

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;

Plaintiffs,

v.

4:19-cv-00872-HSG

**DECLARATION OF DR. KAI DUNN IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION
CONCERNING EL CENTRO PROJECT
1**

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

22
23
24
25
26
27
28
Defendants.

1 I, Dr. Kai Dunn, declare as follows:

2 1. I have personal knowledge of each fact stated in this declaration, and if called as
3 witness could competently testify thereto.

4 2. I am a Senior Water Resources Control Engineer and Chief of the “NPDES /
5 Stormwater / 401 Water Quality Certification Unit” for the California Regional Water Quality
6 Control Board, Colorado River Basin Region (Colorado River Basin Water Board). I have served
7 as the Chief of this unit since 2014 and been employed by the Colorado River Basin Water Board
8 as a senior engineer since 2007.

9 3. As the Chief of the NPDES / Stormwater / 401 Water Quality Certification Unit, I am
10 responsible for drafting National Pollutant Discharge Elimination System (NPDES) permits for
11 wastewater and storm water discharges to surface waters within the Colorado River Basin Region
12 that are issued by the Colorado River Basin Water Board, as well as water quality certifications
13 under Section 401 of the Clean Water Act. I am a California registered civil engineer and hold a
14 doctorate degree in environmental engineering from the University of Southern California.

15 4. The federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) (commonly
16 referred to as the “Clean Water Act”) and the California Porter-Cologne Water Quality Control
17 Act (Cal. Wat. Code sec. 13000 et seq.) authorize the California State Water Resources Control
18 Board (State Water Board) and the nine Regional Water Quality Control Boards (regional water
19 boards) to regulate and protect water quality in California, including by establishing beneficial
20 uses and water quality standards and policies (collectively, “water quality standards”) for surface
21 waters within California and by implementing water quality control laws, regulations, and
22 policies through permits and other orders to ensure compliance with the standards.

23 5. Each regional water board—including the Colorado River Basin Water Board—is
24 required to prepare a water quality control plan (“basin plan”) setting forth the water quality
25 objectives for all surface waters and groundwaters within the region. Cal. Wat. Code § 13241
26 (Regional Board establishes water quality objectives as “in its judgment will ensure the
27 reasonable protection of beneficial uses”); see generally §§ 13220-13228.15. “Beneficial uses” of
28 water refers to the resources, services, and qualities they support or could support, e.g., drinking,

1 boating, critical habitat, etc. Cal. Wat. Code §§ 13050(f), 13240. Water quality objectives ensure
2 water quality is adequate to support designated beneficial uses for each water body. Cal. Wat.
3 Code § 13050(h).

4 6. The Water Quality Control Plan for the Colorado River Basin Region (Basin Plan),
5 adopted by the Colorado River Basin Water Board, contains the legal, technical, and
6 programmatic bases of water quality regulation in the Board's region. Cal. Wat. Code § 13240;
7 33 U.S.C. § 1313. The Colorado River Basin Water Board's mission is to preserve, enhance, and
8 restore the quality of California's water resources and drinking water for the protection of the
9 environment, public health, and all beneficial uses for the benefit of present and future
10 generations. The Basin Plan is designed to preserve and enhance water quality in the region and
11 to protect the beneficial uses of all regional waters. The Basin Plan has been approved by the
12 State Water Board and has the full force and effect of regulation. Cal. Code Regs., tit. 23, § 3960
13 et seq; Cal. Gov Code § 11353.

14 7. The Colorado River Basin Water Board protects the water quality of water bodies
15 within the Colorado River Basin Region, including the New River, Alamo River, Imperial Valley
16 agricultural drains, washes and ephemeral streams that drain into and serve as to tributaries to the
17 New River and Alamo River, the All-American Canal, and the Salton Sea, all of which are
18 located near California's border with Mexico. These surface waters generally constitute
19 jurisdictional waters of the United States under the Clean Water Act and are also waters of the
20 state under the California Porter-Cologne Water Quality Control Act. 33 U.S.C. § 1362; Cal.
21 Wat. Code § 13050(e).

22 8. The Colorado River Basin Water Board implements the water quality objectives
23 contained in the Basin Plan through the issuance of several different types of permits and other
24 orders and certifications to protect water quality. See, e.g., Cal. Wat. Code § 13263 (waste
25 discharge requirements "shall implement any relevant water quality control plans that have been
26 adopted, shall take into consideration the beneficial uses to be protected, the water quality
27 objectives reasonably required for that purpose..."; 33 U.S.C. § 1342 (federal Clean Water Act
28 permits must conform to state water quality standards). In addition to the traditional NPDES

1 permits for domestic, municipal, and industrial wastewater discharges to surface waters (under
2 Clean Water Act Section 402), the Water Boards issue NPDES permits to address storm water
3 runoff from construction activities that may result in discharges into the jurisdictional waters of
4 the United States. Pursuant to section 313 of the Clean Water Act (33 U.S.C. § 1323) federal
5 agencies and departments are required to comply with the requirements of California's NPDES
6 permitting program.

7 9. The Colorado River Basin Water Board also issues water quality certifications under
8 Section 401 of the Clean Water Act for projects that involve the discharge of dredged or fill
9 material into waters of the United States, including rivers and streams and wetlands. Under
10 Section 401, every applicant for a federal permit or license for any activity that may result in a
11 discharge to jurisdictional waters must obtain a water quality certification from the appropriate
12 Water Board demonstrating that the proposed activity will comply with state water quality
13 standards and with any other appropriate requirement of state law. The federal permit, such as a
14 permit issued by the United States Army Corps of Engineers under Clean Water Act Section 404,
15 allowing a party to dredge and fill within or near a water body, cannot be issued unless the state
16 grants or waives certification. 33 U.S.C. §§ 1341, 1344; Cal. Wat. Code §§ 13260, 13376.

17 10. A Section 401 water quality certification ensures that the project complies with water
18 quality objectives for waters impacted by the project, and that the project will not harm or impair
19 the waters' beneficial uses as defined by the Colorado River Basin Plan. Water quality
20 certifications typically include requirements for implementing best management practices (BMPs)
21 that the project proponent must follow in order to minimize the project's impacts on water
22 quality. BMPs are scheduling of activities, prohibitions of practices, maintenance procedures,
23 and other management practices to prevent or reduce the discharge of pollutants to waters of the
24 United States. BMPs also include treatment requirements, operating procedures, and practice to
25 control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material
26 storage.

27 11. The Colorado River Basin Water Board's NPDES / Stormwater / Section 401 Water
28 Quality Certification Unit has reviewed and processed several applications for Section 401 water

1 quality certifications submitted to the Board by federal agencies for projects within the Colorado
2 River Basin Region. These have included applications submitted by the United States Bureau of
3 Reclamation, the United States Army Corps of Engineers, and United States Customs and Border
4 Protection. See, e.g., the Section 401 Water Quality Certifications contained at:

5 <https://www.waterboards.ca.gov/coloradoriver/water_issues/programs/401_certification/>.

6 12. Exhibit 3 to Plaintiffs Request for Judicial Notice is a Water Quality Certification
7 Order issued in response to United States Customs and Border Protection's (CBP) 2013
8 application for a Section 401 water quality certification. I have reviewed the Water Quality
9 Certification Order and CBP's application for certification. CBP sought to construct a 1.6 mile
10 road, known as the West Desert All-Weather Road project, along the United States-Mexico
11 border in an area west of the Calexico Port of Entry. The order reflects that CBP needed a
12 Section 401 water quality certification and federal permits from the Army Corps of Engineers
13 because the project would involve dredge and fill activities within or next to the Pinto Wash, an
14 ephemeral stream that drains into the New River. The Pinto Wash is described under the heading
15 "Receiving Water":

16 Pinto Wash is located north of the project area in the Salton Sea Watershed west of
17 the Westside Main Canal and between the U.S./Mexico border and California State
18 Route 98. Water may flow through this ephemeral wash into the Westside Main
19 Canal, which eventually delivers water into the Salton Sea, or into delivery canals and
20 through agricultural fields into drains and then into washes that flow to the New River
21 and eventually into the Salton Sea.

22 (RJN Ex. 3, p. 7.)

23 13. The Colorado River Basin Water Board's Section 401 Water Quality Certification
24 Order, which granted CBP certification subject to specified conditions, also noted that the West
25 Desert All-Weather Road project would traverse six ephemeral washes that are waters of the
26 United States through use of concrete low-water crossings, reinforce concrete pipes, or box
27 culverts. (See RJN Ex. 3, page 7.) In documents attached to CBP's application for certification,
28 CBP acknowledged that the six unnamed ephemeral washes constitute waters of the United
States. The order also specified the exact location of the West Desert All-Weather Road project
using GPS coordinates. (See RJN Ex. 3, page 7.)

1 14. I have reviewed a February 25, 2019 memorandum from the Executive Secretary of
2 Department of Homeland Security and addressed to the Executive Secretary of the Department of
3 Defense. (Doc. 59-4, RJN Ex. 33.) Page 3 of the memorandum describes El Centro Project 1, a
4 proposed project to replace 15 miles of vehicle barriers location with pedestrian fencing. The
5 memorandum also specifies the exact location of the El Centro Project 1 using GPS coordinates.
6 (Doc. 59-4, RJN Ex. 33, p. 3.)

7 15. I also reviewed a Determination Pursuant to Section of 102 of the Illegal Immigration
8 Reform and Immigrant Responsibility Act (“waiver”) pertaining to the El Centro Project 1. 84
9 Fed. Reg. 21800 (May 15, 2019). The waiver states the project will involve for the construction
10 of barriers 18 to 30 feet high, roads and lighting.

11 16. Exhibit A to this declaration fairly depicts the location of both the El Centro Project
12 1 and the West Desert All-Weather Road Project based on the GPS coordinates specified in RJN
13 Exhibit 3 and the February 25, 2019 memorandum by the Department of Homeland Security.
14 The location of the El Centro Project 1 is the segment of the border between points 1 and 4. The
15 location of the West Desert All-Weather Road Project is the segment of the border between points
16 2 and 3. This necessarily means that the El Centro Project 1 will occur within or near the Pinto
17 Wash and will traverse at least six ephemeral washes that have been identified as waters of the
18 United States as described in the Colorado River Basin Water Board’s 2013 Water Quality
19 Certification Order (RJN Ex. 3) granting the CBP a Section 401 water quality certification.

20 17. I am generally familiar with the steel bollard style fencing that has been constructed
21 by CBP over the past year near the Calexico Port of Entry and understand that the construction of
22 similar fencing is proposed for El Centro Project 1. The construction of these types of barriers
23 necessarily involves the use of heavy equipment, excavation and digging. Similarly, the
24 construction of roadways near the border barriers necessarily require grading and significant soil
25 disturbances.

1 18. The El Centro Project 1 will traverse several ephemeral washes that have been
2 identified as waters of the United States. The eastern portion of the El Centro Project 1 will also
3 occur in areas near agricultural canals that drain into waters of the United States. As with the
4 West Desert All Weather Road project, a smaller project constructed in the same area, the El
5 Centro Project 1 could not proceed without a Section 404 dredge and fill permit issued by the
6 United States Army Corps of Engineers, which would in turn compel Section 401 water quality
7 certification by the unit that I manage.

8 19. Due to the nature and location of construction, the El Centro Project 1 would also
9 require enrollment in the State Water Board's statewide NPDES Construction General Permit,¹
10 which permit is enforced by the Colorado River Basin Water Board in the region. The proposed
11 construction poses a high risk for storm water run-off impacting on water quality during the
12 construction phase and post-construction maintenance. Among other things, the Construction
13 General Permit requires the preparation and implementation of a Storm Water Pollution
14 Prevention Plan (SWPPP) to ensure construction and post-construction activities do not adversely
15 impact water quality. The permit requires a risk assessment of pollutants being discharged to
16 surface waters and that the SWPPP include a description of: (a) the specific project activities that
17 threaten water quality (i.e., characterization of potential sources of storm water pollution and their
18 pollutants); and (b) specific best management practices and other measures that will be
19 implemented by the project proponent for project-specific activities during construction to
20 prevent and minimize adverse water quality impacts.

21 20. The authority of the State and Regional Water Boards under the NPDES permitting
22 program and the Section 401 water quality certification program are necessary to ensure that
23 projects within the Colorado River Basin Region are constructed in a way that is consistent with
24 the state's water quality objectives and in a way that protects the beneficial uses for affected
25 water bodies. Without such permitting authority, the Colorado River Basin Water Board and
26

27 ¹ *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm*
28 *Water Discharges Associated with Construction and Land Disturbance Activities*, State Water
Board Order No. 2009-0009-DWQ, NPDES No. CAS000002 (as amended).

1 other Water Boards lose critical tools for implementing applicable water quality objectives and
2 enforcing California water quality laws.

3 I declare under penalty of perjury that the foregoing is true and correct and that this
4 declaration was executed on May 29, 2019, in Palm Desert, California.

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

Kai Dunn

EXHIBIT A

Exhibit A: Location of CBP's Previous Pinto Wash Project in Relation to the Proposed El Centro Project 1



Legend

- **Point 1: El Centro Project 1 Start Coordinate**
 - 32.63273, -115.922787 (February 25, 2019 DHS Request for DOD Assistance)
- **Point 2: CBP's West Desert All-Weather Road Impacting the Pinto Wash Start Coordinate**
 - N32° 38.89518, W115° 43.52994 (August 24, 2013 CBP Application to the California State Water Resources Control Board)
- **Point 3: CBP's West Desert All-Weather Road Impacting the Pinto Wash End Coordinate**
 - N32° 38.96544, W115° 42.1974 (August 24, 2013 CBP Application to the California State Water Resources Control Board)
- **Point 4: El Centro Project 1 End Coordinate**
 - 32.652563, -115.662399 (February 25, 2019 DHS Request for DOD Assistance)