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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA et al.; Plaintiffs, **v.** **DONALD J. TRUMP, in his official capacity as President of the United States of America et al.;** Defendants.	Case No. 4:19-cv-00872-HSG **PLAINTIFF STATES OF CALIFORNIA AND NEW MEXICO'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002; 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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NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Plaintiff States of California and New Mexico hereby move the Court under Federal Rule of Civil Procedure 56 for partial summary judgment. California and New Mexico respectfully request that the Court enter judgment in their favor as to their claims because the undisputed evidence establishes that the diversions of federal funds and resources under §§ 8005 and 9002 of the Fiscal Year (FY) 2019 Department of Defense Appropriations Act (FY 2019 DOD Appropriations Act), Pub. L. No. 115-245, 132 Stat. 2981, 2999, 3042 (2018) and 10 U.S.C. § 284 for construction of a barrier on the southern borders of California and New Mexico: (1) are ultra vires; (2) violate the United States Constitution's separation of powers principles, including the Appropriations and Presentment Clauses; and (3) violate the Administrative Procedure Act (APA). California and New Mexico are entitled to injunctive relief prohibiting Defendants from utilizing §§ 8005 and 9002 of the FY 2019 DOD Appropriations Act and 10 U.S.C. § 284 to divert $2.5 billion in DOD funds for construction in California and New Mexico. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying declarations and Request for Judicial Notice, all briefs and evidence submitted in support of the earlier motions for preliminary injunction, ECF Nos. 59 and 167, this Court's prior rulings on the motion for preliminary injunction in this case, ECF No. 165, and in *Sierra Club v. Trump,* No. 19-cv-892 (May 24, 2019), ECF No. 144, other papers, evidence, and records on file, and any other evidence or arguments as may be presented.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Court has already ruled that plaintiffs in this lawsuit and in the related case, *Sierra Club v. Trump,* are likely to succeed on the merits of their claims that Defendants have acted unlawfully by diverting $1 billion in Department of Defense (DOD) funds appropriated for other purposes toward construction of a border barrier in the El Paso Sector in New Mexico, and "that Defendants' reading [of § 8005] likely would violate the Constitution's separation of powers principles." Order Den. Pls.' Mot. for Prelim. Inj. 20, 13-24, ECF No. 165 (*States* PI Order); Order Granting in Part and Den. in Part Pls.' Mot. for Prelim. Inj. 31-42, *Sierra Club* (May 24,

2019), ECF No. 144 (*Sierra Club* PI Order). Now, based on the reasoning in those rulings and the undisputed record, New Mexico is entitled to partial summary judgment in its favor.

California is likewise entitled to partial summary judgment. Relying on essentially the same authority that this Court enjoined Defendants from using in the *Sierra Club* PI Order, Defendants have diverted $1.5 billion in additional DOD funds toward construction of a border barrier in the El Centro Sector on California's southern border. Consequently, based on the reasoning in the Court's preliminary injunction rulings, the proposed diversion for construction in the El Centro Sector is unlawful and violates the Constitution. California and New Mexico are also entitled to partial summary judgment because Defendants' actions violate the APA.

For relief, California and New Mexico both request that this Court declare that the transfer and use of DOD funds toward Defendants' proposed border wall is unlawful and unconstitutional, and enjoin the use of those funds toward construction in California and New Mexico. California and New Mexico also respectfully urge that in determining whether to enjoin this construction, this Court consider the unique, significant harms to the States' sovereign interests, in addition to the irreparable injury facing the private plaintiffs, because Defendants may appeal any permanent injunction just as they have appealed the preliminary injunction that this Court granted.[1] Notice of Appeal, *Sierra Club* (May 29, 2019), ECF No. 145. As shown below, absent an injunction, Defendants will be unconstrained in their bypassing of the States' environmental laws and regulations in constructing border barriers, infringing California's and New Mexico's sovereign interests in enforcing their laws. This sovereign injury is in and of itself sufficient to establish irreparable harm. In addition, California and New Mexico would suffer irreparable harm to their natural resources and wildlife protected by those laws. Finally, as this Court has already held, the balance of the equities and public interest favor enjoining Defendants' unlawful conduct.

BACKGROUND

I. THE PRESIDENT AND CONGRESS'S DISPUTE OVER BORDER BARRIER FUNDING

"The President has long voiced support for a physical barrier between the United States and

[1] This Court did not consider whether Plaintiff State of New Mexico established irreparable harm because it deemed the *Sierra Club* PI Order sufficient to provide relief. *States* PI Order 32.

Mexico." *Sierra Club* PI Order 3; *see also* Req. for Judicial Notice in Supp. of Mot. for Prelim. Inj. (PI RJN), ECF No. 59-4, Exs. 3-13.[2] Between 2017 and 2018, Congress considered numerous bills that would have authorized or appropriated billions of dollars toward President Trump's proposed border wall, all of which failed. *See, e.g.*, *Sierra Club* PI Order 3-5; PI RJN Exs. 14-20. Starting at the end of 2018, President Trump and Congress engaged in a protracted and public dispute over funding for a border wall that resulted in a record 35-day partial government shutdown. *Sierra Club* PI Order 3-5; *see also* PI RJN Exs. 21-24, 26.

During the shutdown, on January 6, 2019, the Office of Management and Budget requested $5.7 billion from Congress to fund "approximately 234 miles of new physical barrier." PI RJN Ex. 25. Congress never granted this funding request. Instead, after weeks of negotiation, on February 14, 2019, Congress passed the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (CAA). The CAA appropriates only $1.375 billion to the Department of Homeland Security (DHS) to construct primary pedestrian border fencing in the Rio Grande Valley Sector on Texas's southern border subject to enumerated conditions and limitations. *Id.* §§ 230-32, 133 Stat. at 28. This appropriation is the only funding in the CAA that Congress designated for barrier construction. The funding imposes limits on where the barrier may be built (only in certain portions of the Rio Grande Valley), how the barrier may be designed, and whom DHS must consult with prior to construction. *Id.* §§ 230-32. The CAA became law on February 15, 2019.

II. DEFENDANTS' ACTIONS TO DIVERT FUNDING AND RESOURCES FROM OTHER SOURCES TOWARD DEFENDANTS' PROPOSED BORDER WALL

On the same day that President Trump signed the CAA into law, the Trump Administration announced it would redirect $6.7 billion of federal funds from three other sources to construct a border wall, over and above the $1.375 billion that Congress had appropriated for limited fencing at the border. *Sierra Club* PI Order 6-8; PI RJN Ex. 28. This motion concerns the redirection of $2.5 billion of DOD resources toward construction of a border wall.

[2] To avoid duplication, California and New Mexico refer to previous requests for judicial notice for all exhibits previously presented to the Court for judicial notice in the motion for preliminary injunction that this Court decided. *See States* PI Order 7 n.6; *Sierra Club* PI Order 4 n.3.

While Defendants invoked 10 U.S.C. § 284(b)(7), which authorizes the Secretary of Defense to use the DOD drug-interdiction account to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," none of the transferred funds were originally appropriated by Congress for drug-interdiction purposes. *See Sierra Club* PI Order 16. Instead, on March 25, 2019, DOD transferred $1 billion from DOD's Military Personnel and Reserve account to the drug-interdiction account through the Department's transfer authority in § 8005 of the FY 2019 DOD Appropriations Act. Administrative Record (AR) 1-8, 34-37 (ECF No. 173) (March 25 Reprogramming Action). DOD planned to use these funds for Yuma Sector Projects 1 and 2 (on the southern border of Arizona) and El Paso Sector Project 1 (on the southern border of New Mexico). *Id.* 1-8. In addition, on May 9, 2019, DOD transferred $818.5 million to the drug-interdiction account by means of its general transfer authority in § 8005, and another $681.5 million under its special Overseas Contingency Operations transfer authority in § 9002 of the FY 2019 DOD Appropriations Act, for a total of $1.5 billion. *Id.* 137-56 (May 9 Reprogramming Action, with March 25 Reprogramming Action, Reprogramming Actions). DOD plans to use these funds to construct Tucson Sector Projects 1, 2, and 3 (on the southern border of Arizona) and El Centro Sector Project 1 (on the southern border of California). *Id.* 137-47.

Although DOD historically has sought congressional approval prior to using its transfer authority—indeed, its internal appropriations rules require it, *see* PI RJN Exs. 37-38, DOD notified Congress of all of the Reprogramming Actions only after the transfers were made, and the relevant House committees then formally disapproved of these actions. *States* PI Order 19-20; *Sierra Club* PI Order 37-38; *see also* PI RJN Exs. 35-36; Req. for Judicial Notice re Mot. for Partial Summ. J. (Partial MSJ RJN) Ex. 1.

DOD's Acting Secretary Shanahan informed DHS that Customs and Border Protection (CBP) would "serve as the lead agency for environmental compliance" and will accept and maintain all of the completed border barrier projects. AR 7, 159. DHS issued waivers pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 102(c), 110 Stat. 3009 (1996) for construction in the El Paso and El Centro Sectors

obviating "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" the federal statutes identified in the waiver. 84 Fed. Reg. 17,185, 17,187 (Apr. 24, 2019); 84 Fed. Reg. 21,800-01 (May 15, 2019). DOD has already awarded contracts to private companies for construction in both sectors, Rapuano Decl. Ex. G, ECF No. 89-10; Partial MSJ RJN Ex. 2, and Defendants are poised to begin construction as soon as possible. *See* Mot. to Stay re Order on Mot. for Prelim. Inj., *Sierra Club* (May 29, 2019), ECF No. 146; Second Rapuano Decl. ¶ 11, ECF No. 143-1 (identifying start of construction for El Centro Project 1 as early as 45 days after awarding of contract, i.e., July 1, 2019).

III. HARMS CAUSED BY DEFENDANTS' BORDER BARRIER CONSTRUCTION PROJECTS

A. Construction in the El Centro Sector Harms California's Sovereign Interests in the Enforcement of its Laws that Protect its Environment, Natural Resources, and Wildlife

As a sovereign state, California is entitled to enact and enforce its own laws. California has an express statutory mandate to "conserve, protect, and enhance its environment" and "prevent destruction, pollution, or irreparable impairment of the environment and the natural resources of" the State, Cal. Gov't Code § 12600(a), and it has enacted a robust and extensive series of laws to protect the State's water and air quality, species, land, and other environmental resources. *See, e.g.,* Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2155.5. Pursuant to this body of law, California agencies develop air, water quality, and wildlife resources management plans intended to accomplish California's environmental quality objectives in specific regions of the State. Defendants' diversion of funds to construct El Centro Project 1, and subsequent IIRIRA waiver, bar California from meeting those objectives and enforcing those laws as discussed below.

Water Quality Laws

Under California law, the State Water Resources Control Board and nine regional boards (collectively, Water Boards) establish water quality objectives and standards to protect the beneficial uses of water bodies in the State, which are set forth in "basin plans" that the regional boards must apply in exercising their permitting authority. Cal. Water Code §§ 13260, 13776; Cal. Code Regs. tit. 23, §§ 3960-3969.4; MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 4-6, 20).

California ensures compliance with its water quality objectives through the Water Boards' regulatory authority. MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶5, 6, 20). Consequently, their certification and permitting decisions are the primary means by which the Water Boards implement California's water quality objectives. Cal. Water Code §§ 13240, 13247, 13260, 13376; MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶5, 20).

For construction projects like El Centro Project 1, in which dredge and fill activities are expected to occur at or near the Pinto Wash and several other ephemeral streams that drain into the New River, a regional board must certify compliance with water quality standards. *See* 33 U.S.C. § 1323(a); MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 8-13). Ordinarily, such a construction project could not move forward until a California regional water quality agency certified Defendants' compliance with California's water quality standards, as the federal government previously sought for prior projects in this area. Cal. Water Code §§ 13260, 13776; 33 U.S.C. § 1341(a)(1) (state water quality certification required as part of federal permit); MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 9-10). Compliance with California's water quality laws is required because El Centro Project 1, which would entail significant soil disturbances, would traverse several unnamed ephemeral streams that drain into the Pinto Wash and are protected waters of the United States and of California. *Id.* ¶¶ 12-13, 16; Partial MSJ RJN Ex. 3. Such a project would also require a National Pollution Discharge Elimination System (NPDES) General Construction permit, which is issued by the State Water Resources Control Board and administered by a California regional water quality agency. MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 18-19). Absent a waiver, both these permitting and certification requirements apply to federal projects. *See* 33 U.S.C. §§ 1323, 1341, 1342 1344; MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 8-9, 11). Therefore, denying the Water Boards their regulatory authority, through the funding diversion and IIRIRA waiver, means California's water quality objectives, as set forth in California's Porter-Cologne Water Quality Control Act and the corresponding basin plans, would not be enforced.

Air Quality Laws

The diversion of funds and the waiver of California law would likewise undermine California's enforcement of its air quality standards for complying with the federal Clean Air Act

as set forth in California's State Implementation Plan (SIP). The Clean Air Act prohibits federal agencies, such as Defendant agencies, from engaging in, supporting, or financing any activity that does not conform to a SIP. 42 U.S.C. § 7506(c)(1). "Conformity" violations include "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." *Id.* § 7506(c)(1)(B)(ii)-(iii). These safeguards prevent federal agencies from interfering with states' abilities to comply with the Clean Air Act's requirements.

El Centro Project 1 would be constructed in Imperial County, where the local air district has implemented Rule 801 as part of California's SIP, which has been approved by the California Air Resources Board. Rule 801's purpose is to reduce the amount of fine particulate matter (PM 10) generated from construction and earth-moving activities. Partial MSJ RJN Ex. 4 (Rule 801). If not for the IIRIRA waiver, Defendants would be obligated to comply with Rule 801, which requires the development and implementation of a dust-control plan for construction projects to prevent, reduce, and mitigate PM 10 emissions. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366 (July 8, 2010); Rule 801. In addition to protecting Californians by supporting federal health standards, these rules help mitigate blowing dust that can cause additional acute regional or local health issues. Partial MSJ RJN Ex. 5.

The Clean Air Act also requires federal agencies to conduct a conformity analysis to determine whether a proposed project, such as El Centro Project 1, is consistent with California's SIP. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.150. A "conformity determination" including public disclosures of the agency's decision, 40 C.F.R. § 93.156, is required for each pollutant where the total amount of direct and indirect emissions in a nonattainment or maintenance area caused by the proposed project would equal or exceed the threshold levels. 40 C.F.R. § 93.153(b). Defendants have not conducted a conformity analysis or demonstrated that emissions from El Centro Project 1 would fall below those thresholds.

Endangered and Threatened Species Protection

Lastly, but for the IIRIRA waiver, DHS would be required to consult with the U.S. Fish and Wildlife Service to ensure that El Centro Project 1 "is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" that are identified as endangered under California (and federal) law. 16 U.S.C. § 1536(a)(2); MSJ Env. App'x Ex. 1 (Clark Decl. ¶ 15). As shown below, El Centro Project 1 would harm federal and California endangered species such as the Peninsular Bighorn Sheep, which utilizes an important lamb-rearing habitat adjacent to El Centro Project 1, and the flat-tailed horned lizard. The presence of these species led the federal Bureau of Land Management (BLM) to identify the area (including the segment of the border where El Centro Project 1 would be built) as an Area of Critical Environmental Concern. MSJ Env. App'x Ex 4 (Nagano Decl. ¶ 26). Recognizing the impact projects like El Centro Project 1 would have on the flat-tailed horned lizard in particular, the U.S. Fish and Wildlife Service, the BLM, California Department of Fish and Wildlife, and California State Parks implemented the "Flat-Tailed Horned Lizard Rangewide Management Strategy." This Management Strategy imposes restrictions on projects that would result in large-scale soil disturbances in the project area, like El Centro Project 1, MSJ Env. App'x Ex. 7 (Vanderplank ¶ 8), and flatly prohibits activities that would restrict the lizards' interchange with lizard populations south of the international border. Partial MSJ RJN Ex. 6 at 5, 27, 30, 56.

B. Construction in the El Paso Sector Harms New Mexico's Sovereign Interests in the Enforcement of its Laws that Protect its Environment, Natural Resources, and Wildlife

The diversion of funds and ensuing IIRIRA waiver similarly undermine New Mexico's sovereign ability to implement and enforce its laws to improve air quality and protect wildlife and plant species. Much as in California, in New Mexico, "protection of the state's beautiful and healthful environment is . . . of fundamental importance to the public interest, health, and safety and the general welfare." N.M. Const. art. XX, § 21.

Defendants would normally be required to comply with New Mexico's fugitive dust control rule and High Wind Fugitive Dust Mitigation Plan that New Mexico adopted under the Clean Air Act due to PM 10 exceedances from high winds in Luna and Dona Ana Counties where the El Paso Sector barrier projects are planned for construction. Partial MSJ RJN Ex. 7; 40 C.F.R. § 51.930; N.M. Admin. Code §§ 20.2.23-109-122. Defendants also would normally be required to

consult with the U.S. Fish and Wildlife Service to protect species such as the Mexican wolf that are endangered under both federal and New Mexico law. N.M. Stat. Ann. § 17-2-41 (prohibiting the taking of endangered of threatened species); MSJ Env. App'x Ex. 6 (Traphagen Decl. ¶ 18); Ex. 1 (Clark Decl. ¶ 15). Endangered plants would be harmed by the proposed El Paso Project 1, and Defendants have not demonstrated how impacts to protected plant species would be avoided. N.M. Stat. Ann. § 75-6-1(D); MSJ Env. App'x Ex. 3 (Lasky Decl. ¶ 14). Defendants' diversions of funds to construct both El Centro Project 1 and El Paso Project 1, and the IIRIRA waiver that flows from the diversions, therefore, impede California's and New Mexico's abilities to protect the States' environment, natural resources, and wildlife.

LEGAL ARGUMENT

I. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Declaratory relief is appropriate "[i]n a case or actual controversy" in order to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). And a plaintiff is entitled to a permanent injunction if it has "suffered an irreparable injury," "remedies available at law . . . are inadequate," "the balance of hardships between the plaintiff and defendant" supports an equitable remedy, and "the public interest would not be disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). When the federal government is the opposing party, these last two factors for injunctive relief merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

II. DEFENDANTS LACK AUTHORITY TO DIVERT DOD FUNDING AND RESOURCES FOR A BORDER BARRIER UNDER §§ 8005, 9002, AND § 284 (COUNTS 3 AND 4)

This Court already determined that Defendants likely exceeded their authority by utilizing DOD's general transfer authority under § 8005 of the FY 2019 DOD Appropriations Act to divert DOD funds appropriated for other purposes toward construction of a border barrier. *States* PI Order 14-18; *Sierra Club* PI Order 32-36. Although this Court did not consider DOD's subsequent transfer of funds under § 9002 of the FY 2019 DOD Appropriations Act, it recognized

that this provision, which incorporates the § 8005 criteria and imposes additional limitations, "is, at a minimum, subject to Section 8005's limitations." *Sierra Club* PI Order 12 n.7. Defendants have also exceeded their authority under 10 U.S.C. § 284, which does not authorize the use of DOD funds and resources for a multi-billion dollar border wall project. As the Court correctly determined, these actions in excess of statutory authority are ultra vires. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). They also are "in excess of statutory jurisdiction, authority, or limitations, short of statutory right," in violation of the APA. 5 U.S.C. § 706(2)(C).

A. Defendants Have Exceeded Their Authority Under § 8005

As this Court has already found, *States* PI Order 13, *Sierra Club* PI Order 16-17, in order to divert any of the $1.819 billion in DOD funds toward border barrier construction under § 8005 as intended by the Reprogramming Actions, Defendants must, among other things, show that the transfer is not for an "item" that Congress has denied requested funding and that the transfer is based on "unforeseen military requirements." FY 2019 DOD Appropriations Act § 8005; *see also* 10 U.S.C. § 2214(b) (imposing same conditions). In its prior orders, this Court reasoned that plaintiffs were likely to succeed in showing that Defendants were impermissibly seeking to transfer funds for an item that Congress has denied funding, and there was no "unforeseen" requirement for the border barriers. *States* PI Order 14-18; *Sierra Club* PI Order 32-36. The same reasoning dictates the conclusion that, as a matter of law, Defendants violated § 8005's conditions by transferring money for a project that was denied by Congress and was foreseen. In addition, the transfer violates the § 8005 condition that it be for a "military requirement."

First, Defendants did not follow § 8005 as they transferred money for an item that Congress denied funding. It is undisputed that: (i) the executive branch requested $5.7 billion from Congress for border barrier construction for FY 2019, PI RJN Ex. 25; (ii) in the CAA, Congress appropriated only $1.375 billion "for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction," *States* PI Order 14, *Sierra Club* PI Order 32-33; and (iii) now, Defendants seek to transfer funds by way of § 8005 for barrier construction in a different location and for an amount greater than what was appropriated by Congress. Accordingly, as this Court recognized, Defendants are

proposing to use § 8005 "for an item for which Congress has denied funding" and "thus run[] afoul of the plain language of Section 8005." *States* PI Order 14-15; *Sierra Club* PI Order 33. Moreover, there is nothing in § 8005 suggesting that the "item" for purposes of the provision is *DOD funding* for border barrier construction, as Defendants have argued, rather than "[b]order barrier construction" itself. *States* PI Order 16; *Sierra Club* PI Order 34. Such an interpretation would contradict the purpose of this restriction and "subvert" the judgment made by Congress. *States* PI Order 15-16; *Sierra Club* PI Order 33-34.

Second, Defendants violated the § 8005 condition requiring that the transfer is for a need that was "unforeseen." Defendants' suggestion that any need for border barrier funding was unforeseen "cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018." *States* PI Order 17; *Sierra Club* PI Order 35. Defendants have contended that this Court should look to whether DHS's request for DOD assistance rather than the need for border barrier construction was unforeseen. However, as this Court pointed out, this contention is unreasonable because it makes every request for § 284 support unforeseen until the request is made and thus allows DOD to dictate when it may satisfy § 8005's unforeseen requirement, *States* PI Order 18; *Sierra Club* PI Order 36, an interpretation that would raise serious constitutional questions. *States* PI Order 18-24; *Sierra Club* PI Order 36-42. Defendants' argument also fails because "even the purported need for DoD to provide DHS with support for border security has . . . been long asserted." *States* PI Order 18 (citing the president's April 4, 2018 memorandum directing DOD to support DHS at the border); *Sierra Club* PI Order 36. Moreover, since the plaintiffs filed their preliminary injunction motions, the record on this point has only become stronger, as the House of Representatives has produced evidence of a DOD communication acknowledging that in early 2018, DOD held back the use of funds for counter-drug activity projects "primar[ily]" in anticipation "for possible use in supporting Southwest Border construction" in FY 2018. Partial MSJ RJN Ex. 8 ¶ 2.

Third, Defendants did not satisfy the criteria under § 8005 because the border barrier is not a "military requirement." As Defendants acknowledge, conditions at the border do not pose a "military threat." PI RJN Exs. 46-47. Nor is construction of a border barrier military in nature. To

the contrary, it is DHS, not DOD, that possesses the "experience and technical expertise" to construct border infrastructure, Rapuano Decl. Ex. A at 9; Enriquez Decl. ¶¶ 5-6, ECF No. 89-11, and in fact, the funds transferred by DOD are being used to award contracts to *private* construction companies, Rapuano Decl. Ex. G; Partial MSJ RJN Ex. 2. Indeed, the border barrier is not a military "requirement," which is generally something that is a "necessity." *Requirement*, Merriam-Webster's Dictionary (7th ed. 2016). Far from suggesting that a border wall is a necessity, the president has acknowledged that he "didn't need to" divert funding for it; he just would "rather do it much faster." PI RJN Ex. 50.[3]

B. Defendants Have Exceeded Their Authority Under § 9002

Defendants' use of § 9002 to divert $681.5 million in DOD funding intended for overseas operations in the May 9 Reprogramming Action toward construction in the El Centro Sector is also unlawful and ultra vires. First, as this Court has recognized, *Sierra Club* PI Order 12 n.7, to transfer funds under § 9002, Defendants must satisfy the criteria of § 8005. Section 9002 expressly states that the transfer authority provided in it "is subject to the same terms and conditions as the authority provided in § 8005 of this Act." FY 2019 DOD Appropriations Act § 9002. Thus, Defendants cannot satisfy the requirements of § 9002 because, as shown above, they cannot satisfy § 8005's requirements.

Nor can Defendants satisfy the independent requirements of § 9002. Under § 9002, DOD can only transfer funds "*between* the appropriations or funds made available to the Department of Defense *in this title*" (emphases added)—namely, Title IX, the Overseas Contingency Operations title (also referred to as Overseas Contingency Operations/Global War on Terrorism [OCO/GWOT]). *Id.* The appropriation under Title IX for "Drug Interdiction and Counter-Drug Activities" is limited to those amounts "designated by the Congress for [OCO/GWOT]." *Id.*, 132 Stat. at 3042. The proposed border barrier is plainly not an overseas contingency operation because the lands on which the El Centro Project 1 is planned are all within the continental United States. Nor is the barrier part of the "global war on terrorism," as made clear by the

[3] Defendants argued in opposition to the preliminary injunction motion that the States lacked standing under § 8005 and have no cause of action under that section. This Court correctly rejected both arguments. *States* PI Order 5-7, 9-12.

national security goals set forth in President Trump's designation of those OCO/GWOT funds, which discusses specific areas overseas. Partial MSJ RJN Ex. 9 at 1-2.

C. Defendants Have Exceeded Their Authority Under § 284

Not only is DOD precluded from transferring funds for a border barrier via §§ 8005 and 9002, Defendants also lack statutory authority under 10 U.S.C. § 284 to utilize billions of dollars in DOD funds and resources for these border barrier construction projects. *See Dep't of the Air Force v. FLRA*, 648 F.3d 841, 845-46 (D.C. Cir. 2011) (holding it would be a violation of the Appropriations Clause for the agency "to authorize the expenditure of funds beyond what Congress has approved"). Section 284 is limited to authorizing DOD to provide "support" for the "[c]onstruction of roads and fences and installation of lighting," but that "support" does not authorize DOD to fully fund a construction project for DHS as Defendants plan to do here. PI RJN Ex. 34. When Congress first added this language to DOD appropriations bill, Congress was clear that DOD resources should not "primarily be used to fund" counter-drug activities of other agencies, and any support was to be of "short duration" only. H.R. Rep. No. 101-665, at 20 (1990). Section 284's structure further limits its scope, as it requires notice to Congress for "small scale construction" projects "not to exceed $750,000 for any project." 10 U.S.C. § 284(h), (i)(3).

As this Court observed, "reading [§ 284] to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation." *States* PI Order 21; *Sierra Club* PI Order 39; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statutory construction "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude"). This Court should grant judgment that § 284, as well as §§ 8005 and 9002, cannot be used to effectuate Defendants' border wall project.

III. DEFENDANTS HAVE VIOLATED THE CONSTITUTION (COUNTS 1, 2, AND 3)

This Court recognized that, at minimum, Defendants' expansive interpretations of §§ 8005 and 284 "raise[d] serious constitutional questions," *States* PI Order 18-24; *Sierra Club* PI Order

36-42, and their interpretation of § 8005 "would likely violate the Constitution's separation of powers principles." *States* PI Order 20; *Sierra Club* PI Order 38. But even if § 284 authorized DOD to fund a multi-billion dollar border wall project, and DOD could utilize §§ 8005 and 9002 to divert $2.5 billion appropriated for other purposes into the drug-interdiction account for a project that Congress has already rejected, the executive actions at issue in this case would violate the Constitution's basic separation of powers principles, including the Appropriations and Presentment Clauses. California and New Mexico are entitled to a final judgment that Defendants' actions are unconstitutional.

A. Defendants' Actions Violate the Separation of Powers Doctrine

Defendants' unilateral diversion of billions of dollars toward the construction of a border barrier that Congress refused to fund is antithetical to the constitutional design that "exclusively grants the power of the purse to Congress, not the President." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018). The undisputed facts here—(i) Congress's repeated rejection of border barrier funding from 2017-18; (ii) Congress's pointed refusal to appropriate $5.7 billion in requested border barrier funding resulting in a government shutdown exclusively over the border barrier dispute; *and* (iii) Congress's limited $1.375 billion appropriation for pedestrian fencing in a specified area —demonstrate that Defendants' transfer of funding for construction in other geographic areas is "incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). If Defendants' interpretation of the provisions on which they rely were correct, then "DoD's authority under the statute would render meaningless Congress's constitutionally-mandated power to assess proposed spending, then render its binding judgment as to the scope of permissible spending." *States* PI Order at 20; *Sierra Club* PI Order at 38. Defendants' diversions of funds toward the proposed border barrier projects despite Congress having "repeatedly rejected legislation that would have funded substantially border barrier construction," only underscores the separation of powers violation. *States* PI Order 21 (citing *San Francisco*, 897 F.3d at 1234); *Sierra Club* PI Order 38.

B. Defendants Have Violated the Appropriations Clause

This Court also found that Defendants' interpretation of their authority "likely would pose serious problems under the Appropriations Clause, by ceding essentially boundless appropriations judgment to the executive agencies." *States* PI Order 22; *Sierra Club* PI Order 40. Under Defendants' view, "DHS could wait and see whether Congress granted a requested appropriation, then turn to DoD if Congress declined," allowing DOD to "make a de facto appropriation to DHS, evading congressional control entirely." *States* PI Order 22; *Sierra Club* PI Order 40. The Appropriations Clause, however, prohibits "the President or Executive Branch officials [who are] displeased with . . . restriction[s] . . . imposed by Congress" to "evade" those restrictions, as they have done here. *Office of Pers. Mgmt v. Richmond*, 496 U.S. 414, 428 (1990).

Additionally, Defendants violate the Appropriations Clause's bar against use of a *general* appropriation for an expenditure when that expenditure falls *specifically* "within the scope of some other appropriation or statutory funding scheme." Gov't Accountability Office (GAO), *Principles of Federal Appropriations Law* 3-14-17, 407-10 (4th Ed. 2017) https://www.gao.gov/assets/690/687162.pdf ("GAO Red Book").[4] This "well-settled" principle is supported by a "legion" of GAO cases "from time immemorial." *Id.* at 3-409 (collecting cases); *see also Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (Congress's appropriation of $1 million specifically for Nevada's nuclear waste disposal activities "indicates that is all Congress intended Nevada to get [for that fiscal year]," and precluded the use of a more general appropriation to provide additional funding for those same activities). This principle plays a crucial role in maintaining the balance of power between the legislative and executive branches because, without it, "an agency could evade or exceed congressional established spending limits." GAO Red Book at 3-408; *Dep't of the Navy*, 665 F.3d at 1347 ("If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.") (internal quotations omitted).

[4] *See Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.) (regarding the "assessment of the GAO" and its principles as "expert opinion" when considering whether an agency order was consistent with the Appropriations Clause) (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 & n.1 (D.C. Cir. 1984) (Scalia, J.)).

The principle's application here is straightforward. Congress specifically appropriated $1.375 billion to fund a barrier for a limited segment of the southwest border under enumerated conditions. CAA, § 230-32. Defendants seek to supplement that appropriation by using funds from the more general drug-interdiction appropriation, FY 2019 DOD Appropriations Act, 132 Stat. at 2997, in order to fund additional portions of Defendants' border barrier project that were not part of Congress's specific appropriation. Because "a specific appropriation exists for a particular item"—i.e., the $1.375 billion—"then that appropriation must be used and it is improper to charge any other appropriations for that item." GAO Red Book 3-409.

Defendants cannot evade Congress's prescribed limitations on the specific amount, location, and manner in which a border barrier may be built, CAA, §§ 230-32, by redirecting different funds appropriated for more general purposes for construction in a location that Congress declined to fund. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) ("[I]t would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician . . . but to have given him . . . authority to declare an entire class of activity outside 'the course of professional practice' . . . ."). Simply put, "[w]here Congress had addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). For these reasons, Defendants' Reprogramming Actions violate the Appropriations Clause.

C. Defendants Have Violated the Presentment Clause

Moreover, Defendants have violated the separation of powers principles engrained in the Presentment Clause. U.S. Const., art. I, § 7, cl. 2. Under the Presentment Clause, the president lacks the power to single-handedly "enact," "amend," or "repeal" appropriations after they were approved by both Houses of Congress. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). In *City of New York*, the Supreme Court concluded that the Line-Item Veto Act violated the Presentment Clause because it empowered the president to effectively amend appropriations passed by Congress without following the Constitution's finely wrought procedures. *Id.* at 445-46. Similarly, here, the president's unilateral supplementation of the $1.375 billion appropriation

for limited barrier funding in the Rio Grande Valley with billions of additional funds for use across the southern border without limitation "reject[s] the policy judgment made by Congress" and substitutes it with the president's "own policy judgment." *Id.* at 444.

This Court has already found that it "would subvert 'the difficult judgments reached by Congress' to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA." *States* PI Order 16 (quoting *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016)); *see also id.* 21 (raising doubt that DOD "has authority to redirect sums. . . in the face of Congress's appropriations judgment in the CAA"). Under that same reasoning, Defendants' actions violate the Presentment Clause. *City of New York*, 524 U.S. at 448-49 (the president's unilateral modification of a bill presented to the president "is surely not a document that may 'become a law' pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution").

IV. DEFENDANTS' DIVERSIONS OF DOD FUNDS FOR A BORDER BARRIER ARE ARBITRARY AND CAPRICIOUS (COUNT 5)

Defendants' actions also violate the APA's prohibition on arbitrary and capricious agency action. This aspect of the APA—where "[t]he court's role is to ensure that the agency considered all of the relevant factors and that its decision contained no 'clear error of judgment,'" *State of Ariz. v. Thomas*, 824 F.2d 745, 748 (9th Cir. 1987) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971))—is separate from the question of whether the agency acted within the scope of its authority (i.e., whether that action is ultra vires). *See Overton Park*, 401 U.S. at 416 ("Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"); 5 U.S.C. § 706(2)(A).[5] The Administrative Record shows that Army officials proffered evidence of significant readiness problems that would be generated by reprogramming of "surplus" funds towards a border barrier. Army Chief of Staff Lt.

[5] For the reasons just explained, *supra* 9-17, Defendants' actions also violate the APA because they are "contrary to constitutional right, power, privilege, or immunity" and in excess of statutory authority. 5 U.S.C. § 706(2)(B)-(C); First. Am. Compl. ¶¶ 380-85 (Count 4).

Gen. Joseph F. Martin warned that not using these monies to meet "pressing unfunded readiness requirements" would have a number of serious adverse consequences including: (i) reducing facilities maintenance; (ii) limiting the availability and training of combat pilots; (iii) diminishing Army personnel's "required readiness" and "battalion-level collective proficiency;" and (iv) increasing attrition due to lack of training, which will impact the Army's ability to provide "the required trained and ready Infantry Soldiers to the operational force." AR 51; *see also id.* 39, 182 (Joint Chiefs Chairman Gen. Joseph F. Dunford Jr. memoranda stating: "some of the sources identified for reprogramming could be used to address currently unfunded DoD requirements").

There is nothing in the record showing that Defendant Shanahan or any other Defendant considered General Martin's serious concerns, and although General Dunford's memoranda were directed to Defendant Shanahan, AR 39, 182, nothing in the record indicates that Defendant Shanahan addressed the problems articulated by General Martin either. Indeed, Defendant Shanahan's "Action Memo" indicates that Defendants ignored these concerns entirely, as he summarily stated that the "source funds are excess to need" despite the discussion of unfunded DOD and Army requirements immediately preceding and following that statement. *Id.* 2-3.

Thus, the agency both failed to consider an important aspect of the problem and acted counter to the evidence of adverse impacts to core military functions that result from the diversions that is in the Administrative Record. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if agency has "entirely failed to consider an important aspect of the problem; [or] offered an explanation for its decision that runs counter to the evidence before the agency"); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (overturning agency decision where "considerable data . . . point[ed] in the opposite direction" of the agency's decision). Further, DOD "relied on factors which Congress has not intended it to consider" by diverting $2.5 billion additional federal funds toward a border barrier despite Congress's clear rejection of any appropriation for a border barrier beyond $1.375 billion for FY 2019. *Supra* 3. *See State Farm*, 463 U.S. at 43 (agency action that "relied on factors which Congress has not intended it to consider" is arbitrary and capricious).

Separately and independently, DOD's deviation from its binding rules regarding reprogramming of funds under §§ 8005 and 9002 without Congress's consent, PI RJN Exs. 37-38, without "acknowledg[ing] and provid[ing] an adequate explanation" for that departure is arbitrary and capricious. *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (internal citation omitted).[6]

V. CALIFORNIA AND NEW MEXICO WOULD SUFFER IRREPARABLE HARM FROM THE DIVERSIONS OF FUNDS

A. The Diversions of Funds Harm California's and New Mexico's Sovereign Interests in the Enforcement of Their State Laws

It is well-established that whenever a state is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (state's inability to "employ a duly enacted statute . . . constitutes irreparable harm"). States have an undeniable sovereign interest not only in their "power to create and enforce a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 601 (1982), but also in protecting their natural resources and wildlife within their borders, an interest that is effectuated through a number of state environmental protection laws and regulations. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (state has "broad regulatory authority to protect the . . . integrity of its natural resources"); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994) ("Clearly, the protection of wildlife is one of the state's most important interests.").

But for the illegal diversions of DOD funds and resources, Defendants would not have available the funding and resources to initiate the planned construction of a barrier on California's and New Mexico's southern borders, and thereby undermine the purposes of the states' environmental laws. Unless Defendants are enjoined from illegally transferred DOD funds to DHS to construct a border barrier, Defendants will act on the IIRIRA waiver[7] and infringe on

[6] California and New Mexico recognize that this Court rejected this argument, *States* PI Order 12 n.8, but raise it here to preserve it for appellate purposes.

[7] While the States believe that DOD should not have been able to exercise a waiver here, this Court has preliminarily ruled otherwise. *States* PI Order 28-29.

California's and New Mexico's sovereign interests in enforcing their environmental protection laws.

For example, California would be prevented from enforcing its laws protecting water quality, Cal. Water Code §§ 13050, 13220-13228.15, 13240, 13376; Cal. Code Regs. tit. 23, §§ 3960-3969.4; MSJ Env. App'x Ex. 2 (Dunn Decl. ¶¶ 4-6, 20), its laws protecting residents from the dust and fine particulate matter (PM 10) generated by construction projects, *see supra* 7; *see also* 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366; Partial MSJ RJN Ex. 4 (Rule 801), and its laws protecting rare and endangered wildlife species, *see* MSJ Env. App'x Ex. 1 (Clark Decl. ¶¶ 14-18), Ex. 4 (Nagano Decl. ¶¶ 13-23). Similarly, New Mexico would be prevented from enforcing its laws protecting air quality in Dona Ana and Luna Counties, *see supra* 8-9; N.M. Admin. Code §§ 20.2.23.109-112; Partial MSJ RJN Ex. 7, as well as its laws protecting endangered species and wildlife corridors, including on New Mexico State Trust Lands that border the El Paso Project 1 site, *see* 2019 N.M. Laws Ch. 97; N.M. Stat. Ann. § 17-2-41; MSJ Env. App'x Ex. 5 (Nestlerode Decl. ¶ 4, Ex. A), Ex. 6 (Traphagen Decl. ¶¶ 18, 27).

These harms to the States' "sovereign interests and public policies," which cannot be remedied by monetary damages, constitute an irreparable harm that justify the imposition of injunctive relief. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries" that cannot be remedied by monetary damages "qualify as irreparable harm"). These injuries are distinct from that of private party litigants, as the harm to the States' sovereign interests in preserving and enforcing their own laws cannot be adequately asserted by other parties. *See California v. United States*, 180 F.2d 596, 599 (9th Cir. 1950) (California had a right to intervene in action between the United States and a non-public entity where the non-public entity "can only assert in court the rights of its shareholders and cannot adequately protect the State's interest in its public welfare"). Consequently, regardless of any other relief ordered for private litigants, California and New Mexico are entitled to injunctive relief to ensure that the States can vindicate their own sovereign interests in their environment and natural resources as this case proceeds on appeal. *See Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (granting

intervention as of right to Hawaii because the action involved the state's "protectable interest in the lands" of the state and "[t]he disposition of [the] action may impede the [s]tate's ability to protect this interest").

B. The Diversions of Funds Cause Harm to California's and New Mexico's Environment, Wildlife, and Natural Resources

Unless enjoined, the diversions of funds for border barrier construction will cause irreparable injury to wildlife and plant species protected under federal, California, and New Mexico law. "[E]nvironmental injury, by its nature, can seldom be adequately remedied by monetary damages and is often permanent or at least of long duration, i.e., irreparable." *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (citations omitted). California and New Mexico have demonstrated that, in the absence of injunctive relief, they will suffer irreparable environmental injury. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also States* PI Order 31 (holding that population-level harm is not required to demonstrate irreparable injury to wildlife and plant species).

California Harms Due to El Centro Project 1

The planned construction in the El Centro Sector constitutes a "definitive threat" to protected "species" such as Peninsular Bighorn Sheep, flat-tailed horned lizards, and burrowing owls, and would harm multiple other species of lizards, birds and mammals such as mountain lions and bobcats. MSJ Env. App'x Ex. 1 (Clark Decl. ¶¶ 12-19), Ex. 4 (Nagano Decl. ¶¶ 12-27); *cf. Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1513 (9th Cir. 1994) (citing *Fund for Animals, Inc. v. Turner*, No. 91-2201(MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991)) (injunction warranted by the potential killing of three to nine grizzly bears); *see also States* PI Order 31.

The Peninsular Bighorn Sheep is listed as endangered under both federal and California law. MSJ Env. App'x Ex. 1 (Clark Decl. ¶ 14), Ex. 4 (Nagano Decl. ¶ 27). The sheep have been recorded moving back and forth across the border immediately west of the project area, movement that allows for genetic interchange between populations based in the United States and Mexico. *Id.* Ex. 1 (Clark Decl. ¶ 14), Ex. 4 (Nagano Decl. ¶ 13). Without that genetic exchange,

inbreeding can cause physical abnormalities, behavioral problems, and reduced reproductive capability. *Id.* Ex. 4 (Nagano Decl. ¶ 17). The sheep are currently able to move through the existing vehicle fencing to access habitat on both sides of the border, but would not be able to do so if the bollard barrier planned for El Centro Project 1 is constructed. *Id.* ¶¶ 13, 15.

In addition, over 11,000 acres in the Jacumba Mountains, immediately north of the international border and adjacent to the El Centro Project 1 site, are undisputedly designated critical habitat for the sheep because "the Jacumba Mountains represent the only area of habitat connecting the DPS [Distinct Population Segment] listed in the United States with other bighorn sheep populations that occupy the Peninsular Ranges in Mexico." *Id.* Ex. 1 (Clark Decl. ¶ 14). "The California Department of Fish and Wildlife has tracked collared sheep in this area for many years, and documented intensive use of the slopes immediately above and to the west of the western terminus of the project area." *Id.* These slopes are lamb-rearing habitat, and pregnant ewes would be adversely affected by construction activities at the El Centro Project 1 site and the vehicle traffic and lighting associated with border infrastructure immediately below these slopes, particularly because the ewe group depends on resources in both the United States and Mexico." *Id.* Ex. 1 (Clark Decl. ¶ 14), Ex. 4 (Nagano Decl. ¶¶ 13-18). According to the California Department of Fish and Wildlife, "[a] fence along the US-Mexico border would prohibit movement to, and use of, prelambing and lamb-rearing habitat and summer water sources." *Id.* Ex. 1 (Clark Decl. ¶ 14).

Other protected wildlife species that would be harmed by El Centro Project 1 include the flat-tailed horned lizard and the burrowing owl, which are both species of concern under California state law. MSJ Env. App'x Ex. 1 (Clark Decl. ¶¶ 15-18), Ex. 4 (Nagano Decl. ¶¶ 21-26). The flat-tailed horned lizard occurs within the project footprint and surrounding area. *Id.* Ex. 1 (Clark Decl. ¶ 18). The extensive trenching, construction of roads, and staging of materials would harm or kill lizards that are either active or in underground burrows within the project footprint. *Id.*, Ex. 4 (Nagano Decl. ¶¶ 19-20, 23). Additionally, the principal predators of these lizards include small birds of prey that use perches to hunt. *Id.* Ex. 1 (Clark Decl. ¶18). By constructing a continuous 18-30 feet high fence, and numerous light poles, over the lizards'

habitat range, this project would greatly increase the predation rate of lizards adjacent to the barrier. *Id.* And the permanent roads and infrastructure removing suitable habitat, would effectively sever the linkage that currently exists between populations on both sides of the border. *Id.* Ex. 4 (Nagano Decl. ¶¶ 19, 23). Thus, it is precisely the type of the project that the U.S. Fish and Wildlife Service and BLM's rangewide management strategy prohibits. Partial MSJ RJN Ex. 6. Burrowing owls, which live in underground burrows, also face death or injury from project construction, including being buried alive in their burrows. *Id*. Ex. 4 (Nagano Decl. ¶¶ 24-25). And El Centro Project 1 would inflict irreparable and irreversible impacts to at least 23 plants of conservation concern, 13 of which are considered rare, threatened, or endangered in California and are eligible for state listing, including the flat-seeded spurge and Haydon's Lotus. *Id.* Ex. 7 (Vanderplank Decl. ¶¶ 6, 24).

New Mexico Harms Due to El Paso Project 1

The construction planned in New Mexico would similarly cause irreparable harm to the endangered Mexican wolf, block wildlife corridors for other large mammals, and harm protected plant species. MSJ Env. App'x Ex. 3 (Lasky ¶ 11), Ex. 6 (Traphagen Decl. ¶¶ 17-31). In New Mexico, Defendants' plan for 30-feet tall barriers extending up to 37 miles, AR 56, would undeniably permanently impede wildlife connectivity. *See* MSJ Env. App'x Ex. 3 (Lasky Decl. ¶ 8), Ex. 4 (Nagano Decl. ¶ 31), Ex. 6 (Traphagen Decl. ¶¶ 17-25, 27, 31). Defendants contend that New Mexico has "overstated" its harms, but do not dispute that the bollard barrier planned for El Paso Project 1 would block wildlife corridors for the Mexican wolf, a rare, endangered subspecies of the gray wolf that suffers from a lack of genetic diversity. Enriquez Decl. ¶ 55; Mexican Wolf Recovery Plan (Wolf Plan) (ECF No. 89-13) 5, 13-14; MSJ Env. App'x Ex. 6 (Traphagen Decl. ¶¶ 18-25). The U.S. Fish and Wildlife Service confirms that having the two wild wolf populations (one based in Mexico and the other based in New Mexico and Arizona) interbreed would benefit the species. Wolf Plan 5, 13-14. Defendants also acknowledge that two wolves have crossed from Mexico into the United States, including one wolf that returned to Mexico, *id.* 8; that wolf crossed through the El Paso Project 1 site. MSJ Env. App'x Ex. 6 (Traphagen Decl. ¶¶ 23-24) & Ex. A. And Defendants recognize that if the proposed bollard barrier is constructed, Mexican wolves

would no longer be able to cross the border and access habitat on both sides of the border, meaning there would be zero chance of the two wild-wolf populations interbreeding and improving the wolf's genetic diversity. *See* Enriquez Decl. ¶¶ 18, 55; MSJ Env. App'x Ex. 6 (Traphagen Decl. ¶¶ 18-25). Other species that would suffer from a lack of wildlife connectivity and be irreparably harmed include the mountain lion, bobcat, mule deer, javelina, and at least 53 other land-based mammals, 38 reptiles, and 10 amphibian species. *Id.* Ex. 3 (Lasky Decl. ¶ 6, 11), Ex. 6 (Traphagen Decl. ¶ 28).

Beyond harms due to a loss of wildlife connectivity, there would be additional impacts to wildlife species from noise, deep holes for fence posts, vehicle traffic, lighting, and other disturbances associated with border barrier construction. These construction activities would kill, injure, or alter the behavior of many vital species such as the endangered Aplomado falcon, the iconic Gila monster, which is listed as endangered by the State of New Mexico, and many birds and bats. MSJ Env. App'x Ex. 3 (Lasky Decl. ¶ 9), Ex. 4 (Nagano Decl. ¶¶ 29, 32, 36, 41); Ex. 6 (Traphagen Decl. ¶ 26). Endangered plant species would also be harmed due to construction of El Paso Project 1. *Id.* Ex. 3 (Lasky Decl. ¶ 14).

VI. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR GRANTING A PERMANENT INJUNCTION

Here, the balance of the equities and public interest weigh decidedly in favor of granting the requested relief. As this Court has recognized, the public "has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Sierra Club* PI Order 54 (quoting *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)); *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1082 (D.C. Cir. 1986) ("The public has an interest in assuring that public funds are appropriated and distributed pursuant to Congressional directives."). The public interest is also served by enforcing California's and New Mexico's environmental protection laws, which as discussed *supra*, would be undermined by the construction facilitated by Defendants' illegal and unconstitutional diversions. *See New Motor Vehicle Bd.*, 434 U.S. at 1351 (the "[public] interest is infringed by the very fact that the State is prevented from engaging in investigation and examination" pursuant to its own duly enacted state

laws); *Feldman v. Reagan*, 843 F.3d 366, 394 (9th Cir. 2016) (weighing the state's "compelling interest in the enforcement of its duly enacted laws"). The public's interest in protecting environmental resources from harm also weighs toward the issuance of a permanent injunction. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."); *see also* Cal. Gov't Code § 12600 ("It is in the public interest to provide the people of the State of California . . . with adequate remedy to protect the natural resources of the state of California from pollution, impairment or destruction."); N.M. Const. art. XX, § 21 (similar).

Moreover, there is no significant countervailing interest. As for Defendants' purported harms, President Trump himself acknowledged that he "didn't need to" take the extraordinary steps to divert funding for border wall construction, but he just would "rather do it faster" than our system of government allowed. PI RJN Ex. 50. The president also acknowledged that Congress has provided more than enough funding for homeland security without the wall, undercutting the need for these diversions of funds. *Id.* Even more fundamentally, "the government[] . . . cannot suffer harm from an injunction that merely ends an unlawful practice. . . ." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see also Giovani Carandola, Ltd v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (similar). Consequently, the balance of equities and public interest favor entry of a permanent injunction.

CONCLUSION

For the foregoing reasons, Plaintiff States of California and New Mexico request that the Court grant their motion for partial summary judgment in full.

Dated: June 12, 2019

Respectfully submitted,

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ATTESTATION OF SIGNATURES

I, Lee I. Sherman, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

/s/ Lee I. Sherman

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CERTIFICATE OF SERVICE

Case Name: **California, et al. v Trump, et al. (Border Wall 2019)** No. **4:19-cv-00872**

I hereby certify that on June 12, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **PLAINTIFF STATES OF CALIFORNIA AND NEW MEXICO'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
- **PLAINTIFF STATES OF CALIFORNIA AND NEW MEXICO'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**
- **APPENDIX OF DECLARATIONS RE: ENVIRONMENTAL HARMS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**
- **[PROPOSED] ORDER GRANTING PLAINTIFF STATES OF CALIFORNIA AND NEW MEXICO'S MOTION PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2019, at San Diego, California.

V. Brizuela
Declarant

Signature

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