XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
SALLY MAGNANI
MICHAEL L. NEWMAN
Senior Assistant Attorneys General
MICHAEL P. CAYABAN
CHRISTINE CHUANG
EDWARD H. OCHOA
Supervising Deputy Attorneys General
BRIAN J. BILFORD
NOAH M. GOLDEN-KRASNER
SPARSH S. KHANDESHI
HEATHER C. LESLIE
JANELLE M. SMITH
JAMES F. ZAHRADKA II
LEE I. SHERMAN (SBN 272271)
Deputy Attorneys General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6404
Fax: (213) 897-7605
E-mail: Lee.Sherman@doj.ca.gov
Attorneys for Plaintiff State of California

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 **APPENDIX OF DECLARATIONS RE: ENVIRONMENTAL HARMS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002** Judge: Honorable Haywood S. Gilliam, Jr. Trial Date: None Set Action Filed: February 18, 2019

DECLARATIONS CONCERNING ENVIRONMENTAL HARMS

Exhibit Number	Declarant
1	Kevin B. Clark (San Diego Natural History Museum)
2	Dr. Kai Dunn (California Regional Water Quality Control Board, Colorado River Basin Region)
3	Jesse R. Lasky (Pennsylvania State University)
4	Christopher D. Nagano (Center for Biological Diversity)
5	Eleanore Nestlerode (New Mexico State Lands Office)
6	Myles B. Traphagen (Wildlands Network)
7	Sula Elizabeth Vanderplank (San Diego Zoo Global)
8	Sunalei Stewart (New Mexico State Lands Office)

EXHIBIT 1

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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 KEVIN B. CLARK IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Kevin B. Clark, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below. I previously executed a declaration dated May 28, 2019 in support of the Plaintiff State of California's Preliminary Injunction Concerning El Centro Project 1 that was substantively the same as this declaration.

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

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

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

5. From 2000-2006, I was a Fish and Wildlife Biologist with the U.S. Fish and Wildlife Service ("U.S. FWS" or "Service"), based in Carlsbad, California. In this capacity, I

worked on the recovery of endangered species, including the California Gnatcatcher and California Least Tern, and was the regional recovery coordinator for the threatened Western Snowy Plover. I was the primary author of the 2003 designation of critical habitat for the California Gnatcatcher, which included a proposed rulemaking reclassifying the species as a Distinct Population Segment under the Endangered Species Act (68 Fed. Reg. 20228). As part of this analysis, I thoroughly reviewed all the pertinent literature and survey information for the species, conducted field surveys for the bird and its habitat requirements, and analyzed and finalized maps describing the range of the species and its essential habitat locations. In my capacity as a Fish and Wildlife Biologist I also participated in consultations required under Section 7 of the Endangered Species Act, which are required whenever a federal project may impact threatened or endangered species.

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

7. I have analyzed the border-infrastructure projects outlined in the February 25, 2019, memorandum regarding "Request for Assistance Pursuant to 10 U.S.C. § 284" that the U.S. Department of Homeland Security ("DHS") directed to the U.S. Department of Defense ("DOD"), in which DHS requests DOD's assistance in constructing pedestrian fencing along approximately 218 miles of the U.S.- Mexico border. DHS has identified eleven separate projects

for border areas located in California, Arizona and New Mexico ("Section 284 Projects").

8. One of the Section 284 Projects, El Centro Project 1, is located in Imperial County, California, and involves removing approximately 15 miles of vehicle barrier fencing and replacing it with pedestrian fencing that will be 18 to 30 feet tall. El Centro Project 1 also includes construction of roads and installation of lighting. I have also reviewed the description of El Centro Project 1, as outlined in the "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," that DHS published in the federal register (84 Fed. Reg. 21800).

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

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

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

12. Multiple peer-reviewed scientific studies have found that a variety of wildlife, ranging from mountain lions (*Puma concolor*) to bighorn sheep (*Ovis canadensis*) as well as ground dwelling non-migratory birds, are negatively affected by border fences disrupting their

movement patterns. In disrupting movement, these barriers can reduce or restrict events such as juvenile and adult dispersal, as well as genetic interchange between populations.

13. The American Society of Mammalogists, a professional, scientific, and educational society consisting of nearly 3,000 members, passed a resolution in June 2017 opposing the construction of border infrastructure due to its well-documented negative effects on a variety of mammal species, many of them declining or endangered. The resolution calls upon the Federal Government to ensure that all boundary infrastructure, both existing and proposed, include features and modifications to maintain landscape permeability for mammalian populations to permit demographic and genetic exchange necessary for well-distributed, viable populations and the long-term persistence of species and mammalian community structure. According to the resolution, the actions of DHS on the US-Mexico border must receive regular environmental review to identify, monitor, and mitigate significant threats to the persistence of mammalian populations under the National Environmental Policy Act ("NEPA") and the US Endangered Species Act. In addition, the Southwestern Association of Naturalists ("SWAN") passed a similar resolution in July 2017 opposing the construction of a border wall. SWAN is an international association of scientists, educators, and students founded in 1953 to promote the field study of plants and animals in the southwestern United States, Mexico, and Central America. Their resolution states, ". . . wall construction will irreparably harm many species and some of the Southwest's most significant lands . . .THEREFORE BE IT RESOLVED that the Southwestern Association of Naturalists (SWAN) calls upon the Governors of all the border states (those of the U.S. and of Mexico), the U.S. Secretary of the Interior, the Secretaria de Medio Ambiente y Recursos Naturales (SEMARNAT) of Mexico, the Director of the U.S. Fish and Wildlife Service, and the Secretary for Homeland Security to immediately stop all plans for construction of the proposed border wall based on the potential negative impacts of the wall to native plants and wildlife and to mitigate the current negative impacts of the existing fence."

14. El Centro Project 1 will harm multiple species of lizards, birds and mammals. Within the proposed project area, numerous species such as bighorn sheep, mountain lion, and bobcat (*Lynx rufus*) would be negatively affected. Immediately to the west of the project area, the

Peninsular bighorn sheep has been recorded moving back and forth across the border, allowing for genetic interchange between populations based in the U.S. and Mexico. The Peninsular bighorn sheep is identified as "endangered" under both the Endangered Species Act and the California Endangered Species Act. Over 11,000 acres in the Jacumba Mountains, immediately north of the international border, are 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." (74 Fed. Reg. 17318). 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. These slopes are lamb-rearing habitat, and pregnant ewes would be adversely affected by construction activities and border patrol actions immediately below them. For instance, the intensive ground disturbances due to road construction and trenching in the project area, as well as the establishment of extensive lighting in the area would introduce continuous disruption in an area that is currently a remote, undisturbed habitat area for the sheep. Were bighorn sheep to abandon these slopes due to the increased disturbance level from the project, it is unclear if suitable high-quality lamb rearing habitat remains in the area to support this unique population that represents the sole connection to sheep populations south of the border. The California Department of Fish and Wildlife states in their 2018 annual report on sheep monitoring in the area: "The Jacumba ewe group typically spends each winter and spring within the Jacumba Wilderness in the United States and each summer and fall within a canyon just north of Highway 2 in Mexico." (Colby, J. & Botta, R. 2018. CDFW 2017-18 Peninsular bighorn sheep annual report; Page 7). They further state: "The Jacumba ewe group is dependent on resources both within the US and Mexico. A fence along the US-Mexico border would prohibit movement to, and use of, prelambing and lamb-rearing habitat and summer water sources. Furthermore, lamb-rearing habitat in the east Jacumba Mountains is not within USFWS- designated critical sheep habitat and further development of energy projects within or adjacent to these areas, combined with disturbance by border security activities, will have significant adverse impacts on this ewe group." (Page 24)

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

Flat-tailed Horned Lizard (CA State Species of Special Concern)

Colorado Desert Fringe-toed Lizard (CA State Species of Special Concern)

Loggerhead shrike (CA State Species of Special Concern)

LeConte's Thrasher (CA State Species of Special Concern)

Townsend's big-eared bat (CA State Species of Special Concern)

Pallid bat (CA State Species of Special Concern)

California Leaf-nosed bat (CA State Species of Special Concern)

Western Yellow bat (CA State Species of Special Concern)

Western mastiff bat (CA State Species of Special Concern)

Pocketed free-tailed bat (CA State Species of Special Concern)

Big free-tailed bat (CA State Species of Special Concern)

Pallid San Diego pocket mouse (CA State Species of Special Concern)

Palm Springs pocket mouse (CA State Species of Special Concern)

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

16. The flat-tailed horned lizard (*Phrynosoma mcallii*) is found in a restricted area of low desert habitat in southeastern California, including the project site, and also in southwestern Arizona, and adjacent Mexico. This lizard was proposed by the U.S. Fish and Wildlife Service for listing as a threatened species under the Endangered Species Act. On March 15, 2011, this proposal was withdrawn by the Service, which determined that the species did not need the protection of the Act, in part due to ongoing conservation efforts such as the establishment of a Rangewide Management Strategy. Thus, were it not for the anticipated conservation efforts under

the Rangewide Management Strategy, the flat-tailed lizard would be listed as a threatened species under the Endangered Species Act. It is currently considered a California Species of Special Concern. The Rangewide Management Strategy is an interagency document that provides guidance for conservation and management of sufficient habitat to maintain populations of flat-tailed horned lizards within each of five Management Areas in perpetuity. The flat-tailed horned lizard is typically found in sandy flats and dunes that often support sparse desert vegetation. This lizard is a specialized predator of ants, and has declined throughout its range due to habitat fragmentation and degradation from agricultural development, urbanization, and off-road vehicle use. For much of the year it stays concealed in underground burrows, emerging during warmer months to forage for prey.

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

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

19. The project also proposes to install lighting along the 15-mile construction area. The frequency and intensity of lighting is not specified, but is likely to be extensive to

accommodate border patrol-related activities. Currently, this portion of the California desert is composed of natural habitats and has limited artificial lighting. Artificial night lighting can have myriad negative effects on animals and plants. Artificial night lighting can reduce movement and restrict the effectiveness of corridors for nocturnal mammals, including medium and large predators, as well as the sensitive rodent species that likely occur within the project area. Night lighting can also attract and disorient migrating birds, leading to their death, and has also been correlated with declines in nocturnal reptiles in Southern California. The artificial night lighting associated with the El Centro Project 1 will significantly degrade the natural habitats adjacent to the project area for the entire 15-mile extent of the project, causing harm to a variety of sensitive species inhabiting the area.

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

Executed on June 9, 2019, at San Diego, California.

Kevin B. Clark

EXHIBIT 2

XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
SALLY MAGNANI
MICHAEL L. NEWMAN
Senior Assistant Attorneys General
MICHAEL P. CAYABAN
CHRISTINE CHUANG
EDWARD H. OCHOA
Supervising Deputy Attorneys General
BRIAN BILFORD
NOAH GOLDEN-KRASNER
SPARSH KHANDESHI
HEATHER C. LESLIE
JANELLE M. SMITH
JAMES F. ZAHRADKA II
LEE I. SHERMAN (SBN 272271)
Deputy Attorneys General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6404
Fax: (213) 897-7605
E-mail: Lee.Sherman@doj.ca.gov
Attorneys for Plaintiff State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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,	4:19-cv-00872-HSG **DECLARATION OF DR. KAI DUNN**

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Dr. Kai Dunn, declare as follows:

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

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

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

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

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

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

6. The Water Quality Control Plan for the Colorado River Basin Region (Basin Plan), adopted by the Colorado River Basin Water Board, contains the legal, technical, and programmatic bases of water quality regulation in the Board's region. Cal. Wat. Code § 13240; 33 U.S.C. § 1313. The Colorado River Basin Water Board's mission is to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses for the benefit of present and future generations. The Basin Plan is designed to preserve and enhance water quality in the region and to protect the beneficial uses of all regional waters. A copy of the current Basin Plan is available on the Colorado River Basin Water Board's website at https://www.waterboards.ca.gov/coloradoriver/water_issues/programs/basin_planning/. The Basin Plan has been approved by the State Water Board and has the full force and effect of regulation. Cal. Code Regs., tit. 23, § 3960 et seq; Cal. Gov Code § 11353.

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

8. The Colorado River Basin Water Board implements the water quality objectives contained in the Basin Plan through the issuance of several different types of permits and other orders and certifications to protect water quality. See, e.g., Cal. Wat. Code § 13263 (waste discharge requirements "shall implement any relevant water quality control plans that have been adopted, shall take into consideration the beneficial uses to be protected, the water quality

objectives reasonably required for that purpose..."; 33 U.S.C. § 1342 (federal Clean Water Act permits must conform to state water quality standards). In addition to the traditional NPDES permits for domestic, municipal, and industrial wastewater discharges to surface waters (under Clean Water Act Section 402), the Water Boards issue NPDES permits to address storm water runoff from construction activities that may result in discharges into the jurisdictional waters of the United States. Pursuant to section 313 of the Clean Water Act (33 U.S.C. § 1323) federal agencies and departments are required to comply with the requirements of California's NPDES permitting program.

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

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

11. The Colorado River Basin Water Board's NPDES / Stormwater / Section 401 Water Quality Certification Unit has reviewed and processed several applications for Section 401 water quality certifications submitted to the Board by federal agencies for projects within the Colorado River Basin Region. These have included applications submitted by the United States Bureau of Reclamation, the United States Army Corps of Engineers, and United States Customs and Border Protection. See, e.g., the Section 401 Water Quality Certifications contained at: <https://www.waterboards.ca.gov/coloradoriver/water_issues/programs/401_certification/>.

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

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

(RJN Ex. 3, p. 7.)

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

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

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

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

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

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

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

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

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

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 7, 2019, in Palm Desert, California.

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)

EXHIBIT 3

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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,	4:19-cv-00872-HSG **DECLARATION OF JESSE R. LASKY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, JESSE R. LASKY, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below. I previously executed a declaration dated April 4, 2019 in support of the Plaintiff States' Preliminary Injunction concerning El Paso Project 1 that was substantively the same as this declaration.

2. I have been an Assistant Professor of Biology at Pennsylvania State University since 2015. I obtained an A.B. from Kenyon College and a Ph.D. from the University of Texas at Austin. I was subsequently an Earth Institute Fellow at Columbia University and was awarded the American Society of Naturalists Young Investigator Award in 2015. My scientific background is in spatial ecology and evolution, including biogeography, animal dispersal, and conservation biology. I have published over 40 peer reviewed papers, many in prestigious journals such as *Science* and *Proceedings of the National Academies of Sciences.* I have previously published peer-reviewed research in the journal *Diversity and Distributions* on the potential impacts to animal conservation of barriers along the USA-Mexico border[1].

3. Major construction projects, border infrastructure, and physical barriers pose a number of threats to wildlife. These threats range from short-term rapid destruction of animal habitat and populations to longer-term threats of extinction. My research in this field has been primarily focused on investigating the potential impacts of border barriers and associated infrastructure on wildlife.

4. In addressing Defendants' proposed "El Paso Project 1" border wall construction project ("Project"), I begin with a brief overview of the conceptual background for conservation implications of border barriers and associated infrastructure. I then discuss the consequential environmental impacts stemming from the proposed Project.

5. Immediate, short-term threats of border barrier construction come partly from their inevitable disturbance and destruction of natural habitats for wildlife. Much of the USA-Mexico border runs through wilderness and natural habitats for diverse wildlife, including the proposed

[1] Jesse R. Lasky *et al.*, *Conservation biogeography of the US–Mexico border: a transcontinental risk assessment of barriers to animal dispersal*, 17 Diversity & Distributions 673, 687 (2011).

Project region. To construct major barriers, such as a pedestrian fence, roads must be built and maintained, often across uneven terrain. As a result, wide swathes of natural vegetation and habitat for wildlife are destroyed. The rapid construction of roads over uneven terrain often results in dramatic erosion, destroying additional vegetation in a dry region with sensitive vegetation. Animal populations inhabiting these areas will be destroyed or displaced, either due to injury from construction equipment or the destruction of their habitat. The long-term presence of extensive bright lighting for border patrol and vegetation-free areas along border wall corridors will also drive away many species of animals from these areas.

6. Border barriers pose an additional immediate threat to populations of large animals that must move long distances to satisfy their needs for food, water, and mates, species which would have no ability to fit through small openings between bollards. If populations of these animals are blocked from foraging for food, water, and mates at the border, the result will likely be death, reduced fertility, and population decline. Examples of such species in the area of the proposed Project include Cougar, Bobcat, Mule and White-tailed Deer, Collared Peccary (Javelina), American Badger, and Gray Fox. Although these species are not in danger of global extinction, they play vital roles in their ecosystems. The addition of border barriers threatens their populations and hence ecosystems in the border region.

7. There are multiple species of large mammal in the region of the proposed Project whose populations are already officially threatened. Jaguar is considered Endangered by the US Fish and Wildlife Service. Jaguars were formerly widespread in the southwest US, but were extirpated by hunting. In recent decades, small numbers of individuals have dispersed north from breeding populations in northern Mexico. Some of these jaguars have recently reached mountains in southwestern New Mexico west of Luna county. If further long-term recolonization of jaguars continues, areas in Doña Ana and Luna counties include suitable habitat. Construction of the proposed Project would stop jaguar movement through the region, potentially limiting recolonization. The Mexican wolf is also considered Endangered by US FWS. It was once widely distributed across northwest Mexico and the southwest US. Today the species is limited to mountains straddling the Arizona-New Mexico borders with some recent small reintroductions in

Mexico. Doña Ana and Luna counties as well as the locations across the border in Mexico contain suitable habitat for Mexican wolf. The long-term recolonization and repopulation of the region would be limited by border barriers in the region.

8. Border barriers stop animal dispersal and thus also pose long term threats of extinction and population decline. There are two primary long-term threats of barriers. First, reduced dispersal prevents the recolonization of appropriate habitat following local population extinctions, which can lead to extinction of a whole metapopulation and the species. To explain: many species exist as metapopulations, which are collections of individual separate populations distributed across a landscape. These individual populations may disappear from time to time, perhaps due to a local disease epidemic or myriad other forces. But animal dispersal across a landscape allows these populations to be re-founded by individuals from surviving populations. If dispersal is prevented at the border, this process stops, and can lead the entire set of populations to go extinct over the long term. Second, preventing dispersal causes an erosion of genetic diversity within populations. If border barriers isolate animal populations on either side, the individual populations on a given side will lose genetic diversity over time. A loss of genetic diversity makes populations more vulnerable to extinction because it limits their ability to adapt to new diseases and changing environments, because deleterious mutations accumulate, and because inbreeding often reduces fitness.

9. The height of the proposed Project's wall and lighting pose major problems for the movement of birds and bats. Although these animals have the ability to fly over barriers, many small birds and bats avoid flying high in order to avoid predators (*e.g.* hawks and owls). The bollards of the proposed Project, at 30 feet high, would pose major barriers to many of these species. For example, researchers found that Ferruginous Pygmy-Owls (a transboundary species) in northern Sonora did not typically fly higher than 13 feet, and flights above vegetation were extremely rare[2]. Similarly, many birds and bats active at night avoid clearings with bright lights.

10. Species with small ranges are particularly vulnerable to extinction due to the

[2]Aaron D. Flesch *et al.*, *Potential Effects of the United States-Mexico Border Fence on Wildlife,* 24 Conservation Biology 171, 181 (2009).

various threats above. If animal movement is stopped by the border, then the species ranges will be effectively independent on either side, and the species' vulnerability to extinction will be determined by the size of the larger remaining sub-range (US or Mexican). I measured the larger portion of the species range for each amphibian, reptile, and non-volant mammal on either side of the border. The proposed Project intersects the range of 17 species whose largest remaining sub-range is less than 500,000 km^2, a relatively small size associated with greater risk of extinction. These species include three species whose largest remaining sub-range is less than 100,000 km^2, an even more threatening situation: Desert Pocket Gopher, New Mexico Whiptail, and Texas Lyre Snake.

11. There are a large number of species potentially impacted by these barriers. This region is one of the most biodiverse in the United States. This is particularly true of non-volant terrestrial vertebrate species such as amphibians, reptiles, and non-flying mammals that are most likely to be impacted by barriers to movement. Reptiles and mammal species of the borderlands in particular reach peak diversity in this region. I found that the new barriers of the proposed Project intersect the ranges of 53 non-volant mammal, 38 reptile, and 10 amphibian species.

12. The proposed Project runs directly through habitat and populations of Ornate Box Turtle and the Desert Pocket Gopher, both of which are considered Near Threatened by the International Union for Conservation of Nature ("IUCN"). Additionally, the project intersects the range of the Banner-tailed Kangaroo Rat, which is considered Near Threatened by the IUCN and individuals of which have been recently recorded in this region.

13. In Luna and Doña Ana counties, the locations of El Paso Project 1, there are 87 species of animals considered by the State of New Mexico to be Endangered, Endemic, Sensitive taxa, Species of Greatest Conservation Need, or Threatened. These designations signal that these species are potentially threatened by new major activities that destroy their habitat or limit their dispersal. Thus the proposed Project poses an important threat to these species.

14. There are at least two plant species, both cactus, considered by the State of New Mexico to be Endangered that are also found in the habitat surrounding El Paso Project 1: Nightblooming Cereus and Dune Pricklypear. This designation signals that these already

imperiled species are severely threatened by habitat destruction and erosion that will be caused by border wall construction and associated activities.

15. In summary, the location of the proposed Project contains many species of wildlife potentially impacted by the Project. Many of these species are already under major threats of extinction and extirpation, thus the Project has the potential to do major damage to biodiversity and ecosystems in the region.

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

Executed on June 9, 2019, at State College, Pennsylvania.

JESSE R. LASKY

EXHIBIT 4

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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.

DECLARATION OF CHRISTOPHER D. NAGANO IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Christopher D. Nagano, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below. As to those matters that reflect an opinion, they reflect my personal opinion and judgment on the matter. I previously executed a declaration dated May 23, 2019 in support of the the Plaintiff State of California's Preliminary Injunction concerning El Centro Project 1 that was substantively the same as the El Centro Project 1 portion of this declaration. I also previously executed a declaration dated April 3, 2019 in support of the Plaintiff States' Preliminary Injunction concerning the El Paso Project 1 that was substantively the same as the El Paso Project 1 portion of this declaration.

BACKGROUND

2. I reside in Washougal, Washington.

3. I am a staff member of the Center for Biological Diversity, where I have served as a senior scientist in the Center's Endangered Species Program since 2017. At the Center, I work to protect imperiled species, particularly reptiles and invertebrates. I work in conjunction with campaigners, lawyers, policy experts and other scientists to achieve this goal.

4. Prior to coming to the Center, I worked for 27 years, from 1989 to 2016, as an endangered species entomologist/ecologist, endangered species biologist, Endangered Species Division Chief, and Deputy Assistant Field Supervisor with the U.S. Fish and Wildlife Service ("FWS") based at the field offices in Carlsbad and Sacramento, California, and Albuquerque, New Mexico. I also performed endangered species-related tasks and responsibilities in five other states.

5. Prior to working for the FWS, I worked for several years in the mid-late 1980s as a research associate in the Entomology Section at the Natural History Museum of Los Angeles County.

6. I have a Master of Environmental Studies degree from the Yale School of Forestry and Environmental Studies. While pursuing this degree, I was an intern working on endangered species issues at the Environmental Defense Fund in Washington, D.C. for Michael J. Bean, now retired Deputy Assistant Secretary for Fish, Wildlife and Parks at the Department of Interior.

7. In sum, I have dedicated my career to the scientific research and protection of endangered and threatened species.

8. During my career with the FWS, I routinely reviewed projects proposed by federal, state and local agencies, and non-governmental parties for their potential effects on non-listed wildlife, plants, and their habitats pursuant to the National Environmental Policy Act ("NEPA"), and the California Environmental Quality Act ("CEQA"). My efforts involved assessments of project impacts on non-listed wildlife and plants, and their habitats, as well as review of the proposed mitigations and development of additional measures, if appropriate.

9. I also have an extensive working knowledge of endangered species. During my 27-year career with the FWS, I conducted hundreds of informal consultations and many dozens of formal consultations pursuant to the Endangered Species Act with many federal agencies ranging from the Bureau of Reclamation to the National Park Service. These consultations involved providing guidance to federal agencies in determining whether and to what extent their proposed projects would have an effect on the survival and recovery in the wild of endangered species and whether and to what extent federal agencies' proposed projects would adversely modify or destroy the endangered species' critical habitat.

10. While at FWS, one of the issues that I focused on, analyzed, and encouraged other agencies to first avoid, and if not possible, to mitigate, was the effect of barriers, such as highways and roadways, on the long-term movement of listed animals and wildlife. The ability of many animals to move to new areas, areas containing habitat within their range, or between portions of their home range is critical for ensuring they do not become extinct or extirpated because it prevents genetic inbreeding and other biological and ecological problems.

11. Another issue that I focused on at the FWS was the indirect adverse effects of a project on listed animals and wildlife. Indirect effects, which are caused by the proposed project but occur later in time, are often not adequately analyzed by federal agencies, but their impact on listed species and other wildlife can be far greater and much longer lasting than the direct effects of a project.

EL CENTRO PROJECT 1

12. The Department of Defense ("DOD") and the Department of Homeland Security ("DHS") have failed to consider the effects of their El Centro Project 1 proposed border wall project. (DHS, *DHS Issues Waiver to Expedite Border Wall Projects in California* (May 15, 2019) available at https://www.dhs.gov/news/2019/05/15/dhs-issues-waiver-expedite-border-wall-projects-california.) Through El Centro Project 1, DOD will undertake road construction, replace approximately 15 miles of existing vehicle barrier with new pedestrian fencing, and install lighting beginning approximately 10 miles west of the Calexico Port of Entry continuing west 15.25 miles in Imperial County. (DHS Letter to DOD, *Request for Assistance Pursuant to 10 U.S.C. § 284* (February 25, 2019), page 3). El Centro Project 1 will have significant effects on endangered species such as the peninsular bighorn sheep (*Ovis canadensis nelsoni*) and on State of California Species of Concern such as the flat-tailed horned lizard (*Phrynosoma mccallii*) and burrowing owl (*Athene cunicularia*).

13. From decades of work with endangered and threatened species, as well as experience dealing with imperiled mammals, especially while I was stationed at the FWS Carlsbad and Sacramento field offices, I recognize the threat the construction, maintenance, and associated operations of the El Centro Project 1 border wall pose to the peninsular bighorn sheep. The proposed construction of the border wall and associated activities in Imperial County likely will have a number of adverse effects on this endangered species. Peninsular bighorn sheep will be directly harmed, harassed, or possibly in some circumstances, injured or killed, by the construction of the El Centro Project 1 border wall. In particular, road construction; grading and construction of equipment storage and parking areas; and off road movement of vehicle and equipment involved in construction that will alter the normal behavior of peninsular bighorn sheep. Further DOD, DHS, Customs and Border Protection ("CBP"), and construction/ maintenance vehicles may collide with peninsular bighorn sheep. However, the most significant effect on the endangered peninsular bighorn sheep will be the permanent reduction of its north-south movement across the U.S./Mexico border. The physical barrier of the El Centro Project 1

border wall will prevent such movement and peninsular bighorn sheep will further avoid the area because of night lighting, noise, and DOD, DHS, and CBP personnel and vehicles.

14. The peninsular bighorn sheep has been documented to move across lowlands between desert mountain ranges, such as areas possessing similar geographic features as where the El Centro Project 1 is proposed. The FWS described how peninsular bighorn sheep utilize flat areas such as the El Centro Project 1, such as valley floors and washes, to access resources like water, forage, and lambing habitat, and these areas also are important for enabling gene flow between subpopulations (FWS. 2011. Peninsular bighorn sheep (*Ovis canadensis nelsoni*). 5-year review. Summary and Evaluation. Carlsbad Field Office, Carlsbad, California).

15. El Centro Project 1 will replace 15 miles of existing vehicle fencing, which animals can still cross through, with a pedestrian wall that will prohibit border crossing of species such as the peninsular bighorn sheep. The previously constructed portions of the pedestrian wall in San Diego County are a barrier that this endangered animal simply cannot pass through, under, or over. Along with the previously constructed sections of the border wall, El Centro Project 1 will continue to impair the ability of the peninsular bighorn sheep to move between the two nations.

16. The FWS recovery plan for the peninsular bighorn sheep stated that low survivorship of adult peninsular bighorn sheep threatens population viability. It included the recovery action that mortality should be reduced by "*Prohibit fences in which bighorn sheep may become entangled or strangled, or that interrupt habitat connectivity or block movement of bighorn sheep within remaining habitat* (emphasis in recovery plan) ... All other fences should comply with Bureau of Land Management specifications for fences within bighorn sheep habitat (Bureau of Land Management 1989)." (Recovery Action 1.3.1.1 on Page 91 in FWS. 2000. Recovery Plan for Bighorn Sheep in the Peninsular Ranges, California. U.S. Fish and Wildlife Service, Sacramento, California.)

17. The unimpeded movement of the peninsular bighorn sheep between the United States and Mexico is important for increasing and maintaining their genetic diversity. As the number of animals that move between these two countries declines or ceases, the species will

begin to suffer the deleterious effects of inbreeding and reduced genetic diversity including physical malformities, behavioral problems, reduced ability to successfully reproduce and produce viable offspring, greater susceptibility to disease, and reduced ability to survive adverse environmental conditions, such as extremely cold winters or hot summers. The combined direct and indirect effects of a border wall will be additional pressures on the survival and recovery in the wild of this endangered species.

18. There will be irreparable harm to the peninsular bighorn sheep without proper NEPA review and the completion of section 7 consultation by these federal agencies as required by the Endangered Species Act.

19. The proposed border wall will also harm other species that are not federally recognized as endangered or threatened but are State of California Species of Special Concern such as the flat-tailed horned lizard and the burrowing owl. Given the lack of adequate environmental review of El Centro Project 1, the full extent of irreparable harm currently is unknown. However, significant irreparable harm will likely occur. The border wall construction and associated activities such as DHS and CBP vehicle traffic, road building and maintenance, horseback and quad patrols, night lighting, and other associated law enforcement and border wall maintenance activities could permanently alter the geography, impact native vegetation and plant communities, especially by improving habitat conditions for invasive weeds, and adversely impact the existing natural ecosystems.

20. The earth moving and associated disturbance caused by border wall construction will create habitat for invasive exotic plants and weeds that outcompete and replace native plants. These exotic species initiate a downward spiral of increasingly destructive effects to native plants, and native animals dependent on the native vegetation for food and the predators that feed on them. The seeds of exotic weeds from other areas are easily transported within dried mud or dirt on construction equipment, or unintentionally by DHS and CBP cars, trucks, horse trailers, quads, and the hooves and fur of their patrol horses.

21. The flat-tailed horned lizard, which has the smallest range of all horned lizard species, inhabits both sides of the United States-Mexico border from southeastern California,

extreme southwestern Arizona, in the United States and northeaster Baja California and northwestern Sonora, Mexico. There are many documented observations of this reptile in the El Centro Project 1 area.

22. NatureServe, the publically accessible and highly reputable internet database of the status of animals and plants, ranks the flat-tailed horned lizard as vulnerable to extinction on a global level, and imperiled on a national and state level in Arizona and California.

23. The threats from the El Centro Project 1 border wall to the flat-tailed horned lizard include direct effects such as death or injury from construction operations. The flat-tailed horned lizard would fall into trenches or other holes associated construction operations and then dye of exposure or by being buried alive. The flat-tailed horned lizard may also be run over by vehicles associated with the project and collected by construction personnel. Further, the El Centro Project 1 will impair the long-term genetic viability of the flat-tailed horned lizard because the border wall will diminish their habitat, restrict their movement patterns, and prevent genetically diverse individuals from opposite sides of the international border from mating with each other. Further, the border wall will improve conditions for the flat-tailed horned lizards' predators. The border wall will provide perching sites for loggerhead shrikes and American kestrels, two of the lizard's major predators, which will make it easier for them to observe and capture the horned lizard. Finally, both on and off-road vehicles injure and kill flat-tailed horned lizards. The animal typically "freezes" in the presence of threats, including vehicles, making them particularly susceptible to getting hit by vehicles. Studies have found that even on infrequently traveled roadways, 3% and 19% of the flat-tailed horned lizards observed were dead on the road over two years of study (page 18 in California Department of Fish and Wildlife. 2014. Report to the Fish and Game Commission. Evaluation of the Petition from the Center of Biological Diversity to list the Flat-tailed Horned Lizard (*Phrynosoma mcallii*) as Endangered under the California Endangered Species Act. Sacramento, California).

24. The burrowing owl is a State of California Species of Special Concern. This ground nesting bird has declined throughout most of its range in California.

25. The threats from the proposed El Centro Project 1 border wall to the burrowing owl include death or injury from construction operations, including by being buried alive in their burrows, and from vehicular traffic with the project

26. The U.S. Bureau of Land Management has designated the entire area of Imperial County where the El Centro Project 1's proposed border wall will be located as the Yuha Basin Area of Critical Environmental Concern (ACEC). ACEC designations highlight areas where special management attention is needed to protect important historical, cultural, and scenic values, or fish and wildlife or other natural resources. According to the BLM, the Yuha Basin ACEC contains important habitat for the flat-tailed horned lizard and several unique vegetation communities.

27. I am hopeful that NEPA and ESA analyses, if done properly and in good faith by DOD, DHS and CBP, will ensure the survival and recovery in the wild of the U.S. and State of California endangered peninsular bighorn sheep, and the State of California Species of Special Concern flat tailed horned lizard and burrowing owl.

EL PASO PROJECT 1

28. I am gravely concerned by the failure of the DOD, DHS, and CBP to comply with NEPA for their proposed border wall in New Mexico. These agencies have failed to consider the proposed border wall's effects on the endangered and Experimental Nonessential Populations[1] of the Mexican wolf (*Canis lupus baileyi*) and the Aplomado falcon (*Falco femoralis septentrionalis*), and failed to consult with the FWS on possible environmental and species effects.

[1] "Nonessential Population" is the designation for members of a threatened or endangered species who have been transported and released within suitable habitat within its probable unoccupied historic range or in areas where the species did not formerly exist. An "Essential Experimental Population" is one whose loss would be likely to appreciably reduce the survival of the species in the wild, all other Experimental Populations are nonessential. Nonessential Experimental Populations also intentionally have reduced protections in order to encourage public and private landowners to assist in the recovery of the imperiled species. The purpose of Experimental Populations is to establish populations of endangered or threatened species with the intent of reducing the possibility of their extinction, improving their chances of recovery, and thus the need for their continued protection under the Endangered Species Act. The authority for Endangered Species Act (ESA) section 10(j) rules is given at 50 CFR § 1539(j).

29. From decades of work with endangered and threatened species, as well as experience dealing with the Mexican wolf and Aplomado falcon while I was stationed at the FWS New Mexico Ecological Services Office, I recognize the threat that border wall construction and maintenance, and associated operations pose to these two animals. The proposed construction of the border wall in Doña Ana and Luna Counties and associated construction-related activities may have a number of adverse effects on the Mexican wolf and Aplomado falcon. These include direct effects, such as injury, death, harm, and harassment due to construction of the border wall including linear vegetation clearing; road construction; grading and construction of equipment storage and parking areas; off road movement of vehicle and equipment involved in construction; and poisoning from chemical application (herbicides and pesticides). A series of indirect effects, such as harassment, on the two endangered species also are possible, including, abandonment of the area for essential behaviors such as feeding, resting, and mating due to night lighting; and detrimental impacts caused by exotic invasive weeds introduced by construction and routine DHS and CBP operations, which will eliminate food sources and habitat for rodents and other animals utilized by the Mexican wolf and the Aplomado falcon. The combined direct and indirect effects of a border wall would be additional pressures on the survival and recovery in the wild of these two endangered species. The threats to the endangered Mexican wolf are of special concern, given the dangers they face in the Republic of Mexico, and the need to maintain natural connectivity for the animal between the United States and Mexico.

30. More specifically, the proposed border wall identified as El Paso Project 1 in the February 25, 2019, memorandum from DHS to the DOD regarding a "Request for Assistance Pursuant to 10 U.S.C. § 284" would interrupt the movement of the Mexican wolf across the US/Mexico Border, including in Doña Ana and Luna Counties which is where El Paso Project 1 will be constructed. The Center for Biological Diversity has obtained information from the FWS via the Freedom of Information Act (FOIA) on the cross international border movement of a radio-collared Mexican wolf who was released in Mexico in 2017. It was first recorded on January 21, 2017 in the United States, it was then recorded in the City of Las Cruces, Doña Ana County, New Mexico, on January 23, 2017 and then last recorded on the outskirts of Ciudad

Juárez in the Mexican state of Chihuahua on January 25, 2017. The relevant information obtained by the Center for Biological Diversity via this FOIA request is attached as Exhibit A to this declaration.

31. The pedestrian border wall will adversely affect, and likely restrict or eliminate the ability of Mexican wolves to move on their own volition between Mexico and the United States. Since the pedestrian walls will be effective in prohibiting the entry of humans, they also will restrict or prevent the movement of Mexican wolves between these two nations. The Mexican wolf's essential behavior of long distance movement in Doña Ana and Luna counties will be blocked by the proposed border wall. The unimpeded movement of Mexican wolves between the United States and Mexico is important for increasing and maintaining their genetic diversity. The lack of genetic diversity for a species may result in physical malformities, behavioral problems, reduced ability to successfully reproduce and produce viable offspring, reduced lifespan, reduced ability to avoid predators, greater susceptibility to disease, and the reduced ability to survive adverse environmental conditions, such as extremely cold winters or hot summers. The proposed border wall could eliminate the possibility of the recovery of the endangered Mexican wolf and preclude their delisting under the Endangered Species Act.

32. Further, construction the proposed border wall could result in the harassment of endangered Mexican Aplomado falcons. Noise and other disturbance resulting from bulldozers and other construction equipment and activities could cause the significant disruption of their normal behaviors such as foraging and feeding.

33. There will be irreparable harm to the Mexican wolf and the Aplomado falcon without proper NEPA review and the completion of section 7 consultation by these three federal agencies as required by the Endangered Species Act.

34. The proposed border wall will also harm other species that are not federally recognized as endangered or threatened. Given the lack of an adequate assessment of El Paso Project 1 on the environment, the potential effects of the proposed project on sensitive habitats, as well as non-listed, but imperiled species remains unknown. The border wall construction and associated activities such as vehicle traffic, road building, horseback and quad patrols, night

lighting, and other associated human and law enforcement activities could permanently alter the geography, and impact native vegetation and plant communities, especially by improving habitat conditions for invasive weeds, and adversely impacting the existing natural ecosystems.

35. The earth moving and associated disturbance caused by border wall construction will create habitat for invasive exotic plants and weeds which outcompete and replace native plants. These exotic species initiate a downward spiral of increasingly destructive effects to native plants, and native animals dependent on the native vegetation for food and the predators that feed on them. The seeds of exotic weeds from other areas are easily transported within dried mud or dirt on construction equipment, or unintentionally by CBP cars, trucks, horse trailers, quads, and the hooves and fur of their patrol horses.

36. The Gila monster (*Heloderma suspectum*), the iconic large orange and black colored venomous lizard, inhabits both sides of the international border from west of El Paso, Texas, all through New Mexico, and into Arizona. This legendary reptile is listed as endangered by the State of New Mexico. Its 2017 recovery plan issued by the New Mexico Department of Game and Fish (Gila Monster (*Heloderma suspectum*) Recovery Plan by John Bulger dated April 5, 2017) includes information that the reptile has been collected or observed at six locations west of El Paso and Las Cruces.

37. Gila monsters in New Mexico are typically found where Chihuahuan desert scrub merges with desert grassland. Dominant vegetation in occupied and suitable sites includes creosote bush, catclaw, snakeweed, ocotillo, mesquite, juniper, cacti, sotol, and numerous grasses. Small trees, shrubs, and herbaceous vegetation provide important cover and food for the Gila monster's prey. The recovery plan reported that Gila monsters in New Mexico prefer relatively coarse gravelly conglomerate soils and areas of loam and sand. Of paramount importance is availability of suitable refuge shelters, which occur in rock cavities and crevices, pack rat mounds, and burrows created by other reptiles or mammals.

38. The recovery plan noted Gila monster home range sizes are highly variable, ranging from <2.5 acres to 259 acres. Typically, Gila monsters center their activities and home ranges on their refuge shelters. Individuals have tremendous fidelity to their home ranges, e.g.

they stay within their "home" area, according to one herpetologist (Daniel Beck. 2005. Biology of Gila monsters and beaded lizards. University of California Press).

39. The low number of observations and records of the Gila monster west of El Paso and Las Cruces in the recovery plan may be misleading. It does not demonstrate that the area is not suitable for this reptile. Based on my experience at the FWS, I know Gila monsters are extremely popular in the illegal reptile trade. Poachers and smugglers sell illegally collected individuals for hundreds of dollars. Given their protected status by the State of New Mexico and the Republic of Mexico where it is protected, it is unlikely that poachers who have taken Gila monsters west of the El Paso area on either side of the US/Mexico border would make the information public. This is because they do not want to be caught by law enforcement authorities or reveal the locations where the animals were found to other poachers.

40. Given the amount of suitable habitat along the U.S./Mexico border in New Mexico west of El Paso, the high value of the Gila monster by reptile collectors, and the biology and ecology of the species, it is highly likely that this animal inhabits the area where the border wall is proposed.

41. The threats from the proposed border wall to the Gila monster come in the form of direct effects of wall construction such as their death or injury from construction operations, falling into trenches or other holes and then dying of exposure or being buried alive; getting run over by vehicles associated with the project; collected by construction personnel; and indirect effects in the form of the border wall blocking their movement patterns or reducing the size of individual animal's home ranges and eliminating the available food or shelter resources.

42. I am hopeful that NEPA and ESA analyses, if done properly and in good faith by DOD, DHS and CBP, will ensure the survival and recovery in the wild of the endangered Mexican wolf and endangered Aplomado falcon, and the New Mexico State-listed Gila monster, in addition to maintaining the health of the greater ecosystem in the New Mexico borderlands region. Requiring DOD, DHS and CBP to complete the NEPA process will surely redress the irreparable harms to both federally-listed and state-listed species, wildlife, and the environment.

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

Executed on June 8, 2019, at Portland, Oregon.

CHRISTOPHER D. NAGANO

EXHIBIT A

From: Dwire, Maggie
To: b7C [redacted]
Cc: Sherry Barrett; John Oakleaf
Subject: Mexican wolf M1425
Date: Friday, January 27, 2017 10:22:50 AM
Attachments: image.png
image.png

Hi b7C [redacted]

Our counterparts in Mexico have contacted us about GPS locations downloaded from a radio collar worn by a recently released wolf (M1425) in Mexico. The downloads from the animal's collar presumably show that it crossed the border into the US, went to Las Cruces, and returned across the border into Mexico. I attached below a screenshot of the downloads.

The first location in the US is at 8pm on January 21,and the location in Las Cruces is at 8am on the 23rd (a zoomed in map of this specific location is also below). The first location back into Mexico is at 8am on January 24th.

The last GPS download from this collar was on the outskirts of Juarez at 11am on the 25th. Mexico's field team heard the radio signal from Juarez on the evening of the 25th. The field team has not been able to locate the collar since, and the GPS has not downloaded since.

As you can see, some of the locations are in urban areas. It could be that the animal is alive and dispersing through these areas. Or, and to this point, Mexico has said "it could be that the collar (with or without carcass) is in hands of somebody that is carrying it around."

Mexico is trying to determine whether the collar is being worn by a live wolf, and will let us know any information they learn. Let us know if you have any questions.

Maggie

EXHIBIT A
CHRISTOPHER D. NAGANO
1 of 3

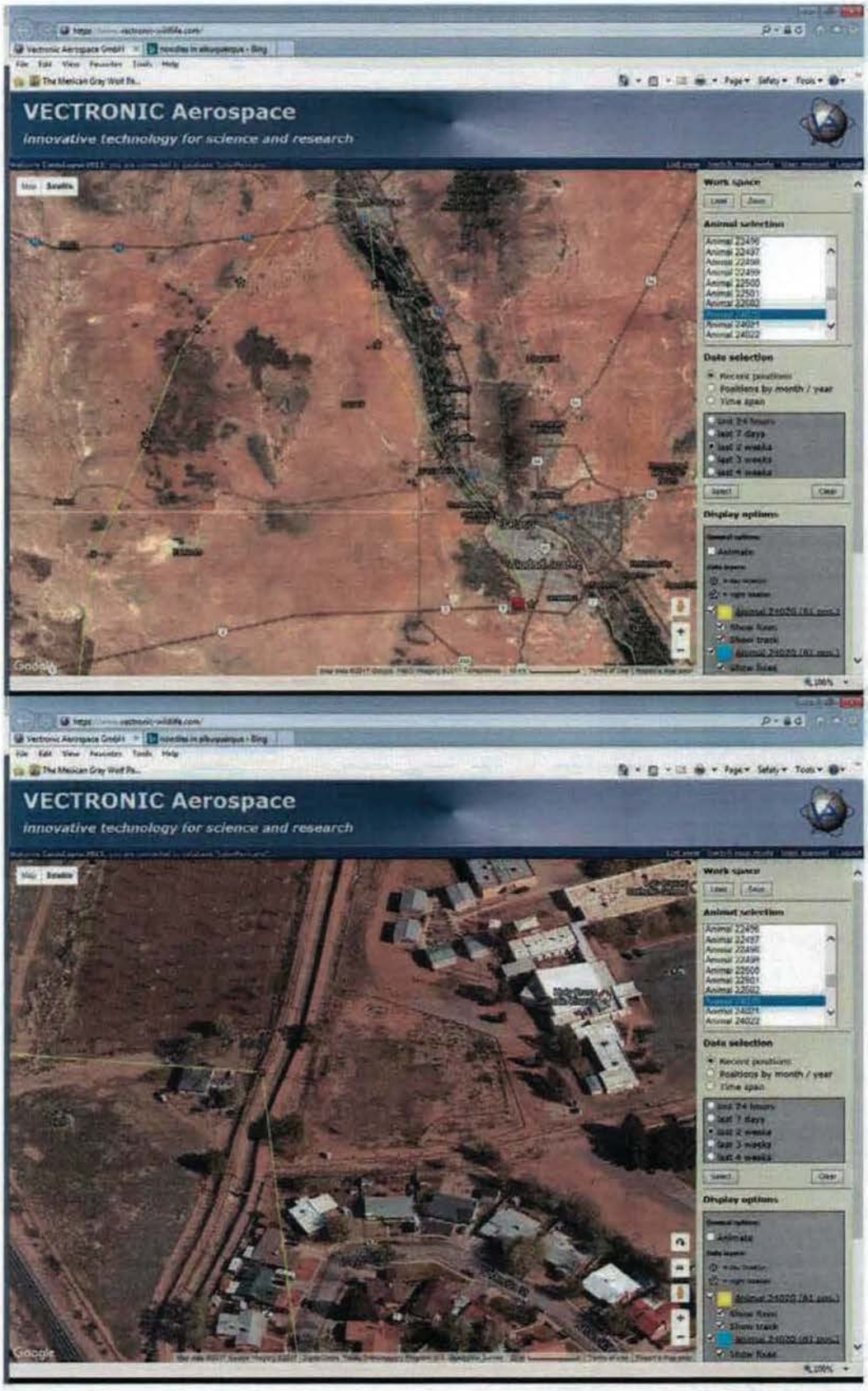


EXHIBIT A
CHRISTOPHER NAGANO
2 OF 3

Maggie Dwire
Assistant Mexican Wolf Recovery Coordinator
U.S. Fish and Wildlife Service
2105 Osuna Road NE
Albuquerque, NM 87113
Ph (505) 761-4783

EXHIBIT A
CHRISTOPHER NAGANO
Chris Nagano
3 OF 3

EXHIBIT 5

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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 ELEANORE NESTLERODE IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Eleanore Nestlerode, declare as follows:

1. I am Eleanore Nestlerode. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below. I previously executed a declaration dated April 3, 2019 in support of the Plaintiff States' Preliminary Injunction concerning the El Paso Sector Project 1 that was substantively the same as this declaration.

2. I am a staff member of the New Mexico State Land Office (SLO) and have worked for SLO as IT/GIS Business Analyst since February 12, 2007.

3. One of my duties is locating and mapping state trust lands for the SLO.

4. I work at the Land Office Geographic Information Center of the SLO, where I prepared the map attached as Exhibit A to this declaration. The map depicts New Mexico state trust lands along the New Mexico-Mexico border and also identifies real property managed by the federal government, as well as privately owned property.

5. The attached map illustrates New Mexico's specific interests in the state trust lands outlined in the map, noting whether New Mexico has a surface interest (or "estate"), a subsurface interest or estate, or both, in the state trust lands shown. Federal surface land management is identified as being associated with the federal Bureau of Land Management (BLM).

6. To prepare the map, I assembled the most up-to-date GIS ownership data layers available to the New Mexico State Land Office, both of federal surface ownership, and of in-house state trust lands surface and subsurface ownership, and overlaid these layers on a standard topographic base map. I then analyzed the state trust lands located in the vicinity of coordinates associated with the El Paso Sector Project 1 site by entering those coordinates that the Department of Homeland Security (DHS) provided to the Department of Defense (DOD) in a memorandum dated February 25, 2019, concerning DHS's "Request for Assistance Pursuant to 10 U.S.C. § 284" (DHS Memorandum).

7. The DHS Memorandum specifies that the El Paso Project 1 includes installation of 46 miles of pedestrian fencing beginning approximately 17.5 miles west of the Columbus Port of Entry and continuing east in non-contiguous segments to approximately 35 miles east of the

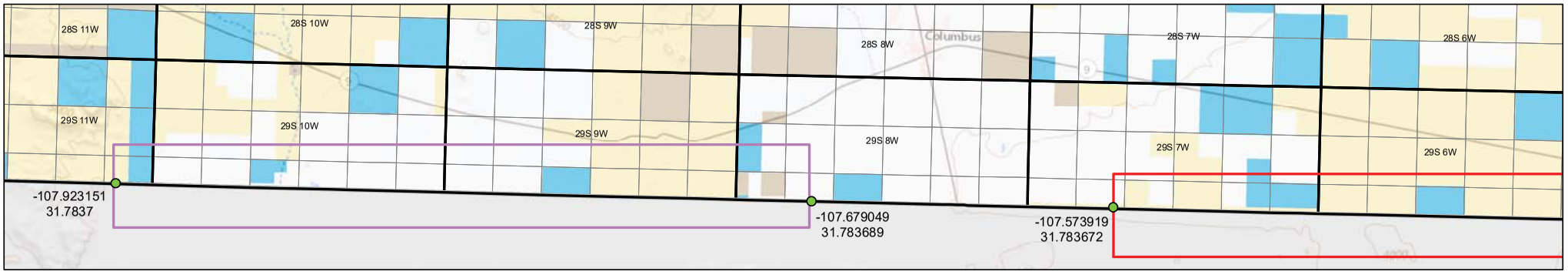
Columbus Port of Entry within Luna and Dona Ana Counties, New Mexico. The Memorandum indicates that the fencing will be constructed in two stretches, with one starting at coordinate 31.7837, -107.923151, and ending at 31.783689, -107.679049, and the second starting at coordinate 31.783672, -107.573919, and ending at 31.783741, -107.038154.

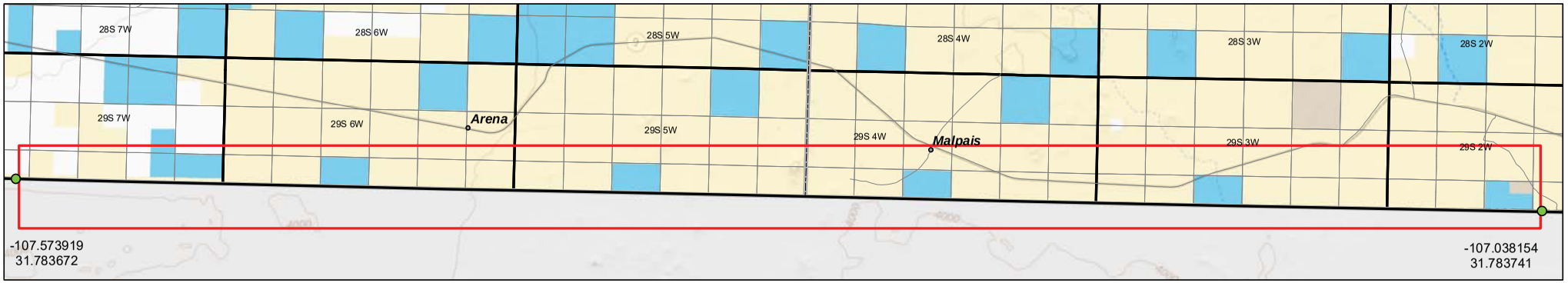
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on June 11, 2019, at Santa Fe, New Mexico.

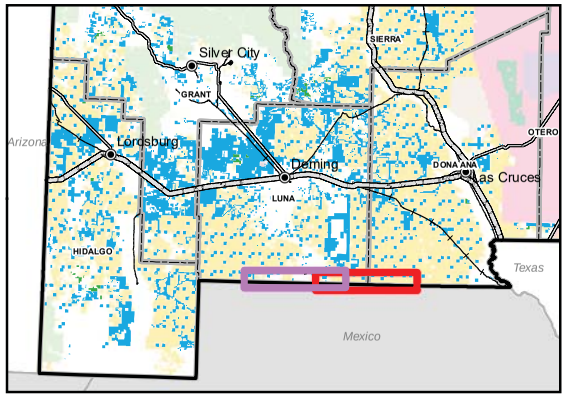
Eleanore Nestlerode

EXHIBIT A





New Mexico State Trust Lands Status Along the Border with Mexico



Locator Map

- Cities and Towns
- County Seats
- Interstate
- Highway
- Local Roads
- Railroads
- County Lines

State Trust Lands

- Subsurface Estate
- Surface Estate
- Both Estates

Federal Surface Management

- Bureau of Land Management

Note: state trust land ownership is adjacent to a 60-foot strip of land along the border with Mexico referred to as the Roosevelt Reservation, reserved in a 1907 Presidential Proclamation; this may not be visible due to scale limitations.

Stephanie Garcia Richard
Commissioner of Public Lands
505-827-5761
www.nmstatelands.org

Compiled, edited and printed by the Land Office Geographic Information Center. V:\LOGIC\FRONT OFFICE\NMSouthernBorder20190327. Save Date: March 27, 2019 Print Date: March 27, 2019. Created by: Eleanore Nestlerode enestlerode@slo.state.nm.us 505-827-5735

EXHIBIT 6

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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 MYLES B. TRAPHAGEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Myles B. Traphagen, declare as follows:

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

2. I am the Borderlands Program Coordinator for Wildlands Network in Tucson, Arizona. I also serve as the Science Coordinator for the Malpai Borderlands Group based in Douglas, Arizona. I reside in Tucson, Arizona.

3. I hold a Bachelor of Arts Degree from the University of California Santa Cruz in Environmental Studies and a Master of Science Degree from the University of Arizona in Geographic Information Systems. The research I conducted for my Master's Degree, "Habitat connectivity for the white-sided jackrabbit (*Lepus callotis*) between the United States and Mexico: The border divides a species," used Landsat satellite imagery over a 30-year period from 1984 to 2014 to evaluate whether connectivity existed between the U.S. and Mexico populations of the white-sided jackrabbit.

4. Since 1996, I have conducted field surveys, inventories and research along the US and Mexico border region and in Mexico. From 1996 to 1998 I worked for the U.S. Fish and Wildlife Service ("Service" or "FWS") at San Bernardino National Wildlife Refuge in southeast Arizona conducting bird surveys, native fish surveys and recovery of Rio Yaqui fishes which reach their northernmost distribution in Cochise County of southeast Arizona.

5. From 1998 to 2008, I conducted research as a consultant for the U.S. Forest Service Rocky Mountain Research Station and Malpai Borderlands Group on the effects of fire, grazing and climate in the borderlands of southwest New Mexico and southeast Arizona. During this time period I also began researching the white-sided jackrabbit (*Lepus callotis gaillardi*), a State of New Mexico Threatened species that reaches its northern distribution in Hidalgo County, New Mexico, commonly referred to as the "Bootheel."

6. From 2000 to 2008, I worked for both Turner Enterprises and the Turner Endangered Species Fund in New Mexico inventorying vegetation, monitoring bison reintroduction, prairie dog reintroduction and rewilding the Bolson tortoise from Durango, Mexico. I have held permits from the New Mexico Department of Game and Fish to survey

mammals in the state.

7. From 2007 to 2014, I was a U.S. Bureau of Land Management ("BLM") Authorized Biologist and worked as a consultant on numerous renewable energy projects in California and Nevada surveying and translocating desert tortoise.

8. In 2010 and 2011, I conducted research for the New Mexico Department of Game and Fish to assess the population status of the white-sided jackrabbit in New Mexico. The results of this survey suggested that roadkill by the U.S. Customs and Border Patrol ("CBP" or "Border Patrol") was a significant factor leading to a threefold population decline in less than decade.

9. I have led botanical survey crews in California, Nevada, Arizona, Nebraska, South Dakota and New Mexico and have produced over 100 reports for agencies and private groups, and have written several publications, book chapters and maps concerning wildlife and plant species.

10. My current employment as Borderlands Program Coordinator with Wildlands Network involves researching and advocating for wildlife corridors and connectivity. This entails a significant amount of work in Mexico on projects such as trail camera trapping, mapping, and designing projects for mitigating road and highway impacts to wildlife and enhancing habitat connectivity.

11. As the Science Coordinator the Malpai Borderlands Group, I implement research and monitoring projects such as climate and weather monitoring and fire and grazing research. I also review and coordinate a large array of projects that relate directly to conservation projects in the borderlands of Arizona and New Mexico.

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

13. One of the Section 284 Projects, El Paso Project 1, is located in Doña Ana and

Luna Counties in New Mexico, and involves removing 46 miles of vehicle barrier fencing and replacing it with pedestrian fencing. El Paso Project 1 also includes construction of roads and installation of lighting.

14. In this declaration, I provide several examples specific to the El Paso Project 1 site, and to the border region more generally, to illustrate how the Section 284 Projects and El Paso Project 1 will cause irreparable harm to wildlife, including to endangered species like the Mexican Gray Wolf (*Canis lupus baileyi*).

15. The specific design of border walls and fences significantly affects how the walls/fences will impact wildlife movement. There are numerous types of fencing that fall into two categories according to what type of traffic they are intended to exclude or deter: vehicle and pedestrian. Within those two types there are many designs depending upon when they were built.

16. Vehicle Fencing: Made of either short steel bollards or "Normandy-style" steel crossbars, these are designed to deter "drive-thrus" of vehicles. They are the least detrimental to wildlife because they allow most animals to cross under or between them. However, they can be a formidable barrier for large animals like bison, Sonoran pronghorn or bighorn sheep. Pronghorn do not jump and can have difficulty passing beneath the vehicle fencing. The Janos-Hidalgo bison herd had roamed between southwest New Mexico and Chihuahua, Mexico for about 100 years, but their movements were inhibited when the Normandy-vehicle barrier was installed along the New Mexico-Mexico border. The herd has not been seen in several years.

17. Pedestrian fencing: This fencing is designed to deter and impede people, and therefore it is effective at impeding most animals from passing through. It ranges from 10 to 18 feet high, although 30-foot replacement fencing is currently planned for San Diego and some areas of Arizona. The style of pedestrian fencing that DHS currently favors is known as steel bollard. The most common type employed is 6 x 6 inch diameter square steel posts filled with concrete. The spacing between the steel posts is 4 inches. The height of the most recent border-wall-infrastructure projects is 18 feet, but some recent plans for replacement fencing call for 30-foot bollards. The bollard fencing recently installed in the twenty-mile section west of Santa Teresa, New Mexico, an area that is adjacent to and just east of the El Paso Project 1 site, is 18

feet high with 4-inch gaps. The details of these fencing designs are extremely important to understand in order to evaluate the effect they may have upon wildlife movement, migration and connectivity.

18. Mexican Gray Wolf (*Canis lupus baileyi*): The Mexican gray wolf is the rarest subspecies of gray wolf in North America. It was once common throughout the southwestern U.S., but was nearly eliminated from the wild by the 1970s. The Mexican gray wolf is listed as endangered under the Endangered Species Act ("ESA") (80 FR 2488), and is also listed as endangered under New Mexico's Wildlife Conservation Act. El Paso Project 1 will harm the Mexican gray wolf and significantly impact its recovery by dividing its habitat and impeding the wolf's movement.

19. For El Paso Project 1, the Trump administration plans to build an impermeable bollard steel wall, precluding all animals greater than 4" wide from passing through. This wall will prevent any connection between wolves from the U.S. and Mexico which is critical for the wolf's recovery. The Mexican Wolf Recovery Plan-First Revision, which is a wildlife plan the Service approved under the ESA to facilitate the wolf's revival, calls for a minimum of 320 wolves in the United States and 200 in Mexico to meet recovery goals. Ensuring that wolves can access their entire range in the U.S. and Mexico is important to the wolf's recovery because it allows for greater utilization of habitat and prey availability and will promote the establishment of meta-population connectivity.

20. Carroll et al (2014) state, "Restoring connectivity between fragmented populations is an important tool for alleviating genetic threats to endangered species. Yet recovery plans typically lack quantitative criteria for ensuring such population connectivity. We demonstrate how models that integrate habitat, genetic, and demographic data can be used to develop connectivity criteria for the endangered Mexican wolf (*Canis lupus baileyi*), which is currently being restored to the wild from a captive population descended from 7 founders. We used population viability analysis that incorporated pedigree data to evaluate the relation between connectivity and persistence for a restored Mexican wolf meta-population of 3 populations of equal size. Decreasing dispersal rates greatly increased extinction risk for small populations

(<150-200), especially as dispersal rates dropped below 0.5 genetically effective migrants per generation." Impeding connectivity between the U.S. and Mexican populations runs counter to published research that advises otherwise. An impenetrable border wall hamstrings binational efforts that have occurred for 30 years.

21. Under the ESA, critical habitat is sometimes designated for listed species. But for the Mexican Wolf, the Service instead re-introduced the species to Arizona and New Mexico as an ESA section 10(j) non-essential experimental population in order to allow for more flexibility in the recovery process within the 5,000 square-mile Mexican Wolf Experimental Population Area ("MWEPA"). On January 16, 2015, the Service revised the regulations for the non-essential experimental population of the Mexican wolf under section 10(j) to improve the population's ability to contribute to recovery (80 FR 2512). With the encouragement of Southwestern states including New Mexico, and based on the Service's collaborative relationship with Mexico, recovery planning was reinitiated in December 2015, focusing south of Interstate 40 in Arizona and New Mexico and into Mexico, which encompasses the historical range of the Mexican wolf.

22. Newly Published Taxonomic Status of the Mexican Gray Wolf: On March 28, 2019, the National Academies of Sciences, Engineering, and Medicine released their findings on *Evaluating the Taxonomic Status of the Mexican Gray Wolf and the Red Wolf*. The report concludes that the Mexican gray wolf is a valid taxonomic subspecies of the gray wolf. The Mexican gray wolf's size, morphology (physical characteristics such as head shape), and color distinguish it from other North American wolves. Genetic and genomic analyses confirm that the Mexican gray wolf is the most genetically distinct subspecies of gray wolf in North America. The Mexican gray wolf represents a smaller form of the gray wolf and inhabits a more arid ecosystem than the gray wolf. Furthermore, the current managed population of Mexican gray wolves are direct descendants of the last remaining wild Mexican gray wolves; the known history of current Mexican gray wolves suggests that there is continuity between them and the historic lineage. There is no evidence that the genome of the Mexican gray wolf includes DNA from domestic dogs. Preserving and maintaining Mexican wolf habitat in Mexico and the U.S. is critical to ensuring the survival of this unique and rare subspecies.

23. Long Distance International Wolf Dispersal, including in the El Paso Project 1 Site: Mexican gray wolf habitat exists on both sides of the U.S.-Mexico border, and wolves cross the border to access this habitat. In January of 2017, a GPS-collared male Mexican Gray Wolf (M1425), that was part of the U.S.-Mexico Bi-national Recovery Program in Mexico, crossed the border from Chihuahua and spent four days in the U.S. before returning to its original starting location in Mexico. While in the U.S., the wolf crossed the entire West Potrillo Mountains portion of the Organ Mountains-Desert Peaks National Monument in New Mexico, and associated wilderness areas and Areas of Critical Environmental Concern ("ACECs") in New Mexico. Additionally, it occupied both Zones 1 and 2 of the Mexican Wolf Experimental Population Area in New Mexico. The entire journey totaled 600 miles, of which 100 were in the U.S. (See Exhibit A attached to this declaration, which is a map I generated using GPS data to depict Wolf M1425's journey which also shows the El Paso Project 1 site).

24. The most important part of Wolf M1425's epic excursion, in regard to this case, is that it crossed the border at the proposed El Paso Project 1 site. Furthermore, it crossed back into Mexico through an unfenced section of the border at El Paso-Juarez. This location is a steep and rocky rugged mountain known as Mt. Cristo El Rey, and it has remained unfenced due to its topography. If El Paso Project 1 is completed, then the prospects of Mexican Gray Wolves dispersing and connecting to their northern counterparts will be next to zero, which will present significant obstacles to the long-term genetic fitness of the species at large and decrease the possibility that a healthy meta-population can grow (referenced above in paragraph 20 which describes the work of Carroll et al).

25. Additional Mexican Wolves Dispersing to the U.S. from Mexico: Wolf M1425 is not alone in making cross-border journeys between the U.S. and Mexico. In 2017, another Mexican gray wolf was documented crossing the U.S.-Mexico border. Like Wolf M1425, this second wolf also originated from Mexico and wore a GPS collar. This wolf, a female labeled F1530, was born in 2016 at a captive-wolf-breeding facility in Cananea, Mexico, and was released in October 2016 in Chihuahua, Mexico, approximately 90 to 100 miles south of the New Mexico border. The last collar radio transmission from Mexico was from February 14, 2017, 21

miles south of the New Mexico international border, as at that time the GPS collar became inoperable. She was later observed in the U.S. in March, 2017, and was captured by the Interagency Wolf Field Team on March 26, 2017, near the Chiricahua Mountains in Cochise County, Arizona. She was then relocated to a wolf-breeding facility at the Sevilleta National Wildlife Refuge in New Mexico. This wolf likely crossed the border in the lower San Bernardino Valley near San Bernardino National Wildlife Refuge in Arizona. This stretch of border currently has a vehicle barrier, but under the proposed Tucson Project 3, one of the Section 284 Projects, steel bollard-pedestrian fencing will be installed, which will preclude any animals larger than four inches in width from crossing the border. The combined impact of the Section 284 Projects, especially in Arizona and New Mexico, will have devastating impacts on the connectivity between Mexican wolf habitat in the U.S. and Mexico and will harm the species' recovery.

26. Secondary effects of Border Patrol activities on wildlife: In addition to border barriers, the uncontrolled perennial presence of Border Patrol can severely impact animals. I recorded evidence of this harm to species in Hidalgo County, New Mexico in an area west of the El Paso Project 1 site. In that area Border Patrol vehicles outnumbered private vehicles 37 to 2 during a survey I conducted on Hidalgo County Road 1. Border Patrol vehicles result in roadkill deaths for numerous species such as the white-sided jackrabbit, which in the U.S. only occurs in Hidalgo County. A rise in the number of Border Patrol Agents in this same area (from 50 in 2000 to 300 in 2010), also led to more roadkill incidents due to increased vehicle use. I expect the same impacts will occur to species such as the Western Narrow-mouthed Toad (*Gastrophyrne olivacea*), a listed endangered species in New Mexico, that was documented by the New Mexico Game & Fish Department along Highway 9 in Luna County near the El Paso Project 1 site. The improved roads planned for El Paso Project 1 will allow Border Patrol vehicles to travel at faster speeds which will likely cause more roadkill to sensitive species like the Western Narrow-mouthed toad which often occupies low-lying depressions in the road that fill after warm-season monsoon rains that occur between June and September.

27. Wildlife Connectivity and Corridors: Wildlife connectivity and corridors should be considered when evaluating a project's environmental impacts, including under the National

Environmental Policy Act ("NEPA"), because habitat connectivity is critical to many species' survival. New Mexico recognizes the importance of wildlife connectivity, and on March 28, 2019, New Mexico's Governor signed the Wildlife Corridors Act into law. The Wildlife Corridors Act requires New Mexico state agencies to create a "wildlife corridors action plan" to protect species' habitat. Portions of El Paso Project 1 cross New Mexico State Trust Lands (as shown in Exhibit B to this declaration), and the planned pedestrian fencing disrupts habitat corridors in New Mexico—contrary to the Wildlife Corridors Act. Also, in my view the Mexican gray wolf is a "species of concern" under the Act due to wolf mortality from vehicles on New Mexico's roads, which include roads along the border that will be constructed as part of El Paso Project 1.

28. New Mexico's State Trust Lands in and around the El Paso Project 1 site, including within the Organ Mountains-Desert Peaks National Monument, the West Potrillo Mountains Wilderness Study Area, and the Alden Lava Flow Wilderness Study Area, form an important wildlife corridor for numerous species such as mule deer, javelina, pronghorn, bighorn sheep, mountain lion, bobcat, coyote, bats, quail and other small game like rabbits. This area is one of the largest undisturbed patches of Chihuahuan Desert grassland in the southwest and forms an important ecosystem and crucial habitat for rare birds such as the Aplomado falcon, which is present in both Luna and Doña Ana Counties, and Baird's sparrow.

29. Organ Mountains-Desert Peaks National Monument: The BLM currently manages all of the public lands within this new national monument for a range of multiple uses, including grazing, conservation of natural and archeological resources, and outdoor recreation activities such as hunting, hiking, biking, and camping. Statewide, BLM-New Mexico hosted 2.9 million visitors at 28 recreation sites in fiscal year 2013. Recreation on BLM-managed lands and waters in New Mexico supported more than 1,900 jobs and contributed more than $172 million to the state's economy in fiscal year 2012. The portions of this monument that would be impacted by a border wall include the Greater Potrillo Mountains and Alden Lava Wilderness Study Areas, which are both located approximately 30 miles southwest of Las Cruces. This monument and BLM Wilderness Study Areas lie only ¼ mile north of the proposed El Paso Project 1 site. Within

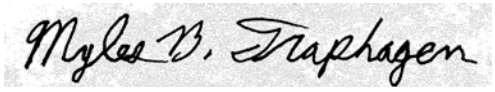
this federally managed area there are 35 parcels of New Mexico State Trust Lands, which total 23,078 acres (See Exhibit B to this declaration).

30. New Mexico Game Management Unit 25: The large expanse of land ranging from the proposed El Paso Project 1 site on the border, north to Interstate 10 near Deming (33 miles north of the border), and east to Las Cruces, NM and the Texas border, constitutes a very large New Mexico Game and Fish Department Game Management Unit known as GMU-25. It is over 2 million acres in size, of which about 1.25 million of are federal and state public lands. GMU-25 contains 337 parcels of New Mexico State Trust Land totaling 268,821 acres. (See Exhibit B to this declaration). These State Trust Lands are a vital engine for the local economy. Important game animals like mule deer and pronghorn rely upon this vast landscape that is connected to an equally large unfragmented grassland in Mexico. Both countries act as sources and sinks for wildlife, largely as a function of the highly variable rainfall that serves as one of the primary drivers of local and regional animal distribution.

31. In a changing climate where drought has become a frequent occurrence in the Southwest, wildlife corridors are more important than ever for ensuring species' survival. In addition to the Mexican gray wolf discussed above, a perfect example in the region of interest to this case, which will be impacted by the Section 284 Projects, is the pronghorn antelope (*Antilocapra Americana*). The pronghorn relies upon "forbs" which are small annual plants that are dependent upon seasonal rainfall. The West Potrillo mountains region, which is located in Luna and Doña Ana Counties, along with the vast grasslands of Chihuahua to the south, is a large area that is needed to fulfill the requirements of a species in search of infrequent and highly variably distributed precipitation. In Mexico, the Chihuahuan subspecies of the American pronghorn (*Antilocapra americana mexicana*) is listed as endangered. For millennia this species has roamed the borderlands unimpeded by barriers. Major efforts are underway in Chihuahua to recover the species, and re-introductions have occurred in the past year not far to the south. The recovery of the Chihuahuan pronghorn in the region may be reliant upon its ability to be able to roam long distances across the grasslands in search of forage.

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

Executed on June 7, 2019, at Tucson, Arizona.



Myles B. Traphagen

EXHIBIT A

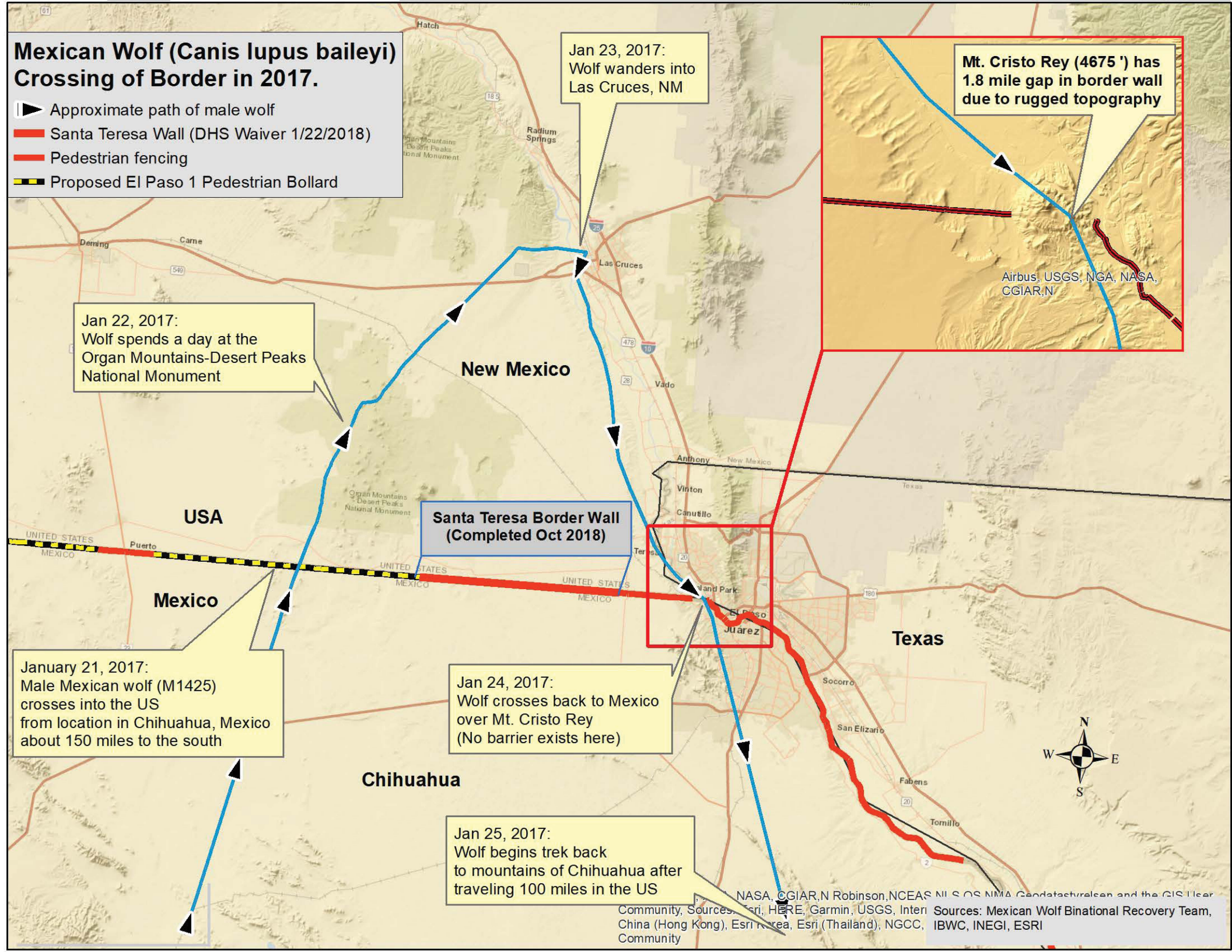

Mexican Wolf (Canis lupus baileyi) Crossing of Border in 2017.
Approximate path of male wolf
Santa Teresa Wall (DHS Waiver 1/22/2018)
Pedestrian fencing
Proposed El Paso 1 Pedestrian Bollard
Jan 23, 2017:
Wolf wanders into
Las Cruces, NM
Mt. Cristo Rey (4675 ') has
1.8 mile gap in border wall
due to rugged topography
Airbus, USGS, NGA, NASA,
CGIAR,N
Jan 22, 2017:
Wolf spends a day at the
Organ Mountains-Desert Peaks
National Monument
New Mexico
USA
Santa Teresa Border Wall
(Completed Oct 2018)
Mexico
Texas
Chihuahua
January 21, 2017:
Male Mexican wolf (M1425)
crosses into the US
from location in Chihuahua, Mexico
about 150 miles to the south
Jan 24, 2017:
Wolf crosses back to Mexico
over Mt. Cristo Rey
(No barrier exists here)
Jan 25, 2017:
Wolf begins trek back
to mountains of Chihuahua after
traveling 100 miles in the US
Las Cruces
Deming
Carne
Radium Springs
Hatch
Vado
Anthony
New Mexico
Texas
Vinton
Canutillo
Socorro
San Elizario
Fabens
Tornillo
Juárez
UNITED STATES
MEXICO
N
W
E
S
NASA, CGIAR,N Robinson,NCEAS NLS OS NMA Geodatastyrelsen and the GIS User Community, Sources: Esri, HERE, Garmin, USGS, Inter China (Hong Kong), Esri Korea, Esri (Thailand), NGCC, Community
Sources: Mexican Wolf Binational Recovery Team, IBWC, INEGI, ESRI

EXHIBIT B

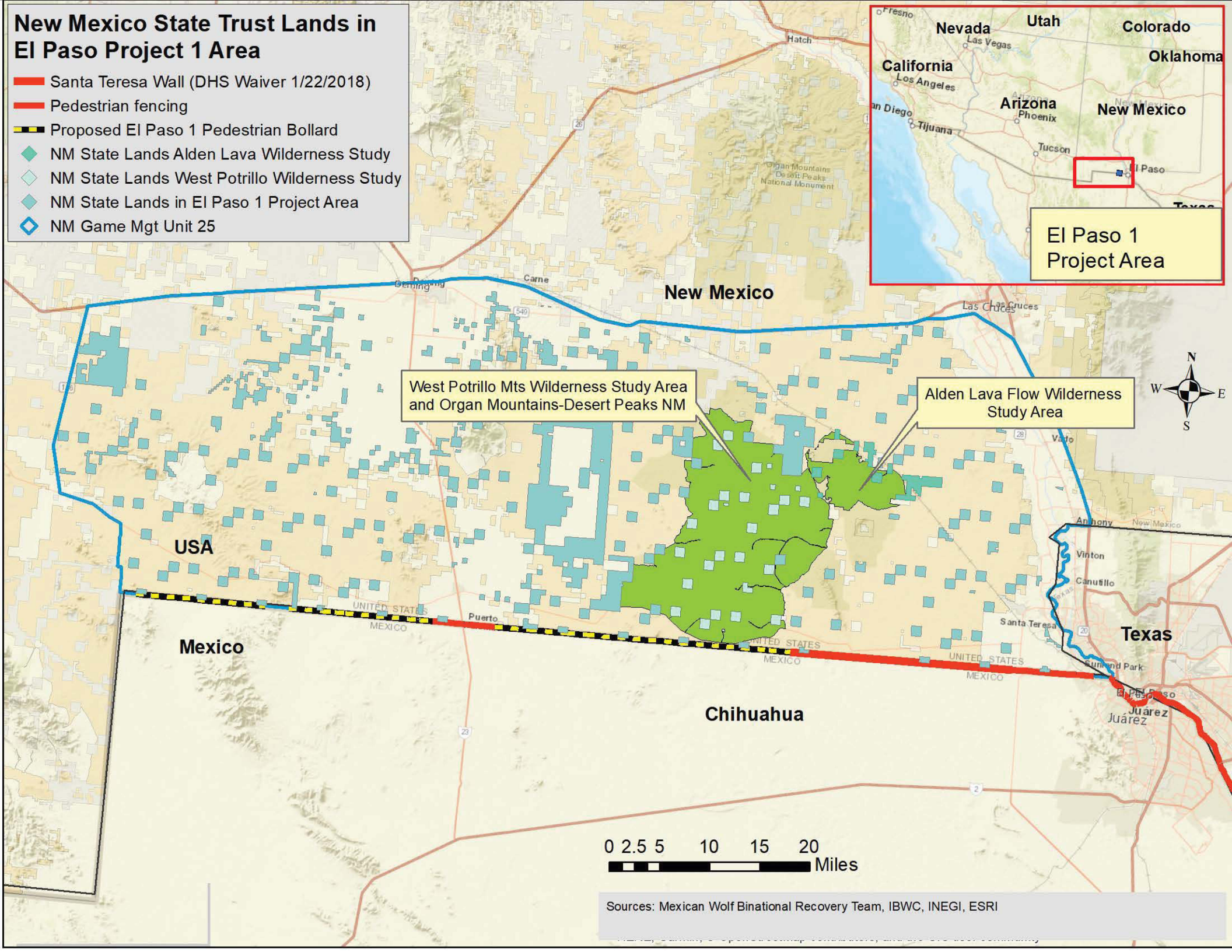

New Mexico State Trust Lands in El Paso Project 1 Area
Santa Teresa Wall (DHS Waiver 1/22/2018)
Pedestrian fencing
Proposed El Paso 1 Pedestrian Bollard
NM State Lands Alden Lava Wilderness Study
NM State Lands West Potrillo Wilderness Study
NM State Lands in El Paso 1 Project Area
NM Game Mgt Unit 25
Nevada
Utah
Colorado
Oklahoma
California
Arizona
New Mexico
Texas
El Paso 1 Project Area
New Mexico
West Potrillo Mts Wilderness Study Area and Organ Mountains-Desert Peaks NM
Alden Lava Flow Wilderness Study Area
USA
Mexico
Chihuahua
Deming
Las Cruces
Anthony
Vinton
Canutillo
Santa Teresa
El Paso
Juárez
Hatch
Carne
Vado
Tijuana
Phoenix
Tucson
Las Vegas
Los Angeles
Fresno
UNITED STATES MEXICO
Puerto
N
S
E
W
0 2.5 5 10 15 20
Miles
Sources: Mexican Wolf Binational Recovery Team, IBWC, INEGI, ESRI

EXHIBIT 7

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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 SULA ELIZABETH VANDERPLANK IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Sula Elizabeth Vanderplank, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below. I previously executed a declaration dated May 28, 2019 in support of the Plaintiff State of California's Preliminary Injunction Concerning El Centro Project 1 that was substantively the same as this declaration.

2. I am a postdoctoral fellow at the San Diego Zoo Global (SDZG), Institute for Conservation Research, and a freelance conservation scientist (Director of SUVA Research). San Diego Zoo Global has a focus on ending extinction worldwide. My postdoctoral position focuses on conservation of cross-border rare plants. I serve as adjunct faculty in the Biology Department of San Diego State University (SDSU) and at the Centro de Investigación Científica y Educación Superior de Ensenada (CICESE), a graduate school in Baja California, Mexico. I specialize in botany and conservation biology for the Southern California and Baja California regions, including the area along California's border with Mexico, and I have published many articles on the subject. The matters set forth in this declaration are based upon my personal knowledge, as well as my expertise in the California border region.

3. In addition to my work with SDZG and CICESE, I hold research associate positions at prominent regional research centers including: San Diego Natural History Museum (SDNHM) since 2012; Rancho Santa Ana Botanic Garden (RSABG) since 2011; and Cabrillo Marine Aquarium (CMA) since 2015.

4. I am also the scientific advisor to a non-profit organization in northwest Baja California – Terra Peninsular AC and I serve on the board of the non-profit organizations: California Botanical Society, Southern California Botanists, Conservación de Fauna del Noroeste AC (FAUNO), and for the research network "Next Generation of Sonoran Desert Researchers." I am also a rare plant botanist for the California Native Plant Society (Baja California Chapter).

5. I have a Ph.D. in Plant Ecology, with minors in Conservation Biology and Biogeography from the University of California, Riverside (2013) where my dissertation focused on correlates of plant diversity in northwestern Baja California. My current research projects as

part of my postdoctoral fellowship at the SDZG focuses on evaluating the conservation status of rare plants in Baja California, Mexico, and in particular, on plant species that are rare on both sides of the U.S./Mexico border. Specifically, we are developing conservation seed banks for these plants, as well as taking samples for genetic research, and recording population data and threats for each plant occurrence.

6. In this declaration, I provide my professional opinions regarding the biological impacts of the federal government's border wall project at El Centro, California (herein El Centro Project 1). El Centro Project 1 has the potential to 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. The El Centro Project 1 area includes near-pristine and fragile desert habitat that will be irreparably harmed by the Project.

7. In developing my opinion about the biological impacts from El Centro Project 1, I have relied on documentation provided in the February 25, 2019, memorandum regarding "Request for Assistance Pursuant to 10 U.S.C. § 284" that the U.S. Department of Homeland Security (DHS) directed to the U.S. Department of Defense (DOD), in which DHS requests DOD's assistance in constructing pedestrian fencing along approximately 218 miles of the U.S.-Mexico border. This includes El Centro Project 1, in Imperial County, California, which involves removing around 15 miles of vehicle barrier fencing and replacing it with pedestrian fencing that will be 18 to 30 feet tall. El Centro Project 1 also includes construction of roads and installation of lighting. In preparation for this declaration I have also reviewed the description of El Centro Project 1, as outlined in the "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," that DHS published in the federal register (84 Fed. Reg. 21800). I also reviewed a description of the Project on DHS's website that stated the pedestrian fencing will be a bollard wall. (See https://www.dhs.gov/news/2019/05/15/dhs-issues-waivers-expedite-border-wall-projects-tucson-and-el-centro).

8. The construction and installation of pedestrian fencing as part of El Centro Project 1 will cause significant environmental impacts by likely harming and killing rare, threatened and endangered plant species. Project activities include the construction of bollard fencing, improvements to a patrol road that will run the length of the fencing, and installation of lighting. Construction activities are expected to include earthwork, excavation, fill, site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features. These activities will obliterate any plants and seeds found within the footprint of the construction activities.

9. In addition to the direct impacts to plant species of conservation concern, there are likely to be serious secondary impacts from project construction such as soil compaction and the spread of invasive species. Disturbance favors invasive plant species, which quickly dominate and displace native plants. Many invasive species will reproduce vigorously and form a dense monoculture that can completely change the ecology of a region (e.g., invasion by annual grasses can enable fires to burn in desert ecosystems that have no adaptation to fire). Other likely secondary impacts include considerable erosion, sedimentation and air quality issues related to the earthwork, excavation and site preparation.

10. The State of California has a rich history of geologic activity that has led to the formation of significant topographic variation, which results in areas of very different climate, not just at differing elevations, but on opposing sides of mountain ranges too, where a rain-shadow often forms. The California borderlands are no exception, with strong climatic gradients from the coast to the mountains and the eastern deserts beyond. Southern California borderlands (including Imperial County) are particularly special biologically because they include the northernmost range extensions of many of North America's rarest plants.

11. Specifically, El Centro Project 1 is almost entirely situated in a region of near-pristine desert habitat and is home to a suite of rare plants (see table below). The area includes the transition from granites to desert as the border enters the lowlands and Sonoran Desert areas (where vehicular fencing is present).

12. Notably, El Centro Project 1 includes part of the Jacumba Federal Wilderness area. (See Exhibit A to this declaration, which is a true and correct copy of a map of the Jacumba Wilderness Area from the U.S. Dept of the Interior, Bureau of Land Management). Wilderness areas "are final holdout refuges for a long list of rare, threatened, and endangered species, forced to the edges by modern development. …..They are places where law mandates above all else that *wildness* be retained for our current generation, and those who will follow." *See* the US Forest Service website for Managing the Land at *https://www.fs.fed.us/managing-land/wilderness.* Federal Wilderness Areas have been protected under federal law since the Wilderness Act of 1964 was enacted, *"In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of* ***an enduring resource of wilderness."*** The Jacumba Wilderness area was included in the National Wilderness Preservation System in 1994, and encompasses 31,357 acres.

13. A checklist of plants previously collected in the El Centro Project 1 region was generated using data from the San Diego County Plant Atlas (which includes Imperial County in its online resources). The checklist consists of a mere 54 different plant taxa (species and subspecies) which have been documented. This is certainly an underestimate of true site diversity and speaks to the lack of available data inside the project footprint. The borderlands are well known to be home to a wealth of biodiversity. During a single weekend in March 2019, citizen scientists documented 1,073 distinct plants and animals along the California/Mexico borderlands during the Border Bioblitz, 805 of which were plants (https://www.inaturalist.org/projects/border-bioblitz-bioblitz-de-la-frontera-2019). Desert ecosystems are notoriously difficult to inventory due to the high percentage of ephemeral species (approximately 30% or more) which are generally invisible for the majority of the year and may not germinate in years of low rainfall. A

plant inventory has never been conducted in the El Centro Project 1 footprint, and a multi-season inventory would be necessary to adequately assess the biological diversity of the project area.

14. Imperial County is home to around 87 rare plants that are included in the California Native Plant Society (CNPS) Rare Plant Rankings. This program develops current and accurate information on the distribution and conservation status of California's rare and endangered plants and since 1968 has been the standard for information on the rarity and endangerment of the state flora. The program operates under a Memorandum of Understanding (MOU) with the California Department of Fish and Wildlife (CDFW) and facilitates broad cooperation in rare plant assessment and protection. The CNPS Rare Plant Botanist is housed at the Sacramento office of the CDFW's Biogeographic Data Branch and shares all data with the California Natural Diversity Data Base (CNDDB). See: http://www.cnps.org/cnps/rareplants/ranking.php. I describe the CNPS Rare Plant Rankings below.

15. California Rare Plant Rank **1B**: Plants **Rare, Threatened, or Endangered in California and Elsewhere**: Plants with a California Rare Plant Rank of 1B are rare throughout their range with the majority of them endemic to California. Most of the plants that are ranked 1B have declined significantly over the last century.

16. California Rare Plant Rank **2B**: Plants **Rare, Threatened, or Endangered in California**, But More Common Elsewhere: Except for being common beyond the boundaries of California, plants with a California Rare Plant Rank of 2B would have been ranked 1B. From the federal perspective, plants common in other states or countries are not eligible for consideration under the provisions of the Federal Endangered Species Act.

17. California Rare Plant Rank **3**: Plants About Which More Information is Needed: Plants with a California Rare Plant Rank of 3 are united by one common theme - we lack the necessary information to assign them to one of the other ranks or to reject them. Nearly all of the plants constituting California Rare Plant Rank 3 are taxonomically problematic.

18. All of the plants constituting California Rare Plant Rank 1A, 1B, 2A, 2B, and 3 are eligible for listing under the California Endangered Species Act (CESA).

19. California Rare Plant Rank **4**: Plants of Limited Distribution - A Watch List: Plants with a California Rare Plant Rank of 4 are of limited distribution or infrequent throughout a broader area in California, and their status should be monitored regularly. Few of the plants constituting California Rare Plant Rank 4 are eligible for state listing. Nevertheless, many of them are significant locally. This is particularly significant for populations at the periphery of a species' range, and areas where the taxon has sustained heavy losses, which are often applicable in the U.S./Mexico border region.

20. Each rare plant also receives a threat rank, follow its listing designation:

- 0.1-Seriously threatened in California (over 80% of occurrences threatened / high degree and immediacy of threat)
- 0.2-Moderately threatened in California (20-80% occurrences threatened / moderate degree and immediacy of threat)
- 0.3-Not very threatened in California (less than 20% of occurrences threatened / low degree and immediacy of threat or no current threats known)

21. To assess impacts to plants of conservation concern due to El Centro Project 1, I conducted a thorough review of relevant records, plant databases and studies. I also visited the El Centro Project 1 project area twice in 2019, in March and May. During the second site visit I took pictures in cardinal directions every half-mile along the border in the El Centro Project 1 area. Using these images I have generated a map of the Project area with multiple points where photos were taken and high habitat quality was observed. I inserted a selection of these images from along the border on top of aerial imagery of the El Centro Project 1 area, to show the absence of development, construction and human impacts inside the Project area. This photo map that I created is attached as Exhibit B to this declaration. The only significant human impact at this time is the border patrol road that runs adjacent to the vehicle barrier.

22. Based on my analysis and site visits, El Centro Project 1 will likely cause impacts to plant species of conservation concern. These expected impacts are noted where plants have been documented in proximity to the border and are expected within the Project footprint, although conclusive data are not currently available because a comprehensive, seasonally-appropriate plant survey has not been conducted of the project site. In desert environments plants are often only present during certain times of the year, where seeds remain in the soil and can be expected to germinate and be impacted following heavy rains. (This is particularly probable for annual plants, which live for only one short season and whose precise locations are more difficult to avoid once their habitats are disturbed). Many plants in the area survive harsh conditions as seeds in the soil. The seeds are alive and although difficult to detect, are equally susceptible to impacts from construction. These impacts are called direct impacts under the National Environmental Policy Act (NEPA).

23. Sensitive plants that live adjacent to the impact area, in fragile habitats that have a high likelihood to suffer from dust, soil erosion, particulate deposition, and/or landscape hydraulic alterations which may result from the installations, will also suffer indirect impacts. Sensitive plants in the project footprint are also likely to suffer edge effects from the disturbance and an increase in invasive species competing for resources. (Indirect Impacts under NEPA.)

24. The following table highlights the rare and endangered plants found in the El Centro Project 1 site along areas of open border and vehicle fencing, including their CNPS rankings (lists and threat ranks as detailed above). The first column indicates whether the impacts are expected to be expected or indirect. All plants listed are also subject to cumulative impacts (as per NEPA) as a result of the repeat disturbances to this region.

Notably the table includes 23 plants considered of conservation concern in California, 10 of which are expected to suffer direct impacts under NEPA, and 13 are expected to suffer indirect impacts.

Status	Family	Genus	Species	InfraName	CommonName	CNPS
Indirect	Euphorbiaceae	*Euphorbia*	*platysperma*		Flat-seeded Spurge	1B.2
Indirect	Fabaceae	*Acmispon*	*haydonii*		Haydon's Lotus	1B.3
Direct	Fabaceae	*Lupinus*	*excubitus*	*medius*	Mountain Springs Bush Lupine	1B.3
Indirect	Fabaceae	*Astragalus*	*insularis*	*harwoodii*	Harwood's Rattleweed	2B.2
Indirect	Fabaceae	*Astragalus*	*sabulonum*		Ground Locoweed	2B.2
Indirect	Apocynaceae	*Matelea*	*parvifolia*		Spearleaf, Talayote	2B.3
Indirect	Asteraceae	*Malperia*	*tenuis*		Brown Turbans	2B.3
Direct	Boraginaceae	*Pholistoma*	*auritum*	*arizonicum*	Arizona Fiesta Flower	2B.3
Direct	Fabaceae	*Calliandra*	*eriophylla*		Pink Fairyduster	2B.3
Direct	Loasaceae	*Eucnide*	*rupestris*		Rock-Nettle	2B.3
Direct	Loasaceae	*Mentzelia*	*hirsutissima*		Hairy Stick-Leaf	2B.3
Direct	Polemoniaceae	*Ipomopsis*	*tenuifolia*		Slender-Leaf Ipomopsis	2B.3
Indirect	Burseraceae	*Bursera*	*microphylla*		Small-Leaf Elephant Tree	2B.3
Direct	Juncaceae	*Juncus*	*acutus*	*leopoldii*	Southwestern Spiny Rush	4.2
Indirect	Apodanthaceae	*Pilostyles*	*thurberi*		Thurber's Pilostyles	4.3
Indirect	Boraginaceae	Johnstonella	*costata*		Ribbed Johnstonella	4.3
Indirect	Brassicaceae	*Lyrocarpa*	*coulteri*		Coulter's Lyrepod	4.3
Direct	Cactaceae	*Cylindropuntia*	*wolfii*		Wolf's Cholla	4.3
Indirect	Juncaceae	*Juncus*	*cooperi*		Cooper's Rush	4.3
Indirect	Martyniaceae	*Proboscidea*	*althaeifolia*		Desert Unicorn Plant	4.3
Direct	Nyctaginaceae	*Mirabilis*	*tenuiloba*		Long-Lobe Four O'Clock	4.3
Direct	Phrymaceae	*Diplacus*	*aridus*		Low bush monkeyflower	4.3
Direct	Ranunculaceae	*Delphinium*	*parishii*	*subglobosum*	Oceanblue Larkspur	4.3

25. In conclusion, the El Centro Project 1 area includes at least 23 plants of conservation concern in the state of California, including at least 3 plants on list 1B (plants that are globally rare, threatened or endangered) and 10 plants on list 2B (plants that are rare, threatened or endangered in California), for a total of 13 species eligible for listing under the

California Endangered Species Act, and 10 more plants on list 4 (plants of limited distribution). The Project will undoubtedly have irreparable and irreversible impacts to numerous plants in the near pristine desert of the El Centro Project area (See Exhibit B – photo map of the project area, with a selection of photos taken along the Project area). El Centro Project 1 will have significant impacts on the Federal Wilderness Area on the eastern edge of the Jacumba Wilderness. The project will also impact numerous animals, including native mammals that were documented during the 2019 bioblitz, and multiple species of conservation concern.

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

Executed on June _10_, 2019, at San Diego, California.

Sula Elizabeth Vanderplank

EXHIBIT A

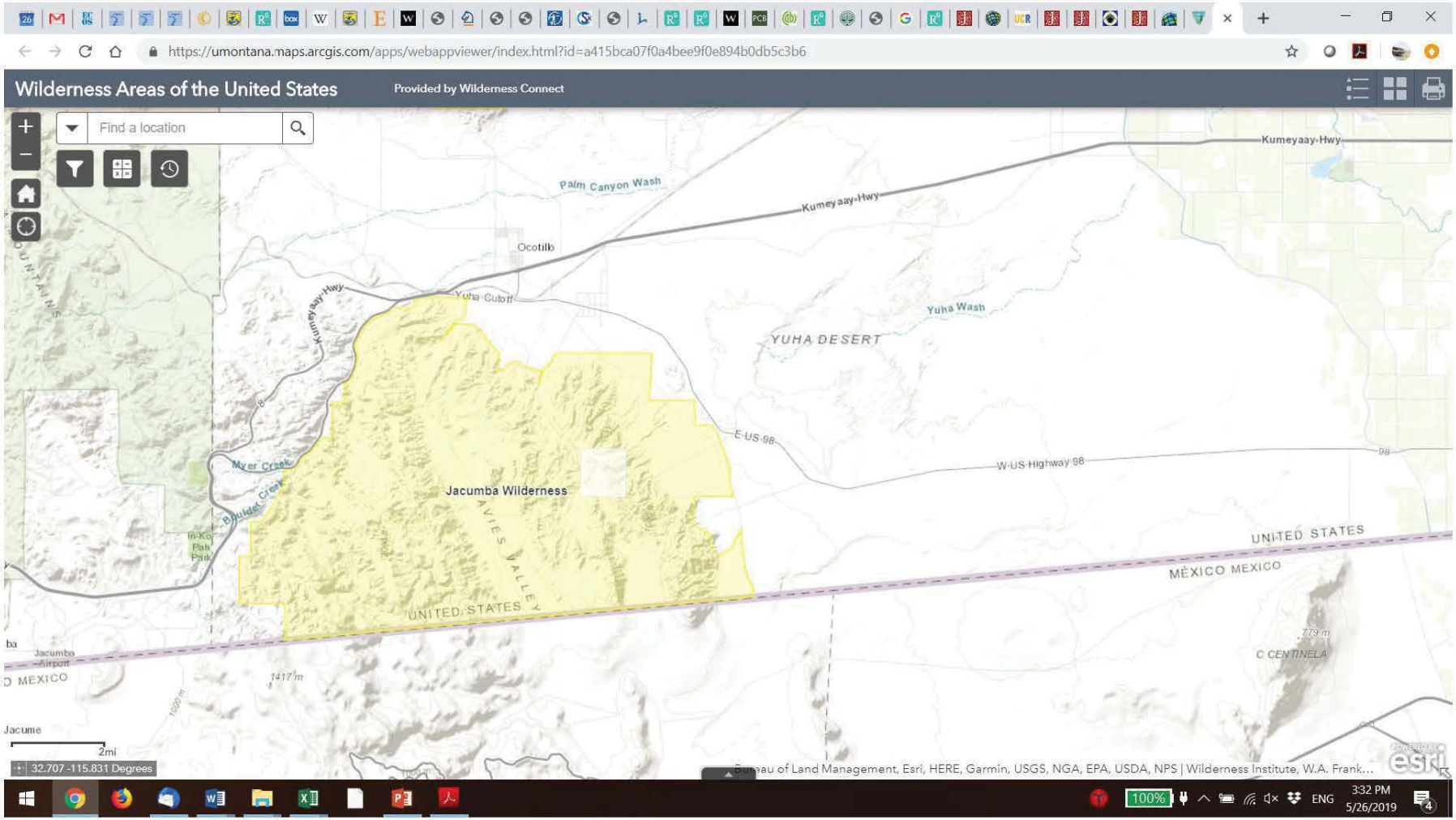

https://umontana.maps.arcgis.com/apps/webappviewer/index.html?id=a415bca07f0a4bee9f0e894b0db5c3b6
Wilderness Areas of the United States
Provided by Wilderness Connect
Find a location
Kumeyaay-Hwy
Palm Canyon Wash
Ocotillo
Yuha Cutoff
Yuha Wash
YUHA DESERT
E-US-98
W-US-Highway 98
Myer Creek
Boulder Creek
Jacumba Wilderness
UNITED STATES
MEXICO
Jacumba Airport
Jacume
2mi
32.707 -115.831 Degrees
Bureau of Land Management, Esri, HERE, Garmin, USGS, NGA, EPA, USDA, NPS | Wilderness Institute, W.A. Frank...
100%
ENG
3:32 PM
5/26/2019

EXHIBIT B

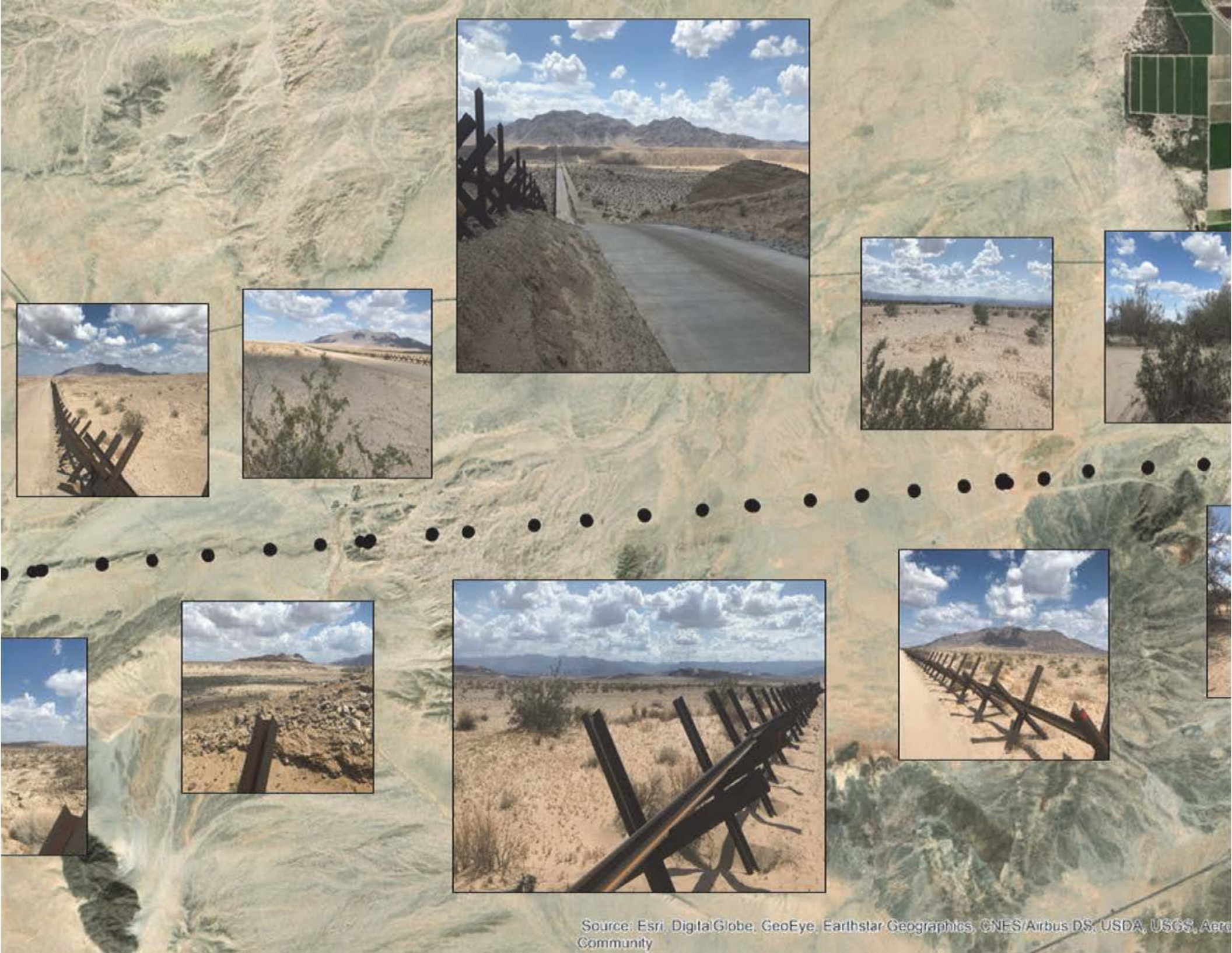

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, Aero
Community

EXHIBIT 8

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF 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 SUNALEI STEWART IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002**

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Sunalei Stewart, declare as follows:

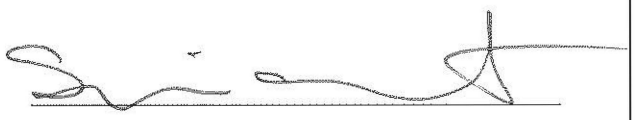
1. I serve as Deputy Commissioner of Operations at the New Mexico State Land Office (SLO). I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below.

2. On behalf of the New Mexico Commissioner of Public Lands, Stephanie Garcia Richard, I transmitted a comment letter to United States Customs and Border Protection (CBP) on May 8, 2019. A copy of the Commissioner's comment letter is attached as Exhibit A.

3. To date, SLO has not received any substantive response to its May 8, 2019 comment letter from CBP.

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

Executed on June 12, 2019, at Santa Fe, New Mexico.



Sunalei Stewart

EXHIBIT A

Stephanie Garcia Richard
COMMISSIONER

State of New Mexico
Commissioner of Public Lands

COMMISSIONER'S OFFICE
Phone (505) 827-5760
Fax (505) 827-5766
www.nmstatelands.org

310 OLD SANTA FE TRAIL
P.O. BOX 1148
SANTA FE, NEW MEXICO 87504-1148

May 8, 2019

Via email and first-class mail
Paul Enriquez, Real Estate and
Environment Director
Border Wall Program Management Office
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Washington, DC 20229-1100

Dear Mr. Enriquez:

This letter responds to your correspondence dated April 8, 2019 requesting input concerning the stated plans of U.S. Customs and Border Protection (CBP) to build bollard walls along two sections of the U.S.-Mexico border in Luna and Doña Ana Counties in New Mexico.

New Mexico State Land Office

The New Mexico State Land Office is an independent state agency responsible for administering nine million acres of surface and 13 million acres of subsurface estate for the beneficiaries of the state land trust, which include public schools, universities, hospitals and other important public institutions. New Mexico acquired much of its state trust land under the Ferguson Act of 1898 and the Enabling Act of 1910, with additional lands obtained through subsequent conveyances and exchanges.

As New Mexico's Commissioner of Public Lands, it is my duty to optimize revenue for New Mexico schoolchildren and other beneficiaries while protecting the health of state trust lands for future generations. By leasing state trust lands for a wide array of uses, the State Land Office generates hundreds of millions of dollars each year to support the trust beneficiaries.

The State Land Office manages over a dozen tracts of land on or immediately adjacent to the U.S.-Mexico border, including over 29,000 acres presently leased for ranching within CBP's

project footprint. As the public official responsible for the wise and sustainable management of these lands, I have serious concerns about the federal government's decision to ignore numerous environmental and cultural resource protection laws to speed construction activity along the border. I also write to urge CBP to act with greater transparency and commitment to public accountability by providing the important and so-far-unexplained details of how it will oversee its construction project along the border. In the absence of any environmental planning document or even a meaningful construction proposal, all available information indicates that CBP's plans will cause unnecessary and lasting harm to rangeland, economic development and the environment in the borderlands of Luna and Doña Ana Counties.

Encroachment on State Trust Lands During Construction

CBP has stated its plans to construct two non-contiguous segments of "vehicle barrier replacement" along the border, "El Paso Project 1" and "El Paso Project 2." According to the Department of Homeland Security, "El Paso Project 1" includes 46 miles of barrier construction "beginning 17.5 miles west of the Columbus Port of Entry continuing east in non-contiguous segments to approximately 35 miles east of the Columbus Port of Entry," in Luna and Doña Ana Counties. "El Paso Project 2" includes 23.5 miles of barrier construction in three non-contiguous segments in Hidalgo and Luna Counties. *February 25, 2019 memorandum from Department of Homeland Security to Department of Defense, "Request for Assistance Pursuant to 10 U.S.C. § 284,"* at 9.

In your April 8, 2019 letter, you indicate that "[m]ore detailed information about the proposed border barrier project location and design is enclosed." That "more detailed information," however, is limited to a two-page attachment with a graphic indicating the approximate mileage of border wall construction in each of our two affected counties, and a schematic map with no scale and very few features depicted. CBP has not informed the public about the duration of CBP's planned construction, the number of personnel that will occupy border areas, the siting of power lines and lighting, location of staging areas, points of ingress and egress, and other details critical to any reasoned assessment of the impact of this construction project on the environment and on property owners along the border. I urge you to quickly correct this troubling lack of information.

In the absence of tangible information about "El Paso Project 1," the State Land Office and other stakeholders, including border communities, must examine the details of CBP's past ventures along the U.S.-Mexico border. CBP's plan for a different section of border wall construction (in Dona Ana County near the port of Santa Teresa, east of "El Paso Project 1") stated that the agency would construct "six staging areas totaling approximately 24.6 acres outside the Roosevelt Reservation … to facilitate operation of equipment, staging of materials, and construction, and three existing access roads totaling approximately 6.5 miles will be used to access the project corridor." Department of Homeland Security, U.S. Customs and Border Protection, *Environmental*

Stewardship Plan for Replacement, Operation and Maintenance of Tactical Infrastructure (March 2018) ("ESP") at CS-1. Notably, the 1907 proclamation that President Roosevelt issued reserving to the United States a sixty-foot strip along the border (commonly called the "Roosevelt Reservation") provides that the reserved land is "set apart as a public reservation …. [and] may be used for public highways but for no other purpose whatsoever." *See* Proclamation 758, Setting Apart as Public Lands a Strip of Land on the Mexican Frontier (1907). CBP's imminent construction of a 46-mile border wall, presumably with ancillary infrastructure, is not consistent with the sole lawful purpose permitted by the very proclamation upon which CBP relies to assert control over lands along most of the border in Luna and Doña Ana Counties.

With respect to "El Paso Project 1," CBP has not revealed the locations of its staging areas, or for road access to its 46-mile long construction site. CBP has not obtained any easement for use of state trust lands for staging areas, for the construction of new roads, or for the siting of power lines or other infrastructure, and since I began my service as Commissioner of Public Lands your agency has not contacted me or my staff for such permission. CBP's unauthorized use of state trust lands for these purposes would be a serious and actionable violation of law. I urge CBP to communicate openly with the State Land Office regarding its operational plans and the impact that its construction activities will have on state trust lands.

Long-Term Impacts to State Trust Lands

Even if CBP's wall-building does not directly trespass on state trust lands – a determination that cannot accurately be made at this point in time, since CBP has released so little information about its plans – the intended wall project will have lasting and negative implications for state trust lands that are close as sixty feet to the construction site.

Removal of current sections of fencing, and installation of the new wall material, will require digging, excavating, and trenching, destroying forage and eroding soils. CBP has not explained the intensity of vehicle traffic that will be required to accomplish its stated objectives, but the scope of the intended project would require the use of heavy earthmoving equipment for an extended period of time along the border, which we expect to have a negative impact on air quality as well as surface resources. Pile driving, welding, and cutting will create metal shavings and other waste that may contaminate soil and water in the area. Although CBP does not elaborate on any road building or upgrading it plans to conduct in support of its wall-building, any construction of a new road will likely result in additional surface disturbance and generate pollutants. In addition, new roadways will likely increase storm water runoff and therefore may pose a threat to water quality in the project area. CBP has not disclosed its plans for power lines or other infrastructure that may create additional surface disturbance, air pollution, and habitat disruption.

The two-page attachment to your April 8, 2019 letter states that the new bollard wall will

also include LED lighting and unspecified "detection technology," and states that CBP "will work with the appropriate stakeholders to develop solutions to avoid excess lighting beyond the existing patrol road." To date, the State Land Office has not received any information from CBP about your agency's plans for mitigating light pollution along the approximately 46 miles of new construction. Without any description of the specific light sources, frequency or intensity that CBP intends to use, it is impossible to make any precise analysis of the severity of this trespass on immediately adjacent state trust lands.

Lasting Damage to Habitat and Threatened Species

CBP has agreed that it "will be responsible for any applicable environmental planning and compliance to include stakeholder outreach and consultation associated with the [border wall construction]." *February 25, 2019 Memorandum from Department of Homeland Security to Department of Defense, "Request for Assistance Pursuant to 10 U.S.C. § 284,"* at 2. To date, CBP has not engaged in any outreach and consultation with the State Land Office, or to my knowledge with other communities or organizations in New Mexico that will be affected by this massive construction project. There is no publicly available evidence that CBP has engaged in any environmental planning for its imminent wall-building project.

Although CBP has presented no evaluative study on the environmental impacts of "El Paso Project 1," a number of scientists, advocates and community members have done so. An analysis co-authored by Stanford University biologists Paul Ehrlich and Rodolfo Dirzo concluded that border wall construction is "reducing the area, quality, and connectivity of plant and animal habitats and [is] compromising more than a century of binational investment in conservation ….The border wall threatens some populations by degrading landscape connectivity. Physical barriers prevent or discourage animals from accessing food, water, mates, and other critical resources by disrupting annual or seasonal migration and dispersal routes." *See* Robert Peters et al., "Nature Divided, Scientists United: US-Mexico Border Wall Threatens Biodiversity and Binational Conservation," *BioScience*, Vol. 68, No. 10 (Oct. 2018) at 740. Aggressive border wall construction will likely harm endangered or threatened species in New Mexico including the Mexican gray wolf. *Id*. at 741. New Mexico State University professor Gary Roemer, who has conducted extensive fieldwork in the New Mexico borderlands, confirms that "border walls sever wildlife connectivity."

Although local advocacy organizations like the Center for Biological Diversity and Southwest Environmental Center have undertaken thoughtful analysis of the dangers that border wall construction poses to wildlife, your fellow federal agencies also have sounded the alarm. As you are likely aware, a September 2017 draft letter addressed to you from the U.S. Fish and Wildlife Service's Southwest Regional Office warned that "the Service recommends considering technology, additional border patrols agents and other mechanisms, instead of installation of levee or bollard walls" due to reduction of habitat connectivity.

The environmental harms that CBP's bollard wall threatens are not limited to habitat fragmentation. The sparse information CBP has shared with New Mexicans indicates that your agency plans to flood the border wall with high-intensity lighting. In 1999, New Mexico enacted the Night Sky Protection Act "to preserve and enhance the state's dark sky while promoting safety, conserving energy and preserving the environment for astronomy." NMSA 1978, § 74-12-2. The prospect of constant and intensive illumination along 46 miles of border will impair this carefully crafted balance. As the U.S. Fish and Wildlife Service concluded, "[i]ncreased lighting at night, along the wall, will likely have negative impacts on ocelot, jaguarondi and other nocturnal species," and urged CBP to more carefully analyze the effects of lighting to nocturnal wildlife. CBP does not appear to have accepted this professional assessment.

Perhaps most troubling, while your April 8, 2019 letter states CBP's desire to consider environmental impacts and conduct environmental site assessments, the Department of Homeland Security has exempted itself (including its operational components like CBP) from all environmental and cultural resource protection laws in the planning and construction of border wall in Luna and Doña Ana Counties. It is difficult to understand how the Department of Homeland Security and its components can act in an environmentally responsible manner when the Department has authorized itself to ignore landmark protections like the Endangered Species Act, the National Environmental Policy Act, the Clean Water Act, the National Fish and Wildlife Act, and the Federal Land Policy and Management Act without any apparent consequences.

These environmental risks are a serious concern to me because my responsibility is not only to maximize revenue for the trust beneficiaries but to do so sustainably. The State Land Office must continue to honor its duty to the trust and it can only do so if it protects the integrity and value of its lands for future generations. Responsible land stewardship requires, at a minimum, extensive and careful evaluation of the numerous risks posed by CBP's border wall plans before ground is broken.

Sincerely,

Stephanie Garcia Richard
Commissioner of Public Lands

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

SD2019100647
71856365.docx