oneida Total Integrated Enterprises ("Oneida"). (Doc.
16 No. 14.) The FAC alleges that Plaintiff Kammeyer is an
17 accomplished landscape architect who co-designed the
18 Mural when he was in high school. (FAC ¶ 4, 15.) The
19 Mural, which was painted by high school volunteers in
20 1976, is 640 feet long and 100 feet tall, and is visible
21 to commuters passing by on the State Route 91 freeway.
22 (Id. ¶¶ 17-18.) Plaintiffs allege that Defendants plan
23 to destroy the Mural, ostensibly due to concerns over
24 graffiti and lead paint. (Id. ¶ 21.) Based on these
25 allegation, Plaintiffs allege causes of action under: (1)
26 the Visual Rights Act of 1990 ("VARA"), 17 U.S.C. § 101
27 et seq; (2) the California Art Preservation Act ("CAPA"),
28

1 California Civil Code § 987; (3) California Business &
2 Professions Code § 17200.

3
4 **A. Motion for Preliminary Injunction**

5
6 On June 2, 2015, Plaintiffs filed their Motion for
7 Preliminary Injunction. (Doc. No. 19.) USACE opposed on
8 June 22, 2015. ("Opp'n," Doc. No. 27.) Plaintiffs
9 replied on June 29, 2015. ("Reply," Doc. No. 29.)

10
11 In the preliminary injunction briefing, USACE
12 explains that the Prado Dam and its spillway are part of
13 a federal flood-risk-management project known as the
14 Santa Ana River Mainstem Project ("SARM").¹ (Opp'n at
15 1.) The Prado Dam is located on federal lands that are
16 within the jurisdiction of the L.A. District of USACE.
17 (Id. at 2.) USACE explains that in August 2011, a SARM
18 project manager requested that USACE perform a safety
19 survey of the Mural; this request was prompted by
20 concerns over the appearance of the Mural and the
21 suspicion that it contained lead paint. (Declaration of
22 Diane Rosenberg ("Rosenberg Decl."), Doc. No. 27-6, ¶ 3.)
23 The Mural has become faded and chipped over the years,
24 and has also been the target of graffiti. (Declaration

25
26 ¹ SARM provides flood protection to the Santa Ana
27 River Basin communities in Orange, Riverside, and San
28 Bernardino counties. (Declaration of David Van Dorpe
("Van Dorpe Decl."), Doc. No. 27-5, ¶ 2.)

1 of David Van Dorpe ("Van Dorpe Decl."), Doc. No. 27-5,
2 Ex. A.) USACE has not maintained the Mural, as it
3 asserts that its operations and maintenance budgets do
4 not include the necessary funds. (Declaration of Lillian
5 Dampios ("Dampios Decl."), Doc. No. 27-8, ¶ 2.)
6

7 After USACE surveyed the Mural, it commissioned lead-
8 paint testing. (Van Dorpe Decl. ¶ 10.) The report,
9 finalized in May 2014, concluded that various paints on
10 the spillway were either "lead-based" or "lead-
11 containing." (Rosenberg Decl., Ex. B.) The report
12 concluded that the paint should either be encapsulated (a
13 process by which a sealant is applied over the paint) or
14 removed so as to prevent lead paint from washing off the
15 face of the spillway and being released into the
16 environment. (Id. at 4.) In May 2014, a USACE project
17 manager presented these conclusions to a USACE review
18 board. (Van Dorpe Decl. ¶¶ 11-12.) The project manager
19 believed that remediation was necessary, and presented
20 cost estimates for encapsulation (\$210,000.00) and full
21 removal (\$285,000.00). (Id. ¶ 12.) USACE leadership
22 determined full removal was appropriate, given that (1)
23 the estimated cost for encapsulation did not include
24 future upkeep costs, which would likely make
25 encapsulation more expensive than removal over the long
26 term, and (2) future construction on the spillway was
27 planned, which could lead to potential damage of the
28

1 encapsulation with resulting lead-paint exposure.
2 (Rosenberg Decl. ¶ 17.) USACE therefore solicited
3 contracts for removal of the Mural, and ultimately
4 awarded the job to Oneida. (Van Dorpe Decl. ¶¶ 13-14.)
5

6 On July 25, 2014, USACE posted a Special Public
7 Notice on one of its websites about the planned removal
8 of the Mural. (Declaration of Carvel Bass ("Bass
9 Decl."), Doc. No. 27-3, ¶¶ 7-8.) On April 9, 2015, a
10 public meeting was held at Corona High School, and the
11 general public was invited to speak or provide written
12 comments on the Mural removal project and on the Mural
13 itself. (Van Dorpe Decl. ¶¶ 25-26.) In February 2015,
14 USACE held another meeting with local government and
15 resource agencies, in which USACE presented further
16 details about the Mural removal project. (Van Dorpe
17 Decl. ¶ 17.) During the meeting, USACE informed these
18 local agencies that it would seek a willing partner or
19 partners to commit to re-painting the spillway with a new
20 mural and maintaining that new mural in the future.

21 (Id.)
22

23 **B. Supplemental Briefing**

24

25 After reviewing the parties' initial briefing on the
26 preliminary injunction, the Court noted that Plaintiffs
27 had shifted their focus to their third cause of action,
28

1 under which they asserted that USACE had not complied
2 with its obligations under Section 106 of the National
3 Historic Preservation Act ("NHPA"). Given the
4 significance of the preliminary injunction decision, the
5 Court concluded that fuller briefing on the issue was
6 necessary. Additionally, Plaintiffs had not pleaded
7 their NHPA claim properly; rather than pleading it
8 against USACE under the APA (as would have been proper),
9 Plaintiffs pleaded it against Oneida under the UCL. (See
10 Doc. No. 35 at 2.) The Court therefore issued an Order
11 on July 9, 2015. (Doc. No. 35.) The Order granted
12 Plaintiffs leave to file a Second Amended Complaint and
13 requested additional briefing on the NHPA cause of
14 action. (Id. at 3.)

15
16 On July 17, 2015, Plaintiffs filed their Second
17 Amended Complaint, which included a cause of action under
18 the NHPA. (Doc. No. 36.) On July 31, 2015, Plaintiffs
19 and USACE filed their supplemental briefing on the NHPA
20 cause of action. ("P. Supp. Brief," Doc. No. 39; "U.
21 Supp. Brief," Doc. No. 37.) On August 7, 2015,
22 Plaintiffs and USACE filed their opposition supplemental
23 briefs. ("P. Supp. Opp'n," Doc. No. 43; "U. Supp.
24 Opp'n," Doc. No. 44.)

1
2
3 **II. LEGAL STANDARD²**

4 "A plaintiff seeking a preliminary injunction must
5 establish that he is likely to succeed on the merits,
6 that he is likely to suffer irreparable harm in the
7 absence of preliminary relief, that the balance of
8 equities tips in his favor, and that an injunction is in
9 the public interest." Winter v. Natural Res. Def.
10 Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary
11 injunction is an extraordinary and drastic remedy; it is
12 never awarded as of right." Munaf v. Geren, 553 U.S. 674,
13 690 (2008) (citations omitted). An injunction is binding
14 only on parties to the action, their officers, agents,
15 servants, employees and attorneys and those "in active
16 concert or participation" with them. Fed. R. Civ. P.
17 65(d).

18 **III. DISCUSSION**

19
20 Plaintiffs seek a preliminary injunction that would
21 enjoin USACE from "tak[ing] any action that could alter,
22 desecrate, destroy or modify in any way" the Mural.
23 Neither party disputes that absent an injunction, USACE
24 will go ahead with its plans to remove the Mural.
25

26
27 ² Unless otherwise noted, all mentions of "Rule"
28 refer to the Federal Rules of Civil Procedure.

1 In contesting the Motion, USACE primarily focuses its
2 arguments on Plaintiffs' likelihood of success on the
3 merits. However, before reaching the merits arguments,
4 the Court will first discuss the likelihood of
5 irreparable harm and the balance of equities. This is
6 necessary because the Ninth Circuit has endorsed a
7 "sliding scale" test for preliminary injunctions. As
8 stated by the Ninth Circuit: "[w]here the balance of
9 hardships tips sharply in the plaintiff's favor and the
10 plaintiff has demonstrated a likelihood of irreparable
11 harm, however, the plaintiff need only show that "serious
12 questions" exist as to success on the merits.
13 See Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127,
14 1131 (9th Cir. 2011).

16 **A. Likelihood of Irreparable Harm**

18 Given the facts of this case, the Court easily
19 concludes that Plaintiffs have shown a high likelihood of
20 irreparable harm: USACE intends to immediately remove the
21 Mural if not enjoined. If the Mural is removed, it will
22 be destroyed and lost forever. It is well established
23 that "[p]roperty is always unique under general
24 principles of the law of equity and its possible loss or
25 destruction usually constitutes irreparable harm."
26 Fisher v. Kealoha, No. CIV. 11-00589 ACK, 2012 WL
27 2526923, at *10 (D. Haw. June 29, 2012) (quoting Bennet
28

1 v. Dunn, 504 F. Supp. 981, 986 (D. Nev. 1980). Moreover,
2 the property at issue here is a unique work of public art
3 with arguable historical significance. The destruction
4 of that art - which Defendants concede will occur absent
5 an injunction - is clearly irreparable harm.

6
7 **B. The Balance of Equities**

8
9 The Court next concludes that the balance of equities
10 tips sharply in in Plaintiffs' favor. If the Mural is
11 destroyed Plaintiffs and the public will have no further
12 recourse. On the other hand, if the Court grants a
13 preliminary injunction, USACE will only suffer some delay
14 in their construction plans if it ultimately prevails.
15 Moreover, it appears unlikely that USACE's plans to
16 modify the Prado Dam will even need to be postponed at
17 all. USACE has conceded that the spillway is not
18 scheduled to be raised until approximately 2019. (Van
19 Dorpe Decl. ¶ 6.) It is highly unlikely that the
20 proceedings in this lawsuit will last until then. If
21 USACE ultimately prevails, it will still have plenty of
22 time to remove the Mural before construction on the
23 spillway is set to begin. Thus, any hardship to USACE is
24 minimal.

1 **C. Likelihood of Success on the Merits**

2
3 Given that Plaintiffs have shown both an immediate
4 threat of irreparable harm and that the balance of
5 equities tips sharply in their favor, they must only show
6 that "serious questions" exist as to their likelihood of
7 success on the merits. See Alliance for Wild Rockies,
8 632 F.3d at 1131. The Court will examine each of
9 Plaintiffs' three claims against USACE.

10
11 **1. Visual Artists Rights Act of 1990**

12
13 **a. Sovereign Immunity**

14
15 USACE first argues that Plaintiffs' VARA claim is
16 barred by the doctrine of sovereign immunity. The Court
17 disagrees.

18
19 Under the doctrine of sovereign immunity, "it is
20 axiomatic that the United States may not be sued without
21 its consent and the existence of consent is a
22 prerequisite for jurisdiction." United States v.
23 Mitchell, 463 U.S. 206, 212 (1983). In order for waivers
24 of the government's sovereign immunity to be effective,
25 they must be "unequivocally expressed" by Congress.
26 Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981). The
27 same principles of sovereign immunity which would apply
28

1 to a suit against the United States apply to a suit
2 against a government agency, because the United States is
3 the real party in interest. See Helash v. Ballard, 638
4 F.2d 74, 76 (9th Cir. 1980) (per curiam).

5
6 There are two Congressional waivers of sovereign
7 immunity at play for purposes of this Motion,³ the first
8 of which is the Administrative Procedures Act ("APA"), 5
9 U.S.C. § 702. The APA allows a "person suffering legal
10 wrong because of agency action" to seek injunctive relief
11 (but not money damages) in a suit against the United
12 States. 5 U.S.C. § 702.

13
14 USACE does not dispute that the APA could apply to
15 Plaintiffs' causes of action. USACE, a government
16 agency, has decided to take a course of action that
17 Plaintiffs assert is unlawful under VARA. The APA
18 permits the Court to "hold unlawful and set aside agency
19 action, findings and conclusions" that are "arbitrary,
20 capricious . . . or otherwise not in accordance with
21 law." 5 U.S.C. § 706(2)(A)(emphasis added). Therefore,
22 the APA would, on its face, appear to apply to
23 Plaintiffs' claims.

24
25
26 ³ Plaintiffs also assert that they are entitled to
27 money damages, which are allowed under the Federal Tort
28 Claims Act ("FTCA"), 28 U.S.C. §1346(b). (Motion at 14.)
However, that issue is not germane to this Motion, as
Plaintiffs only seek injunctive relief.

1 USACE contends that a closer reading of Section 702
2 shows that Plaintiffs may not pursue their VARA claim
3 under the APA. Specifically, USACE points to Section
4 702(2), which explains that a court may not grant relief
5 under the APA "if any other statute that grants consent
6 to suit expressly or impliedly forbids the relief which
7 is sought." 5 U.S.C. § 702(2). USACE argues that 28
8 U.S.C. § 1498(b) forbids the relief Plaintiffs seek.
9

10 Section 1498(b) is another Congressional waiver of
11 sovereign immunity. The statute grants consent for the
12 United States to be sued for copyright infringement; yet,
13 it only allows monetary damages (not injunctive relief)
14 and requires that the claim be brought in the United
15 States Court of Claims. 28 U.S.C. § 1498(b). Therefore,
16 if Section 1498(b) provided the jurisdictional basis for
17 Plaintiffs' VARA claim, it would preclude the injunctive
18 relief they seek and would divest this Court of
19 jurisdiction. However, the Court is not persuaded that
20 Section 1498(b) applies. Section 1498(b) provides:
21

22 [W]hensoever the copyright in any work . . . shall be
23 infringed by the United States . . . the exclusive action
24 which may be brought for such infringement shall be an
25 action by the copyright owner against the United States
26 in the Court of Federal Claims for the recovery of his
27
28

1 reasonable and entire compensation as damages for such
2 infringement."

3
4 28 U.S.C. § 1498(b) (emphasis added.) VARA claims
5 are not for copyright infringement; rather, they are
6 designed to protect the artistic and reputational rights
7 of the artist. See 17 U.S.C. § 106A(a). These rights
8 also referred to as "moral rights" - afford protection
9 "for the author's personal, non-economic interests in
10 receiving attribution for her work, and in preserving the
11 work in the form in which it was created, even after its
12 sale or licensing." Leicester v. Warner Bros., 232 F.3d
13 1212, 1227 (9th Cir. 2000) (quoting Jane C. Ginsburg,
14 Copyright in the 101st Congress: Commentary on the Visual
15 Artists Rights Act and the Architectural Works Copyright
16 Protection Act of 1990, 14 colum. Vla J.L. & Arts 477,
17 478 (1991)). As such, even though VARA claims are listed
18 in the "Copyrights" Title of the United States Code, the
19 Court is not persuaded that they constitute claims for
20 copyright "infringement" as contemplated by Section
21 1498(b).

22
23 This conclusion is supported by the text of VARA
24 itself. Section 106A(b), entitled "Scope and exercise of
25 rights," explains that an artist has VARA rights "whether
26 or not the author is the copyright owner." 17 U.S.C. §
27 106A(b) It is thus clear that a VARA claim is not a
28

1 copyright infringement claim, as a VARA claim may be
2 brought by someone who doesn't own the copyright.

3
4 Accordingly, the Court finds that the APA, rather
5 than Section 1498(b), provides the applicable waiver of
6 sovereign immunity here. As such, Plaintiffs may seek
7 injunctive relief as contemplated by the APA.

8
9 **b. Plaintiffs' VARA Claim**

10
11 Although Plaintiffs may seek injunctive relief under
12 VARA, their VARA claim founders on the merits. Under the
13 facts present here, VARA does not grant Kammeyer the
14 right to prevent removal of the Mural.

15
16 VARA provides that "the author of a work of visual
17 art . . . shall have the right (A) to prevent any
18 intentional distortion, mutilation, or other modification
19 of that work which would be prejudicial to his or her
20 honor or reputation, and any intentional distortion,
21 mutilation, or modification of that work is a violation
22 of that right, and (B) to prevent any destruction of a
23 work of recognized stature, and any intentional or
24 grossly negligent destruction of that work is a violation
25 of that right." 17 U.S.C. § 106A(a) (3).

1 Plaintiffs contend that Kammeyer is the author of the
2 Mural (a work of visual art) and that he thus has the
3 right to enjoin USACE's destruction of the Mural. If the
4 Court were to accept Plaintiffs' interpretation of VARA,
5 Kammeyer would have the lifetime right to keep the Mural
6 on the spillway, regardless of safety, environmental, or
7 other important public policy concerns.⁴ Congress could
8 not have intended this "lifelong-veto" when enacting
9 VARA.

10
11 The First Circuit addressed this issue by concluding
12 that VARA does not protect "site-specific" art. Phillips
13 v. Pembroke Real Estate, Inc., 459 F.3d 128, 134 (1st
14 Cir. 2006). The court explained that with site-specific
15 art, the "location of the work is an integral element of
16 the work," and thus "because the location of the work
17 contributes to its meaning, site-specific art is
18 destroyed if moved from its original site."⁵ In summing
19

20 ⁴ For example, imagine that the spillway had a
21 growing crack within it that threatened its structural
22 integrity, and it needed to be torn down immediately and
23 rebuilt. Plaintiffs' legal theory would mean that he, as
24 an artist, would be able to prevent USACE from taking
25 such steps.

26 ⁵ To be sure, the Mural may not technically be a
27 piece of "site-specific" art. In "site-specific" art,
28 the artist "incorporates the environment as one of the
29 media with which he works." Phillips, 459 F.3d at 134.
30 For example, a "sculpture that has a marine theme that
31 integrates the large granite stones of [a] park with
32 [the] sculpture and the granite sea walls of Boston
33 Harbor" is clearly site-specific art. See id.
34 Nevertheless, the First Circuit's rationale behind the

(continued . . .)

1 up the problem of applying VARA's protections to site-
2 specific art, the First Circuit explained:

3
4 Once a piece of art is considered site-
5 specific, and protected by VARA, such objects
6 could not be altered by the property owner
7 absent consent of the artist. Such a
8 conclusion could dramatically affect real
9 property interests and laws.

10
11 Phillips, 459 F.3d at 142. Here, applying VARA as
12 Plaintiffs urge could present potential problems much
13 graver than merely encumbering an owner's property
14 interest. The dam is a large infrastructural component
15 whose upkeep implicates serious public safety and
16 environmental concerns. USACE must be allowed to operate
17 and manage SARM and the dam in a manner that protects the
18 public and promotes their designated function. USACE's
19 proposed improvements to the SARM, including raising the
20 height of the dam, constructing protective dikes within
21 the basin, and raising the elevation of the spillway are
22 indisputably consistent with these objectives.

23
24 To address the "life-long veto" problem, the Court
25 could conclude that the Mural is site-specific and thus

26 _____
27 (. . . continued)
28 site-specific exception to VARA is more important than
whether the Mural may be classified as site-specific.

1 not covered by VARA's protections. Yet, the Court finds
2 another route more logically sound; specifically, one
3 based on interpretation of 17 U.S.C. § 113(d)(1), another
4 section of VARA. Section 113(d)(1) creates an exception
5 to VARA for a "work of visual art" installed before June
6 1, 1991⁶ that "has been incorporated in or made part of a
7 building in such a way that removing the work from the
8 building will cause the destruction . . . of the work."
9

10 The question then becomes whether the term "building"
11 covers the Prado Dam. Plaintiffs argue that no other
12 court examining a VARA claim has construed "building" to
13 mean something other than a standard residential or
14 commercial space. (Motion at 12-13 (collecting cases).)
15 However, Plaintiffs offer no cases that have held a
16 large, man-made structure should not be deemed a
17 "building" under VARA. And the same justifications for
18 an exception for buildings apply to a dam - changes to a
19 functional, man-made structure may be necessary from time
20 to time, and the structure's owner should not be
21 permanently prevented from ever making such changes.
22

23 The above analysis assumes that the Mural could not
24 be moved from its current location. However, Plaintiffs
25 assert that there is a "strong possibility" that the
26 Mural could be moved, using a technique known as the
27

28 ⁶ The date VARA became effective.

1 "Strappo Method." (Declaration of Isabel Rojas-Williams,
2 Doc. No. 20, ¶ 3.) Plaintiffs do not present any
3 evidence about how this process would work, or how much
4 it would cost. However, even if the Mural could be moved
5 without causing its destruction, another VARA exception,
6 17 U.S.C. § 113(d)(2), applies. Section 113(d)(2)
7 explains that an owner may remove a work of visual art if
8 the owner (1) provides written notice to the author of
9 the owner's intention and (2) the author has not removed
10 the work or paid for its removal within ninety days. 17
11 U.S.C. § 113(d)(2). On March 5, 2015, USACE provided
12 formal written notice to Plaintiffs' counsel of USACE's
13 intention to remove the Mural from the dam. (Declaration
14 of Lawrence Minch (Doc. No. 27-7), Ex. B.) Thus, the
15 ninety-day window closed on June 3, 2015.

16
17 Plaintiffs, without any citations to evidence or
18 further explanation, state that the notice did not "truly
19 [provide] 90 days to remove the Mural" and that USACE
20 "inserted arbitrary deadlines to present a plan." (Reply
21 at 12.) The Court is not persuaded by these unsupported
22 assertions.

23
24 In sum, the Court concludes that the Prado Dam is a
25 "building" for the purposes of Section 113(d) and finds
26 that USACE has complied with Section 113(d)(2)'s ninety-
27 day notice provision applicable to removals of works of
28

1 visual art. Accordingly, it is immaterial whether the
2 mural can be removed. If removal without destruction is
3 possible, USACE has complied with the applicable notice
4 provisions. If it is not, VARA's exception for works of
5 visual art incorporated into buildings applies. In
6 either instance, Plaintiffs likely cannot prevail on
7 their VARA claim.

9 **2. California Arts Preservation Act**

10
11 Plaintiffs also argue that they are likely to succeed
12 on their claims under CAPA, California's analog to VARA.
13 (Motion at 14-16.) USACE responds that VARA preempts
14 CAPA. (Opp'n at 22-23.) The real problem with
15 Plaintiffs' argument, however, is not that CAPA is
16 preempted, but that CAPA cannot apply to a federal
17 agency's actions on federal land.⁷

18
19 It is well settled that the activities of federal
20 installations are shielded by the Supremacy Clause from
21 direct state regulation unless Congress provides "clear
22 and unambiguous" authorization for such regulation. EPA
23 v. State Water Resources Control Board, 426 U.S. 200,
24 211(1976); accord, Hancock v. Train, 426 U.S. 167, 178-

25
26 ⁷ At the August 19, 2015 hearing, the Court ordered
27 the parties to submit additional briefing on this issue.
28 The parties did so on August 21, 2015. (Doc. Nos. 47-
48.)

1 179 (1976). Consistent with this principle of immunity,
2 the Supreme Court held in Arizona v. California, 283 U.S.
3 423 (1931) that the United States was under no obligation
4 to submit the plans and specifications of the Boulder Dam
5 construction project to the State of Arizona for
6 approval. 283 U.S. at 451-52. The Court emphasized that
7 the United States must be free to perform its functions
8 without conforming to the police regulations of a state.
9 Id.

10
11 Here, Plaintiffs contend that USACE should be subject
12 to California state law (CAPA), even though it is a
13 federal agency seeking to take action on federal land.
14 USACE hopes to remove the Mural, in part so that it may
15 proceed with raising the height of the Prado Dam's
16 spillway. These facts are analogous to those in United
17 States v. State of Mont., 699 F. Supp. 835 (D. Mont.
18 1988). There, the United States brought an action
19 challenging Montana's attempt to enforce its building
20 codes and regulations on construction projects occurring
21 on federal military installations. 499 F. Supp. at 836-
22 37. The court explained that "[t]o the extent the State
23 of Montana, by the enforcement of its building codes, is
24 attempting to exercise authority over the plans and
25 specifications for construction projects at federal
26 military installations, the conflict is indistinguishable
27 from the conflict presented in Arizona v. California, 283
28

1 U.S. 423, 451 (1931).” Id. at 838. Here, although
2 California itself is not seeking to enforce its own
3 authority, Plaintiffs are attempting to use state law to
4 restrict a construction project on federal land.
5 Accordingly, the Court finds that Arizona’s holding is
6 controlling, and that USACE’s conduct likely cannot be
7 restricted by CAPA.

8
9 As such, the Court finds that Plaintiffs have not
10 shown serious questions exist as to their CAPA claim.
11

12 **3. Section 106 of the National Historic Preservation** 13 **Act**

14
15 Finally, Plaintiffs contend that they are likely to
16 show that USACE did not comply with its obligations under
17 Section 106 of the National Historic Preservation Act
18 (“NHPA”).⁸ Plaintiffs bring this claim under the APA.⁹
19
20

21 ⁸ As previously explained, Plaintiffs and USACE
22 present these arguments in the supplemental briefing that
23 the Court ordered on this issue. (See Doc. No. 35 (July
9, 2015 Order explaining why supplemental briefing was
necessary on this issue).)

24 ⁹ As previously stated, under the APA a court may
25 overturn an agency’s decision if it finds that it is
26 “arbitrary, capricious, an abuse of discretion, or
27 otherwise not in accordance with law.” 5 U.S.C. §
706(2)(A). The standard of review is narrow, and does
28 not empower courts to substitute their judgment for that
of the agency. See Marsh v. Oregon Natural Res. Council,
490 U.S. 360, 378 (1989).

1 Section 106 of the NHPA is a "stop, look, and listen
2 provision" that requires federal agencies to consider the
3 effects of its programs. See Montana Wilderness Ass'n v.
4 Connell, 725 F.3d 988, 1005 (9th Cir. 2013). Under the
5 NHPA, a federal agency must make a "reasonable and good
6 faith effort to identify historic properties; determine
7 whether identified properties are eligible for listing on
8 the National Register based on criteria in 36 C.F.R. §
9 60.4; assess the effects of the undertaking on any
10 eligible historic properties found; determine whether the
11 effect will be adverse; and avoid or mitigate any adverse
12 effects." Id.

13
14 Plaintiffs contend that USACE failed at the first
15 step: it never made a good faith effort to identify
16 whether the Mural was historic property before initiating
17 the plan to remove it.

18
19 Under the NHPA, an agency must "take the steps
20 necessary to identify historic properties within the area
21 of potential effects" before beginning an undertaking.
22 36 C.F.R. § 800.4(b). In going through the process of
23 identifying "historical properties", an agency must "in
24 consultation with the [State Historical Preservation
25 Officer] . . . review existing information on historic
26 properties within the area of potential effects,
27 including any data concerning possible historic
28

1 properties not yet identified." 36 C.F.R. § 800.4(a)(2).
2 An agency is also required to "seek information, as
3 appropriate, from consulting parties, and other
4 individuals and organizations likely to have knowledge
5 of, or concerns with, historic properties, and identify
6 issues relating to the undertaking's potential effects on
7 historic properties." 36 C.F.R. § 800.4(a)(3).
8

9 USACE contends it fulfilled its NHPA obligations
10 through a series of steps it took while in the beginning
11 stages of the SARM Project.¹⁰ First, in August 1988,
12 USACE prepared a General Design Memorandum ("GDM").
13 (Supplemental Declaration of Stephen Dibble ("Dibble
14 Decl. II"), Doc. No. 38, ¶ 3.) The GDM included an
15 Appendix that outlined the SARM Project's potential
16 impacts on cultural resources. (Id. ¶ 4.) The GDM
17 Appendix noted that the Prado Dam itself could
18 potentially be considered a historic property. (Id.)
19

20 To evaluate the Prado Dam, as called for in the GDM
21 Appendix, USACE commissioned a report in October 1989.
22 (Id. ¶ 5.) The report, entitled "The Prado Dam and
23 Reservoir, Riverside and San Bernardino Counties,
24 California," concluded that the Prado Dam itself (not the
25

26 ¹⁰ The SARM Project was designed to provide urban
27 flood protection to communities in Orange, Riverside, and
28 San Bernardino Counties. (Dibble Decl. II ¶ 3.) The
SARM Project recommended, among other things, raising the
Prado Dam to provide additional flood protection. (Id.)

1 Mural, which was barely mentioned) was eligible for
2 inclusion in the National Register of Historic Places.
3 (Id., Ex. 3, Doc. No. 38-3 at 14.) The report
4 principally focuses on the history, construction,
5 functioning, and architecture of the dam itself. (See
6 Doc. No. 38-3 at 1-14.) In the fourteen pages of the
7 report that USACE provided, the Mural receives two
8 sentences of discussion.¹¹ (Id. at 10.)
9

10 After the report was completed, USACE sent a letter
11 to the State Historical Preservation Office ("SHPO") on
12 March 27, 1991, advising it that USACE had concluded that
13 the Prado Dam was eligible for listing as a historic
14 property. (Dibble Decl. II ¶ 6.) USACE also drafted a
15 Programmatic Agreement for the implementation of the SARM
16 Project. (Id. ¶ 7.) After consultation with the SHPO
17 and the American Council on Historic Preservation
18 ("ACHP"), USACE finalized the Programmatic Agreement in
19 April 1993. (Id. Ex. 8, Doc. No. 38-8 at 1.). The
20 Programmatic Agreement was ultimately signed by USACE,
21 the SHPO, the ACHP, Orange County, Riverside County, San
22 Bernardino County, and two Native American
23 representatives. (Dibble Decl. II ¶ 11.) As part of the
24

25 ¹¹ The report states, ". . . a large red, white, and
26 blue logo, "200 Years of Freedom, 1776-1976," was painted
27 on the Prado Dam spillway in 1976 by students from the
28 Corona High School. Easily visible from Highway 91 just
south of the dam, the logo remains today one of the dam's
most striking features."

1 Programmatic Agreement, USACE agreed that it would
2 develop a treatment plan to address the adverse effects
3 of the SARM Project on historic properties. (Id.) USACE
4 addressed the effects on the Prado Dam, which was likely
5 going to be modified as part of the SARM Project, by
6 completing a Historic American Engineering Record
7 ("HAER") documentation of the Dam, which occurred in June
8 1996. (Id. Ex. 13, Doc. No. 38-13.) The body of the
9 HAER is 89 pages long. (Id.) It principally discusses
10 the design, construction, physical layout, and operating
11 principles of the Prado Dam. (Id. at 2-3 (table of
12 contents of the HAER).) It discusses the Mural itself
13 for two sentences - the same two sentences from the
14 October 1989 report. (Id. at 13.)

15
16 In 2011, USACE determined that lead paint on the
17 Mural would hinder further work on the Prado Dam.
18 (Dibble Decl. II ¶ 22.) Mr. Dibble, a Senior District
19 Archeologist with USACE, concluded that the Mural was not
20 a historic property based solely on the 1993 Programmatic
21 Agreement. (Dibble Decl. ¶ 8.) Mr. Dibble also
22 concluded that there was no basis for a new consultation
23 to evaluate the Mural. (Dibble Decl. II ¶ 23.)
24 Additionally, Mr. Dibble concedes that he did not consult
25 with the SHPO as part of his NHPA evaluation. (Dibble
26 Decl. ¶ 8 ("Based on my review of the proposal for the
27 paint removal action, the conclusion of my evaluation was
28

1 that there were no historic properties in the [Area of
2 Potential Effects] or surrounding the spillway, and thus
3 no Section 106 consultation was necessary.") (emphasis
4 added).)

5
6 There is clearly a serious question as to whether
7 USACE's actions were sufficient under Section 106 of the
8 NHPA. USACE's only attempt at "evaluation" of the Mural
9 took place in 1989 - over 27 years ago. And the October
10 1989 report is deficient for two reasons.

11
12 First, the report clearly did not focus on the Mural
13 itself; it centered on the history, functioning, and
14 architecture of the Prado Dam. (See Doc. No. 38-3 at 1-
15 14.) The report devotes two sentences to the Mural, and
16 obviously does not evaluate the historical significance
17 of it. Even if this could be called an evaluation, Mr.
18 Dibble should not have relied on those two sentences when
19 conducting his evaluation in 2011. The NHPA explains
20 that an agency official may be required to reevaluate
21 properties that were subjected to "incomplete prior
22 evaluations." 36 C.F.R. § 800.4(c)(1).

23
24 The second reason is the report's age. The NHPA
25 itself recognizes that "the passage of time, changing
26 perceptions of significance . . . may require the agency
27 official to reevaluate properties previously determined
28

1 eligible or ineligible." 36 C.F.R. § 800.4(c)(1). The
2 Mural is now approximately 40 years old - it was 13 years
3 old at the time of the 1989 report. And there are
4 certainly serious questions as to whether it is subject
5 to changing perceptions of its significance. It is one
6 of the only a handful of bicentennial murals remaining,
7 and it is both the largest and most visible of those
8 still existing. (Declaration of Daniel Paul, Doc. No.
9 15-2, ¶ 1.) Daniel Paul, an architectural historian,
10 declares that the Mural has become one of the last public
11 works of any kind manifestly associated with the United
12 States Bicentennial, and that it is thus a historic
13 physical landmark. (Id. ¶ 8.) Furthermore, the Mural
14 has been recognized in news articles as one of the
15 largest patriotic murals in America and has been honored
16 by numerous local, state, and federal government
17 officials. (See Declaration of Eric Bjorgum, Doc. No.
18 15-1, ¶ 2; Ex. E.). The cities of Norco, Eastvale, and
19 Corona have passed resolutions in favor of restoring and
20 preserving the Mural.¹² (Doc. No. 39-1, Exs. A, B; Doc.
21 No. 43-1 ¶ 4.) Finally, the Mural is clearly a source of
22 pride and meaning to local residents. Over 14,000
23 citizens have signed a petition to "Save the Prado Dam."

24
25
26 ¹² Additionally, the ACHP recently weighed in and
27 expressed concerns to USACE about the public notice it
28 provided regarding the plans to remove the mural. (Doc.
No. 39-1, Ex. C.)

1 (Declaration of Peter Usle ("Usle Decl.") Doc. No. 21,
2 Ex. B.)

3
4 In sum, there are serious questions as to whether
5 USACE "in consultation with the SHPO . . . review[ed]
6 existing information on historic properties . . .
7 including any data concerning possible historic
8 properties not yet identified" before approving the
9 removal of the Mural. See 36 C.F.R. § 800.4(a)(2).
10 USACE was required to "seek information, as appropriate,
11 from consulting parties, and other individuals and
12 organizations likely to have knowledge of, or concerns
13 with, historic properties, and identify issues relating
14 to the undertaking's potential effects on historic
15 properties." 36 C.F.R. § 800.4(a)(3). It is apparent
16 that they did not do so. Thus, the Court concludes that
17 Plaintiffs have raised serious questions about whether
18 USACE's decision to remove the Mural was arbitrary or
19 capricious under the APA. See Pacific Coast Fed'n of
20 Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265
21 F.3d 1028, 1034 (9th Cir. 2001) (An agency decision is
22 inadequate where the agency "entirely failed to consider
23 an important aspect of the problem or failed to
24 "consider[] the relevant factors and articulate[] a
25 rational connection between the facts found and the
26 choice made.")

1 USACE also argues that, even if it didn't consult a
2 proper evaluation, it would not matter, as the Mural
3 "would not be eligible for inclusion in the National
4 Register." (U. Supp. Brief at 7.) To be sure, under the
5 relevant guidelines, properties that are "primarily
6 commemorative in nature" or that "have achieved
7 significance within the past 50 years" are generally not
8 considered eligible for inclusion in the National
9 Register of Historic Properties. 36 C.F.R. § 60.4.
10 However, a commemorative property may qualify if its
11 "design, age, tradition, or symbolic value has invested
12 it with its own exceptional significance." Id. And if a
13 property is less than 50 years old, it may be designated
14 a historic property if it is of "exceptional importance."
15 Id. Given the groundswell of public support and renewed
16 historical interest in the Mural, the Court concludes
17 that there is a serious question as to whether the Mural
18 meets one of these exceptions. Furthermore, USACE cannot
19 sidestep its duties under the NHPA by putting forth
20 belated and self-serving speculation about what a proper
21 Section 106 evaluation would reveal.

22
23 In light of the above, the Court finds that there are
24 serious questions as to whether Plaintiffs will prevail
25 on their APA claim that USACE did not properly evaluate
26 the Mural under Section 106 of the NHPA.

1 **c. The Public Interest**

2

3 Finally, the Court finds that Plaintiffs have shown

4 that an injunction here would be in the public interest.

5 Plaintiffs have presented thousands of signatures and

6 comments attesting to the Mural's value to the community;

7 community members note the sense of civic pride and

8 patriotic appreciation the Mural engenders. (See Usle

9 Decl., Exs. A, B.) Furthermore, local governments have

10 begun to come forward to express their support for

11 preserving the Mural. (See Doc. No. 39-1, Exs. A, B;

12 Doc. No. 43-1 ¶ 4 (resolutions by Cities of Norco,

13 Eastvale, and Corona).) Additionally, California law

14 makes clear that there is "a public interest in

15 preserving the integrity of cultural and artistic

16 creations." Cal. Civ. Code § 987(a).

17

18 Accordingly, the Court finds Plaintiffs have shown

19 that an injunction would be in the public's interest.

20

21 **IV. CONCLUSION**

22

23 The Court finds that Plaintiffs have shown an

24 immediate threat of irreparable harm and that the balance

25 of equities tips sharply in their favor. The Court also

26 finds that Plaintiffs have shown serious questions exist

27 as to their NHPA cause of action brought under the APA.

28


1 Finally, the Court finds that an injunction would serve
2 the public interest. The Court therefore GRANTS
3 Plaintiffs' Motion, and ORDERS as follows:
4

- 5 • USACE or their agents, servants, employees,
6 attorneys, or any other persons in active concert or
7 participation with USACE, shall not take any action
8 that could alter, desecrate, destroy or modify in any
9 way the painted mural known as the "200 Years of
10 Freedom Mural" painted on the spillway of the Prado
11 Dam in Corona, California until this matter is fully
12 adjudicated.

- 13
14 • The Court shall retain the nominal bond of five
15 hundred dollars (\$500) Plaintiffs' posted June 11,
16 2015, as security for the preliminary injunction.
17

18 **IT IS SO ORDERED.**
19
20
21
22

23 Dated: August 24, 2015



Jesus G. Bernal
United States District Judge