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

16  
 17 STATE OF CALIFORNIA, *et al.*,

18 Plaintiffs,

19 v.

20 DONALD J. TRUMP, *et al.*,

21 Defendants.  
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 28

No. 4:19-cv-00872-HSG

**DEFENDANTS' REPLY  
 MEMORANDUM IN SUPPORT  
 OF MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

Hearing Date: November 20, 2019

Time: 10 a.m.

Place: Oakland Courthouse  
 Courtroom 2, 4th Floor

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1 **INTRODUCTION**

2 DoD’s use of 10 U.S.C. § 2808 to undertake eleven border barrier military construction  
3 projects along the U.S.-Mexico border is lawful. *See generally* Defs.’ Mot. (ECF No. 236). The projects  
4 comply with § 2808’s statutory requirements and do not violate any other statutory or constitutional  
5 provision. There is thus no basis to enjoin them.

6 The States disagree, but fail to establish any basis for the declaratory and injunctive relief they  
7 seek. At the outset, the States lack a cause of action to enforce § 2808, the Consolidated  
8 Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13 (2019), and the constitutional  
9 provisions they invoke because they fall outside the zone of interests protected by those provisions.  
10 The States’ sovereign, environmental, and tax revenue interests are entirely unrelated to the emergency  
11 military construction and appropriations interests protected by § 2808 and the CAA, and there is no  
12 basis to conclude that Congress intended to allow these sorts of plaintiffs to invoke those provisions.

13 The States’ challenge to DoD’s use of its § 2808 authority fares no better. The locations of  
14 the discrete border barrier projects at issue here fall within the definition of “military installation” not  
15 only because they are part of Fort Bliss, but also because they fall within the broad scope of the phrase  
16 “other activity under the jurisdiction of the Secretary of a military department.” 10 U.S.C. § 2808(c)(4).  
17 Additionally, the Secretary of Defense’s determination, supported by the detailed administrative  
18 record, that the projects are necessary to support the use of armed forces is committed to his discretion  
19 or, at most, is subject to review under a highly deferential standard. Under either approach, there is  
20 no basis for the Court to substitute its judgment for that of the Secretary on this military matter. Nor  
21 have the States established that the Secretary acted arbitrarily and capriciously in undertaking the  
22 § 2808 projects using funds from deferred military construction projects.

23 The States also have not established that the § 2808 projects violate any other statutory or  
24 constitutional provision. The CAA provided funding for agencies other than DoD, and it is not an  
25 implied prohibition on DoD’s ability to utilize its own separate statutory authority for border barrier  
26 funding and construction. And by undertaking these projects, DoD is not adding funds to an  
27 appropriation account of the Department of Homeland Security (DHS) in contravention of § 739 of  
28 the CAA. Additionally, the States cannot sidestep the fact that § 2808 authorizes military construction

1 “without regard to any other provision of law” and their claims against DoD under the National  
2 Environmental Policy Act (NEPA) fail. Similarly, the States have not pleaded a proper NEPA claim  
3 against the Department of the Interior (DoI) and, in any event, NEPA does not apply to DoI’s transfer  
4 of land to DoD because of the mandatory nature of the emergency transfer authority under the Federal  
5 Land Policy and Management Act (FLPMA). Nor can the States re-cast their statutory claims in  
6 constitutional terms. This case raises purely statutory issues and the States’ effort to recast their  
7 statutory claims as ones arising under the Appropriations Clause, Presentment Clause, and separation  
8 of powers lacks merit.

9 Finally, the States have failed to demonstrate their entitlement to a permanent injunction  
10 stopping the funding and construction of the § 2808 projects in California and New Mexico. The  
11 States have not established an irreparable injury necessary to support a permanent injunction based  
12 on their purported loss of future tax revenue or their speculative environmental harms. Further,  
13 Defendants’ significant interest in supporting the armed forces and enhancing border security far  
14 outweighs the States’ interests, thus the balance of equities tips sharply in Defendants’ favor.

15 For these reasons, as explained further below, the Court should grant summary judgment in  
16 Defendants’ favor on all claims related to the construction of the § 2808 border barrier projects.

## 17 **ARGUMENT**

### 18 **I. The States Lack a Cause of Action to Obtain Review of Defendants’** 19 **Compliance with § 2808, the CAA, the National Emergencies Act, or the** 20 **Constitution.**

#### 21 **A. The Zone-of-Interests Requirement Applies to Implied Equitable** 22 **Actions as well as Causes of Action Under the APA and the Constitution.**

23 The zone-of-interests requirement is a general presumption about Congress’s intended limits  
24 on the scope of *all* causes of action, not just express causes of action under the Administrative  
25 Procedure Act (APA) or other statutes. As the Supreme Court has made clear, the zone-of-interests  
26 test “is a ‘requirement of general application.’” *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*,  
27 572 U.S. 118, 129 (2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). Accordingly, the States  
28 do not dispute that the test applies to its claims brought under the APA. *See* States’ Opp’n at 3 (ECF  
No. 241); *see also Lexmark*, 572 U.S. at 192 (the zone of interests is “a limitation on the cause of action

1 for judicial review conferred by” the APA).

2 The States, however, contend that the zone-of-interest test does not apply to their purported  
3 constitutional claims. See State’s Opp’n at 5. This argument runs flatly contrary to Supreme Court  
4 and Circuit precedent. See, e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church &*  
5 *State, Inc.*, 454 U.S. 464, 475 (1982) (“[T]he Court has required that the plaintiff’s complaint fall within  
6 the zone of interests to be protected or regulated by the statute or constitutional guarantee in  
7 question.” (quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320-21 n.3  
8 (1977) (applying the zone-of-interests requirement to plaintiffs seeking to enforce the dormant  
9 Commerce Clause); *Individuals for Responsible Gov’t, Inc. v. Wasboe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997)  
10 (stating that although the zone-of-interests test is applied “most frequently in suits brought under the  
11 Administrative Procedure Act,” it “also governs claims under the Constitution in general.”). The  
12 States argue that plaintiffs routinely bring equitable constitutional claims without satisfying the zone-  
13 of-interests test, see States’ Opp’n at 5, but the case they cite—*United States v. McIntosh*, 833 F.3d 1163  
14 (9th Cir. 2016)—did not address the zone-of-interests requirement and focused on Article III standing  
15 of a criminal defendant to bring a constitutional challenge to his prosecution. Cases that did not  
16 discuss the zone-of-interests requirement in the course of addressing claims to enjoin alleged statutory  
17 or constitutional violations have no force because “[q]uestions which merely lurk in the record, neither  
18 brought to the attention of the court nor ruled upon, are not to be considered as having been so  
19 decided as to constitute precedents.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

20 With respect to the States’ purported implied *ultra vires* claims for alleged statutory violations,  
21 Defendants recognize that this Court previously concluded that the zone-of-interests test does not  
22 apply to these sorts of actions outside the APA framework. See *California v. Trump*, 379 F. Supp. 3d  
23 928, 943 (N.D. Cal. 2019). Defendants respectfully disagree with the Court’s conclusion and have  
24 explained the reasons why that conclusion is inconsistent with established doctrine on the zone of  
25 interests. See Defs.’ Mot. at 9–10. The Supreme Court has stated that the zone-of-interests “limitation  
26 *always* applies and is never negated.” *Lexmark*, 572 U.S. at 129 (emphasis in original). There is also  
27 no basis to conclude that Congress intended to allow courts to infer an equitable cause of action for  
28 individuals outside the zone of interests of the statute being enforced. Such a rule would lead to

1 “absurd consequences.” *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (identifying  
2 hypothetical persons with Article III injuries from statutory violations who plainly would be improper  
3 plaintiffs to enforce the statute).

4 The Court’s prior decision on zone of interests also cannot be reconciled with the Supreme  
5 Court’s order staying this Court’s injunction of the border barrier projects funded by transfers  
6 pursuant to § 8005 of the DoD Appropriations Act, 2019. *See Trump v. Sierra Club*, No. 19A60, 2019  
7 WL3369425, at \*1 (U.S. July 26, 2019); Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999. The States’  
8 assert that the Supreme Court’s order was a preliminary ruling and provides no grounds for the Court  
9 to depart from its prior analysis. *See States’ Opp’n* at 2–3. But the Supreme Court’s conclusion that  
10 Defendants’ appeal was sufficiently meritorious to warrant a stay necessarily rejects this Court’s  
11 contrary conclusion, particularly where the standard for a stay required the Supreme Court to evaluate  
12 the likelihood of success on the merits. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, when the  
13 Supreme Court stayed this Court’s injunction, it necessarily found that Defendants were likely to  
14 succeed on the merits of the claim that that the plaintiffs “have no cause of action to obtain review of  
15 the Acting Secretary’s compliance with Section 8005.” *Sierra Club*, 2019 WL 3369425 at \*1. That  
16 rationale is equally applicable to the States’ § 2808 and CAA claims because neither of those statutes  
17 provide a cause of action, and the States do not fall within either provision’s zone of interests. The  
18 States cannot escape the Supreme Court’s order merely by pointing to the fact that the order used the  
19 terms “cause of action” and not “zone of interests.” *See States’ Opp’n* at 3. The Supreme Court has  
20 made clear that “a statutory cause of action extends only to plaintiffs whose interests fall within the  
21 zone of interests protected by the law invoked.” *Lexmark Int’l*, 572 U.S. at 129.

22 **B. The States Cannot Satisfy the Zone-of-Interests Requirement.**

23 The States cannot satisfy the zone-of-interests requirement for § 2808, the CAA, or the  
24 National Emergencies Act (NEA) because their sovereign, environmental, and economic interests are  
25 entirely unrelated to the interests protected by those statutes. *See States’ Opp’n* at 3–5.

26 As a threshold matter, the States contend that they fall within the zone of interests protected  
27 by the NEA, *see id.* at 4, but the States did not assert any claim under the NEA in their motion for  
28 summary judgment. *See* 50 U.S.C. § 1601 *et seq.* The States expressly disclaimed any challenge to

1 action by the President under the NEA in their motion. *See* States’ Opp’n at 8 (“The States do not  
2 challenge the President’s declaration of a national emergency here.”). Consequently, there is no need  
3 for the Court to address whether States fall within the zone of interests protected by the NEA. In  
4 any event, the NEA simply establishes procedural and reporting guidelines that the President must  
5 follow when he invokes other statutory authorities conditioned on a declaration of a national  
6 emergency declaration. *See* 50 U.S.C. §§ 1631, 1641; *see also* S. Rep. No. 94-922 (1976). The statute  
7 thus protects Congress’ interest in review of the President’s invocation of his emergency authorities,  
8 not the States’ interest in protecting tax revenue or the environment.

9 The States make no meaningful attempt to argue that they fall within the zone of interests  
10 protected by the provisions of the CAA they invoke. *See* States’ Opp’n at 13–14 & n.6 (citing CAA  
11 §§ 230–32, 739). These provisions regulate the relationship between Congress and the Executive  
12 Branch regarding federal spending and in no way protect the States’ tax base or environmental  
13 interests. The States only response is to argue that the zone-of-interests test either does not apply or  
14 is satisfied because of the Ninth Circuit’s decision in *McIntosh*. *See id.* at 14 n.6. As explained above,  
15 those arguments lack merit.

16 Nor are the States’ asserted interests within the zone of interests that § 2808 protects. *See*  
17 States’ Opp’n at 3–5. The States point to the deferral of military construction projects within the  
18 States, but § 2808 does not protect local governments from a diminution in future tax revenue arising  
19 from the deferral of unobligated military construction projects. *Cf. Hazardous Waste Treatment Council*  
20 *v. Thomas*, 885 F.2d 918, 925 (D.C. Cir. 1989) (stating that a defense contractor would fall outside the  
21 zone of interests in challenging an appropriations act because “the annual defense appropriation is  
22 not passed *in order* to benefit defense contractors, benefit them though it may”) (emphasis in original).<sup>1</sup>  
23 Additionally, the States’ environmental and sovereign interests are not “arguably within the zone of  
24 interests protected or regulated by” § 2808. *Association of Data Processing Services Organizations, Inc. v.*

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25 <sup>1</sup> The States’ reliance on *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1360  
26 (D.C. Cir. 1996), is misplaced. Unlike the government contractor in that case who suffered a  
27 competitive disadvantage in the market for government contracts as a result of alleged agency  
28 policies and whose injuries were aligned with the interests of the United States Treasury regarding  
enforcement of the statute at issue, the States’ tax interests do not make them either intended  
beneficiaries or suitable challengers to enforce § 2808’s limitations. *See id.* at 1360.

1 *Camp*, 397 U.S. 150, 153 (1970). In authorizing military construction projects during a time of war or  
2 national emergency “without regard to any other provision of law,” 10 U.S.C. § 2808(a), it is not  
3 plausible that Congress even considered the impact such emergency construction projects would have  
4 on the environmental or financial interests of state governments, let alone that it actually sought to  
5 protect those far-flung interests when it enacted § 2808. The States are thus far more attenuated from  
6 the limitations in § 2808 than was the nearby landowner who fell within the zone of interests protected  
7 by the land acquisition statute at issue in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v.*  
8 *Patchak*, 567 U.S. 209, 225–26 (2012). The States thus have not established the necessary relationship  
9 between the “interests to be protected or regulated” by § 2808 and their interests in this lawsuit.  
10 *Bennett*, 520 U.S. at 175.

11 Finally, the States do not offer any argument explaining why they fall within the zone of  
12 interests protected by the constitutional provisions they invoke. *See* States’ Opp’n at 5. The States  
13 simply refer back to their statutory zone-of-interest arguments, further underscoring that this is a  
14 statutory, not constitutional, case and the zone of interests must be determined by reference to the  
15 statutes the States invoke. *See id.*; *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

## 16 **II. The Border Barrier Projects Are Military Construction Projects.**

17 As for the border barrier projects themselves, Defendants have satisfied the statutory  
18 requirement that they constitute “military construction” because the projects are undertaken “with  
19 respect to a military installation.” 10 U.S.C. § 2801(a); *see* Defs’ Mot. at 16–19. The States in their  
20 opposition ignore the majority of the Defendants’ arguments. In particular, they do not offer any  
21 meaningful rebuttal to Defendants’ argument that the term “other activity” within the definition of a  
22 military installation should be construed broadly and includes locations “under the jurisdiction of a  
23 Secretary of a military department” in addition to those types of locations specifically listed in the  
24 statute. *See* Defs.’ Mot. at 13–14 (quoting 10 U.S.C. § 2801(c)(4)). Additionally, construction of the  
25 § 2808 border barrier projects is plainly an “activity” under any definition of that term,<sup>2</sup> and there is  
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27 <sup>2</sup> *See Yeskey v. Com. of Pa. Dep’t of Corr.*, 118 F.3d 168, 170 (3d Cir. 1997), *aff’d sub nom.*  
28 *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998) (“the ordinary meaning[] of ‘activity’ . . . includes  
the ‘duties or function’ of ‘an organizational unit for performing a specific function.’ (quoting *Webster’s*

1 no dispute that this activity is “under the jurisdiction” of the Secretary of the Army. *See* Administrative  
2 Record re: § 2808 (AR) at 9–10 (ECF No. 212).

3         Instead, the States take issue with the Secretary of the Army’s decision to assign all land  
4 necessary for the § 2808 projects to be part of the Fort Bliss military installation upon transfer of  
5 administrative jurisdiction over those sites to the Army. *See* States’ Opp’n at 6–7. The States claim  
6 that it is “absurd” for the Secretary to assign these parcels to Fort Bliss in Texas because the projects  
7 they challenge are located hundreds of miles away in New Mexico and California. *See id.* at 7. But the  
8 States do not contest that DoD may acquire land for § 2808 projects. *See* 10 U.S.C. § 2801(a). Nor  
9 do they present any authority for their assertion that the Secretary’s decision about what lands under  
10 his jurisdiction will become part of an existing military installation is somehow restricted by the  
11 proximity of the land to that military installation—or indeed, by anything else. To the contrary, Army  
12 regulations specifically contemplate the assignment of lands “under the control of the Department of  
13 the Army, at which functions of the Department of the Army are carried on” as “subinstallation[s],”  
14 which are “attached to installations for command and administrative purposes, *although they are located*  
15 *separately.*” 32 C.F.R. § 552.31(c) (emphasis added); *see also id.* at 552.31(b) (“[T]he term ‘installation’  
16 will include installations, subinstallations, and *separate locations housing an activity.*” (emphasis added)). In  
17 practice, military departments often designate geographically separated locations as part of, but  
18 physically separate from, the main military installation. *See, e.g.,* Navy Auxiliary Landing Field Orange  
19 Grove (auxiliary landing field located 40 miles away from the main military installation in Kingsville,  
20 TX) (Exhibit 1). Accordingly, there no basis for the Court to second-guess the Secretary of the Army’s  
21 decision to designate land under its jurisdiction and control to a particular military installation, or  
22 conclude that such land is not part of the military installation to which it is assigned.<sup>3</sup>

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*Third New International Dictionary* 22 (1986)); *Black’s Law Dictionary* (8th ed. 2004) (defining “activity” as  
25 “[t]he collective acts of one person or of two or more people engaged in a common enterprise”).

26         <sup>3</sup> The States erroneously contend that the decision to assign the sites to Fort Bilss is a “post-  
27 hoc rationalization” that was not part of the administrative record. *See* States’ Opp’n at 6. To the  
28 contrary, the Secretary of Defense made clear in his decision that the project locations would be part  
of either a new military installation or an existing military installation. *See* AR at 3–6, 9. The fact  
that the Army subsequently assigned the sites to a specific military installation, Fort Bliss, does not  
undermine the Secretary of Defense’s decision.

1           Moreover, the States are incorrect to the extent they argue that the Secretary of the Army's  
2 decision to assign the § 2808 project locations to the Fort Bliss military installation constitutes an end-  
3 run around either the “military construction” requirement of § 2808 or the definition of “military  
4 installation.” *See* States’ Opp’n at 6–7. The discrete project locations fall squarely within the definition  
5 of “military installation” not only because they have been assigned to Fort Bliss, but also because they  
6 fall within the broad scope of an “other activity under the jurisdiction of the Secretary of a military  
7 department.” 10 U.S.C. § 2801(c)(4). Contrary to the States’ argument, Defendants have not  
8 abandoned their argument that the § 2808 projects are an “other activity under the jurisdiction of the  
9 Secretary of a military department.” States’ Opp’n at 6. Defendants’ point is that the Court need not  
10 decide whether the southern border as a whole is an “other activity” given the subsequent decision by  
11 the Secretary of Defense to undertake § 2808 projects at specific locations. *See* Defs.’ Mot. at 13.  
12 Although the Court posited in its prior opinion that “other activity” should be understood as referring  
13 to “discrete and traditional military locations,” it also noted that “‘other activity’ is not an empty term”  
14 and that it “encompass[es] more than just ‘a base, camp, post, yard, [or] center.’” *See Sierra Club*, 379  
15 F. Supp. 3d at 921. Along these lines, the Supreme Court has endorsed a broad reading of the term  
16 “military installation,” observing that federal law treats it as “synonymous with the exercise of *military*  
17 *jurisdiction.*” *United States v. Apel*, 571 U.S. 359, 368 (2014) (emphasis in original). Further, Congress  
18 could have limited the reach of the term “military installation” here, by replacing “other activity” with  
19 “any similar military facility,” as it has in other statutes, but it chose not to here. *See* Defs.’ Mot. at 18.

20           The breadth of the term “military installation” is further confirmed by the second clause of  
21 the definition, which states that a military installation also includes “an activity in a foreign country,  
22 under the operational control of the Secretary of a military department or the Secretary of Defense,  
23 without regard to the duration of operational control.” 10 U.S.C. § 2801(c)(4). This repeated use of  
24 the term “activity” in the same definition reinforces the understanding of the term military installation,  
25 whether foreign or domestic, to cover any land on which DoD is exercising jurisdictional control for  
26 an official purpose. The presumption of consistent usage controls, *see Midbrook Flowerbulbs Holland*  
27 *B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 615 n.11 (9th Cir. 2017), and the term “activity”  
28 must be given its ordinary meaning throughout § 2808.

1 This understanding of “military installation” does not violate the canon of statutory  
2 interpretation that courts should give effect to every word of a statute. *See* States Opp’n at 7.  
3 Defendants’ construction gives the term “activity” its plain meaning and in a manner consistent with  
4 the way the term is used throughout the definition of “military installation.” By contrast, the States’  
5 argument would read this term out of the statute entirely and render it a nullity. Thus, the locations  
6 on which the 11 specific border barrier projects at issue will be constructed constitute an “other  
7 activity under the jurisdiction of the Secretary of a military department,” and the barrier construction  
8 associated with them is being undertaken “with respect to a military installation,” thereby falling within  
9 the definition of “military construction” as required by § 2808. *See* Defs.’ Mot. at 12–13 (quoting 10  
10 U.S.C. §§ 2801(a) & (c)(4)).

### 11 **III. The Border Barrier Projects are Necessary to Support the Use of the Armed** 12 **Forces.**

13 As explained in Defendants’ motion, the administrative record supports the Secretary of  
14 Defense’s determination that the § 2808 border barrier projects are necessary to support the use of  
15 the armed forces in connection with the national emergency at the southern border. *See* Defs.’ Mot.  
16 at 15–18. The Secretary’s decision is committed to agency discretion by law or, at most, subject to  
17 highly deferential review based on the well-established authority requiring judicial deference to military  
18 judgments. *See id.* The States’ contrary arguments lack merit. *See* States’ Opp’n at 7–8

19 The States present no authority to counter Defendants’ argument that there is no meaningful  
20 standard by which the Court could review the Secretary’s decision. *Heckler v. Chaney*, 470 U.S. 821,  
21 830 (1985). There is no statutory guidance or judicially manageable criteria for the Court to assess the  
22 Secretary’s exercise of his military judgment that the projects are necessary to support the use of the  
23 armed forces. *See National Federation of Federal Employees v. United States*, 905 F.2d 400, 405-06 (D.C.  
24 Cir. 1990). Further, the States do not contest the long line of authority cited by Defendants that  
25 requires courts to defer to military judgments. *See* Defs.’ Mot. at 15–16.

26 Instead, the States’ contend that “the question before the court is not whether the border  
27 barriers are ‘necessary,’ but rather the legal question of which *agency* they support.” States’ Opp’n at  
28 7. But contrary to the States’ argument, the § 2808 projects support the use of the armed forces, as

1 the administrative record sets forth in detail, by improving the effectiveness and efficiency of DoD  
2 personnel deployed to the border. *See* Defs.’ Mot. at 16–18; AR at 1–11; 42–75; 97–137. The projects  
3 will reduce demand for DoD personnel and assets at the locations where the barriers are constructed  
4 and will allow the redeployment of DoD personnel and assets to other high-traffic areas on the border  
5 that lack barriers. *See id.* at 9. In reaching this considered military judgment, the Secretary undertook  
6 a robust internal deliberative process, seeking analysis and advice from Chairman of the Joint Chiefs  
7 of Staff, and input from others, and made a decision that warrants deferential review. *See Gilligan v.*  
8 *Morgan*, 413 U.S. 1, 10 (1973) (“it is difficult to conceive of an area of governmental activity in which  
9 the courts have less competence” than “[t]he complex subtle, and professional decisions as to the  
10 composition, training, equipping, and control of a military force”). Accordingly, the Court should not  
11 disturb the Secretary’s determination.

12 The States, however, contend that the projects are not authorized under § 2808 because the  
13 projects also assist DHS in its border security mission. *See* State’s Opp’n at 7–8. But the States never  
14 explain why military construction projects that provide benefits to both DoD and DHS are somehow  
15 thereby rendered unlawful. The text of § 2808 certainly does not support that assertion, as it does not  
16 require that military construction projects solely benefit the armed forces to the exclusion of other  
17 federal agencies or allied partners. The fact that the projects are *both* necessary to support the armed  
18 forces *and* also assist DHS in its efforts to secure the border thus does not violate § 2808.

19 The States also argue that § 2808’s support requirement would “become meaningless” if it  
20 could be satisfied by “DoD supporting civilian agencies.” *See* States’ Opp’n at 8. But Defendants are  
21 not arguing that DoD’s support to DHS or another federal agency, standing alone, is sufficient to  
22 support the use of the armed forces. To the contrary, military construction projects undertaken  
23 pursuant to § 2808 must support the use of the *armed forces*. In other words, there must be a nexus  
24 between the military construction and the support such construction provides to the armed forces in  
25 the context of the national emergency for which they are deployed. As explained above, that  
26 requirement is satisfied here, while any additional benefits the construction projects provide to DHS  
27 in its mission does not render them unlawful under § 2808 or unnecessary to support the use of the  
28 armed forces. Moreover, this understanding of § 2808 is consistent with the plain text of the statute

1 and, contrary to the States’ argument, does not violate any canons of statutory interpretation.

2 **IV. DoD’s Use of § 2808 Authority Was Not Arbitrary and Capricious.**

3 DoD’s decision to construct border barrier military construction projects under its § 2808  
4 authority is not arbitrary and capricious, and the States’ arguments to the contrary do not alter that  
5 conclusion.

6 The States do not dispute that Congress expressly authorized DoD to fund construction  
7 undertaken pursuant to § 2808 with “funds that have been appropriated for military construction . . .  
8 that have not been obligated.” *See* 10 U.S.C. § 2808(a). That is the “*only restriction*” § 2808 places on  
9 DoD’s decision, *see* H.R. Rep. 97-612 at 20 (June 17, 1982) (emphasis added), and the statute does not  
10 identify *any* other factors the Secretary must weigh in determining which military construction projects  
11 to defer in order to fund § 2808 construction.<sup>4</sup> Thus, DoD is “free to exercise [its] discretion” in  
12 determining project deferrals. *See New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992); *see also*  
13 *Defs.’ Mot.* at 18–20. That DoD did not give weight to factors that Congress did not require it to  
14 consider does not show “clear error” in the agency’s decision, especially under the APA’s highly  
15 deferential standard of review. *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463  
16 U.S. 29, 43 (1983); *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009).

17 In response, the States continue to rely on inapposite cases. *See* States’ Opp’n at 8–9. In *State*  
18 *v. United States Bureau of Land Management*, the Bureau of Land Management (BLM) invoked APA § 705  
19 to postpone the effective compliance dates of rules governing natural gas waste and royalties. 277 F.  
20 Supp. 3d 1106, 1121 (N.D. Cal. 2017). The court held that it was arbitrary and capricious for BLM in  
21 reaching its decision to consider only the industry’s compliance costs and not the financial and  
22 environmental benefits of compliance because § 705 required the agency to determine that “justice so  
23 requires” postponement. *Id.* at 1122. The court rejected BLM’s argument that nothing in the APA  
24 limited BLM’s determination of what justice required, and held that the meaning of the statutory  
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26 <sup>4</sup> Contrary to the States’ argument, Defendants did not take the “extraordinary position” that  
27 “their decision to divert funding is entirely insulated from review.” States’ Opp’n at 8. The Court  
28 could review whether DoD’s decision violated the express terms of § 2808(a) if, for example, it had  
decided to use funds appropriated for military construction that were already obligated or funds  
appropriated for non-military construction. The States allege no such violations.

1 language itself required BLM to take “an impartial look at the balance struck between two sides of the  
2 scale.” *Id.* The court did not impose, as the States suggest, free-floating factors that an agency must  
3 consider regardless of the relevant statutory text. And, here, it is undisputed that *nothing* in § 2808  
4 requires DoD to take account of the factors that the States contend it should have considered. *Cf.*  
5 *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–11 (1981) (“When Congress has intended that  
6 an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the  
7 statute.”).

8 The States’ reliance on *Koobi v. United States*, 976 F.2d 1328, 1131 (9th Cir. 1992) is similarly  
9 misplaced. *Koobi* was a tort action that did not involve review under the APA’s arbitrary and capricious  
10 standard; thus, it has no application here. In any event, the Court in *Koobi* held that the plaintiffs had  
11 pleaded a justiciable claim for damages against the United States resulting from an incident in which  
12 a U.S. naval cruiser mistakenly shot down an Iranian passenger plane. *Id.* at 1330-31. According to  
13 the Court, the fact that the incident took place during an authorized military operation did not render  
14 the military’s actions unreviewable. *Id.* at 1331 (“the claim of military necessity will not, without more,  
15 shield governmental operation from judicial review”). However, “[a] key element” of the Court’s  
16 holding was that the plaintiffs sought only monetary damages. *Id.* at 1332. The Court explained that  
17 “[b]y contrast” suits—like this one—that seek “injunctive relief may require the courts to engage in  
18 the type of operational decision-making beyond their competence and constitutionally committed to  
19 other branches.” *Id.*

20 Indeed, this action presents an even stronger case for not disturbing DoD’s § 2808 decision  
21 because the “operational decision-making,” *id.*, at issue here involves assessments of “military value”  
22 “better left to those more expert in issues of defense,” *National Federation of Federal Employees*, 905 F.2d  
23 at 400. And by not setting forth in § 2808 any specific factors that should be considered, Congress  
24 afforded DoD the discretion to make expert judgments about which military construction should be  
25 deferred to fund § 2808 projects. Here, DoD’s judgment took into account the potential impacts of  
26 deferring existing military construction projects and rationally explained how those projects were  
27 selected. *See* Defs.’ Mot. at 19. Because the States have shown no reason to invalidate DoD’s exercise  
28 of discretionary judgment under § 2808, their APA claim fails. *See State Farm*, 463 U.S. at 43.

1           **V.     DoD’s Use of § 2808 Does Not Violate the Constitution.**

2           DoD has not violated the Constitution by utilizing the military construction funding and  
3 statutory authorization that Congress provided in § 2808, and the States’ claims lack constitutional  
4 dimension because they depend upon their statutory claims. *See Dalton*, 511 U.S. at 472; Defs.’ Mot.  
5 21-22.

6           The States’ attempt to distinguish *Dalton* is unavailing. *See States’ Opp’n* at 9–11. The States  
7 rely on *Dalton*’s purported contemplation that some statutory claims may also be constitutional claims.  
8 But the States fail to acknowledge that *Dalton*’s reasoning rejecting a constitutional claim is squarely  
9 applicable to the context of this case. When an executive branch official is alleged to “ha[ve] exceeded  
10 his statutory authority,” “no constitutional question whatever is raised,” “only issues of statutory  
11 interpretation.” *Dalton*, 511 U.S. at 473–74 & n.6. *Dalton* thus establishes that the States cannot simply  
12 characterize an alleged statutory violation as a claim that an agency is violating the Constitution—the  
13 very thing the States attempt to do here by recasting their statutory claims by reference to  
14 constitutional provisions. The States’ framing would have the radical effect of transforming every  
15 challenge to agency action into a constitutional controversy, thereby “eviscerat[ing]” the “well  
16 established” “distinction between claims that an agency official exceeded his statutory authority, on  
17 the one hand, and claims that he acted in violation of the Constitution, on the other.” *Id.* at 474.

18           The States also argue that, even if Defendants complied with § 2808, it would be  
19 “unconstitutional as applied,” thus falling within *Dalton*’s exception for challenges implicating the  
20 constitutionality of a statute. *States’ Opp’n.* at 9 n.3, 11. But the States’ principal argument here is  
21 that § 2808 as applied to the facts of this case does not authorize the funding and construction of  
22 border barriers, and thus Defendants’ actions violate the Constitution. *See States Opp’n* at 12  
23 (conceding that “§ 2808 authorizes Defendants to divert federal funds toward emergency military  
24 construction projects under certain circumstances”). Moreover, the States’ purported constitutional  
25 claim does not resemble the type of claims that *Dalton* recognized as reviewable through a  
26 constitutional lens. As *Dalton* explained, a claim of constitutional dimension would arise only in a case  
27 involving a facial constitutional challenge to a statute, *see Panama Refining Co. v. Ryan*, 293 U.S. 388  
28 (1935), or a case like *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), “involv[ing] the

1 conceded absence of any statutory authority” and the assertion instead of “inherent constitutional  
2 power as the Executive.” *Dalton*, 511 U.S. at 473 & n.4. Here, the States do not purport to challenge  
3 the facial constitutionality of § 2808 and Defendants are not asserting any constitutional authority to  
4 undertake the § 2808 projects.<sup>5</sup>

5 The States nevertheless claim that, despite acting pursuant to the statutory authority granted  
6 by Congress in § 2808, Defendants violated separation-of-powers principles, the Appropriations  
7 Clause, and the Presentment Clause. Each of these assertions fails.

8 The States’ separation-of-powers claim turns upon the allegation that DoD acted against the  
9 implied will of Congress by allegedly violating the CAA. *See* States’ Opp’n at 12–13. As an initial  
10 matter, this is a *statutory* claim—not a constitutional claim—as the Supreme Court recognized in *Dalton*.  
11 Moreover, the States are incorrect that, by appropriating funds to DHS for border barrier construction  
12 in the CAA, Congress *sub silentio* precluded DoD from using its separate statutory authorities and  
13 separate appropriations to engage in border barrier construction. *See* CAA §§ 230–32. In  
14 appropriating funds to DHS for border barrier construction, *see* CAA § 230, Congress did not modify  
15 any other law or impose a general appropriations restriction that would span the entire U.S. Code and  
16 prevent the President from invoking other statutory authorities or appropriations to engage in military  
17 construction. Congress also expressly preserved agencies’ authority to repurpose appropriated funds  
18 pursuant to “the reprogramming or transfer provisions of this or any other appropriations Act.” CAA  
19 § 739.

20 The text of an appropriation is the source of guidance as to Congress’s will. *See Salazar v.*  
21 *Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012); *see also McIntosh*, 833 F.3d at 1178. Accordingly,  
22 contrary to the States’ argument, neither congressional negotiations nor unenacted bills are indicative  
23 of the will of Congress. *See McIntosh*, 833 F.3d at 1178 (“[W]e may only consider the text of an  
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25 <sup>5</sup> Nor does *Chamber of Commerce of U.S. v. Reich* limit the scope of *Dalton* in any way relevant to  
26 this matter, as suggested by the States. *See* States’ Opp’n 11-12. There, in response to an argument  
27 that the Executive’s exercise of statutory authority was unreviewable under the circumstances  
28 presented in *Reich*, the D.C. Circuit held that statutory limits applied. *See Reich*, 74 F.3d at 1331–32.  
*Reich* did not, however, address *Dalton*’s holding regarding statutory versus constitutional claims and  
is therefore inapposite here.

1 appropriations rider, not expressions of intent in legislative history.”). This is particularly true where,  
2 as here, Congress has had multiple opportunities to speak clearly on the subject of funding for border  
3 barrier construction and has failed to do so. The President had made plain prior to the passage of the  
4 CAA his intention to declare a national emergency and invoke alternative statutory sources—like  
5 § 2808—to fund border barrier construction. And yet, in enacting the CAA, Congress did not impose  
6 any appropriations rider restricting all other border barrier construction. The CAA does not, for  
7 example, preclude use of § 2808 and, in fact, does not discuss military construction at all—a significant  
8 omission given that Congress could have imposed a rider prohibiting all other barrier construction, as  
9 it has done in the past, including via similar riders elsewhere in the CAA. *See, e.g.*, CAA § 206  
10 (“Notwithstanding any other provision of law, none of the funds provided in this or any other Act . .  
11 . . .”); *id.* § 231 (“None of the funds made available by this Act or prior Acts are available for the  
12 construction of pedestrian fencing” in certain specifically-enumerated locations). The absence of such  
13 provisions in the text of the law precludes any inference that Congress disabled DoD from invoking  
14 other available authorities or appropriations. By arguing that the CAA prohibits DoD’s use of § 2808,  
15 the States manufacture an illusory conflict between the two provisions and claim that the CAA trumps  
16 § 2808. But such an implied repeal of § 2808, as the States in essence argue for here, is disfavored,  
17 particularly when the statute claimed to affect the repeal is an appropriations measure. *See, e.g.*,  
18 *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992) (“repeals by implication are especially  
19 disfavored in the appropriations context”).<sup>6</sup>

20 Nor are the States’ correct that § 739 of the CAA—part of an appropriations act that funds  
21 *DHS* and other non-DoD agencies—prohibits *DoD* from utilizing § 2808, a previously enacted  
22 permanent statute that concerns only funds appropriated separately to DoD through different  
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24 <sup>6</sup> The States misunderstand Defendants’ citation to *Lincoln v. Vigil*, 508 U.S. 182 (1993).  
25 Defendants do not contend that § 2808 represents a lump-sum appropriation, as was at issue in that  
26 case; Defendants merely observed that Congress’s decision to permit DoD to redirect military  
27 construction funds where certain statutory criteria are met does not pose constitutional concerns  
28 because Congress could have permissibly given DoD broader authority to control its own budget. *See*  
Defendants’ Mot. at 22. The States are incorrect that the CAA changes this understanding because the  
CAA’s appropriations to DHS says nothing about and has no effect on DoD’s ability to expend its  
own appropriated funds.

1 appropriations acts.<sup>7</sup> DoD’s utilization of § 2808 does not violate the plain terms of § 739, which  
2 prohibits the use of funds “made available in this or any other Appropriations Act” to “increase,  
3 eliminate, or reduce funding for a program, project, or activity as proposed in the President’s budget”  
4 absent a new appropriation. That is because DoD is engaging in its own military construction projects,  
5 is not transferring any money to DHS, and thus is not “increasing” DHS’s appropriations in any way.  
6 The States try to get around this by adding the word “supplement” into § 739’s prohibitions, but that  
7 word is not in the provision they invoke. *See* States’ Opp’n at 14. And even if it were, the States  
8 cannot explain how DoD is “supplementing” DHS’s budget accounts by expending military  
9 construction funds appropriated to DoD on construction authorized and carried out by DoD any  
10 more than such *DoD* expenditures “increase” *DHS* funding. That is, of course, because DoD is not  
11 transferring funds to any “program, project, or activity” within one of DHS’s budget accounts, as that  
12 specific term is used in the CAA. *See* Defs.’ Mot. at 24; *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221  
13 (1991) (“the meaning of statutory language, plain or not, depends on context”). Rather, DoD is  
14 expending its *own* military construction funds pursuant to its *own* statute. *See* Defs.’ Mot. at 23. The  
15 term “program, project, or activity” has an established meaning in the appropriations context and  
16 refers to a particular item funded in an agency’s budget account as set forth in an appropriations act.  
17 *See* 2 U.S.C. § 906(k)(2) (defining “programs, projects, and activities” for purposes of budget  
18 sequestration by reference to “a budget account . . . as delineated in the appropriation Act or  
19 accompanying report for the relevant fiscal year covering that account”); *United States v. Burgess*, 1987  
20 WL 39092, at \*17 n.16 (N.D. Ill. Dec. 1, 1987) (defining the term by reference to the “most specific  
21 level of budget items” listed in an appropriations act and committee reports). Accordingly, there is  
22 no violation of § 739 here because DoD’s use of § 2808 is not increasing “funding for a program,  
23 project, or activity” in the CAA.<sup>8</sup>

24 The States’ Appropriations Clause arguments should likewise be rejected. The States do not—  
25 nor could they—contest that the Appropriations Clause codifies the principle that “the payment of

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26 <sup>7</sup> This argument, like the States’ other contentions concerning the CAA, is purely statutory and  
27 does not present a constitutional separation-of-powers issue.

28 <sup>8</sup> Not even the House of Representatives endorses the States’ § 739 argument. *See* ECF No.  
230.

1 money from the Treasury must be authorized by a statute.” See *Office of Pers. Mgmt. v. Richmond*, 496  
2 U.S. 141, 424 (1990). That requirement is satisfied here though § 2808. Accordingly, a federal statute  
3 authorizing an expenditure by definition cannot violate the Appropriations Clause.

4 *Nevada v. Department of Energy*, 400 F.3d 9 (D.C. Cir. 2005), is not to the contrary. Although  
5 the States assert that *Nevada* involves an Appropriations Clause violation, the D.C. Circuit, in fact,  
6 based its decision upon statutory construction principles and the interaction of two provisions in the  
7 same appropriations act. See *id.* at 15 (basing conclusion upon a “general principle of statutory  
8 construction”). It did not find an Appropriations Clause violation. See generally *id.* Nor can the States  
9 contest that the few applications of the principle outlined in *Nevada*, that a specific appropriation is  
10 given precedence over a more general one, involve the same appropriations bill and/or the same  
11 agency. See States’ Opp’n at 15. Because DoD is expending appropriated military construction funds  
12 pursuant to statutory authority, and Congress’s separate appropriation to DHS does not affect DoD’s  
13 ability to use its authorities or appropriations, the States have not proven an Appropriations Clause  
14 violation.

15 Moreover, applying the States’ proposed restriction across multiple agencies undertaking  
16 related (but distinct) activities funded by their own separate appropriations would lead to absurd  
17 results. For example, it is routine for multiple agencies to spend their own separate appropriations in  
18 furtherance of an overall government policy, and in no way are such expenditures adding to another  
19 agency’s appropriation in violation of the Appropriations Clause. For example, multiple agencies  
20 receive appropriations from Congress to fight illegal drug trafficking, but it cannot possibly be the  
21 case that Congress’s appropriation of funds to DoD for counter-narcotics activities precludes the  
22 Drug Enforcement Administration, Department of Health and Human Services, or the Department  
23 of State from utilizing their own separate appropriations and authorities in support of similar activities  
24 (or vice-versa). Accepting the States’ argument would result in a radical transformation of  
25 appropriations law and there is no legal and historical support for such an extreme step.

26 Additionally, DoD’s use of § 2808 does not violate the Presentment Clause. As Defendants  
27 have pointed out, § 2808 does not empower any executive official to amend or repeal any law, actually  
28 or effectively, and is in no way comparable to *Clinton v. City of New York*, 524 U.S. 417 (1998). See

1 Defs.' Mot. at 24. The CAA remains in effect, and the Presentment Clause does not prevent DoD  
2 from acting pursuant to other duly enacted statutes to fund additional border barrier construction.  
3 The States mischaracterize the facts insofar as they claim that the President, in declaring the national  
4 emergency, added funds from other sources to the CAA. *See* States' Opp'n at 16. Instead, the  
5 President invoked separate statutes, each of which—including § 2808—could be utilized only where  
6 their specified criteria were met, and only by the individuals authorized to act pursuant to those  
7 statutes. *See, e.g.*, 10 U.S.C. § 2808(a) (empowering the Secretary of Defense to act in certain  
8 circumstances). The President did not, as the States imply, independently increase the funds  
9 appropriated in the CAA.

10 To the extent the States suggest that the NEA violates the Presentment Clause by permitting  
11 the President to move funds on his own accord as a result of a national emergency declaration, they  
12 ignore the text of the NEA.<sup>9</sup> In fact, the NEA does nothing more than permit the President to invoke  
13 statutory authorities that Congress has passed for the purpose of making certain powers available  
14 during times of national emergency. *See* 50 U.S.C. § 1621(a). Statutory authorities specific to times of  
15 national emergency are available only if and when the President specifies those provisions of law he  
16 intends to make available during a particular national emergency. *See id.* § 1631. Congress has the  
17 ability to terminate a national emergency, *id.* § 1622, and the fact that such legislation must be  
18 presented to the President, and his veto may be overridden only by two-thirds of both houses of  
19 Congress, makes this process align with the Constitution, rather than violate it.

## 20 VI. The States' NEPA Claims Against DoI and DoD Lack Merit.

21 The States assert three different theories to support their position that DoD and DoI violated  
22 NEPA by failing to conduct environmental reviews of the § 284 and § 2808 border barrier projects.  
23 *See* States' Opp'n at 17–18. Each of these arguments should be rejected.

24 First, with respect to the § 284 projects, the States continue to contest the Court's prior ruling  
25 that the Secretary of Homeland Security waived NEPA's application for the § 284 projects. The States  
26 offer no new argument on this point and the Court should continue to adhere to its prior decision.

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27  
28 <sup>9</sup> As noted above, the States disclaimed any challenge to the President's national emergency  
declaration, thus they cannot assert that the NEA is unconstitutional.

1 *See* Defs.’ Mot. at 24–25.

2         Second, the States do not offer any meaningful rebuttal to Defendants’ argument that § 2808’s  
3 “without regard to any other provision of law” clause sweeps aside all statutory and regulatory  
4 provisions, such as NEPA, that might otherwise constrain or impede the activities authorized by  
5 § 2808. *See* Defs.’ Mot. at 14, 25. The States do not dispute the merits of this argument and simply  
6 contend that the clause is not available because the border barrier projects are not authorized by  
7 § 2808. *See* States’ Opp’n at 17. As explained herein and in Defendants’ motion, the § 2808 border  
8 barrier projects are lawful; consequently, § 2808’s “without regard to” clause renders NEPA  
9 inapplicable.

10         Third, the States contend that “DOI was obligated to conduct an environmental review under  
11 NEPA before transferring property under its control to DoD.” States’ Opp’n at 27. But this claim  
12 was not raised in the States’ amended complaint and they cannot bring it in the first instance in their  
13 motion for summary judgment. *See, e.g., Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir.  
14 2011). The amended complaint asserts no claims against DoI and contains no allegations that would  
15 place DoI on notice that it was being sued for failure to comply with NEPA in connection with its  
16 transfer of land to DoD. *See, e.g., Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006)  
17 (“Rule 8’s liberal notice pleading standard . . . requires that the allegations in the complaint give the  
18 defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”). Nor could  
19 the amended complaint have raised such a claim, given that it was filed before DoI made the  
20 transfers.<sup>10</sup> The States claim it was not possible to include this allegation in their complaint, *see* States’  
21 Opp’n at 17, but the land transfer occurred three weeks before their motion for summary judgment  
22 was due, *see* Defs.’ Mot. at 8–9, and the States took no action to supplement their complaint. In light  
23 of their failure to comply with basic pleading requirements, the States should not be permitted to raise  
24 their new claims against DoI in the first instance at summary judgment.

25         This pleading deficiency is further exacerbated because the States’ now argue for the first time

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26  
27 <sup>10</sup> Indeed, given that the APA waives sovereign immunity only for challenges to final agency  
28 action and those actions had not even taken place at the time the States filed their amended  
complaint, the Court would not have subject matter jurisdiction over such challenges to DoI’s  
transfer actions. *See* 5 U.S.C. § 702, § 704.

1 that DoI did not comply with the emergency withdrawal requirements of the FLPMA. *See* States’  
2 Opp’n at 18. The States do not contest the merits of Defendants’ argument that because of the  
3 mandatory nature of the land transfer under the FLPMA, compliance with NEPA is not required. *See*  
4 Defs.’ Mot. at 26–27. Instead, the States now argue that DoI’s land transfer was unlawful because it  
5 was not made “to preserve values that would otherwise be lost.” 43 U.S.C. § 1714(e); *see* States’ Opp’n  
6 at 18. But neither the FLPMA nor this theory of liability was raised in the States’ amended complaint  
7 and they should not be permitted to assert it now in the first instance. *Patel v. City of Long Beach*, 564  
8 F. App’x 881, 882 (9th Cir. 2014) (“a plaintiff cannot raise a new theory for the first time in opposition  
9 to summary judgment”).

10 In the event, however, the Court entertains the States’ new theory, it should be rejected  
11 because the Secretary of the Interior has made detailed findings that the land transfers comply with  
12 the FLPMA’s emergency withdrawal provision, 43 U.S.C. § 1714(e), including the requirement that  
13 the transfers preserve values that would otherwise be lost. *See* Decision Memorandum re: Applications  
14 for Emergency Withdrawal of Certain Land along the Southern United States Border (Sept. 18, 2019)  
15 (Exhibit 2). The land transfers preserve border and national security values by, among other things,  
16 preventing unlawful entry into the United States, stopping entry of illegal drugs, and enabling DHS to  
17 reallocate its resources to better address the crisis at the border. *See id.* at 5–8, 18–27. Additionally,  
18 the transfers also preserve natural and cultural resources harmed by unlawful border crossings and  
19 drug trafficking. *See id.* at 8–12, 18–27. These unlawful activities damage vegetation, destroy wildlife  
20 habitats, generate significant trash and abandoned property on public lands, and cause fires. *See id.*  
21 In light of the need to preserve these values, DoI acted in accordance with the FLPMA.

## 22 **VII. The Court Should Not Issue A Permanent Injunction.**

23 An injunction is an “extraordinary and drastic remedy” that “should never awarded as of  
24 right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). It “may only be awarded upon a clear showing  
25 that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).  
26 The States cannot meet this demanding standard because they cannot establish an irreparable injury  
27 absent their requested injunction, and the balance of equities tips sharply in Defendants’ favor given  
28 the compelling need to support military forces and enhance border security.

1                   **A.       The States’ Have Not Established Irreparable Injury to Their**  
2                   **Environmental Interests.**

3                   The States’ asserted environmental interests are insufficient to establish irreparable injury. *See*  
4                   Defrs.’ Mot. at 27–31. In response, the States continue to argue that they are not required to show  
5                   population level harms, but instead may demonstrate irreparable harm to their interests in wildlife  
6                   management through some vague, lesser showing. States’ Opp’n at 19. As explained in Defendants’  
7                   motion, the States must show an injury to their interests—which is in managing populations of  
8                   animals, not in individual members of a species. Defrs.’ Mot at 28. The States cannot do so through  
9                   the speculative declarations they have offered, and so cannot meet their burden of establishing  
10                  irreparable harm regardless of how the burden is characterized. No injunction should issue.

11                  As to the Quino Checkerspot Butterfly, California attempts to move the goal posts, arguing  
12                  that the fact that the absence of any individual butterflies during its declarant’s site visit to the project  
13                  area “is not conclusive evidence that the butterfly is absent.” States’ Opp’n at 20 (citing Clark Decl.  
14                  ¶¶ 13-17). Of course, it is not Defendants’ burden to prove that no animals are present in the  
15                  construction footprint, or that no members of a given species will be harmed. Rather, it is California’s  
16                  burden to make “a clear showing,” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted),  
17                  that irreparable harm to their interests in the butterfly “is *likely*, not just possible.” *All. for the Wild*  
18                  *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). That California cannot even show the presence  
19                  of a single butterfly in the project areas should end the inquiry. The same flaw appears again in—and  
20                  thus defeats—California’s allegations regarding the Coastal California Gnatcatcher and Western  
21                  Burrowing Owl. *See* Defrs.’ Mot. at 29–30.<sup>11</sup> Absent evidence that the species are present in the

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22                  <sup>11</sup> In regard to the burrowing owl specifically, the Beehler Declaration describes special  
23                  protocols in place to mitigate against harm to the species. Beehler Decl. ¶ 62. The States argue that  
24                  the Beehler declaration’s statements regarding mitigations “lack foundation, are speculative, and are  
25                  inadmissible.” States’ Reply 18 n.7. The declaration contains ample foundation; Assistant Secretary  
26                  Beehler states that his written testimony is “based on [his] personal knowledge and information  
27                  made available to [him] in the course of [his] official duties,” Beehler Decl. ¶ 2; *see also id.* ¶¶ 34, 38,  
28                  40; *see, e.g., Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009) (upholding admission of evidence that  
                    “was either part of the public record of a trial, given under oath, or presumptively reliable as  
                    produced by public officials during the ordinary course of their duties”). Nor is the declaration any  
                    more speculative than any other statement of intent, any other forecast, or for that matter the States’  
                    own declarations. The States’ evidentiary objection should be overruled.

1 construction footprint, California cannot demonstrate that it faces likely irreparable harm to its  
2 interests.

3 California repeats its allegations of impacts to vernal pool species, arguing that the Clark  
4 Declaration demonstrates that “San Diego Fairy Shrimp have been documented” along a road leading  
5 to the project site, and that road improvements will damage those pools. States’ Opp’n at 21. The  
6 Clark Declaration alleges that unspecified “recent biological surveys on private properties” have  
7 revealed vernal pool species in the area, “including nine pools along the road network immediately  
8 north of the secondary fence, to the west of the construction area.” Clark Decl. ¶ 32. These vague  
9 statements are not sufficient to show that any harm to California’s interests in these species is likely.  
10 The Clark Declaration’s description of where these vernal pools are located is too vague to show that  
11 the pools are within the footprint of any road improvement, or that construction activities will  
12 otherwise harm or destroy them. Clark Decl. ¶ 32 (describing the area as “contain[ing] vernal pools”  
13 and that there are “nine pools along the road network.”). And even accepting Mr. Clark’s  
14 characterizations of these studies and their findings as true, California makes no effort to demonstrate  
15 how the loss of any vernal pool habitat threatens irreparable harm to its interests in managing any  
16 species.

17 Finally, New Mexico continues to press speculative theories of harm to its interests in the  
18 White-sided Jackrabbit and Northern Jaguar. Because the jackrabbit is not listed under the  
19 Endangered Species Act, the United States Fish and Wildlife Service does not have survey data about  
20 the species presence in the project areas. New Mexico does not argue that it has surveyed for the  
21 jackrabbit either, and so relies entirely on the Traphagen Declaration for its argument that El Paso 8  
22 will prevent the White-sided Jackrabbit from accessing habitat in Mexico. But the Traphagen  
23 Declaration is self-contradictory on this point. Mr. Traphagen argues that El Paso 8 will completely  
24 block the only habitat corridor available to the jackrabbit, but also that El Paso 2 partially blocks a  
25 separate habitat corridor. Traphagen Decl. ¶ 18. Plainly, both cannot be true—either there is an  
26 exclusive habitat corridor or there is not. The record shows that there are gaps between El Paso 2  
27 and El Paso 8 that will remain open for cross-border migration for the jackrabbit. *See* ECF No. 236-  
28 6 at 32 (map showing El Paso 2 and El Paso 8 project areas); Beehler Decl. ¶ 65. New Mexico also

1 alleges that the jaguar will face harm because “El Paso Projects 2 and 8 will block the eastern-most  
2 corridor of the jaguar’s habitat between the U.S. and Mexico.” States Opp’n at 21 (citing Traphagen  
3 Decl. ¶ 21). The States’ briefing and declaration are both conclusory on this point and make no  
4 attempt to explain why the jaguar could not continue to use the uninterrupted critical habitat migration  
5 corridor to cross the border into Mexico. Beehler Decl. ¶ 64 (explaining that all seven individual  
6 jaguar detections within the United States since 1982 have occurred in critical habitat).

7 The States thus cannot show a likely irreparable harm to their interests in wildlife management,  
8 or even that most of the species they mention are present in the project areas at all.

9 **B. The States Purported Financial Injuries Cannot Support Injunctive**  
10 **Relief.**

11 As Defendants’ opening brief explained, the States cannot ground irreparable injury on  
12 indirect harm to their State fiscs arising from the decision to defer planned military spending in certain  
13 areas pursuant to § 2808. Defs.’ Mot. at 31–33. In their response, the States improperly categorize  
14 this planned construction as a direct benefit *to the States*, and the deferral of that construction as a harm  
15 to their own economic interests. That is not a sufficient basis for the States to receive an injunction.

16 Defendants agree that *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th Cir. 2004), and *City of*  
17 *Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015), are consistent with *Wyoming v. Oklahoma*, 502 U.S. 437  
18 (1992), but not in a way that supports the States’ application for an injunction. In *City of Sausalito*, the  
19 plaintiff municipality claimed injury-in-fact on the grounds that plans by the National Park Service to  
20 develop and rehabilitate a former military base would increase traffic and crowds, decrease the city’s  
21 aesthetic appeal such that the city’s tax base would erode, and harm its natural resources. 386 F.3d at  
22 1198–99. In *City of Oakland*, the city successfully alleged injury by the potential loss of revenue from  
23 a marijuana dispensaries operating under a city permit. 798 F.3d at 1164. Both cases present the sort  
24 of “direct injury in the form of a loss of specific tax revenues” that was held to constitute injury in  
25 fact in *Wyoming*. 502 U.S. at 448–49.

26 The States have not shown such an injury here. Their declarant, Dr. Reaser, alleges that DoD’s  
27 use of military construction funds under § 2808 will result in “lost sales for the primary contractors  
28 for the project, subcontractors, various firms in the supply chains, and companies selling goods and

1 services to individuals hired to work directly on the project or at some point in the supply chain.”  
2 Decl. of Alison Lynn Reaser ¶ 18, ECF no. 221-1. She then estimates a loss of revenue “through taxes  
3 on personal income, retail sales, corporate profits, and other sources” for these States. *Id.* at ¶ 20. But  
4 the States are only affected by the § 2808 decision insofar as the decision not to award contracts to  
5 resident contractors, subcontractors, and other firms within the States deprives the States of future  
6 economic benefits that might accrue from such contracts being awarded. That is a quintessential  
7 indirect harm. And unlike the tax revenue stream from the marijuana dispensary at issue in *City of*  
8 *Oakland*, or the tax revenues linked to coal extraction in *Wyoming*, Dr. Reaser concedes that the  
9 economic effect on the States is a general reduction of tax revenues. The States’ allegations are  
10 indistinguishable from previous cases denying standing to states and other governments under Article  
11 III for failure to allege an appropriate injury-in-fact “directly linked” to government conduct. *Iowa ex.*  
12 *Rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (rejecting Iowa’s argument that it had standing  
13 because the government’s disaster relief plan would “forc[e] unemployment up and state tax revenues  
14 down”); *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976) (rejecting standing because alleged  
15 “diminution of tax receipt is largely an incidental result of the challenged action”); *Arias v. DynCorp*,  
16 752 F.3d 1011, 1015 (D.C. Cir. 2014) (“Lost tax revenue is generally not cognizable as an injury-in-  
17 fact for purposes of standing.”). *A fortiori*, they cannot serve as grounds for an injunction, either.

18 Lacking a good response to *Kleppe*, *Miller*, and *Arias*, the States suggest that they are  
19 distinguishable because the allegations of the plaintiff states in those cases were “generalized and  
20 speculative,” and not supported by the sort of detailed expert analysis found in Dr. Reaser’s report.  
21 States’ Opp’n at 23–24. But concerns about the speculative nature of the plaintiff’s injury were  
22 relegated to a footnote in *Kleppe*, were an *additional* reason for rejecting standing in *Arias*, and were not  
23 noted by the court at all in *Miller*. The Supreme Court properly recognized that the cases stand for  
24 the proposition that states lack standing “where the claim was that actions taken by United States  
25 Government agencies had injured a State’s economy and thereby caused a decline in general tax  
26 revenues.” *Wyoming*, 502 U.S. at 448. Dr. Reaser has merely quantified a type of injury that does not  
27 provide a basis for injunctive relief. As such, no injunction should issue on the basis of the States’  
28 alleged fiscal injuries.

1                   **C.     The Balance of Equities and Public Interest Weigh Against Injunctive**  
2                   **Relief.**

3                   Finally, the Court should not enter a permanent injunction in this case because the balance of  
4 equities and public interest weigh decidedly in Defendants’ favor. *See* Defs.’ Mot. at 33–34; *Winter*,  
5 555 U.S. at 26–30. The States do not dispute that the Government and the public have a significant  
6 interest in ensuring that military forces are well-supported during deployments and have the necessary  
7 resources to ensure mission success. Nor do they challenge that the Government and the public have  
8 a “compelling interest[]” in the “safety and in the integrity of our borders.” *Nat’l Treasury Employees*  
9 *Union v. Von Raab*, 489 U.S. 656, 672 (1989). These interests “plainly outweigh[]” the States’ asserted  
10 sovereign, environmental, and economic interests, and the States make no effort to contend otherwise.  
11 *See Winter*, 555 U.S. at 26; *see also* States’ Opp’n at 24.

12                   Instead, the States point to the alleged impact from the deferral of other military construction  
13 projects, *see* States Opp’n at 25, but as previously explained, these projects were identified because of  
14 the minimal effect deferral would have on military readiness and consistency with the National  
15 Defense Strategy. *See* Defs’ Mot. at 19. It is not in the public’s interest for the Court override the  
16 Secretary of Defense’s military judgment to support the use of the armed forces using the funds from  
17 these deferred projects. The States also cite their sovereign interests, *see id.*, but the federal  
18 government’s sovereign interest in supporting its armed forces pursuant to a federal statute that  
19 authorizes military construction “without regard to any other provision of law” prevails over the  
20 States’ interest in enforcing their environmental laws.

21                   **CONCLUSION**

22                   For the foregoing reasons, the Court should grant Defendants’ motion for partial summary  
23 judgment, deny the States’ motion for partial summary judgment, and enter final judgment for  
24 Defendants on all claims related to the funding and construction of the § 2808 projects.  
25  
26  
27  
28

1  
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Respectfully submitted,

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