

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
 13 IN THE UNITED STATES DISTRICT COURT
 14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 15 OAKLAND DIVISION
 16

17 **STATE OF CALIFORNIA; STATE OF**
 18 **COLORADO; STATE OF**
 19 **CONNECTICUT; STATE OF**
 20 **DELAWARE; STATE OF HAWAII;**
 21 **STATE OF ILLINOIS; STATE OF**
 22 **MAINE; STATE OF MARYLAND;**
 23 **COMMONWEALTH OF**
 24 **MASSACHUSETTS; ATTORNEY**
 25 **GENERAL DANA NESSEL ON BEHALF**
 26 **OF THE PEOPLE OF MICHIGAN;**
 27 **STATE OF MINNESOTA; STATE OF**
 28 **NEVADA; STATE OF NEW JERSEY;**
STATE OF NEW MEXICO; STATE OF
NEW YORK; STATE OF OREGON;
STATE OF RHODE ISLAND; STATE OF
VERMONT; COMMONWEALTH OF
VIRGINIA; and STATE OF WISCONSIN;

4:19-cv-00872-HSG

DECLARATION OF KEVIN B. CLARK
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION
CONCERNING EL CENTRO PROJECT
1

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity

1 as President of the United States of America;
2 **UNITED STATES OF AMERICA; U.S.**
3 **DEPARTMENT OF DEFENSE; PATRICK**
4 **M. SHANAHAN**, in his official capacity as
5 Acting Secretary of Defense; **MARK T.**
6 **ESPER**, in his official capacity as Secretary of
7 the Army; **RICHARD V. SPENCER**, in his
8 official capacity as Secretary of the Navy;
9 **HEATHER WILSON**, in her official capacity
10 as Secretary of the Air Force; **U.S.**
11 **DEPARTMENT OF THE TREASURY;**
12 **STEVEN T. MNUCHIN**, in his official
13 capacity as Secretary of the Treasury; **U.S.**
14 **DEPARTMENT OF THE INTERIOR;**
15 **DAVID BERNHARDT**, in his official capacity
16 as Acting Secretary of the Interior; **U.S.**
17 **DEPARTMENT OF HOMELAND**
18 **SECURITY; KIRSTJEN M. NIELSEN**, in
19 her official capacity as Secretary of Homeland
20 Security;

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Defendants.

1 I, Kevin B. Clark, declare as follows:

2 1. I have personal knowledge of the facts set forth in this declaration. If called as a
3 witness, I could and would testify competently to the matters set forth below.

4 2. I am the Director of BioServices for the San Diego Natural History Museum, a
5 position I have held since 2014.

6 3. I have over twenty-five years of biological experience, including conducting surveys
7 for a wide range of endangered species. I hold permits with the state and federal governments to
8 nest search, monitor, and band rare and endangered passerines, shorebirds, and seabirds. I hold
9 federal and state permits to survey and nest monitor endangered species such as the Southwestern
10 Willow Flycatcher, Western Snowy Plover, Least Bell's Vireo, California Gnatcatcher, and
11 California Least Tern. I am also permitted to mist-net, handle, and band migratory birds.

12 4. I have conducted biological surveys throughout the U.S., Mexico, and Costa Rica,
13 from bird banding in bottomland hardwood forests of Louisiana to mammal, bird, and reptile
14 studies in the Sierra Nevada of California. I co-authored a book on the extinction of the Imperial
15 Woodpecker that took me throughout tropical and montane habitats of northwestern Mexico. I
16 have a Bachelor of Science degree from the University of California, Berkeley, and a Master of
17 Science Degree in Ecology from Arizona State University. My thesis research involved the
18 effects of habitat fragmentation on birds, mammals, and reptiles. My research analyzed
19 landscape influences on biological communities and trophic level relationships of extirpated and
20 persisting species. This research found that smaller habitat fragments supported fewer species of
21 animals, and even common species in pre-fragmented landscapes could be extirpated once
22 fragmentation occurred. In 2011, this research was published in the Journal of the Arizona-
23 Nevada Academy of Sciences.

24 5. From 2000-2006, I was a Fish and Wildlife Biologist with the U.S. Fish and
25 Wildlife Service ("U.S. FWS" or "Service"), based in Carlsbad, California. In this capacity, I
26 worked on the recovery of endangered species, including the California Gnatcatcher and
27 California Least Tern, and was the regional recovery coordinator for the threatened Western
28 Snowy Plover. I was the primary author of the 2003 designation of critical habitat for the

1 California Gnatcatcher, which included a proposed rulemaking reclassifying the species as a
2 Distinct Population Segment under the Endangered Species Act (68 Fed. Reg. 20228). As part of
3 this analysis, I thoroughly reviewed all the pertinent literature and survey information for the
4 species, conducted field surveys for the bird and its habitat requirements, and analyzed and
5 finalized maps describing the range of the species and its essential habitat locations. In my
6 capacity as a Fish and Wildlife Biologist I also participated in consultations required under
7 Section 7 of the Endangered Species Act, which are required whenever a federal project may
8 impact threatened or endangered species.

9 6. Subsequent to my employment at the U.S. FWS, I founded my own company,
10 Clark Biological Services, to conduct focused surveys and conservation-based research on
11 endangered species in Southern California. I possess authorized take permits from both federal
12 and state wildlife agencies to conduct surveys and monitoring of the California Gnatcatcher. I
13 authored numerous reports on the results of California Gnatcatcher surveys and monitoring,
14 generally for large landowners in southern California such as the Department of Defense. After I
15 founded my own conservation firm, I joined the San Diego Natural History Museum as the
16 Director of BioServices, and in this capacity I coordinate the contracting within the science
17 departments with various clients requiring applied ecological research, typically for large
18 agencies and institutions. I also currently serve on the recovery teams of the endangered Masked
19 Bobwhite Quail (*Colinus virginianus ridgwayi*) and the Sonoran pronghorn (*Antilocapra*
20 *americana sonoriensis*), both convened by the U.S. FWS.

21 7. I have analyzed the border-infrastructure projects outlined in the February 25,
22 2019, memorandum regarding “Request for Assistance Pursuant to 10 U.S.C. § 284” that the U.S.
23 Department of Homeland Security (“DHS”) directed to the U.S. Department of Defense
24 (“DOD”), in which DHS requests DOD’s assistance in constructing pedestrian fencing along
25 approximately 218 miles of the U.S.- Mexico border. DHS has identified eleven separate projects
26 for border areas located in California, Arizona and New Mexico (“Section 284 Projects”).

27 8. One of the Section 284 Projects, El Centro Project 1, is located in Imperial County,
28 California, and involves removing approximately 15 miles of vehicle barrier fencing and

1 replacing it with pedestrian fencing that will be 18 to 30 feet tall. El Centro Project 1 also
2 includes construction of roads and installation of lighting. I have also reviewed the description of
3 El Centro Project 1, as outlined in the “Determination Pursuant to Section 102 of the Illegal
4 Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” that DHS
5 published in the federal register (84 Fed. Reg. 21800).

6 9. DHS has not provided detailed information regarding El Centro Project 1. It is
7 presumed that the project will be similar to recently completed border wall projects in other
8 portions of the California border, and will include a new bollard wall from 18 to 30 feet high,
9 construction of a 20-foot wide all-weather road, and assorted temporary roads for access to the
10 work sites. As with any construction project of this scale, it is assumed that extensive areas for
11 equipment staging and materials storage will also be required in the vicinity of the project area at
12 the border.

13 10. I have considerable experience in evaluating the impacts caused by similar border
14 infrastructure projects. From 2011-2012, my company was hired to perform biological
15 monitoring of the construction along the primary and secondary border fences from Bunker Hill
16 (about a mile east of the Pacific Ocean) to the coast. My observations of the amount of area
17 needed for staging equipment and materials, constructing roads for access to construction areas,
18 and cut and fill activities during construction are directly relevant to the current proposal.

19 11. In this declaration, I provide several examples specific to the El Centro Project 1
20 site, and to the border region more generally, to illustrate how El Centro Project 1 will cause
21 irreparable harm to wildlife.

22 12. Multiple peer-reviewed scientific studies have found that a variety of wildlife,
23 ranging from mountain lions (*Puma concolor*) to bighorn sheep (*Ovis canadensis*) as well as
24 ground dwelling non-migratory birds, are negatively affected by border fences disrupting their
25 movement patterns. In disrupting movement, these barriers can reduce or restrict events such as
26 juvenile and adult dispersal, as well as genetic interchange between populations.

27 13. The American Society of Mammalogists, a professional, scientific, and
28 educational society consisting of nearly 3,000 members, passed a resolution in June 2017

1 opposing the construction of border infrastructure due to its well-documented negative effects on
2 a variety of mammal species, many of them declining or endangered. The resolution calls upon
3 the Federal Government to ensure that all boundary infrastructure, both existing and proposed,
4 include features and modifications to maintain landscape permeability for mammalian
5 populations to permit demographic and genetic exchange necessary for well-distributed, viable
6 populations and the long-term persistence of species and mammalian community structure.
7 According to the resolution, the actions of DHS on the US-Mexico border must receive regular
8 environmental review to identify, monitor, and mitigate significant threats to the persistence of
9 mammalian populations under the National Environmental Policy Act (“NEPA”) and the US
10 Endangered Species Act. In addition, the Southwestern Association of Naturalists (“SWAN”)
11 passed a similar resolution in July 2017 opposing the construction of a border wall. SWAN is an
12 international association of scientists, educators, and students founded in 1953 to promote the
13 field study of plants and animals in the southwestern United States, Mexico, and Central America.
14 Their resolution states, “. . . wall construction will irreparably harm many species and some of the
15 Southwest’s most significant lands . . . THEREFORE BE IT RESOLVED that the Southwestern
16 Association of Naturalists (SWAN) calls upon the Governors of all the border states (those of the
17 U.S. and of Mexico), the U.S. Secretary of the Interior, the Secretaria de Medio Ambiente y
18 Recursos Naturales (SEMARNAT) of Mexico, the Director of the U.S. Fish and Wildlife Service,
19 and the Secretary for Homeland Security to immediately stop all plans for construction of the
20 proposed border wall based on the potential negative impacts of the wall to native plants and
21 wildlife and to mitigate the current negative impacts of the existing fence.”

22 14. El Centro Project 1 will harm multiple species of lizards, birds and mammals.
23 Within the proposed project area, numerous species such as bighorn sheep, mountain lion, and
24 bobcat (*Lynx rufus*) would be negatively affected. Immediately to the west of the project area, the
25 Peninsular bighorn sheep has been recorded moving back and forth across the border, allowing
26 for genetic interchange between populations based in the U.S. and Mexico. The Peninsular
27 bighorn sheep is identified as “endangered” under both the Endangered Species Act and the
28 California Endangered Species Act. Over 11,000 acres in the Jacumba Mountains, immediately

1 north of the international border, are designated critical habitat for the sheep because, “the
2 Jacumba Mountains represent the only area of habitat connecting the DPS [Distinct Population
3 Segment] listed in the United States with other bighorn sheep populations that occupy the
4 Peninsular Ranges in Mexico.” (74 Fed. Reg. 17318). The California Department of Fish and
5 Wildlife has tracked collared sheep in this area for many years, and documented intensive use of
6 the slopes immediately above and to the west of the western terminus of the project area. These
7 slopes are lamb-rearing habitat, and pregnant ewes would be adversely affected by construction
8 activities and border patrol actions immediately below them. For instance, the intensive ground
9 disturbances due to road construction and trenching in the project area, as well as the
10 establishment of extensive lighting in the area would introduce continuous disruption in an area
11 that is currently a remote, undisturbed habitat area for the sheep. Were bighorn sheep to abandon
12 these slopes due to the increased disturbance level from the project, it is unclear if suitable high-
13 quality lamb rearing habitat remains in the area to support this unique population that represents
14 the sole connection to sheep populations south of the border. The California Department of Fish
15 and Wildlife states in their 2018 annual report on sheep monitoring in the area: “The Jacumba
16 ewe group typically spends each winter and spring within the Jacumba Wilderness in the United
17 States and each summer and fall within a canyon just north of Highway 2 in Mexico.” (Colby, J.
18 & Botta, R. 2018. CDFW 2017-18 Peninsular bighorn sheep annual report; Page 7). They further
19 state: “The Jacumba ewe group is dependent on resources both within the US and Mexico. A
20 fence along the US-Mexico border would prohibit movement to, and use of, prelambling and
21 lamb-rearing habitat and summer water sources. Furthermore, lamb-rearing habitat in the east
22 Jacumba Mountains is not within USFWS- designated critical sheep habitat and further
23 development of energy projects within or adjacent to these areas, combined with disturbance by
24 border security activities, will have significant adverse impacts on this ewe group.” (Page 24)

25 15. In addition to the Peninsular Bighorn Sheep, numerous rare species occur in the
26 project area and would be harmed or killed by the extensive trenching, construction of roads, and
27 staging of materials necessary to construct the proposed border fence. These include:
28

- 1 Flat-tailed Horned Lizard (CA State Species of Special Concern)
- 2 Colorado Desert Fringe-toed Lizard (CA State Species of Special Concern)
- 3 Loggerhead shrike (CA State Species of Special Concern)
- 4 LeConte's Thrasher (CA State Species of Special Concern)
- 5 Townsend's big-eared bat (CA State Species of Special Concern)
- 6 Pallid bat (CA State Species of Special Concern)
- 7 California Leaf-nosed bat (CA State Species of Special Concern)
- 8 Western Yellow bat (CA State Species of Special Concern)
- 9 Western mastiff bat (CA State Species of Special Concern)
- 10 Pocketed free-tailed bat (CA State Species of Special Concern)
- 11 Big free-tailed bat (CA State Species of Special Concern)
- 12 Pallid San Diego pocket mouse (CA State Species of Special Concern)
- 13 Palm Springs pocket mouse (CA State Species of Special Concern)

14 In my experience, if environmental review under NEPA had not been waived, the USFWS
15 would consider and address potential impacts to these state listed species as part of its review of
16 the project during the NEPA process.

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18 16. The flat-tailed horned lizard (*Phrynosoma mcallii*) is found in a restricted area of low
19 desert habitat in southeastern California, including the project site, and also in southwestern
20 Arizona, and adjacent Mexico. This lizard was proposed by the U.S. Fish and Wildlife Service for
21 listing as a threatened species under the Endangered Species Act. On March 15, 2011, this
22 proposal was withdrawn by the Service, which determined that the species did not need the
23 protection of the Act, in part due to ongoing conservation efforts such as the establishment of a
24 Rangewide Management Strategy. Thus, were it not for the anticipated conservation efforts under
25 the Rangewide Management Strategy, the flat-tailed lizard would be listed as a threatened species
26 under the Endangered Species Act. It is currently considered a California Species of Special
27 Concern. The Rangewide Management Strategy is an interagency document that provides
28

1 guidance for conservation and management of sufficient habitat to maintain populations of flat-
2 tailed horned lizards within each of five Management Areas in perpetuity. The flat-tailed horned
3 lizard is typically found in sandy flats and dunes that often support sparse desert vegetation. This
4 lizard is a specialized predator of ants, and has declined throughout its range due to habitat
5 fragmentation and degradation from agricultural development, urbanization, and off-road vehicle
6 use. For much of the year it stays concealed in underground burrows, emerging during warmer
7 months to forage for prey.

8 17. The Rangewide Management Strategy focuses conservation efforts on five
9 Management Areas, including the Yuha Desert Management Area, in which the El Centro Project
10 1 footprint occurs. The population within the Yuha Desert Management Area is naturally
11 connected to populations to the south in Mexico, and provides a genetic linkage with
12 Management Areas to the north. The El Centro Project 1 occurs across the entire southern
13 boundary of this population, and if these lizards cannot cross this barrier, there would be a new
14 genetic break in the species range.

15 18. The flat-tailed horned lizard occurs within the project footprint and surrounding
16 area. The extensive trenching, construction of roads, and staging of materials proposed in this
17 area will harm or kill lizards that are either active or in underground burrows within the project
18 footprint. Additionally, the principal predators of these lizards include small birds of prey that
19 use perches to hunt. By constructing a continuous fence, 18-30 feet high, as well as numerous
20 light poles, over the entire southern boundary of the Yuha Desert Management Area, this project
21 will greatly increase the predation rate of lizards adjacent to the wall, and in combination with
22 permanent roads and infrastructure removing suitable habitat, will effectively sever the linkage
23 that currently exists between populations on both sides of the border.

24 19. The project also proposes to install lighting along the 15-mile construction area.
25 The frequency and intensity of lighting is not specified, but is likely to be extensive to
26 accommodate border patrol-related activities. Currently, this portion of the California desert is
27 composed of natural habitats and has limited artificial lighting. Artificial night lighting can have
28 myriad negative effects on animals and plants. Artificial night lighting can reduce movement and

1 restrict the effectiveness of corridors for nocturnal mammals, including medium and large
2 predators, as well as the sensitive rodent species that likely occur within the project area. Night
3 lighting can also attract and disorient migrating birds, leading to their death, and has also been
4 correlated with declines in nocturnal reptiles in Southern California. The artificial night lighting
5 associated with the El Centro Project 1 will significantly degrade the natural habitats adjacent to
6 the project area for the entire 15-mile extent of the project, causing harm to a variety of sensitive
7 species inhabiting the area.

8
9 I declare under penalty of perjury under the laws of the United States that the foregoing is
10 true and correct.

11 Executed on May 28, 2019, at San Diego, California.

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15 _____
16 Kevin B. Clark
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