

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT W. BYRNE  
 SALLY MAGNANI  
 3 MICHAEL L. NEWMAN  
 Senior Assistant Attorneys General  
 4 MICHAEL P. CAYABAN  
 CHRISTINE CHUANG  
 5 EDWARD H. OCHOA  
 Supervising Deputy Attorneys General  
 6 HEATHER C. LESLIE  
 JANELLE M. SMITH  
 7 JAMES F. ZAHRADKA II  
 LEE I. SHERMAN (SBN 272271)  
 8 Deputy Attorneys General  
 300 S. Spring St., Suite 1702  
 9 Los Angeles, CA 90013  
 Telephone: (213) 269-6404  
 10 Fax: (213) 897-7605  
 E-mail: Lee.Sherman@doj.ca.gov  
 11 *Attorneys for Plaintiff State of California*

12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 14 OAKLAND DIVISION

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| <p>17 <b>STATE OF CALIFORNIA et al.;</b></p> <p>18 Plaintiffs,</p> <p>19 v.</p> <p>20 <b>DONALD J. TRUMP, in his official capacity</b><br/> <b>as President of the United States of America</b><br/> <b>et al.;</b></p> <p>21</p> <p>22 Defendants.</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p> |
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Case No. 4:19-cv-00872-HSG

**PLAINTIFF STATE OF CALIFORNIA’S  
 NOTICE OF MOTION AND MOTION  
 FOR PRELIMINARY INJUNCTION  
 REGARDING EL CENTRO BORDER  
 WALL PROJECT; MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT THEREOF**

Judge: Honorable Haywood S. Gilliam,  
 Jr.  
 Trial Date: None Set  
 Action Filed: February 18, 2019

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1                   **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2                   PLEASE TAKE NOTICE that Plaintiff State of California hereby moves the Court under  
3 Federal Rule of Civil Procedure 65 for entry of a preliminary injunction prohibiting Defendants  
4 from diverting federal funds and resources for the construction of a border wall in the El Centro  
5 Sector located in Imperial County, California. This motion also responds to the Court’s May 23,  
6 2019 Order, ECF No. 163, directing further briefing by the parties in light of federal activities in  
7 California and elsewhere announced after the parties filed their initial motions for preliminary  
8 injunction that were the subject to the Court’s hearing on May 17, 2019. California moves to  
9 enjoin Defendants’ use of their transfer authority under §§ 8005 and 9002 of the Fiscal Year (FY)  
10 2019 Department of Defense Appropriations Act (FY 2019 DOD Appropriations Act), Pub. L.  
11 No. 115-245, 132 Stat. 2981, 2999, 3042 (2018), and 10 U.S.C. § 284 to divert funding and  
12 resources for construction of a barrier on the southern border of California. California also moves  
13 to enjoin Defendants from taking any further action related to their border wall proposal unless  
14 and until Defendants comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§  
15 4321-4370m-12. This motion is based on this Notice of Motion and Motion, the Memorandum of  
16 Points and Authorities, the accompanying declaration and Request for Judicial Notice, all briefs  
17 and evidence submitted in support of Plaintiff States’ Motion for Preliminary Injunction, ECF No.  
18 59, as well as the papers, evidence and records on file, and any other written or oral evidence or  
19 arguments as may be presented.

20                   **MEMORANDUM OF POINTS AND AUTHORITIES**

21                   **INTRODUCTION**

22                   This Court has already found that plaintiffs in this lawsuit and in the related case *Sierra*  
23 *Club v. Trump*, are likely to succeed on the merits of their claims that Defendants’ diversion of  
24 Department of Defense (DOD) funding appropriated for other purposes through § 8005 of the FY  
25 2019 DOD Appropriations Act and 10 U.S.C. § 284 toward construction of a border wall is  
26 beyond their statutory authority and violates separation of powers principles. Order Den. Pls.’  
27 Mot. for Prelim. Inj. at 13-24, *California v. Trump*, No. 19-cv-872 (May 24, 2019), ECF No. 165  
28 (*States PI Order*); Order Granting in Part and Den. in Part Pls.’ Mot. for Prelim. Inj., at 31-42,

1 *Sierra Club v. Trump*, No. 19-cv-892 (May 24, 2019), ECF No. 144 (*Sierra Club* PI Order).  
2 Defendants have now taken additional actions relying on essentially the same provisions that this  
3 Court enjoined Defendants from using in the *Sierra Club* PI Order to divert \$1.5 billion in  
4 additional DOD funds toward construction in the El Centro Sector on California’s southern  
5 border. California supports the issuance of the *Sierra Club* PI Order and for the same reasons that  
6 this Court preliminarily enjoined Defendants from invoking §§ 8005 and 284 to construct a  
7 border barrier in New Mexico and Arizona, a preliminary injunction should be issued to prevent  
8 construction in the El Centro Sector.<sup>1</sup> Similarly, this Court should enjoin Defendants’ invocation  
9 of § 9002 to transfer a portion of the \$1.5 billion (funding appropriated for “overseas  
10 contingencies”) because § 9002 requires that the § 8005 criteria be met and includes additional  
11 conditions that Defendants fail to satisfy.

12 Moreover, while the Court may once again issue a preliminary injunction based on the  
13 threat of irreparable injury facing the *Sierra Club* plaintiffs, California respectfully urges that the  
14 Court consider the unique, significant harms to its sovereign interests and environment and  
15 natural resources that independently justify the issuance of preliminary relief preventing  
16 Defendants from moving forward with construction in the El Centro Sector—and thereby  
17 recognize that in cases like this one, such relief does not turn on the happenstance of private  
18 plaintiffs facing irreparable injury. Absent a preliminary injunction, Defendants will be permitted  
19 to utilize funds neither authorized nor appropriated by Congress to bypass California’s  
20 environmental laws and regulations to initiate construction in the El Centro Sector. This  
21 infringement on California’s sovereign interest in enforcing its environmental laws is in and of  
22 itself sufficient to establish irreparable harm. In addition, the natural resources and wildlife  
23 protected by those laws are likely to suffer irreparable injury absent preliminary injunctive relief.

24 Finally, as this Court found in its *Sierra Club* PI Order, the balance of the equities and  
25 public interest favor a preliminary injunction here where plaintiffs’ injuries are irreparable.

26 \_\_\_\_\_  
27 <sup>1</sup> Since the Court determined that the plaintiffs in *Sierra Club* established irreparable  
28 harm, the Court did not consider whether Plaintiff State of New Mexico in this case proffered  
sufficient evidence of irreparable harm because it deemed the relief sought in New Mexico’s  
motion as “duplicative” of the relief granted in the *Sierra Club* PI Order. *States* PI Order at 32.

1 California is therefore entitled to preliminary relief in order to preserve the status quo for the  
2 pendency of this litigation.

### 3 **BACKGROUND**

#### 4 **I. DEFENDANTS' DIVERSION OF FUNDING FOR CONSTRUCTION OF A BORDER BARRIER** 5 **IN THE EL CENTRO SECTOR**

6 California incorporates by reference the factual record submitted in support of Plaintiff  
7 States' Motion for Preliminary Injunction. *See, e.g.*, ECF No. 59 at 4-12 (background section of  
8 motion for preliminary injunction). Moreover, California submits the following factual  
9 information about Defendants' plans for construction in the El Centro Sector.

10 Defendants have diverted \$2.5 billion in DOD funds appropriated by Congress for other  
11 purposes to carry out President Trump's proposal to construct a wall across the southern border of  
12 the United States. On March 25, 2019, Defendants first ordered the diversion of \$1 billion of  
13 DOD funds through § 8005 of the FY 2019 DOD Appropriations Act for use under 10 U.S.C.  
14 § 284 in constructing fencing in the El Paso and Yuma Sectors on New Mexico and Arizona's  
15 southern borders, respectively. ECF No. 59-4, RJN Exs. 32 & 34. This Court preliminarily  
16 enjoined the use of this \$1 billion for construction in those sectors in the *Sierra Club* PI Order (at  
17 55). On May 13, 2019, Defendants informed the Court that they had diverted, through §§ 8005  
18 and 9002 of the FY 2019 DOD Appropriations Act, an additional \$1.5 billion which had been  
19 appropriated by Congress for other purposes, and that they would use those funds toward  
20 construction of fencing under DOD's authority in 10 U.S.C. § 284. ECF No. 143; *see also* ECF  
21 No. 143-1, Exs. B & C. DOD transferred \$818.5 million by means of its general transfer  
22 authority in § 8005, and \$681.5 million under its special Overseas Contingency Operations  
23 transfer authority in § 9002. ECF No. 143-1, Ex. C. Defendants have represented that a portion  
24 of those funds will be used to construct fencing for the El Centro Project 1 on the southern border  
25 of California. ECF No. 143-1 at 2.

26 The El Centro Sector consists of 70 miles on California's southern border. California's  
27 Req. for Judicial Notice re El Centro Project (El Centro RJN), Ex. 1. On February 25, 2019, DHS  
28 requested DOD's support for the El Centro Project 1. ECF No. 59-4, RJN Ex. 33 at 3.

1 Specifically, DHS asked DOD to assist in the El Centro Sector by: (1) “undertaking road  
2 construction;” (2) “replacing approximately 15 miles of existing vehicle barrier with new  
3 pedestrian fencing;” and (3) “installing lighting in . . . specific locations.” *Id.* In the February 25  
4 request, Defendants provided precise coordinates for the proposed construction to extend  
5 “approximately 10 miles west of the Calexico Port of Entry continuing west 15.25 miles in  
6 Imperial County.” *Id.*

7 On May 9, 2019, DOD agreed to provide DHS with the requested support for three projects  
8 in the Tucson Sector in Arizona and El Centro Project 1 in California for constructing “30-foot  
9 pedestrian fencing” and roads, and installing lighting. ECF No. 143-1, Rapuano Decl., Ex. A  
10 (May 9 reprogramming). On May 15, 2019, DOD awarded a \$141.75 million contract to BFBC  
11 LLC, in part, for construction in the El Centro Sector. El Centro RJN Ex. 2. DOD obligated  
12 \$141.75 million at the time of the award. *Id.* DOD plans to begin construction as early as July 1,  
13 2019, 45 days after the awarding of the contract. ECF No. 143-1, Rapuano Decl. ¶ 11.

14 In agreeing to provide DOD support for the El Centro Project 1, Acting DOD Secretary  
15 Shanahan informed DHS that “[a]s the proponent of the requested action, CBP will serve as the  
16 lead agency for environmental compliance” and CBP will “accept custody of the completed  
17 infrastructure, account for that infrastructure in its real property records, and operate and maintain  
18 the completed infrastructure.” ECF No. 59-4, RJN Ex. 34. On May 15, 2019, Acting DHS  
19 Secretary Kevin McAleenan published in the federal register his determination that a number of  
20 environmental laws be waived pursuant to § 102(c) of the Illegal Immigration Reform and  
21 Immigrant Responsibility Act of 1996 (IIRIRA) for construction in the El Centro Sector.  
22 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant  
23 Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019) (IIRIRA waiver).  
24 Acting Secretary McAleenan waived a number of federal environmental statutes and “all federal,  
25 state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject  
26 of” the federal statutes identified in the waiver. *Id.* at 21,801.

1 **II. HARMS TO THE STATE’S ENVIRONMENT, WILDLIFE, AND NATURAL RESOURCES**  
2 **CAUSED BY DEFENDANTS’ CONSTRUCTION OF A BORDER BARRIER IN EL CENTRO**  
3 **AND INTERFERENCE WITH CALIFORNIA’S ENFORCEMENT OF ITS STATE LAWS**

4 As a sovereign state, California is entitled to enact and enforce its own laws. It is the policy  
5 of the State to “conserve, protect, and enhance its environment” and “prevent destruction,  
6 pollution, or irreparable impairment of the environment and the natural resources of” the  
7 State. Cal. Gov’t Code § 12600(a). Over the course of decades, California has enacted a robust  
8 an extensive state environmental regulatory structure designed to protect the State’s air and water  
9 quality, species, land, and other environmental resources. *See, e.g.*, Porter-Cologne Water  
10 Quality Control Act, Cal. Water Code §§ 13000-16104; California Safe Drinking Water Act, Cal.  
11 Health & Safety Code §§ 116270-116755; California Endangered Species Act, Cal. Fish and  
12 Game Code §§ 2050-2155.5; California Noise Control Act of 1973, Cal. Health & Safety Code  
13 §§ 46000-46080; California Hazardous Waste Control Law, Cal. Health & Safety Code §§  
14 25100-25259; Carpenter-Presley-Tanner Hazardous Substances Account Act, Cal. Health &  
15 Safety Code §§ 25300-25395.45. Since 1971, the Attorney General of the State of California has  
16 been charged with providing the people of the State of California “with adequate remedy to  
17 protect the natural resources of the State of California from pollution, impairment, or  
18 destruction.” Cal. Gov’t Code § 12600(b).

19 Defendant’s unlawful diversion of funds to construct El Centro Project 1 and the IIRIRA  
20 waiver that flows from that diversion harm California’s sovereign interests in, among other  
21 things, enforcing its laws protecting water quality, air quality, and endangered and rare wildlife.

22 **Water Quality Laws**

23 For a construction project such as El Centro Project 1, in which dredge and fill activities are  
24 expected to occur at or near the Pinto Wash and several other ephemeral streams that drain into  
25 the New River, Defendants would ordinarily be required to comply with federal and state laws to  
26 protect water quality. *See* 33 U.S.C. § 1323(a); Decl. of Dr. Kai Dunn (Dunn Decl.) ¶¶ 8-13. In  
27 fact, absent a waiver of all environmental laws, Defendants would be precluded from moving  
28 forward with El Centro Project 1 until the Colorado River Regional Water Quality Control Board  
(a state agency) certified Defendants’ compliance with California’s permitting process set forth

1 under the California Porter-Cologne Water Quality Control Act. Cal. Water Code §§ 13260,  
2 13776; 33 U.S.C. § 1341(a)(1) (state water quality certification required as part of federal permit);  
3 Dunn Decl. ¶¶ 9-10. Compliance with California’s water quality laws is required because El  
4 Centro Project 1, which would entail significant soil disturbances, will traverse several unnamed  
5 ephemeral streams that drain into the Pinto Wash and are protected waters of the United States  
6 and the State of California. Dunn Decl. ¶¶ 12-13, 16; El Centro RJN Ex. 3. Due to the nature and  
7 location of the proposed construction project, El Centro Project 1 would also require a National  
8 Pollution Discharge Elimination System (NPDES) General Construction permit, which is issued  
9 by the State Water Resources Control Board and administered by California’s Colorado River  
10 Regional Water Quality Control Board. Dunn Decl. ¶¶ 18-19. These permitting and  
11 certifications requirements apply just as equally to federal projects as they do to all other projects.  
12 *See* 33 U.S.C. §§ 1323, 1341, 1342 1344; Dunn Decl. ¶¶ 8-9, 11.

13 Under California law, the State Water Resources Control Board and nine regional boards  
14 (collectively Water Boards) are charged with responsibility for establishing water quality  
15 objectives designed to protect the beneficial uses of water bodies in each region of the State. Cal.  
16 Water Code §§ 13240-13247; Dunn Decl. ¶¶ 4-5. These water quality objectives are set forth in  
17 “basin plans” that are adopted regulations under the California Code of Regulations and that the  
18 regional boards are required to apply in exercising their permitting authority. *See, e.g.*, Cal. Code  
19 Regs. tit. 23, §§ 3960-3969.4 (regulations for Colorado River Basin Region); Dunn Decl. ¶ 6.  
20 The regulatory authority of the State Water Boards is a critical means by which the State of  
21 California ensures compliance with its water quality objectives. Dunn Decl. ¶¶ 5, 20.  
22 Consequently, the Water Boards’ decisions concerning applications to certify compliance with  
23 the state quality standards or decisions concerning the applications for storm water construction  
24 permits, including determination on whether conditions or limitations should be imposed on those  
25 permits, are the primary means by which the Water Boards implement those water quality  
26 objectives. Cal. Water Code §§ 13240-13247; 13260, 13376 (waste discharge requirements);  
27 Dunn Decl. ¶¶ 5, 20. Denying the Water Boards their regulatory authority strips them of their  
28 ability to implement California’s water quality objectives.

1           **Air Quality Laws**

2           The construction project that Defendants propose to undertake and the waiver of California  
3 law relating to it would also undermine California’s enforcement of its air quality standards. The  
4 federal Clean Air Act prohibits federal agencies, such as Defendants, from engaging in,  
5 supporting, or financing any activity that does not conform to a state implementation plan. 42  
6 U.S.C. § 7506(c)(1). “Conformity” violations, as defined by the Clean Air Act, include  
7 “increas[ing] the frequency or severity of any existing violation of any standard in any area,” or  
8 “delay[ing] timely attainment of any standard . . . in any area.” *Id.* § 7506(c)(1)(B)(ii)-(iii); *see*  
9 *also* 40 C.F.R. § 93.154 (conformity is the “responsibility” of each federal agency). These  
10 safeguards prevent federal agencies from interfering with the States’ abilities to comply with the  
11 Clean Air Act’s requirements.

12           El Centro Project 1 is being constructed in Imperial County, and the local air district has  
13 implemented Rule 801 as part of California’s U.S. Environmental Protection Agency (EPA)  
14 approved State Implementation Plan (SIP), which has also been approved by the California Air  
15 Resources Board, to reduce, among other criteria pollutants, the amount of fine particulate matter  
16 (PM 10) generated from construction and earth-moving activities in Imperial County. Rule 801,  
17 El Centro RJN Ex. 4. Under the Clean Air Act and the SIP, Defendants must comply with Rule  
18 801, which, among other things, requires Defendants to develop and implement a dust-control  
19 plan for construction projects to prevent, reduce, and mitigate PM 10 emissions. 42 U.S.C. §  
20 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); Revisions to the California State Implementation  
21 Plan, Imperial County Air Pollution Control District, 75 Fed. Reg. 39,366 (July 8, 2010) (to be  
22 codified at 40 C.F.R. Part 52); Rule 801. In addition to protecting Californians by supporting  
23 federal health standards, these rules avoid blowing dust that can also cause more acute regional or  
24 local health issues. Here, through the IIRIRA waiver, Defendants have made clear they will not  
25 comply with California’s air quality rules in constructing El Centro Project 1.

26           The Clean Air Act also requires federal agencies, in many cases, to conduct a conformity  
27 analysis in order to determine whether a proposed project, such as El Centro Project 1, is  
28 consistent with California’s SIP. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.150. A “conformity

1 determination,” including public disclosures of the agency’s decision, 40 C.F.R. § 93.156, is  
2 required for each pollutant where the total amount of direct and indirect emissions in a  
3 nonattainment or maintenance area, that are caused by the proposed project would equal or  
4 exceed the threshold levels established by the EPA. 40 C.F.R. § 93.153(b). Defendants have not  
5 conducted a conformity analysis or demonstrated that they fall below those threshold levels for El  
6 Centro Project 1, and due to the IIRIRA waiver, there is no indication that they intend to do so.

7 **Endangered and Threatened Species Protection**

8 Lastly, but for the IIRIRA waiver, DHS would be required to consult with the United States  
9 Fish and Wildlife Service to ensure that construction of the border wall “is not likely to  
10 jeopardize the continued existence of any endangered species or threatened species or result in the  
11 destruction or adverse modification of habitat of such species” that are identified as endangered  
12 under federal and California law. 16 U.S.C. § 1536(a)(2); Decl. of Kevin Clark (Clark Decl.) ¶¶  
13 5, 15. As discussed in greater detail below, El Centro Project 1 will harm federal and California  
14 endangered species such as the Peninsular Bighorn Sheep, which utilizes an important lamb-  
15 rearing habitat adjacent to El Centro Project 1. Thus, absent injunctive relief pending the Court’s  
16 determination of the merits of California’s claims, the project and the waiver relating to it will  
17 interfere with the objectives of California’s environmental laws and regulations.

18 **LEGAL ARGUMENT**

19 **I. CALIFORNIA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS**

20 California incorporates by reference the arguments made in Plaintiff States’ briefs in  
21 support of their motion for preliminary injunction. ECF No 59; ECF No. 112. For the reasons  
22 discussed in those briefs, and as this Court has already determined with respect to New Mexico,  
23 California is likely to succeed on its claims that Defendants have acted ultra vires by transferring  
24 funds through § 8005 and 10 U.S.C. § 284 for construction of the border barrier project that  
25 Congress rejected, *States* PI Order at 14-18, and that “Defendants’ reading [of § 8005] likely  
26 would violate the Constitution’s separation of powers principles.” *Id.* at 20; *see also id.* at 18-24  
27 (discussing “serious constitutional questions” raised by Defendants’ interpretation of §§ 284 and  
28

1 8005); *see also* ECF No. 59 at 13-25, *States PI Order* at 4-9, 11-12. There is no reason to treat  
2 California’s claims in this motion differently.<sup>2</sup>

3 Defendants’ use of § 9002 to divert DOD funding intended for overseas operations in the  
4 May 9 reprogramming action is unlawful and ultra vires as well. First, in order to transfer funds  
5 between appropriations under § 9002, Defendants must satisfy the criteria of § 8005. That section  
6 expressly states that the transfer authority provided in it is subject to the same terms and  
7 conditions as the authority provided in section 8005 of this Act. FY 2019 DOD Appropriations  
8 Act, § 9002. Section 8005 in turn states that such transfers: (1) may not be used “where the item  
9 for which funds are requested has been denied by the Congress,” and (2) must be “based on  
10 unforeseen military requirements.” *Id.* § 8005. As this Court has already found, Defendants have  
11 failed to satisfy the § 8005 criteria because: (1) the border barrier is an item for which Congress  
12 has denied funding; and (2) the ostensible need for the border barrier was not an “unforeseen  
13 military requirement.” *States PI Order* at 13-18. This alone supports a ruling from this Court that  
14 California has established a likelihood of success on the merits.

15 Second, under § 9002, DOD can only transfer funds “*between* the appropriations or funds  
16 made available to the Department of Defense *in this title*” (emphases added)—namely, Title IX,  
17 the Overseas Contingency Operations title (also referred to as Overseas Contingency  
18 Operations/Global War on Terrorism [OCO/GWOT]). FY 2019 DOD Appropriations Act, §  
19 9002. Notably, this clause is specific to § 9002 and OCO/GWOT funding; it does not appear in §  
20 8005, which allows DOD to transfer funds made available in the FY 2019 DOD Appropriations  
21 Act without the proviso that such transfers only be made between items within a given title. FY  
22 2019 DOD Appropriations Act, § 8005. Thus, this operates as an additional limitation on DOD’s  
23 authority to divert OCO/GWOT funds.

24 The appropriation under Title IX for OCO/GWOT in the FY 2019 DOD Appropriations  
25 Act for “Drug Interdiction and Counter-Drug Activities” is limited to those amounts “designated

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26 <sup>2</sup> For the same reasons presented in the prior motion, California continues to assert that its  
27 claims that Defendants violated the Administrative Procedure Act (APA) by exceeding their  
28 statutory authority and acting in an arbitrary and capricious manner, and violated NEPA by  
failing to conduct an environmental review, are likely to succeed. ECF No. 59 at 26-29; ECF No.  
112 at 9-14, 15-17.

1 by the Congress for [OCO/GWOT] pursuant to section 251(b)(2)(A)(II) of the Balanced Budget  
2 and Emergency Deficit Control Act of 1985.” FY 2019 DOD Appropriations Act, 132 Stat. 2981,  
3 3042. That section (codified in U.S.C. Title 2) exempts from the general sequestration statute  
4 (Pub. L. No. 112-25, 125 Stat 240 (2011), which imposes strict limits on defense spending)  
5 appropriations that “the Congress designates for [OCO/GWOT] in statute on an account by  
6 account basis and the President subsequently so designates.” 2 U.S.C. § 901(b)(2)(A)(ii).  
7 President Trump issued a designation for the funds at issue here on September 28, 2018, stating  
8 that the OCO/GWOT amounts “cover the military and civilian costs necessary to achieve U.S.  
9 national security goals in Afghanistan, the broader Middle East, and other designated conflict  
10 zones and to address other emergent crises.” El Centro RJN Ex. 5 at 1-2. But the lands on which  
11 the El Centro Project 1 is planned are all within the United States, and not overseas. As a  
12 consequence, spending funds on a border barrier within the territory of the United States simply  
13 does not fall within the areas of national security concern set forth in President Trump’s  
14 designation of OCO/GWOT funds, which discusses specific overseas geographies and  
15 “designated conflict zones.”

16 For these reasons, the transfer of OCO/GWOT funds under § 9002 for border barrier  
17 construction does not satisfy the criteria of that provision, and is therefore unlawful.

## 18 **II. CALIFORNIA IS LIKELY TO SUFFER IRREPARABLE HARM FROM THE FUNDING** 19 **DIVERSION**

### 20 **A. The Funding Diversion Harms California’s Sovereign Interest in the** 21 **Enforcement of Its State Laws**

22 For decades, California has had in place a robust regulatory framework to protect its  
23 environment and natural resources. The imminent construction of the border barrier in the El  
24 Centro Sector will impede California’s ability to implement numerous state environmental  
25 protection laws and directly interferes with California’s undeniable sovereign interest in its  
26 “power to create and enforce a legal code.” *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*,  
27 458 U.S. 592, 601 (1982). In particular, Defendants’ actions undermine California’s sovereign  
28 interest in protecting its natural resources and wildlife within its borders, an interest that is  
effectuated through a number of state environmental protection laws and regulations. *See Maine*

1 v. *Taylor*, 477 U.S. 131, 151 (1986) (state has “broad regulatory authority to protect the . . .  
2 integrity of its natural resources”); *Pac. Nw. Venison Producers v. Smith*, 20 F.3d 1008, 1013  
3 (9th Cir. 1994) (“Clearly, the protection of wildlife is one of the state’s most important  
4 interests.”).

5 It is well-established that whenever a state is prevented “from effectuating statutes enacted  
6 by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of*  
7 *California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see*  
8 *also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (state’s inability to  
9 “employ a duly enacted statute . . . constitutes irreparable harm”); *Coalition for Econ. Equity v.*  
10 *Wilson*, 122 F.3d 718, 719 (9th Cir. 1977) (“[I]t is clear that a state suffers irreparable injury  
11 whenever an enactment of its people or their representatives is enjoined.”). But for the illegal  
12 diversion of DOD funding, Defendants would not have available the funding and resources to  
13 initiate the planned construction of a barrier on California’s southern border, consequently  
14 undermining the purposes of state environmental laws.

15 Without an injunction, Defendants could act on the IIRIRA waiver (which California  
16 submits should not be applicable) to infringe on California’s sovereignty by thwarting the State’s  
17 legislative objectives to enforce its environmental laws and regulations. For example, the  
18 diversion of funding and the IIRIRA waiver interfere with California’s ability to enforce its laws  
19 protecting water quality, Cal. Water Code §§ 13050, 13220-13228.15, 13240, 13376; Cal. Code  
20 Regs. tit. 23, §§ 3960-3969.4; Dunn Decl. ¶¶ 4-6, 20, as well as its air quality laws designed to  
21 protect residents from the dust and fine particulate matter (PM 10) that will be generated during  
22 project construction. *See supra* Background, Section II; *see also* 42 U.S.C. § 7506(c)(1); 40  
23 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366; Rule 801, El Centro RJN Ex. 4. The  
24 diversion of funding and waiver also interfere with California’s ability to implement laws to  
25 protect rare wildlife species such as the flat-tailed horned lizard, a species of special concern  
26 under California law, and the Peninsular Bighorn Sheep, which is endangered under California’s  
27 Endangered Species Act (as well as the federal Endangered Species Act). Clark Decl. ¶¶ 14-18;  
28 Decl. of Chris Nagano Re: El Centro Project 1 (Nagano Decl.) ¶¶ 13-23.

1           Since Defendants’ diversion of funding for construction in El Centro “places [California’s]  
2 sovereign interests and public policies at stake . . . the harm the State stands to suffer [is]  
3 irreparable if deprived of those interests without first having a full and fair opportunity to be  
4 heard on the merits.” *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *see also*  
5 *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental Inc.*, 944 F.2d 597, 603 (9th Cir.  
6 1991) (recognizing that “intangible injuries” that cannot be remedied by monetary damages  
7 “qualify as irreparable harm”). That it is the executive branch that is denying California through  
8 the IIRIRA waiver the State’s sovereign right to “effectuate” its own statutes only amplifies the  
9 irreparable injury. Defendants have unlawfully diverted over a billion dollars in funding and then  
10 waived federal and state environmental laws under IIRIRA, actions that impede the will of  
11 California’s people through their elected representatives to enforce the State’s environmental  
12 laws. These unilateral executive actions stand in repudiation of both separation of powers *and*  
13 federalism principles “that when the people delegate some degree of control to a remote central  
14 authority, one branch of government ought not possess the power to shape their destiny without a  
15 sufficient check from the other two.” *Clinton v. City of New York*, 524 U.S. 417, 450 (1998)  
16 (Kennedy, J., concurring); *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“a healthy  
17 balance of power between the States and the Federal Government will reduce the risk of tyranny  
18 and abuse from either front.”). This infringement on California’s sovereignty in and of itself rises  
19 to the level of irreparable injury and justifies the imposition of preliminary injunctive relief. *See*  
20 *Maryland*, 567 U.S. at 1301.

21           Furthermore, California’s interests are distinct from that of private party litigants, as the  
22 irreparable harm to its sovereign interests in preserving and enforcing its own laws cannot be  
23 adequately asserted by other parties. *See California v. United States*, 180 F.2d 596, 599 (9th Cir.  
24 1950) (determining California had a right to intervene in action between the United States and a  
25 non-public entity where the non-public entity “can only assert in court the rights of its  
26 shareholders and cannot adequately protect the State’s interest in its public welfare”). Therefore,  
27 California is entitled to preliminary relief to ensure that the State can protect its own interests in  
28 its environment and natural resources throughout the pendency of this case. *See Day v. Apoliona*,

1 505 F.3d 963, 965 (9th Cir. 2007) (granting intervention as of right to Hawaii because the action  
2 involved the state’s “protectable interests in the lands” of the state and “[t]he disposition of [the]  
3 action may impede the State’s ability to protect this interest”).<sup>3</sup>

4 **B. The Funding Diversion Causes Harm to California’s Environment,  
5 Wildlife, and Natural Resources**

6 The construction that flows from Defendants’ funding diversion is likely to cause  
7 irreparable injury to California’s resources because it will harm wildlife and plant species that are  
8 protected under both federal and state law. “Environmental injury, by its nature, can seldom be  
9 adequately remedied by monetary damages and is often permanent or at least of long duration,  
10 i.e., irreparable.” *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000)  
11 (citations omitted). California has demonstrated that irreparable environmental injury is likely to  
12 occur in the absence of relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22  
13 (2008); *see also States PI Order* at 30. Specifically, the planned construction in the El Centro  
14 Sector constitutes a “definitive threat” to protected “species” such as Peninsular Bighorn Sheep,  
15 flat-tailed horned lizards, and burrowing owls, and will harm multiple other species of lizards,  
16 birds and mammals such as mountain lion and bobcat. Clark Decl. ¶¶ 12-19; Nagano Decl. ¶¶  
17 12-27; *Nat’l Wildlife Fed’n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994) (citing *Fund  
18 for Animals, Inc. v. Turner*, No. 91-2201(MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991)) (where  
19 an injunction was warranted by the potential killing of three to nine grizzly bears); *see also States  
20 PI Order* at 31.

21 For instance, the Peninsular Bighorn Sheep is listed as endangered under both federal and  
22 California law. Clark Decl. ¶ 14; Nagano Decl. ¶ 27. The sheep has been recorded moving back  
23 and forth across the border immediately west of the project area, which allows for genetic  
24 interchange between populations based in the United States and Mexico. Clark Decl. ¶ 14;

25 \_\_\_\_\_  
26 <sup>3</sup> California also has an independent interest in obtaining and defending any preliminary  
27 injunction issued by this Court based on the legal claims alleged. For instance, California submits  
28 that its claims that Defendants violated the APA by acting “contrary to constitutional right,  
power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), and “in excess of statutory jurisdiction,  
authority, or limitations, short of statutory right,” *id.* § 706(2)(C), are a proper basis for relief and  
requests this Court to rule on those bases as well. *See ECF No. 59* at 26.

1 Nagano Decl. ¶13. Without that genetic exchange, inbreeding can cause physical abnormalities,  
2 behavioral problems and reduced reproductive capability. *Id.* ¶ 17. The sheep are currently able  
3 to move through the vehicle fencing to access habitat on both sides of the border, but would not  
4 be able to do so once the bollard wall planned for El Centro Project 1 is constructed. *Id.* ¶¶ 13,  
5 15.

6 In addition, over 11,000 acres in the Jacumba Mountains, immediately north of the  
7 international border and adjacent to the El Centro Project 1 site, are designated critical habitat for  
8 the sheep because “the Jacumba Mountains represent the only area of habitat connecting the DPS  
9 [Distinct Population Segment] listed in the United States with other bighorn sheep populations  
10 that occupy the Peninsular Ranges in Mexico.” Clark Decl. ¶ 14. “The California Department of  
11 Fish and Wildlife has tracked collared sheep in this area for many years, and documented  
12 intensive use of the slopes immediately above and to the west of the western terminus of the  
13 project area.” *Id.* These slopes are lamb-rearing habitat, and pregnant ewes would be adversely  
14 affected by construction activities at the El Centro Project 1 site and vehicle traffic and lighting  
15 associated with border infrastructure immediately below these slopes, particularly because the  
16 ewe group depends on resources in the United States and also in Mexico. *Id.*; Nagano Decl. ¶¶  
17 13-18. According to the California Department of Fish and Wildlife, “[a] fence along the US-  
18 Mexico border would prohibit movement to, and use of, prelambing and lamb-rearing habitat and  
19 summer water sources.” Clark Decl. ¶ 14.

20 Other protected wildlife species that will be harmed by El Centro Project 1 include the flat-  
21 tailed horned lizard and the burrowing owl, which are both species of concern under California  
22 state law. *Id.* ¶¶ 15-18; Nagano Decl. ¶¶ 21-26. The flat-tailed horned lizard occurs within the  
23 project footprint and surrounding area. Clark Decl. ¶ 18. The extensive trenching, construction  
24 of roads, and staging of materials proposed for the project would harm or kill lizards that are  
25 either active or in underground burrows within the project footprint. *Id.*; Nagano Decl. ¶¶ 19-20,  
26 23. Additionally, the principal predators of these lizards include small birds of prey that use  
27 perches to hunt. By constructing a continuous fence, 18-30 feet high, as well as numerous light  
28 poles, over the lizards’ habitat range, this project will greatly increase the predation rate of lizards

1 adjacent to the wall, and in combination with permanent roads and infrastructure removing  
2 suitable habitat, will effectively sever the linkage that currently exists between populations on  
3 both sides of the border. Clark Decl. ¶ 18; Nagano Decl. ¶¶ 19, 23. Burrowing owls, which live  
4 in underground burrows, also face death or injury from project construction, including being  
5 buried alive in their burrows. Nagano Decl. ¶¶ 24-25. And El Centro Project 1 is likely as well  
6 to inflict irreparable and irreversible impacts to at least 23 plants of conservation concern, 13 of  
7 which are considered rare, threatened, or endangered in California and are eligible for state  
8 listing, including the flat-seeded spurge and Haydon’s Lotus. Decl. of Sula Vanderplank ¶¶ 6 &  
9 24.

### 10 **III. THE BALANCE OF HARDSHIPS FAVORS GRANTING A PRELIMINARY INJUNCTION**

11 This Court has already determined that the balance of equities and the public interest favor  
12 a preliminary injunction for the *Sierra Club* plaintiffs upon a showing of irreparable injury.  
13 *Sierra Club* PI Order at 54. Likewise, here, where California has established irreparable injury,  
14 and the public “has an interest in ensuring that statutes enacted by their representatives are not  
15 imperiled by executive fiat,” a preliminary injunction is warranted to preserve the status quo until  
16 the Court can determine the merits of California’s claims. *Id.* (quoting *E. Bay Sanctuary*  
17 *Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

### 18 **CONCLUSION**

19 For the foregoing reasons, Plaintiff State of California requests that the Court grant its  
20 motion for preliminary injunction.  
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1 Dated: May 29, 2019

Respectfully submitted,

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28

XAVIER BECERRA  
Attorney General of California  
ROBERT W. BYRNE  
SALLY MAGNANI  
MICHAEL L. NEWMAN  
Senior Assistant Attorneys General  
MICHAEL P. CAYABAN  
CHRISTINE CHUANG  
EDWARD H. OCHOA  
Supervising Deputy Attorneys General  
HEATHER C. LESLIE  
JANELLE M. SMITH  
JAMES F. ZAHRADKA II

*/s/ Lee I. Sherman*

LEE I. SHERMAN  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California*