

EXHIBIT 2

DECISION MEMORANDUM

DATE: September 18, 2019

SUBJECT: Applications for Emergency Withdrawal of Certain Land along the Southern United States Border

I. INTRODUCTION

This memorandum explains my decision regarding five applications for an emergency withdrawal for a period of three years of various land parcels comprising approximately 559 total acres and transfer of jurisdiction of such land, subject to valid existing rights, to the Department of the Army in accordance with section 204(e) of the Federal Land Policy and Management Act (FLPMA).

Section 204(e) requires a Secretary of the Interior to make an emergency withdrawal when that Secretary determines that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost. 43 U.S.C. § 1714(e); 43 C.F.R. § 2310.5. Stated simply, once the Secretary determines that the statutory threshold is met and the determination is made, the action of withdrawing the land is non-discretionary.

II. BACKGROUND

On February 15, 2019, the President of the United States issued Proclamation 9844 declaring a national emergency at the southern border, and, among other things, invoking the military construction authority at 10 U.S.C. § 2808.¹ On February 25, 2019, the Department of Homeland Security (DHS), the Department tasked with border security, identified several border security projects for which it sought Department of Defense (DOD) assistance with the construction of border barriers, including fences, roads, and lighting, under the provisions of 10 U.S.C. § 284(b)(7), which authorizes the Secretary of Defense to provide support to other Federal Departments “for the construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” On March 20, 2019, the Secretary of Homeland Security recommended (in order of priority) several other projects for military construction of border barriers under 10 U.S.C. § 2808 to address a surge of illegal border crossings from migrant activity as well as drug and human trafficking.

¹ 10 U.S.C. § 2808, provides, in relevant part:

In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 *et seq.*) that requires use of the armed forces, the Secretary of Defense, *without regard to any other provision of law*, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces....

“Military construction” is defined as “any construction, development or extension of any kind carried out with respect to a military installation...”. 10 U.S.C. § 2801(a). A “military installation,” in turn, is defined as a base, camp, post, station, yard, center, or other activity under the jurisdiction of [DoD].” *Id.* at § 2801(c)(4).

On September 3, 2019, the Secretary of Defense, in reliance on analysis from DOD, DHS, and an independent analysis by the Chairman of the Joint Chiefs of Staff, determined that 11 military construction projects referenced in either the February 25, 2019, memo or the March 20, 2019, letter:

are necessary to support the use of the armed forces in connection with the national emergency. These projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry. This will reduce the demand for DoD personnel and assets at the location where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers. In short, these barriers will allow DoD to provide support to DHS more efficiently and effectively. In this respect, the contemplated construction projects are force multipliers.

See September 3, 2019, Letter from Secretary of Defense to Secretary of the Interior; *see also* September 3, 2019, DOD Action Memo Entitled *Military Construction Pursuant to 10 U.S.C. § 2808* (“Action Memo”).² The Secretary of Defense further directed the Secretary of the Army to undertake such projects, including the transfer of administrative jurisdiction, as necessary. In accordance with that instruction, on September 4, 2019, the Acting Secretary of the Army Ryan D. McCarthy (Army), applied for the withdrawal and transfer of administrative jurisdiction, on an emergency basis, of land along the southern border underlying five of those segments in order to allow for the establishment of military installations, and construction of facilities related to border security in these areas.³

Specifically, the Army has applied for the emergency withdrawal of lands underlying border facility segments referred to as “San Diego Project 4” in San Diego County, California, “Yuma Project 3” and “Yuma Project 6,” both in Yuma County, Arizona,⁴ “El Paso Project 2” in Luna and Hidalgo Counties, New Mexico, and “El Paso Project 8” in Hidalgo County, New Mexico.⁵ As previously stated, together these parcels encompass approximately 559 acres of Federal land along the border. The Army’s requested emergency withdrawals are more particularly described in the attached applications. These segments overlap with a 1907 withdrawal by President Theodore Roosevelt, in which he withdrew and set apart as a public reservation all public lands within sixty feet of the international boundary in California, Arizona, and New Mexico to keep those lands “free from obstruction as a protection against the smuggling of goods” between the

² The September 3 letter also asserts, and I agree, that 10 U.S.C. § 2808 itself authorizes the Department of Defense to acquire jurisdiction over the lands necessary to undertake the military construction projects. A withdrawal transferring such jurisdiction is therefore unnecessary. Nevertheless, the Department of the Interior has processed the Army’s applications in accordance with the Army’s requests and my statutory obligations under FLPMA.

³ As noted below, the Army applied for emergency withdrawals regarding seven total segments. However, this memorandum addresses the Army’s request only as to five such segments. *See* footnote 5.

⁴ A portion of Yuma Project 6 is also in Imperial County, California.

⁵ The Army has also requested an emergency withdrawal for lands underlying two additional segments: “San Diego Project 11” in San Diego County, California and “El Centro Project 9” in Imperial County, California. I have not yet made a decision regarding those two applications pending further information as to how the circumstances there meet the statutory criteria described herein.

U.S. and Mexico. *See* 35 Stat. 2136 (May 27, 1907). This strip of land is known as the “Roosevelt Reservation.”

On September 4 and September 5, 2019, I personally viewed each of these five segments via helicopter, in motor vehicle or on foot. Throughout my personal inspection, I had the continual opportunity to visit with Customs and Border Patrol officials, BLM law enforcement officials, BLM land managers, and each respective State BLM director, along with the General from the Army Corps of Engineers who is tasked with implementing this massive effort.

III. EMERGENCY WITHDRAWAL

A. In General

FLPMA defines a “withdrawal” to mean:

withholding an area of Federal land from settlement, sale, location or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; *or transferring jurisdiction over an area of Federal land*, other than “property” governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency, to another department, bureau, or agency.

43 U.S.C. § 1702(j)(emphasis added). FLPMA authorizes two types of withdrawals: “conventional” withdrawals under sections 204(c) and (d), 43 U.S.C. § 1714(c)-(d), and “emergency” withdrawals under section 204(e), *id.* § 1714(e). Conventional withdrawals are discretionary and require compliance with certain procedural requirements, including (1) Publication of a Notice in the Federal Register,⁶ (2) a minimum 90-day comment period,⁷ (3) the opportunity for the public to request a public meeting,⁸ and (4) preparation of a “case file,” including reports and appropriate compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other applicable laws.⁹

Emergency withdrawals under section 204(e), 43 U.S.C. § 1714(e), however, are not discretionary. In particular, section 204(e) *requires* the Secretary to make an emergency withdrawal “immediately” when he determines “that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost.” 43 U.S.C. § 1714(e); 43 C.F.R. § 2310.5. Emergency withdrawals cannot exceed three years and must be limited in scope and duration to the emergency. *Id.*

The fact that the withdrawal is non-discretionary once the determination is made impacts the applicability of certain procedures and processes that govern discretionary actions. FLPMA recognizes that compliance with procedural obligations otherwise applicable to conventional

⁶ 43 U.S.C. § 1714(b)(1); 43 C.F.R. § 2310.3-1(a),(b).

⁷ 43 C.F.R. § 2310.3-1(b)(2)(iv).

⁸ 43 C.F.R. §§ 2310.3-1(b)(2)(v); (c)(1).

⁹ *See* 43 C.F.R. § 2310.3-2.

withdrawals would frustrate the purpose of emergency withdrawals, given the immediacy of their nature. For that reason, there is no requirement for publication of a Federal Register notice, a public comment period, a public meeting, or the consent of the head of another agency to withdraw lands under that agency's jurisdiction. *See* 43 U.S.C. § 1714(b)(2); § 1714(h); § 1714(i); *see also Federal Land Withdrawals; Amendment to Withdrawal Procedures*, 46 Fed. Reg. 5794, 5796 (Jan. 19, 1981) (rejecting a suggestion to include in the withdrawal regulations a provision allowing for public input prior to making an emergency withdrawal because it would “defeat the purpose” of such a withdrawal). Similarly, none of the other process requirements for conventional withdrawals in the regulations apply to emergency withdrawals. *See* 43 C.F.R. §§ 2310.5; 2310.1(a); 2310.1-2(a); 2310.1-3(e); 2310.3.

Because of the emergency character of the requested withdrawal--and because it is mandatory that the Secretary make such a withdrawal immediately--analysis under NEPA is not required. *State of Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (holding that an emergency withdrawal does not require preparation of an environmental impact statement under NEPA because such compliance would conflict with FLPMA's command that such withdrawal be made “immediately”); *see also Flint Ridge Dev. Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 788 (1976) (where statute provided Department of Housing and Urban Development only 30 days to act, no NEPA compliance was required: “where clear and unavoidable conflict in statutory authority exist, NEPA must give way”); *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 963-65 (9th Cir. 2016) (“There is no question that it would be impossible for [the National Indian Gaming Commission] to prepare an [environmental impact statement under NEPA] in the ninety days [from the time the tribe submits the proposed ordinance] it has to approve a gaming ordinance [under the Indian Gaming Regulatory Act].”); *Jones v. Gordon*, 792 F.3d 821, 825 (9th Cir. 1986) (following *Flint Ridge* analysis to assume that it takes an agency at least 360 days to prepare an EIS); *see also Public Land Policy and Management Act of 1975: Hearings on H.R. 5224 and H.R. 5622 Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 94th Cong. 252 (1975) (Rep. Melcher of Montana addressing John R. McGuire, Chief, Forest Service, Dept. of Agriculture, regarding withdrawals in general in a pre-FLPMA bill: “above all, we seek not to prevent you from exercising prudent judgment quickly.... ”); Public Land Order No. 5662, Emergency Withdrawal of Los Padres National Forest for Casitas Reservoir Watershed in California, 44 Fed. Reg. 29065 (May 16, 1979) (publication of Public Land Order twelve days after notification by the House Interior and Insular Affairs Committee of the existence of an emergency situation, and request that the Secretary immediately establish a withdrawal).

For similar reasons, consultation under the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA) is not required. *See National Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (ESA consultation covers only discretionary agency actions “and does not attach to actions....that an agency is required by statute to undertake once certain specified triggering events have occurred.”); 50 C.F.R. § 402.03 (“Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control”); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262-1263 (10th Cir. 2001) (lack of agency discretion obviates the need for consultation under the NHPA).

B. An Emergency Situation Exists and Extraordinary Measures Must be Taken to Preserve Values that Would Otherwise be Lost

Here, taking extraordinary measures in the form of emergency withdrawals that transfers these lands to the Army in order to facilitate construction of border barriers are necessary to preserve values that would otherwise be lost. These values encompass border and national security values, including law enforcement and humanitarian values, and also the natural and cultural values most commonly associated with my land management responsibilities under FLPMA. The impacts and threats to the non-resource values (humanitarian, national security, the rule of law) from the increasing number of illegal border crossings constitute an emergency that requires immediate action. Separately and independently, the impacts and threats to resource values also constitute an emergency that requires immediate action to preserve those values. Without the grant of the requested emergency withdrawals, these values will be lost for each individual application.

1. Transferring Jurisdiction to the Army Would Facilitate Construction of Border Barriers to Reduce Illegal Border Crossings

Border barriers are effective at reducing illegal border crossings; not only do they protect U.S. Customs and Border Patrol (CBP) agents, but they also assist the CBP in gaining and maintaining operational control and support a safe and secure border community. Declaration of Chief Jerry B. Martin, U.S. Border Patrol Strategic Planning and Analysis Directorate, U.S. Customs and Border Protection, August 12, 2019 (providing trafficking data and describing effectiveness of physical barriers). For example, according to DHS, physical barriers prevent incursions into communities, businesses, and other sensitive areas close to the border; reduce the enforcement footprint and compress CPB operations; increase the time it takes for illegal border crossers to disappear into the surrounding environment and evade apprehension; and provide a force multiplier effect by increasing the efficacy and efficiency of DOD resources. September 3, 2019, DOD Action Memo Entitled *Military Construction Pursuant to 10 U.S.C. § 2808*, Tab H, Necessity of Border Barriers, Summary of Supporting Analysis, at p. 2. Moreover, as described further below, in 2007, CBP and DOI constructed vehicle barriers in much of OPCNM and pedestrian barriers in the area of the Lukeville Port of Entry. The installation of both styles of barrier in OPCNM significantly reduced illegal vehicle crossings into the United States, and, as a result, the National Park Service was able to reopen OPCNM to the public in 2014. During my visit to the border, CBP noted that where BLM has improved and increased public land access, illegal drive-throughs have increased. In many areas, vehicles can drive around the end of the existing vehicle barrier and quickly reach a road. For example, during my visit to the El Paso Project 2 site in Luna County, New Mexico, CBP officials showed me that the area where the vehicle barrier ends is met by a simple barbed wire fence, which is easily overcome by both pedestrian and vehicle traffic. Local CBP and BLM personnel explained that the lack of a significant barrier allows individuals to circumvent the vehicle barrier by cutting or driving through the barbed wire directly into and through the Cedar Mountains Wilderness Study Area located directly north of the Luna County site.

The Army identified several areas along the borders where installation of physical barriers would assist them and the CBP; the segments included in these applications, as detailed below, represent those both most feasible and that fulfill immediate strategic needs. The resulting reduction in illegal border crossings will preserve the humanitarian, national security, and environmental and natural resource values discussed below and prevent their loss.

2. Illegal Border Crossings in the Areas Described in the Attached Applications Impact National Security, Humanitarian, and Related Values as well as Resource Values

a. National Security, Humanitarian and Related Values

The President has found that a national emergency exists on the southern border. In Proclamation 9844, the President found that:

[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interest and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authority, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, officials have often released such aliens into the country and have difficulty removing them from the United States because the aliens fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the DOD has provided support and resources to the DHS at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

The Presidential Proclamation further states that the Secretary of Defense, the Secretary of the Interior, the Secretary of Homeland Security, and, subject to the discretion of the Secretary of Defense, the Secretaries of the military departments, shall take all appropriate actions, consistent with applicable law, to use or support the use of the authorities invoked, including, if necessary, the transfer and acceptance of jurisdiction over border lands.

On March 15, 2019, the President vetoed a joint resolution passed by Congress that would have terminated the President's national emergency declaration. *See* Veto Message for H.J. Res. 46 (Mar. 15, 2019). In his veto message, the President emphasized that recent increases in apprehensions and drug seizures along the southern border as well changes in migration patterns have strained border security personnel "to the breaking point." The President reaffirmed that

the “situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it.”

The change in migration patterns toward families and unaccompanied children that DHS cannot detain and quickly remove has incentivized more families to travel to the United States, leading to a large-scale humanitarian crisis. *See* President’s Proclamation; President’s Veto Message; Testimony of Kevin McAleenan, Acting Secretary of Homeland Security, Before the U.S. House of Representatives Committee on Oversight and Reform (July 18, 2019). This fiscal year thousands of families and unaccompanied children have attempted to enter the United States via Mexico. *See* Southwest Border Migration FY 2019 Statistics, at <https://www.cbp.gov/newsroom/stats/sw-border-migration>. Many of the individuals who undertake this dangerous journey arrive with life-threatening medical conditions. *See* Letter from Secretary of Homeland Security Kirstjen M. Nielsen to the United States Senate and House of Representatives (Mar. 28, 2019). As a result, CBP is often required to perform rescue missions, provide medical treatment, and other forms of humanitarian assistance instead of its traditional border security responsibilities. *See* Letter from Secretary of Homeland Security Kirstjen M. Nielsen to the United States Senate and House of Representatives (Mar. 28, 2019); Testimony of Secretary of Homeland Security Kirstjen M. Nielsen Before the U.S. House of Representatives Committee on Homeland Security (Mar. 6, 2019). The proposed barriers would help reduce the incentives or “pull factors” that encourage more individuals to attempt to enter the United States unlawfully, thereby reducing the strain on CBP’s resources and mitigating the humanitarian crisis at the border. Where constructed, border barriers establish a level of deterrence and redirect those who contemplate making an illegal entry out of the immediate area. This in turn provides CBP the opportunity to reallocate requisite resources to better address both the humanitarian crisis and the border security mission.

Moreover, during my visit to the border, CBP agents explained that cartels often control the areas where illegal crossings take place and require payment to the cartel before it will permit them to cross the border. Construction of border barriers reduces these human smuggling operations, and funnels these migrants to points of entry.

The DOD identified several specific border segments for immediate action based on their respective locations, and some of these lie on Federal lands already under DOD jurisdiction, or are available for transfer to the Army. Some are near to existing CBP installations, such as “San Diego Project 4,” which would extend an already-existing pedestrian barrier near Tijuana, Mexico, “El Paso Project 2,” which would replace an existing vehicle barrier with a pedestrian barrier to be located near the Antelope Wells Port of Entry in New Mexico, and “Yuma Project 6,” which would extend with primary and secondary pedestrian barriers adjacent to an already existing barrier at the Andrade Port of Entry, at Yuma, Arizona. Not only are these segments strategically important, but they are, for the most part, land owned by the United States. Also, as the Secretary of Defense has determined, border barriers on these segments will reduce the demand for DOD personnel and assets where the barriers are constructed and allow the redeployment of DOD personnel and assets to other national security priorities.

When I visited the border on September 4th and 5th, 2019, DHS agents explained that areas where the existing barrier ends must be manned 24 hours a day. There are some locations along the southern border where existing natural conditions make barrier construction difficult. Completing the barrier in the areas identified by DOD will allow DHS to focus human resources on the fewer remaining open segments, thereby reducing the demands on our nation's military and reducing illegal border crossings. In some locations, a primary and secondary border fence will be installed, creating an enforcement zone between two rows of barriers along the southern border and making patrols more manageable. The efficacy of this system is apparent in Southern California where San Diego lies adjacent to the city of Tijuana, Mexico. While the system of using dual barriers may be effective, it is not continuous between these two major cities. At the San Diego Project 4 site I observed a section of the border where only one barrier exists, and that single barrier abruptly ends at the Otay Mountains Wilderness Area leaving a large swath of the border without any infrastructure to prevent continued traffic through the Wilderness Area.

The Appendix includes details of all five locations and values for individual segments.

b. *Natural Resource Values*

Likewise, the current situation at the border impacts natural and cultural resources. Indeed, illegal border crossings, including the arrival of criminals and gang members, and the flow of illegal drugs and pesticides threatens to prevent the use of public lands for outdoor recreation and human occupancy. For instance, in 2010, the BLM Arizona State Director chartered Operation Reclaim Our Arizona Monuments (ROAM) to respond to an increase in illegal border impacts specific to several National Conservation Lands units in the state: "Since its inception, the intent of the initiative is to integrate all necessary resources to increase public safety and remedy resource impacts affecting these units." Southern Arizona Project, 2016 Border Report (BLM, 2016), p. 2. The 2016 Border Report describes how, as the CBP has increased its security presence at traditional border crossings at Nogales and Yuma, Arizona, the unlawful traffic has been pushed further into remote areas of the public lands:

The [unlawful trafficking of humans and narcotics] creates new, ad hoc roads and trails, damages native vegetation and disturbs wildlife. Drug and human smuggling also generates tons of garbage, including discarded personal items, bicycles, tires and abandoned vehicles. Millions of pounds of trash and waste along with damaged roads, structures, and fences have impacted Wilderness areas, riparian habitat, and other back-country natural resources.

2016 Border Report, at p. 1. *See also* Declaration of Chief Jerry B. Martin, U.S. Border Patrol Strategic Planning and Analysis Directorate, U.S. Customs and Border Protection, August 12, 2019 (providing trafficking data and describing effectiveness of physical barriers).

Under Operation ROAM, targeted law enforcement surges deter illegal activity and provide a window of opportunity for habitat restoration and mitigation projects to be completed. The BLM relies on partners such as the [Borderland Management Task Force or BMTF], State of Arizona, American Conservation Experience and tribal communities to prioritize and implement these projects.

2016 Border Report, at p. 2. As demonstrated by the details provided in the 2016 Border Report, unlawful border crossings have direct negative impacts on the environment. The BLM has had to take affirmative steps to protect natural resources from these harmful actions and mitigate the harm to public lands, but those efforts are not sufficient. Additional border barriers would protect public land resources and environmental values from the harmful effects of unlawful border crossings.

Regarding other areas along the southern border, CBP explains that in the late 1990s and 2000s, the Yuma and Tucson Sectors experienced large numbers of illegal cross-border activity from pedestrians and vehicles crossing into the OPCNM and parts of the Cabeza Prieta National Wildlife Refuge (CPNWR). During this period, it was common for vehicles loaded with narcotics to cross from Mexico into the U.S. and drive through both OPCNM and CPNWR, creating trails, destroying sensitive habitat, and causing fires. In addition, these illegal activities put visitors to both the park and refuge at risk for harm from fleeing vehicles. Due to the high numbers of pedestrian and vehicle activities, the National Park Service (NPS) had to close OPCNM to public access and use.

As noted above, in 2007, CBP and OPCNM constructed vehicle barriers in much of OPCNM and pedestrian barriers in the area of the Lukeville Port of Entry. Due to the installation of both styles of barrier in OPCNM, illegal vehicle crossings into the U.S. diminished significantly and as a result, the NPS was able to reopen OPCNM to the public in 2014. Today, visitor attendance to OPCNM is at its highest levels. In addition, habitat and sensitive species have benefited from the lack of cross border activity. In fact, NPS has restored with native plants many of the trails created by smugglers and illegal cross border vehicles.

CBP has also reported that the abandoned vehicles often catch fire. In CPNWR, for instance, CBP reports that illegal vehicle crossings would often result in pursuits by CBP agents, vehicles driving off roads into sensitive habitat or wilderness and becoming stuck, and vehicles catching fire. As Congress does not fund CPNWR to remove stuck, burned or abandoned vehicles, the U.S. Fish and Wildlife Service (USFWS) had to use funds meant for other purposes to remove abandoned and burnt vehicles from the refuge. In addition, the process of physically removing vehicles from the refuge often caused additional damage to habitat and wilderness. Since the addition of the vehicle barrier at CPNWR, illegal crossings by vehicles have diminished.¹⁰

When I visited the border, I heard from the BLM that Wilderness Areas near the border are being degraded at an alarming rate. I saw one area (Otay Mountains Wilderness) that might no longer meet the criteria for wilderness based on its current state. I saw fire retardant all along the hillsides left by the agencies battling recent fires, started by smugglers and groups who crossed the border illegally. I saw trails all throughout this Wilderness Area, created by these groups over time. Illegal crossings in these areas continue to damage these lands, once “untrammelled by man.” The CBP informed me that in the San Diego Border Patrol Sector, where the Otay Mesa Wilderness is located, the number of apprehensions has increased by more than 13,000

¹⁰ However, as described in the Appendix, illegal pedestrian crossings are still a significant issue in the Refuge.

individuals from FY18 to FY19.¹¹ While the terrain in some of these Wilderness Areas is rugged, the lack of a barrier leaves the wilderness subject to traffic seeking to circumvent the adjacent bollard fencing.

The attached Appendix includes more specific details regarding individual segments and the impacts of illegal border crossings on natural resource values at each requested withdrawal location addressed herein.

3. An Emergency Situation Exists and Extraordinary Measures Must be Taken

The current situation at the southern border -- and with respect to the segments of land described in the attached applications -- constitutes an emergency situation requiring extraordinary measures in order to preserve the values described above. As noted, the President has already declared a national emergency. And the Secretary of Defense, in invoking 10 U.S.C. § 2808 and directing the Secretary of the Army to undertake border barrier construction projects expeditiously on these five segments, along with six others, has determined that such construction is:

necessary to support the use of the armed forces in connection with the national emergency. These projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry. They will reduce the demand for DoD personnel and assets at location where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers.

See September 3, 2019, Letter from Secretary of Defense to Secretary of the Interior dated September 3, 2019; see also September 3, 2019, DOD Action Memo Entitled *Military Construction Pursuant to 10 U.S.C. § 2808* (“Action Memo”). This determination was based in part on Recommendations of the Chairman of the Joint Chiefs of Staff, which identified and considered four key factors to prioritize segments for border barrier construction: (1) DHS’s prioritization of projects, (2) current migrant flows as measured by monthly apprehensions in each Customs and Border Patrol (CBP) sector, (3) current deployment of military personnel and support missions by CBP Sector, and (4) the type of land upon which the proposed projects would be undertaken. See Action Memo, Tabs H, J. Using that ranking system, with input from DHS and the Office of the Under Secretary for Defense for Policy, these five segments were all within the top 11 segments as priorities for military construction.¹²

Two examples illustrate the emergency nature of this situation. First, the CBP reports that the sector where the El Paso Project 2 is planned in New Mexico has the second largest number of apprehensions of persons illegally crossing the border of any sector, and that this is noteworthy, especially given that this area has sparse existing pedestrian fencing and rugged terrain. See

¹¹ See also *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>

¹² The Secretary of Defense has directed the Secretary of the Army to expeditiously undertake all 11 projects. See Action Memo.

Action Memo, Tab H, at p. 4. These latter physical features combined with the close proximity of Highway 81, contribute to particularly high “vanishing” rates of persons crossing illegally avoiding apprehension. The remoteness of this area makes it particularly attractive to both drug and people smugglers, but also quite dangerous. *Id.* Therefore, DHS and DOD have determined that it is critical to construct new primary and secondary pedestrian barriers at El Paso Project 8 to channel migrants to the existing Antelope Wells Point of Entry, both for the safety of the migrants and of the CPB personnel, given the dangers of the rugged terrain. *Id.* DHS and DOD have also determined that projects to improve border facilities in the El Paso sector, where DOD has mobilized the highest percentage of DOD assets to assist CPB, can best leverage these military assets and contribute to the ripple effect where success in one sector can contribute to the success of efforts in other border sectors. *Id.*; *see also* Action Memo, Tab H, at p. 3 (discussing ripple effects). El Paso Project 2, which would replace existing vehicle barriers with pedestrian barriers would provide readily-executable support of this effort at establishing more effective operational control in the El Paso sector, and would reduce reliance on DOD-furnished mobile surveillance camera sites. *See* Action Memo, Tab H., at p. 4.

The situation is similar in the Yuma sector in Arizona, where there are twice as many military as DHS personnel mobilized, and apprehensions of persons attempting illegal crossings of the border have more than doubled in the last year, with 31,383 total in FY 2018, and 65,363 so far in FY 2019. *See* Action Memo, Tab H., at p. 5. While the Yuma projects are either located on, or near to the Barry M. Goldwater Range administered by the Departments of the Navy and the Air Force, and border barrier projects located on the Range would impede the passage of migrants onto a live-fire range and otherwise divert migrants to ports of entry, DHS has previously asked for funding for border barriers adjacent to the Range, for similar reasons, without success. *Id.* Replacement of existing vehicle barriers with pedestrian barriers at the Yuma Project 3 site, and construction of new primary and secondary pedestrian barriers at Yuma Project 2 will allow DOD personnel to focus on unfenced areas on and near the Range, or, should fewer DOD personnel be needed on the border because of the efficacy of the barriers, to turn to other high priority national defense missions. *Id.* at p. 6.

These are only two examples of sectors where immediate attention to security measures are needed; other sectors are described in more detail in the Appendix and the Army’s applications. Indeed, in accordance with the direction from the Secretary of Defense to “expeditiously” undertake the border barrier construction projects, and immediately apply for and accept administrative jurisdiction over lands necessary to undertake such projects, and proceed with construction as soon as it has obtained administrative jurisdiction, the Army immediately requested that I make emergency withdrawals transferring administrative jurisdiction for the necessary lands underlying these five projects. And the Army intends to award construction contracts soon after it has accepted administrative jurisdiction over the land and recorded it in its property records as a military installation, beginning in November, 2019. *See* September 3, 2019, Declaration of General Glenn Goddard, paragraph 10(b), 12. After those contracts are awarded, the Army would begin preparatory work, such as geotechnical borings and clearing and grubbing, at least 20 days after the contract award. *Id.* It would then begin actual construction. *Id.* Currently, the Army tentatively intends to issue requests for proposal for Yuma Project 3,

San Diego Project 4, El Paso Project 2, Yuma Project 6, and El Paso Project 8 by late November 2019, award contracts by mid-December 2019, begin ground disturbing activities in January 2020 and begin substantial construction in February.

Taking all of these circumstances into account, I find that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost. In making that determination, I am aware that construction of border barriers can have adverse environmental impacts, including impacts from construction on air quality, land use, soils, water, vegetation, wildlife, and cultural resources.¹³ However, those impacts have generally been found to be insignificant, including with respect to barriers in the areas at issue in the Army's applications. *Id.* Indeed, those analyses also show that there will be long term beneficial impacts - especially on wildlife and vegetation resources -- from such construction. Moreover, many of the potential adverse impacts are short-term, resulting from construction itself. Accordingly, I find that any potential adverse environmental impacts are negligible in comparison to the emergency situation arising from the impacts of illegal border crossings described above and in the Army's applications, and which I personally viewed on my visit to these areas.

To address this emergency, extraordinary measures are necessary to transfer administrative jurisdiction to the Department of the Army in order to facilitate construction of border barriers -- and preserve the values discussed above.¹⁴

¹³ See, e.g., Final Environmental Stewardship Plan for the Replacement, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol San Diego Sector, Imperial Beach and Brown Field Stations, California (June 2018); Final Environmental Stewardship Plan for the Replacement, Operation, and Maintenance of Tactical Infrastructure, San Diego Sector Secondary Wall Replacement Project, U.S. Border Patrol San Diego Sector, Imperial Beach Station and Chula Vista Station, California (May 2019); Final Environmental Assessment for Border Road and Fence; Construction and Repair, Tecate to Canyon City, San Diego County, California (October 1993); Final Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol Yuma Sector, Arizona and California (May 2008); Final Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Vehicle Fence and Related Tactical Infrastructure, U.S. Border Patrol Yuma Sector, Wellton Station, Arizona (December 2008); Final Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, Segments HV-1 through HV-3 (August 2008); Final Supplemental Environmental Assessment for the Proposed Installation of 2.62 Miles of Primary Fence Near Calexico, California, Office of Border Patrol, El Centro Sector, California (August 2007); Final Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, Segment HV-4, U.S. Border Patrol El Paso Sector, Lordsburg Station, New Mexico (August 2008); Programmatic Environmental Assessment for Proposed Tactical Infrastructure, Office of Border Patrol El Paso Sector Stations (October 2006); Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol San Diego Sector (October 2008); Final Environmental Assessment for Proposed Construction, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol San Diego Sector (February 2011); Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol San Diego Sector, El Cajon, Campo, and Boulevard Stations, California (July 2008); Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure, U.S. Border Patrol El Centro Sector, California (May 2008); Memorandum for the Record, Replacement of Primary Border Wall in Calexico, El Centro Sector, California (February 2018).

¹⁴ In making this determination, I have also considered two developments occurring since the Army filed its applications. First, the Supreme Court reversed a lower court stay enjoining enforcement of an interim final rule issued by the Departments of Justice and Homeland Security denying asylum to certain aliens who seek asylum in the United States without having first sought protection in a third country through which they travelled. *Barr v. East*

C. The Department's Past Interpretation of FLPMA 204(e)

In making the determination above, I recognize that in prior regulations and withdrawal petitions/applications, the Department has chosen to limit the nature of the emergency and the “values” to be protected in section 204(e) to natural resource and environmental values. Certainly, as detailed herein and in the Army’s applications, there are natural resource and environmental values at risk that must be preserved or they will otherwise be lost. However, for the reasons set forth below, I conclude that, absent specific insertion by Congress, the imposition of such a limiting qualifier of the term “values” would needlessly frustrate the executive branch’s ability to immediately address extraordinary circumstances that could necessitate emergency withdrawals to preserve public values that are intrinsically valuable, such as border and national security. The term “values” is better understood to include national and border security, humanitarian and other similar values that are presented by the emergency at the southern border. Such an understanding of the term “values” is also more consistent with FLPMA.¹⁵

The Department’s withdrawal regulations were explicit as to their interpretation of the nature of the emergency and the values referenced until the Department amended the regulations in 2008. Specifically, prior to 2008, the regulations explicitly provided that the Secretary “shall immediately make a withdrawal” when he “determines.....that extraordinary measures need to be taken to protect *natural resources or resource values* that would otherwise be lost.” 43 C.F.R. § 2310.5(a) (2007) (emphasis added). In defining a “resource use” (a term used in section 204(d) of FLPMA regarding conventional withdrawals aggregating less than 5,000 acres), the regulations state that such a use means a land use having as its primary objective the preservation, conservation, enhancement or development of:

Any renewable or nonrenewable natural resource indigenous to a particular land area, including, but not limited to, mineral, timber, forage, water, fish or wildlife resources, or

Any resource value associated with a particular land area, including, but not limited to, watershed, power, scenic, wilderness, clean air or recreational values.

The term does not include military or other governmental activities requiring land

Bay Sanctuary Covenant, 588 U.S. ___ (2019). Second, on September 6, Mexico Foreign Secretary Marcelo Ebrard announced that Mexican actions taken to curb migration had reduced the flow of migrants to its northern border. The existence and deployment of these other tools to address the emergency at our southern border does not change my determination, based on the Army’s applications and the information described in this memorandum, that illegal border crossings continue on a massive scale and bring extreme harm to our country, and, accordingly, that an emergency situation exists and that extraordinary measures are necessary to preserve the values discussed herein.

¹⁵ My determination is consistent with decisions of the Supreme Court holding that an agency is permitted to change its interpretation of a statute if it (1) displays awareness that it is changing position; (2) believes the new policy is better; (3) provides good reasons for the new policy, which, if the new policy rests upon factual findings that contradict those which underlay its prior policy must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy; and (4) shows that the new policy is permissible under the statute. See *Federal Communications Commission v. Fox Television*, 556 U.S. 502, 515 (2009); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

sites only as an incidental means to achieving an end not related primarily to the preservation, conservation, enhancement or development of natural resources or resource values indigenous to or associated with a particular land area.

43 C.F.R. § 2300.0-5. And based on those specific regulations, the Department has previously denied as not properly concerned with the preservation of “natural values” or “resource values” a request for emergency withdrawal on the part of the Department of the Navy, in order that the public land that was the subject of its request for a longer-term legislative withdrawal would be insulated from the operation of the mining and other public disposal laws for up to three years, by which time, presumably, Congress would have acted on the Navy’s legislative withdrawal request. *See* Memorandum from the Associate Solicitor, Energy and Resources to the Director, Bureau of Land Management, dated September 5, 1984. That memo, relying on the regulations discussed above, concluded that the Navy’s request did not meet the statutory criteria, as interpreted by those regulations then in effect.

In 2008, the Department amended 2310.5(a) (but not 2300.0-5) to refer to the standard in FLPMA for granting an emergency withdrawal instead of articulating it in the regulation; accordingly, the “natural resources or resource values” language referenced above no longer appears. *See* 73 Fed. Reg. 74047 (Dec. 5, 2008). Thus, the regulation itself no longer limits the Department to an emergency related to natural resource values. I acknowledge, however, that the 2008 rulemaking was narrowly tailored to address the unrelated question regarding the constitutionality of an emergency withdrawal directed by certain House and Senate Committees and did not articulate any intent to change the Department’s interpretation of the nature of an emergency. *Id.* Moreover, the premise of the 2008 rulemaking -- that lands can be protected quickly using the segregation period that is initiated by *proposing* a conventional withdrawal -- is arguably based on the assumption that the emergency relates only to resource values. *See id;* *see also* 73 Fed. Reg. 60212 (Oct. 10, 2008) (notice of proposed rulemaking that became the 2008 final rule -- and, following the same rationale, would have eliminated the emergency withdrawal regulation altogether); 56 Fed. Reg. 59914 (Nov. 26, 1991) (similar proposed rule that was never finalized). And, in places, the preambles to those rulemakings explicitly state that FLPMA 204(e)’s emergency is for the preservation of natural resource values. *See, e.g.,* 73 Fed. Reg. 74047 (“Section 204(e) provides that the Secretary of the Interior shall withdraw lands immediately upon a determination...that an emergency exists and that extraordinary measures need to be taken to protect natural resources or resource values that would otherwise be lost.”); 56 Fed. Reg. 59914 (similar). Finally, Secretaries of the Interior have exercised this authority on seven prior occasions, each of which addressed preservation of natural or cultural resource values by preventing impacts from these natural resource uses.¹⁶

¹⁶ *See* Public Land Order (PLO) No. 7773, Emergency Withdrawal of Public and National Forest System Lands; Coconino and Mojave Counties; Arizona, 76 Fed. Reg. 124 (Jun. 28, 2011) (withdrawing 1,010,776 acres to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and mining); PLO No. 7005, Emergency Withdrawal of Public Mineral Estate within the Desert National Wildlife Refuge; Nevada, 58 Fed. Reg. 44049 (Oct. 20, 1993) (withdrawing 769,543 acres for one year for the protection of the Refuge until the USFWS can complete an environmental impact statement); PLO No. 6099, Emergency Withdrawal of Archeological Sites, Windy Gap Project, Grand County, Colorado, 46 Fed. Reg. 63047 (Dec. 30, 1981) (withdrawing 679.46 acres for

Although I acknowledge the Department's prior interpretation, I believe the better interpretation is that the "values" that form the basis of the emergency and which require immediate action to preserve should not be so limited. FLPMA does not define the term "values." The dictionary defines "value" (as relevant here) as *something* (such as a principle or quality) intrinsically valuable or desirable, which is certainly not limited to environmental or natural resource values. Most importantly, however, limiting the interpretation to natural resource values is inconsistent with FLPMA's definition of withdrawal. As noted above, a withdrawal is not just a means to close lands to settlement, sale, location or entry; it is also a means to transfer jurisdiction over lands to another agency. Many times, especially for transfers of jurisdiction to the Department of Defense (DOD) or its components, the purpose of that withdrawal is not to protect *resource* values, but for some other purpose, such as national defense. An emergency withdrawal is just one kind of withdrawal (which includes a transfer of jurisdiction) -- and the broad term "values" should not be limited when the context of the statute indicates that some types of withdrawals are for the express purpose of protecting non-resource values.

The next question is what types of values qualify. While I find it unnecessary to define the outer limits of that term here, I believe that, at a minimum, they include the national and border security issues detailed in the President's Proclamation; and specifically include preserving values associated with preventing the kind of large-scale unlawful migration through the southern border that not only allows for the entry of criminals, gang members, and drugs--draining the resources of DHS and DOD that could be utilized to address other border or national security issues--and also leads to the inability of the Federal government to provide detention space for many of the aliens, including family units. This is especially true given the broad dictionary definition of "values" and that FLPMA does not define the term.

Protection of national security values is also consistent with FLPMA's withdrawal provisions as a whole, and Congress's clear awareness at the time of FLPMA's passage in 1976 that withdrawals often transferred jurisdiction to DOD components for military or national security purposes. Lawmakers acknowledged the long history of withdrawals of public land for military purposes during congressional committee hearings leading up to the enactment of the 1958 Engle

the protection of archeological sites for three years); PLO No. 5952, Emergency Withdrawal of the Bob Marshall, Scapegoat, and Great Bear Wilderness Areas; Montana, 46 Fed. Reg. 30086 (Jun. 5, 1981) (withdrawing 1.5 million acres in response to an emergency withdrawal resolution adopted by the House Interior and Insular Affairs Committee on May 21, 1981); PLO No. 5662, Emergency Withdrawal of Los Padres National Forest for Casitas Reservoir Watershed in California, 44 Fed. Reg. 29065 (May 16, 1979) (withdrawal of 69,305 acres for the protection of the Casitas Reservoir Watershed from mining claim location which could jeopardize the water supply for the cities of Ojai and Ventura, California, in connection with the Ventura River Project of the Bureau of Reclamation, following May 4, 1979 notification from the House Interior and Insular Affairs Committee of the existence of an emergency situation, and a request to immediately withdraw the subject lands); PLO No. 5653, Emergency Withdrawal of Certain Lands in Alaska, 43 Fed. Reg. 246 (Dec. 21, 1978) (withdrawal of 110 million acres of land to protect their resource values, issued at the request of the House Interior and Insular Affairs Committee, upon the Committee's determination of the existence of an emergency situation with respect to the national interest lands in Alaska); PLO No. 5617, Emergency Withdrawal of Critical Environmental Area; Utah, 42 Fed. Reg. 85 (May 3, 1977) (withdrawing 26,927.24 acres in the Deep Creek Mountain area and reserving them for the protection of the critical environmental area, specifically to protect certain enumerated rare species and resources including Snake Valley cutthroat trout and its habitat, various species of plants, as well as some 9000-year old archaeological sites).

Act, 43 U.S.C. § 157. The Engle Act provides that withdrawals of more than 5000 acres for any one defense project or facility of the DOD for defense purpose require an Act of Congress, and therefore, withdrawals (including transfers of administrative jurisdiction) for defense purposes of more than 5000 acres are among those types of withdrawals that exceed the Secretary's FLPMA withdrawal authority. 43 U.S.C. § 1714(j) (listing among the exceptions to the Secretary's withdrawal authority those "which can be made only by Act of Congress"). In 1956 deliberations regarding whether 5000 acres would be the appropriate acreage limit for Secretarial action on military withdrawals, Chairman Engle noted for inclusion in the hearing record a review of the Federal Register for a recent 2-year period that had revealed 67 applications by the DOD for withdrawals of public lands for defense purposes, commenting that "a very large number of small withdrawals for radar sites and whatnot will be handled directly through the Interior Department without reference to congressional committees unless the committee wants to go into the subject matter," leaving the larger withdrawal proposals to Congress. *Withdrawal and Utilization of the Public Lands of the United States: Hearings on H.R. 10371, H.R. 10380, H.R. 10377, H.R. 10367, and similar bills Before the H. Comm. on Interior and Insular Affairs, 84th Cong. 96-97 (1956)*. Indeed, such an interpretation is consistent with prior withdrawals -- including "Roosevelt Reservation" in particular -- which withdrew many of the lands at issue here for border security purposes. For all these reasons, and while I acknowledge the Department's contrary prior position, the "values" that can form the basis for an emergency under FLPMA 204(e) are broad and include the preservation of values associated with public purposes such as national security, reduction in crimes such as drug and human trafficking, and other public values associated with reducing illegal border crossings and their impact to society in addition to those natural resource values that the Department has previously associated with that term. Such an interpretation is consistent with FLPMA. In making this determination, I do not question or disregard any factual determinations made under the prior interpretation or policy.

D. Compliance with Other Statutory and Regulatory Requirements

As noted above, an emergency withdrawal does not require compliance with the procedural requirements applicable to conventional withdrawals under the regulations, nor does it require analysis under NEPA or consultation under the ESA or NHPA. Moreover, to the extent compliance with those or any other laws could impede the expeditious construction of those projects, they do not apply by the terms of 10 U.S.C § 2808. *See* September 3, 2019, letter from the Secretary of Defense to the Secretary of the Interior.

IV. DECISION BY THE SECRETARY

For the reasons set forth above and in the included attachments, I find that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost. In accordance with section 204(e) of FLPMA, I therefore am approving the emergency withdrawal applications discussed herein and immediately making the requested emergency withdrawals. Public Land Orders will issue forthwith. I have further directed that all Department of the Interior bureaus expeditiously review any necessary requests for access to the lands described in those Orders for the purposes of border barrier construction.

A handwritten signature in black ink, appearing to read "David Bernhardt", written over a horizontal line.

David L. Bernhardt
Secretary of the Interior

Attachments: Applications for Emergency Withdrawal

APPENDIX

Segments Requested and their National Security/Humanitarian Values and Natural Resource Values

1) SAN DIEGO Project 4, San Diego County, California

a) Location

A strip of land of the uniform width of 200 feet lying contiguous to and parallel with the international border between the United States and Mexico, located in the County of San Diego, State of California, and situate in the following described locations:

San Bernardino Meridian, California

T. 18 S., R. 1 E.,

sec. 34;

sec. 35.

The areas described above aggregate approximately 44 acres of Federal lands in San Diego County.

b) Proposal/Construction Schedule

Construction of new primary (bollard fence-not pedestrian) and secondary pedestrian barrier. A Request for Proposal is tentatively scheduled to issue at the end of November 2019, with a contract award in mid-December. Ground-disturbing activities, including geotechnical borings and clearing and grubbing, are tentatively scheduled to begin in January 2020, with actual construction beginning in February.

c) National Security/Humanitarian Values

According to U.S. Customs and Border Patrol (CBP), for FY19, through July, there were over 51,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the San Diego Sector. Also for the same period, CBP seized nearly 2,500 pounds of marijuana, over 1,200 pounds of cocaine, over 225 pounds of heroin, over 2,800 pounds of methamphetamine and almost 100 pounds of fentanyl between border crossings in the sector. Indeed, CBP has reported 31 call outs, 45 rescues and 4 recoveries between FY 2017-2019 in the Otay Mountains Wilderness Area. The San Diego Sector saw a drastic increase in assaults on CBP Agents in FY19, nearly doubling from FY18 to 149 assaults this year. The existing barrier ends in a relatively populated area. The city of Tijuana has sprawled considerably since the existing bollard fence was built and dwellings back up almost right to the existing barrier. Construction of new primary (bollard fence-not pedestrian) and secondary pedestrian barrier, as proposed for this project, would address these issues. BLM law enforcement told me they have ongoing investigations of drug trafficking occurring on public land. This activity will continue unless the border barrier is extended to protect and restore this Wilderness Area.

d) Natural Resource Values

The project lies adjacent to the Otay Mountain Wilderness Area managed by the Bureau of Land Management (BLM). That Wilderness Area, designated by Congress in 1999 in recognition of its diversity of unique and sensitive plants, must be managed to preserve its wilderness character and devoted to the public purposes of “recreational, scenic, scientific, educational, conservation, and historical use.” *See* 16 U.S.C. § 1133; Pub. L. No. 106-45 (Dec. 9, 1999). The Wilderness area represents a unique ecosystem, home to twenty sensitive plant and animal species, including the endangered quino checkerspot butterfly, the only known stand of Tecate cypress, as well as the only known population of the Mexican flannel bush. CBP reports smugglers and foot guides started fires within the Wilderness Area to create diversions in order for them to avoid apprehension. Illegal border crossers create signal fires when they are in distress or when they need to make their location known to search and rescue personnel. In 2019 in particular, seven fires in the Wilderness Area burned a total of more than 75 acres. And in 2018, two illegal aliens pled guilty to charges related to their ignition of two signal fires in the area and a third suspect was booked on similar charges for a separate fire. Indeed, Congress has found that illegal immigration traffic, along with the rugged topography, “presents unique fire management challenges for protecting lives and resources.” *Id.* at § 3.

Large quantities of trash (discarded clothing, aluminum cans, water bottles, human waste, etc.) can be found throughout the Wilderness Area, particularly in and around “lay-up” spots where illegal aliens and others crossing the border illegally sleep and wait until they are ready to continue their northbound trek. Hiking through the Wilderness Area, specifically on the tops of ridgelines and in the bottom of canyons, smugglers will create *hooches* (shelters) made from uprooted trees, broken branches and piled up rocks. Illegal aliens commonly build *hooches* to camouflage their sleeping locations in order to prevent being discovered by law enforcement personnel. Currently there are still makeshift hideouts on BLM land.

On my visit to this site, I saw degradation of the Wilderness Area firsthand and heard about the challenges BLM Law Enforcement and CBP agents experience every day. I saw fire retardant left along the hills from the agencies battling a recent fire. Finally, I saw extreme route proliferation throughout the Wilderness Area.

All of these impacts degrade the wilderness character of the area - including opportunities for recreation - which BLM is specifically obligated by law to maintain. Absent this action, these wilderness values will be lost and destroyed.

2) YUMA Project 3, Yuma County, Arizona

a) Location

Strips of land of the uniform width of 60 feet lying contiguous to and parallel to the international border between the United States and Mexico, currently subject to Presidential Proclamation No. 758, 35 Stat. 2136 (May 27, 1907), located in the County of Yuma, State of Arizona, and situate in the following described locations:

Gila-Salt River Meridian, Arizona

T. 14 S., R. 15 W.,

secs. 18 and 19;

sec. 20, SE1/4;

sec. 21;

sec. 22, SW1/4;

sec. 26, S1/2.

T. 14 S., R. 16 W.,

sec. 6, E1/2;

secs. 7 thru 10, and 13 thru 15.

T. 15 S., R. 11 W.,

secs. 31 and 32.

T. 15 S., R. 12 W.,

secs. 19, 20, 26 thru 29, 35 and 36.

T. 15 S., R. 13 W.,

secs. 7 thru 9, 14 thru 16, 23 and 24.

T. 15 S., R. 14 W.,

secs. 1 and 2;

sec. 3, NE1/4;

sec. 12.

T. 16 S., R. 10 W.,

sec. 18, W1/2.

T. 16 S., R. 11 W.,

secs. 3 thru 6, and 10 thru 12.

The areas described above aggregate approximately 228 acres of Federal lands in Yuma County.

Note: This application applies only to the 60' Roosevelt Reservation.¹⁷

¹⁷ The Army has asked me to transfer administrative jurisdiction only over the 60-foot wide public land corridor along the United States side of the boundary with Mexico withdrawn by President Roosevelt 1907 for protection against smuggling. When the CPNWR was later established, the Refuge excluded these lands. Thus, the requested emergency withdrawal would not transfer jurisdiction over any lands currently in the Refuge.

b) Proposal/Construction Schedule

Replacement of the existing vehicle barrier adjacent to the Cabeza Prieta National Wildlife Refuge (CPNWR) with pedestrian barrier. A Request for Proposal is tentatively scheduled to issue at the end of November 2019, with a contract award in mid-December. Ground-disturbing activities, including geotechnical borings and clearing and grubbing, are tentatively scheduled to begin in January 2020, with actual construction beginning in February.

c) National Security/Humanitarian Values

Since the addition of the vehicle barrier at CPNWR, illegal crossings by vehicles have diminished. Installation of pedestrian barrier will preserve this benefit while also reducing other illegal cross border activities including human traffic through the refuge. CBP reports for FY19, through July 31, 2019, apprehensions of over 65,000 persons attempting illegal entry of the United States between border crossings in the Yuma Sector. Also during the same period, CBP seized over 3,000 pounds of marijuana, over 30 pounds of heroin, over 900 pounds of methamphetamine and almost 40 pounds of fentanyl between border crossings in this sector.

d) Natural Resource Values

CPNWR is home to hundreds of species of mammals, reptiles, and plants whose presence is necessary to maintain the ecological balance of the Refuge. Endangered species include Sonoran pronghorn and lesser long-nosed bats. Other species include the desert bighorn sheep, desert tortoises and many species of lizards, snakes, and toads. The Refuge is also a migratory stop for many birds in spring and fall and other birds reside here year-round, including elf owls and Gila woodpeckers. There are over 400 plant species including creosote bush, white bursage, mesquite, palo verde, ironwood, ocotillo and an abundance of cacti, including cholla, and saguaro. Illegal cross-border activities continue to negatively affect species and habitat within the refuge due to direct human interaction as well as habitat and refuge land degradation and destruction caused by the creation of trail networks and deposition of trash. Prior to installation of the vehicle barrier, illegal vehicle crossings into the CPNWR often resulted in CBP pursuit of vehicles driving off roads into sensitive habitat or wilderness, where the vehicles would become stuck, and frequently catch fire. The U.S. Fish and Wildlife Service ended up using funds planned for other purposes to remove abandoned and burnt vehicles from the refuge. In addition, the process of physically removing vehicles from the refuge often caused additional damages to habitat and wilderness.

3) YUMA Project 6, Yuma County, Arizona and Imperial County, California

a) Location

A strip of land of the uniform width of 270 feet lying contiguous to and parallel to the international border between the United States and Mexico, located in the County of Imperial, State of California, and situate in the following described locations:

San Bernardino Meridian, California

T. 16 S., R. 21 E.,

sec. 33, lots 13, 14, 19, and 20;

sec. 34.

Containing 49 acres

Subject to existing State sovereign land in the last natural bed of the Colorado River.

A strip of land of the uniform width of 200 feet lying contiguous to and parallel to the international border between the United States and Mexico, located in the County of Yuma, State of Arizona, and situate in the following described locations:

Gila-Salt River Meridian, Arizona

T. 8 S., R. 24 W.,

sec. 21;

sec. 22, lot 4.

San Bernardino Meridian, California

T. 16 S., R. 21 E.,

sec. 35.

Containing 12 acres

A strip of land of the uniform width of 200 feet, located in the County of Yuma, State of Arizona, and situate in the following described locations:

Gila-Salt River Meridian, Arizona

T. 8 S., R. 24 W.,

sec. 28, lot 4, and lots 15 thru 18.

Containing 7 acres

Subject to existing State sovereign land in the last natural bed of the Colorado River.

The areas described above aggregate approximately 19 acres of Federal lands in Yuma County, Arizona and Imperial County, California.

b) Proposal/Construction schedule

Construction of both new primary and secondary pedestrian barriers. A Request for Proposal is tentatively scheduled to issue at the end of November 2019, with a contract award in mid-December. Ground-disturbing activities, including geotechnical borings and clearing and grubbing, are tentatively scheduled to begin in January 2020, with actual construction beginning in February.

c) National Security/Humanitarian Values

CBP reports for FY19, through July, there were over 65,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the Yuma Sector. Also during the same period, Border Patrol seized over 3,000 pounds of marijuana, over 30 pounds of heroin, over 900 pounds of methamphetamine, and almost 40 pounds of fentanyl between border crossings in this sector.

Here, cartel members regularly infiltrate family groups to gain entry to the US. Groups are also attempting to cross the Colorado River in this segment. What was once a natural barrier is no longer discouraging illegal entry in this area. This means CPB must frequently conduct dangerous rescues for those stranded in the fast current of this river. If someone is able to successfully cross the river, they dress in a way to quickly blend in with the many field workers nearby.

d) Natural Resource Values

Federal property in the project area include lands managed by the Bureau of Indian Affairs and Bureau of Reclamation. Protected and sensitive species of animals and plants that occur in this area include: the Southwestern Willow Flycatcher, Yellow-Billed Cuckoo, Yuma Ridgway's Rail, Flat-Tailed Horned Lizard, Yuma Desert Fringe-Toed Lizard, Chuckwalla, Sand food, Blue sand-lily, Algodones sunflower, Dune spurge, Burrowing owl, and Loggerhead shrike. Continued illegal cross border activities including human traffic through this area of the Colorado River region has the potential for damage to endangered species and critical habitat, as well as to other more common plants and animals. Illegal cross-border activity in this area continues to negatively affect species and habitat within the Federal lands due to direct human interaction as well as habitat and land degradation and destruction caused by the creation of trails and deposition of trash.

Salt Cedar grows along the river here and quickly catches fire. This can be catastrophic in a region that can reach 120 degrees. During the visit to this site, I observed that vegetation had grown tall along the river and signs of past burns were immediately apparent. BLM personnel noted that fires such as these may spread north across the river and that BLM has frequently needed to respond to these burns using a specialized firefighting boat to prevent the rapid spread of the fires.

4) EL PASO Project 2, Luna and Hidalgo Counties, New Mexico

a) Location

A strip of land of the uniform width of 60 feet lying contiguous to and parallel with the international border between the United States and Mexico, currently subject to Presidential Proclamation No. 758, 35 Stat. 2136 (May 27, 1907), located in the County of Luna, State of New Mexico, and situate in the following described locations:

New Mexico Principal Meridian, New Mexico

T. 29 S., R. 11 W.,

secs. 16 thru 18.

T. 29 S., R. 12 W.,

secs. 13 thru 18.

T. 29 S., R. 13 W.,

secs. 13 thru 16.

The area described aggregates 94.76 acres.

A strip of land of the uniform width of 60 feet lying contiguous to and parallel with the international border between the United States and Mexico, currently subject to Presidential Proclamation No. 758, 35 Stat. 2136 (May 27, 1907), located in the County of Hidalgo, State of New Mexico, and situate in the following described locations:

New Mexico Principal Meridian, New Mexico

T. 34 S., R. 16 W.,

sec. 19;

sec. 20;

sec. 21, W. of the N. and S. centerline of SW1/4.

T. 34 S., R. 17 W.,

sec. 20; E. of the N. and S. centerline of SE1/4;

secs. 21 thru 24.

The area described aggregates 47.39 acres.

A strip of land of the uniform width of 60 feet lying contiguous to and parallel with the international border between the United States and Mexico, currently subject to Presidential Proclamation No. 758, 35 Stat. 2136 (May 27, 1907), located in the County of Hidalgo, State of New Mexico, and situate in the following described locations:

New Mexico Principal Meridian, New Mexico

T. 34 S., R. 20 W.,

sec. 19;

sec. 20;

sec. 21, W. of the N. and S. centerline of SW1/4.

T. 34 S., R. 21 W.,

sec. 22, E. of the N. and S. centerline;

sec. 23;

sec. 24.

The area described aggregates 34.08 acres.

The areas described above aggregate approximately 176.23 acres of Federal lands in Luna and Hidalgo counties.

b) Proposal/Construction Schedule

Replacement of existing vehicle barrier with pedestrian barrier. A Request for Proposal is tentatively scheduled to issue at the end of November 2019, with a contract award in mid-December. Ground-disturbing activities, including geotechnical borings and clearing and grubbing, are tentatively scheduled to begin in January 2020, with actual construction beginning in February.

c) National Security/Humanitarian Values

CBP reports that the El Paso Project 2 location is used as a corridor for illegal border crossings and drug smuggling activities due to the remoteness of southern Hidalgo and Luna Counties. According to CBP, for FY19, through July, there were over 167,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the El Paso Sector. Also during the same period, the CBP seized over 10,000 pounds of marijuana, over 100 pounds of cocaine, and over 200 pounds of methamphetamine between border crossings in this sector.

This is *the* primary location for the Juarez and Chihuahua cartels to transport drugs and humans. Anyone crossing illegally in this area must pay these cartels a significant sum or run the risk of exposure to violence. During my visit, CBP explained that in some instances, the cartels would fire weapons at individuals attempting to cross the border in this area without first having paid the cartel. The lack of barriers sufficient to stop pedestrian traffic in this area may make the location appealing to individuals seeking to cross the border on foot, especially children and families. Between FY18 and FY19, CBP reported the apprehension of unaccompanied children (between 0-17) has increased by 249% and the number of family unit apprehensions has increased by 1510%. This area is also receiving the highest number of large groups of asylum seekers (1,000/week in December 2018) in a remote area that cannot support that high volume. The El Paso Project 2 would address these issues through the replacement of existing vehicle barrier with pedestrian barrier. The replacement work makes this project site-specific to the identified lands.

d) Natural Resource Values

CBP has identified Southern Hidalgo County as home to many bird species including state species of concern like the Red-faced Warbler, Greater Pewee, Gould's Wild Turkey, Painted Redstart, and the Olive Warbler. Potential threatened and endangered species in this border area include eight species including the Mexican Grey Wolf, Northern Aplomado Falcon, the southwestern willow flycatcher, and the American Peregrine Falcon. According to its Southern Arizona Project 2016 Border Report, the BLM Field Offices along the border experience

resource impacts from illegal border crossings, including unauthorized trails, trash and intrusion on biological resources. Illegal crossings degrade watersheds and wildlife habitat through disturbance of soil, increasing soil erosion and destruction of vegetation. Warming fires can escape to become wildland fires that threaten human life and property. Fighting these fires is often more complex and costly due to safety concerns. Environmental damage is prevalent and requires extensive resources to remove litter, repair fences, restore biological resources, and maintain roads. CBP reports that illegal crossings in these specific areas of the border have resulted in impacts to habitat, plants and animals caused by the creation of foot trails and the deposition of trash, damaging or killing vegetation essential for food and habitat of endangered species and other animals. In addition, illegal vehicle crossings create vehicle trails, cause damage to vegetation and habitat, and lead to fires from abandoned or stuck vehicles. This is also a popular hunting area and BLM has attempted to expand access to these public lands. However, opening BLM roads in this area has increased the number of illegal vehicle incursions into the area, making it unsafe for recreational and hunting use.

5) EL PASO Project 8, Hidalgo County, New Mexico

a) Location

A strip of land of the uniform width of 60 feet lying contiguous to and parallel with the international border between the United States and Mexico, currently subject to Presidential Proclamation No. 758, 35 Stat. 2136 (May 27, 1907), located in the County of Hidalgo, State of New Mexico, and situate in the following described locations:

New Mexico Principal Meridian, New Mexico

T. 34 S., R. 18 W.,

secs. 19 thru 24.

The areas described above aggregate approximately 43.32 acres of Federal lands in Hidalgo County.

b) Proposal/Construction Schedule

Construction of new primary and secondary pedestrian barriers. A Request for Proposal is tentatively scheduled to issue at the end of November 2019, with a contract award in mid-December. Ground-disturbing activities, including geotechnical borings and clearing and grubbing, are tentatively scheduled to begin in January 2020, with actual construction beginning in February.

c) National Security/Humanitarian Values

CBP reports that the El Paso Project 8 location is used as a corridor for illegal border crossings and drug smuggling activities due to the remoteness of southern Hidalgo County. According to CBP, for FY19, through July, there were over 167,000 apprehensions of persons attempting

illegal entry of the United States between border crossings in the El Paso Sector. Also during the same period, the CBP seized over 10,000 pounds of marijuana, over 100 pounds of cocaine, and over 200 pounds of methamphetamine between border crossings in this sector. El Paso Project 8 would address these issues through the construction of new primary and secondary pedestrian barriers. This segment sees a high volume of drive-throughs because all that exists currently is a vehicle barrier that ends at the top of a hill. Vehicles are able to drive up and around and immediately get on a US road.

d) Natural Resource Values

El Paso Project 8 would address the same kinds of natural resources issues as those present at the El Paso Project 2 location. CBP has identified Southern Hidalgo County as home to many bird species including state species of concern like the Red-faced Warbler, Greater Pewee, Gould's Wild Turkey, Painted Redstart, and the Olive Warbler. Potential threatened and endangered species in this border area include eight species including the Mexican Grey Wolf, Northern Aplomado Falcon, the southwestern willow flycatcher, and the American Peregrine Falcon. According to its Southern Arizona Project 2016 Border Report, the BLM Field Offices along the border experience resource impacts from illegal border crossings, including unauthorized trails, trash and intrusion on biological resources. Illegal border crossings degrade watersheds and wildlife habitat through disturbance of soil, increasing soil erosion and destruction of vegetation. Warming fires can escape to become wildland fires that threaten human life and property. Fighting these fires is often more complex and costly due to safety concerns. Environmental damage is prevalent and requires extensive resources to remove litter, repair fences, restore biological resources, and maintain roads. CBP reports that illegal crossings in these specific areas of the border have resulted in impacts to habitat, plants and animals caused by the creation of foot trails and the deposition of trash, damaging or killing vegetation essential for food and habitat of endangered species and other animals. In addition, illegal vehicle crossings create vehicle trails, cause damage to vegetation and habitat, and lead to fires from abandoned or stuck vehicles.