

No. 19-17501

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

SIERRA CLUB, ET AL.,  
*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, ET AL.,  
*Defendants-Appellants.*

---

**On Appeal from the United States District Court  
for the Northern District of California**

No. 4:19-cv-00892

The Honorable Haywood S. Gilliam, Jr., Judge

---

**MOTION FOR LEAVE TO FILE BRIEF FOR THE STATES OF  
CALIFORNIA, COLORADO, HAWAII, MARYLAND, NEW MEXICO,  
NEW YORK, OREGON, VIRGINIA, AND WISCONSIN AS AMICI  
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION TO  
LIFT STAY PENDING APPEAL**

---

Xavier Becerra  
*Attorney General of California*  
Robert W. Byrne  
Michael L. Newman  
*Senior Assistant Attorneys General*  
Edward H. Ochoa  
*Acting Senior Assistant Attorney  
General*  
Michael P. Cayaban  
Christine Chuang  
*Supervising Deputy Attorneys General*

Brian J. Bilford  
Sparsh S. Khandeshi  
Lee I. Sherman  
Janelle M. Smith  
James F. Zahradka II  
Heather C. Leslie (SBN 305095)  
*Deputy Attorneys General*  
CALIFORNIA DEPARTMENT OF JUSTICE  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550  
(916) 210-7382  
[heather.leslie@doj.ca.gov](mailto:heather.leslie@doj.ca.gov)  
*Attorneys for Amici*

January 9, 2020

---

## CONSENT MOTION FOR LEAVE TO FILE BRIEF

The States of California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, and Wisconsin, and the Commonwealth of Virginia respectfully move for leave to file an amicus curiae brief supporting Plaintiffs-Appellants’ (“the *Sierra Club* Plaintiffs”) emergency motion for relief from the stay that the district court imposed on the permanent injunction that it issued.<sup>1</sup> The parties consent to the filing of the brief.

The States’ motion should be granted because they have a significant interest in the outcome of the *Sierra Club* Plaintiffs’ motion, particularly given the unique posture of this case. The district court granted declaratory relief to both the *Sierra Club* Plaintiffs and the States that Defendants’ diversion of \$3.6 million in military construction funds under 10 U.S.C. § 2808 toward a construction of a border wall is unlawful, but granted injunctive relief only to the *Sierra Club* Plaintiffs. The district court declined to rule on the States’ request for injunctive relief based on the court’s view that it was “duplicative” of the *Sierra Club* Plaintiffs’ relief. Further, as this Court recognized in its order denying the *Sierra Club* Plaintiffs’ original emergency motion, the Western District of Texas had issued an injunction

---

<sup>1</sup> States may file amicus briefs “without consent of the parties or leave of court” during initial consideration of a case on the merits. Fed. R. App. P. 29(a)(2). Because it is not clear whether this rule applies in the context of motions like that currently before the Court, out of an abundance of caution, the States have obtained consent from the parties.

precluding Defendants from using the § 2808 funds at issue for border wall construction beyond that authorized by Congress. However, the Fifth Circuit has stayed that injunction. Thus, the resolution of the pending motion will almost certainly impact the States, because the Amici States will be harmed if the stay is not lifted.

The States will focus their brief on the two stay factors related to the interests of Amici States and the public at large: (1) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (2) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Both of these factors support granting the *Sierra Club* Plaintiffs' motion and lifting the stay.

First, Defendants' diversions of funding from military construction projects within Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin will subject those States to serious financial harms in the form of lost tax revenue.

Second, the stay allows Defendants to go forward with construction of the border barriers in California and New Mexico without complying with those States' environmental laws, despite the fact that Congress has required federal agencies undertaking major federal construction projects to act in accordance with such laws.

Third, cancelling the military construction projects at issue here, 19 of which are located within the States, will put public health and safety at risk, as Defendants' own documents demonstrate.

Fourth, by diverting funds from military construction projects to use toward construction of a wall across the southern border that Congress declined to fund, the President subverted Congress's judgment in violation of separation of powers principles and contrary to the public interest.

### **CONCLUSION**

For the reasons stated above, the States request that this Court grant their consent motion for leave to file the attached brief as amici curiae supporting the *Sierra Club* Plaintiffs' motion to lift the stay.

Dated: January 9, 2020

Respectfully submitted,

*s/ Heather C. Leslie*

---

Xavier Becerra  
*Attorney General of California*  
Robert W. Byrne  
Michael L. Newman  
*Senior Assistant Attorneys General*  
Edward H. Ochoa  
*Acting Senior Assistant Attorney General*  
Michael P. Cayaban  
Christine Chuang  
*Supervising Deputy Attorneys General*  
Brian J. Bilford  
Sparsh S. Khandeshi  
Lee I. Sherman  
Janelle M. Smith  
James F. Zahradka II  
Heather C. Leslie (SBN 305095)  
*Deputy Attorneys General*  
*Attorneys for Amici*

[Counsel listing continues on next page]

PHILIP J. WEISER  
*Attorney General*  
*State of Colorado*  
1300 Broadway, 10th Floor  
Denver, CO 80203

CLARE E. CONNORS  
*Attorney General*  
*State of Hawaii*  
425 Queen Street  
Honolulu, HI 96813

BRIAN E. FROSH  
*Attorney General*  
*State of Maryland*  
200 Saint Paul Place  
Baltimore, MD 21202

HECTOR BALDERAS  
*Attorney General*  
*State of New Mexico*  
408 Galisteo Street  
Santa Fe, NM 87501

LETITIA JAMES  
*Attorney General*  
*State of New York*  
28 Liberty Street  
New York, NY 10005

ELLEN F. ROSENBLUM  
*Attorney General*  
*State of Oregon*  
1162 Court Street N.E.  
Salem, OR 97301

MARK R. HERRING  
*Attorney General*  
*Commonwealth of Virginia*  
202 N. Ninth Street  
Richmond, VA 23219

JOSHUA L. KAUL  
*Attorney General*  
*State of Wisconsin*  
P.O. Box 7857  
Madison, WI 53707

### CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 27(d)(2) and 32(c) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 585 words.

Dated: January 9, 2020

*s/ Heather C. Leslie*

---

Heather C. Leslie

### **CERTIFICATE OF SERVICE**

I certify that on December 16, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 9, 2020

*s/ Heather C. Leslie*

---

Heather C. Leslie



No. 19-17501

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

SIERRA CLUB, ET AL.,  
*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, ET AL.,  
*Defendants-Appellants.*

---

**On Appeal from the United States District Court  
for the Northern District of California**

No. 4:19-cv-00892

The Honorable Haywood S. Gilliam, Jr., Judge

---

**AMICUS BRIEF OF THE STATES OF CALIFORNIA, COLORADO,  
HAWAII, MARYLAND, NEW MEXICO, NEW YORK, OREGON,  
VIRGINIA, AND WISCONSIN IN SUPPORT OF PLAINTIFFS-  
APPELLANTS' MOTION TO LIFT STAY PENDING APPEAL**

---

Xavier Becerra  
*Attorney General of California*  
Robert W. Byrne  
Michael L. Newman  
*Senior Assistant Attorneys General*  
Edward H. Ochoa  
*Acting Senior Assistant Attorney  
General*  
Michael P. Cayaban  
Christine Chuang  
*Supervising Deputy Attorneys General*

Brian J. Bilford  
Sparsh S. Khandeshi  
Lee I. Sherman  
Janelle M. Smith  
James F. Zahradka II  
Heather C. Leslie (SBN 305095)  
*Deputy Attorneys General*  
CALIFORNIA DEPARTMENT OF JUSTICE  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550  
(916) 210-7382  
[heather.leslie@doj.ca.gov](mailto:heather.leslie@doj.ca.gov)  
*Attorneys for Amici*

January 9, 2020

---

## TABLE OF CONTENTS

	<b>Page</b>
INTERESTS OF AMICI AND INTRODUCTION .....	1
ARGUMENT .....	3
I. The Stay Substantially Injures Amici States .....	3
A. Amici States Will Lose Tens of Millions of Tax Dollars from Cancellation of Military Construction Projects .....	3
B. Proceeding with Construction of Defendants’ Border Barriers Pending Appeal Will Harm California’s and New Mexico’s Sovereign Interests in Enforcing Their State Laws .....	5
II. The Stay Harms the Public Interest .....	8
A. Cancelling Military Construction Projects Will Harm Public Health and Safety .....	8
B. Proceeding with Construction for Which Congress Explicitly Denied Funding Harms the Public’s Interest in Protecting Congress’s Power of the Purse .....	9
CONCLUSION .....	12

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Alfred L. Snapp &amp; Son, Inc. v. Puerto Rico ex rel. Barez</i> 458 U.S. 592 (1982).....	7
<i>California v. Azar</i> 911 F.3d 558 (9th Cir. 2018) .....	5
<i>City of Houston v. HUD</i> 24 F.3d 1421 (D.C. Cir. 1994).....	5
<i>City of Oakland v. Lynch</i> 798 F.3d 1159 (9th Cir. 2015) .....	5
<i>City of Sausalito v. O’Neill</i> 386 F.3d 1186 (9th Cir. 2004) .....	4
<i>Clinton v. City of New York</i> 524 U.S. 417 (1998).....	11, 12
<i>Dep’t of the Navy v. Fed. Labor Relations Auth.</i> 665 F.3d 1339 (D.C. Cir. 2012).....	10
<i>El Paso Cty. v. Trump</i> Case No. 19-51144 [Doc. 00515264406] (5th Cir. Jan. 8, 2020) .....	1
<i>Kansas v. United States</i> 249 F.3d 1213 (10th Cir. 2001) .....	7
<i>Maine v. Taylor</i> 477 U.S. 131 (1986).....	7
<i>Maryland v. King</i> 567 U.S. 1301 (2012).....	7
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> 434 U.S. 1345 (1977).....	7

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Nken v. Holder</i> 556 U.S. 418 (2009).....	3
<i>Office of Pers. Mgmt. v. Richmond</i> 496 U.S. 414 (1990).....	10, 11
<i>Sierra Club v. Trump</i> 929 F.3d 670 (9th Cir. 2019) .....	2, 12
<i>Tenn. Valley Auth. v. Hill</i> 437 U.S. 153 (1978).....	10
<i>Texas v. United States</i> 809 F.3d 134 (5th Cir. 2015) .....	3
<i>Trump v. Sierra Club</i> 140 S. Ct. 1 (2019).....	2
<i>United States v. McIntosh</i> 833 F.3d 1163 (9th Cir. 2016) .....	10
<i>Wyoming v. Oklahoma</i> 502 U.S. 437 (1992).....	4
 <b>FEDERAL STATUTES</b>	
United States Code, Title 10 § 2808.....	1, 2, 5
United States Code, Title 33 § 1323.....	6
§ 1341.....	6
United States Code, Title 42 § 7418.....	6
Consolidated Appropriations Act 2019 Pub. L. No. 116-6, 133 Stat. 13 (2019).....	11

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<b>STATE STATUTES</b>	
California Fish and Game Code	
§§ 2050-2089.26 .....	6
California Water Code	
§§ 13000-16104 .....	6
§ 13050.....	6
§ 13260.....	6
New Mexico Administrative Code	
§§ 20.2.23.6, 108-113 .....	6
<b>CONSTITUTIONAL PROVISIONS</b>	
New Mexico Constitution	
Article XX, § 21 .....	6
United States Constitution	
Article I, § 9, cl. 7 .....	10, 11, 12

## INTERESTS OF AMICI AND INTRODUCTION

The Amici States of California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, and Wisconsin, and the Commonwealth of Virginia have a significant interest in the outcome of Plaintiffs-Appellants’ (“*Sierra Club* Plaintiffs”) emergency motion for relief from the district court’s stay, particularly given the unique posture of this case. The district court granted declaratory relief to both the *Sierra Club* Plaintiffs and the Amici States, finding that Defendants’ diversion of \$3.6 billion in military construction funds under 10 U.S.C. § 2808 toward construction of a border wall was unlawful. However, the court denied the Amici States’ request for injunctive relief on the ground that such relief would be “duplicative” of the *Sierra Club* Plaintiffs’ injunction. Ex. 1, *California v. Trump*, Case No. 19-cv-872 (N.D. Cal.) (“*States* case”), ECF No. 257 (“Order”). Further, as this Court recognized in its order denying the *Sierra Club* Plaintiffs’ original emergency motion, the Western District of Texas had issued an injunction precluding Defendants from using the § 2808 funds at issue for border wall construction beyond that authorized by Congress. Order re Emergency Mot. for Stay 2 [Dkt. 12]. However, the Fifth Circuit has stayed that injunction. *El Paso Cty. v. Trump*, Case No. 19-51144 [Doc. 00515264406] (5th Cir. Jan. 8, 2020). Thus, the resolution of the pending motion will impact whether the Amici States are protected against the irreparable harm threatening them.

The States agree with the *Sierra Club* Plaintiffs that the district court's stay of its injunction here is legally erroneous. As this Court is aware, the *Sierra Club* Plaintiffs previously obtained a permanent injunction preventing Defendants from using other funds that they transferred under *separate* statutory authority relating to DoD's drug interdiction efforts. *Sierra Club v. Trump*, No. 19-cv-892 (N.D. Cal.), ECF No. 185. This Court denied Defendants' motion to stay that injunction. *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019). Defendants then sought relief from the Supreme Court, which granted a stay of the injunction in a one-paragraph order, stating only that "the Government has made a sufficient showing at this stage that the [Sierra Club] plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

In its stay order, the Supreme Court did not address § 2808. And neither the Supreme Court nor the Fifth Circuit's order address the threats to public health and safety and loss of tens of millions of dollars in state tax revenue created by Defendants' cancellation of military construction projects under that authority. All of these points weigh heavily against a stay here. Accordingly, as detailed below, the district court's stay of the injunction protecting the Sierra Club and the States was unjustified.

## ARGUMENT

The Amici States concur with—and need not repeat—the *Sierra Club* Plaintiffs’ arguments about the merits of their claim. Amici States focus instead on the final two stay factors: (1) injury to other parties interested in the proceeding (here, the States); and (2) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). These factors support granting the *Sierra Club* Plaintiffs’ motion and lifting the stay.

### I. THE STAY SUBSTANTIALLY INJURES AMICI STATES

#### A. Amici States Will Lose Tens of Millions of Tax Dollars from Cancellation of Military Construction Projects

Defendants’ actions will seriously harm the fiscs of Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin (“MILCON States”).<sup>1</sup> *See, e.g., Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015), *aff’d by equally divided court*, 136 S.Ct. 2271 (2016) (per curiam) (recognizing financial harms to states by federal actions that cause “a major effect on the states’ fiscs” and harms to state sovereignty by “federal interference with the enforcement of state law.”).

---

<sup>1</sup> California does not assert financial harm, though Defendants’ actions will harm California’s environmental and sovereign interests, *infra* § I.B, and will harm public health and safety in the State, *infra* § II.A.



Defendants intend to divert all funding from 19 separate military construction projects within these States. Ex. 2, *States* case, ECF No. 207-1. Unrebutted evidence demonstrates that Defendants' diversion of funds from these projects will cause lost sales for contractors and subcontractors for the projects, for various firms in the supply chains, and for companies selling goods and services to individuals hired to work directly on the projects or at some point in the supply chain. Ex. 3, Reaser Decl. ¶ 18, *States* case, ECF No. 220-3. This lost business activity would have created tax revenues for the MILCON States. Defendants' actions will reduce the tax revenues of these states and their municipalities by over \$36 million. *Id.* ¶ 20.<sup>2</sup>

Such decreases in tax revenues are cognizable harms. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (standing for Wyoming arose from its loss of specific tax revenues); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198 (9th Cir. 2004) (recognizing financial harm from, *inter alia*, decreased tax revenue "due to impaired vehicular movement and commerce" caused by federal plan to develop and rehabilitate a former military base even where harm could not be quantified);

---

<sup>2</sup> In addition to tax revenues, the construction projects cancelled by Defendants would have generated \$366 million in direct and inter-state benefits to the MILCON States' economies even when offsetting the economic benefits that would result from the border barrier construction in New Mexico and California. *Id.* ¶ 18. These financial losses are also clearly relevant to the broader public interest. *See infra* § II.A.

*City of Oakland v. Lynch*, 798 F.3d 1159, 1164 (9th Cir. 2015) (recognizing “[a]n expected loss of tax revenue” as harm).

These harms are irreparable and, thus, justify lifting the stay. This Court recently affirmed in *California v. Azar* that “[economic] harm . . . is irreparable [where] the states will not be able to recover monetary damages” to compensate for financial losses. 911 F.3d 558, 581 (9th Cir. 2018). Without an injunction, Defendants would be free to redirect the funds previously slated for military construction projects in the MILCON States, six of which have January 2020 award dates, toward border wall construction. Moreover, once those funds have been obligated for border barrier construction, “the federal courts are without authority to provide monetary relief.” *City of Houston v. HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994). Therefore, without an injunction, even if the MILCON States ultimately prevail on the appeal they face a substantial risk of being forever deprived of the tax revenue that would be lost by the unlawful diversions. *See id.* Lifting the stay is necessary to ensure the MILCON States’ interests in these funds are protected for the duration of the appeal.

**B. Proceeding with Construction of Defendants’ Border Barriers Pending Appeal Will Harm California’s and New Mexico’s Sovereign Interests in Enforcing Their State Laws**

The district court’s stay also undermines California’s and New Mexico’s sovereign interests. Defendants cite § 2808’s clause authorizing military

construction projects “without regard to any other provision of law,” *see States* case, ECF No. 236 at 25, to refuse to comply with any environmental laws—including those adopted and enforced by California and New Mexico—in constructing border barriers, despite the fact that Congress has specifically mandated that these kind of state laws typically apply to major federal construction projects.

Both California and New Mexico have implemented numerous laws to protect their natural resources and environments, and public health. *See, e.g.*, Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2089.26; N.M. Const., art. XX, § 21; N.M. Admin. Code §§ 20.2.23.6, 108-113. Congress has decreed that federal construction projects are normally subject to these laws. *See, e.g.*, 33 U.S.C. §§ 1323(a), 1341(a) (requiring federal agencies to comply with state law standards concerning water quality and to obtain certification from a state agency demonstrating that compliance); 42 U.S.C. § 7418(a) (requiring federal agencies to comply with state law standards concerning air quality); Cal. Water Code §§ 13050(c), 13260 (imposing requirements on “persons” including the United States before discharging waste into state waters); Ex. 4, *States* case, ECF No. 220 at 21-26. Defendants, however, plan to construct border barriers using unlawfully

diverted military construction funds without following California's and New Mexico's environmental laws. *See* Ex. 5, *States* case, ECF No. 212-2 at 9.

A state suffers irreparable harm when prevented from enforcing its laws. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). States possess undeniable sovereign interests in their “power to create and enforce a legal code,” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982), including codes protecting the natural resources and public health within their borders, *see Maine v. Taylor*, 477 U.S. 131, 151 (1986). Federal actions that unlawfully impede or prevent states from enforcing their laws undermine state sovereign interests and inflict irreparable injury to those states. *See, e.g., New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001) (harm from federal agency action that undermines state’s “sovereign interests and public policies” is irreparable). Accordingly, Defendants’ proposed course of action—to proceed with construction of border barriers in disregard of California’s and New Mexico’s environmental laws—will inflict an irreparable injury on those states.

## II. THE STAY HARMS THE PUBLIC INTEREST

### A. Cancelling Military Construction Projects Will Harm Public Health and Safety

Defendants' planned cancellation of over 120 military construction projects, 19 of which are located within the Amici States, will also put public health and safety at risk. *See* Ex. 2, *States* case, ECF No. 207-1. When originally seeking funding for these projects, DoD explained that they were necessary to prevent specific public health and safety harms. Ex. 6, Plaintiffs' RJN Exs. 2-19, *States* case, ECF No. 220-5. Because of the district court's stay, the retrofits, upgrades, and other important changes for which Congress appropriated funds will not occur, and those serious health and safety concerns will remain unaddressed. For example, Defendants cancelled two projects totaling \$41 million to construct new hazardous materials warehouses at Naval Stations in Virginia to replace existing World War II-era facilities not equipped for storing such materials. *Id.* RJN Exs. 15, 17. As a consequence, Virginia residents face an increased risk of harms from the release of hazardous materials. Virginia residents will face additional risks as a result of the funding diversions because the Navy will no longer be able to build a nuclear containment shop and new ship maintenance facility to replace a facility the Navy itself described as presenting "severe life safety and environmental concerns" and a "high risk environment." *Id.* RJN Ex. 18 at 2. And residents of Hawaii will face increased risks due to cancellation of a \$26.5 million project to

improve security at an access point to a Marine Corps Base that, according to the Marine Corps, is needed to comply with current anti-terrorism and force protection standards. *Id.* RJN Ex. 5.

In addition, the California Air National Guard will lose funding for an \$8 million facility that would have housed a C-130J flight simulator to provide enhanced training to flight crews that regularly combat massive wildfires in California. Ex. 7, Green Decl. ¶¶ 6-9, 15-16, 18-25, *States* case, ECF No. 220-2. In a state that faces increasing threats due to wildfires, the elimination of this enhanced training will expose Californians and their communities to significant health and safety risks. *Id.* ¶¶ 8, 25.

As district court amicus the Iraq and Afghanistan Veterans of America rightly observed, these cancelled projects “would have significantly improved the safety of our service members” and “provid[ed] the military with a work environment that is worthy of their service.” Ex. 8, *States* case, ECF No. 232, at 6-7. Because their cancellation puts public health and safety at risk, the public interest weighs heavily in favor of lifting the stay.

**B. Proceeding with Construction for Which Congress Explicitly Denied Funding Harms the Public’s Interest in Protecting Congress’s Power of the Purse**

Finally, the federal government’s interest in enforcing immigration laws, no matter how important, cannot outweigh the public’s interest in safeguarding the

judgments made by Congress in the appropriations process and the structural separation of powers protections that are the foundation of our Constitution.

It is the “exclusive province of the Congress not only to formulate the legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). The Constitution arms Congress with the power to set those priorities through the “straightforward and explicit command” in the Appropriations Clause that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting U.S. Const. art. I, § 9, cl. 7). Then-Judge Kavanaugh described the Appropriations Clause as a “bulwark of the Constitution’s separation of powers ... particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.” *Dep’t of the Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (internal quotations omitted); *see also United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (noting that the Appropriations Clause “plays a critical role in the Constitution’s separation of powers among the three branches of government and the checks and balances between them.”).

The Appropriations Clause’s check on unilateral executive spending “assure[s] that public funds will be spent according to the letter of the difficult judgments reached by the Congress as to the common good, and not according to the individual favor of Government agents.” *Richmond*, 496 U.S. at 428. Congress’s judgment here was clear: Congress specifically considered and rejected the Administration’s repeated requests to spend billions of dollars toward the construction of a border wall across the southwest border. *See* Order 2. Instead, Congress agreed to appropriate only \$1.375 billion for pedestrian border barrier funding in the FY 2019 Consolidated Appropriations Act (“CAA”) to be built solely in a specified area in Texas and subject to congressionally prescribed limitations. Pub. L. No. 116-6, §§ 230-32, 133 Stat. 13, 28 (2019). By diverting funds from military construction projects that Congress specifically *chose* to fund, toward construction of a wall across the southern border that Congress *declined* to fund, the President “reject[ed] the policy judgment made by Congress” and impermissibly substituted “his own policy judgment” based “on the same conditions [Congress] evaluated when it passed [the CAA].” *Clinton v. City of New York*, 524 U.S. 417, 443-44 (1998).

This subversion of separation of powers principles is profoundly adverse to the public interest. That is, if “the decision to spend [is] determined by the Executive alone, without adequate control by the citizen’s Representatives in



Congress, liberty is threatened.” *City of New York*, 524 U.S. at 451 (Kennedy, J., concurring); *Sierra Club*, 929 F.3d at 704 (“The Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation’s sake.”). An injunction, therefore, is necessary to preserve the core fabric of our Constitution, and the individual rights and liberty that its structure guarantees.

### CONCLUSION

Amici States request that this Court grant the *Sierra Club* Plaintiffs’ motion and lift the stay.

Dated: January 9, 2020

Respectfully submitted,

*s/ Heather C. Leslie*

---

Xavier Becerra  
*Attorney General of California*  
Robert W. Byrne  
Michael L. Newman  
*Senior Assistant Attorneys General*  
Edward H. Ochoa  
*Acting Senior Assistant Attorney General*  
Michael P. Cayaban  
Christine Chuang  
*Supervising Deputy Attorneys General*  
Brian J. Bilford  
Sparsh S. Khandeshi  
Lee I. Sherman  
Janelle M. Smith  
James F. Zahradka II  
Heather C. Leslie (SBN 305095)  
*Deputy Attorneys General*  
*Attorneys for Amici*

[Counsel listing continues on next page]

PHILIP J. WEISER  
*Attorney General*  
*State of Colorado*  
1300 Broadway, 10th Floor  
Denver, CO 80203

CLARE E. CONNORS  
*Attorney General*  
*State of Hawaii*  
425 Queen Street  
Honolulu, HI 96813

BRIAN E. FROSH  
*Attorney General*  
*State of Maryland*  
200 Saint Paul Place  
Baltimore, MD 21202

HECTOR BALDERAS  
*Attorney General*  
*State of New Mexico*  
408 Galisteo Street  
Santa Fe, NM 87501

LETITIA JAMES  
*Attorney General*  
*State of New York*  
28 Liberty Street  
New York, NY 10005

ELLEN F. ROSENBLUM  
*Attorney General*  
*State of Oregon*  
1162 Court Street N.E.  
Salem, OR 97301

MARK R. HERRING  
*Attorney General*  
*Commonwealth of Virginia*  
202 N. Ninth Street  
Richmond, VA 23219

JOSHUA L. KAUL  
*Attorney General*  
*State of Wisconsin*  
P.O. Box 7857  
Madison, WI 53707

### CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 2,599 words excluding the parts exempted by Fed. R. App. P. 32(f). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it because it uses a proportionately spaced Times New Roman font and has a typeface of 14 points.

Dated: January 9, 2020

*s/ Heather C. Leslie*  
\_\_\_\_\_  
Heather C. Leslie

### **CERTIFICATE OF SERVICE**

I certify that on January 10, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 9, 2020

*s/ Heather C. Leslie*

---

Heather C. Leslie

# EXHIBIT 1

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.
SIERRA CLUB, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.

Case No. [19-cv-00872-HSG](#)

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’ MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS’ MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

Re: Dkt. No. 220, 236

Case No. [19-cv-00892-HSG](#)

Re: Dkt. Nos. 210, 236

Pending before the Court are cross-motions for partial summary judgment in two related cases, *State of California v. Trump*, No. 19-cv-00872-HSG, and *Sierra Club v. Trump*, No. 19-cv-00892-HSG.<sup>1</sup> Plaintiffs in both cases challenge Defendants’ proposed reallocation of \$3.6 billion in military construction funds under 10 U.S.C. § 2808 (“Section 2808”) to build a wall along the southern border of the United States. Section 2808 is just one of several alternative sources of

<sup>1</sup> Plaintiffs in *State of California v. Trump* are a coalition of nine states, including California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Wisconsin, and the Commonwealth of Virginia (“State Plaintiffs”). Plaintiffs in *Sierra Club v. Trump* include the Sierra Club and the Southern Border Communities Coalition (“Sierra Club Plaintiffs”). Because Plaintiffs’ motions for summary judgment overlap considerably, the Court refers collectively to both State and Sierra Club Plaintiffs in this order as “Plaintiffs,” unless otherwise specified. Defendants in both cases include President Donald J. Trump and certain of his cabinet members, in their official government capacities. The Court refers to them collectively as “Defendants” in this order to avoid confusion in light of the apparent conflict between the Executive and Legislative branches of the government in these cases.

United States District Court  
Northern District of California

1 funding that Defendants identified for border construction after Congress appropriated only  
 2 \$1.375 billion for that purpose in the Consolidated Appropriations Act of 2019 (“CAA”), far less  
 3 than the \$5.7 billion the President ultimately requested. *Compare California*, 19-cv-00872-HSG,  
 4 Dkt. No. 59-4, Ex. 25, with CAA, Pub. L. No. 116-6, 133 Stat. 13 (2019). Plaintiffs assert that  
 5 Defendants’ reliance on Section 2808—like Defendants’ other alternative funding plans—  
 6 improperly circumvents the CAA and Congress’ appropriations power under the Constitution.<sup>2</sup>  
 7 Plaintiffs therefore seek declaratory and injunctive relief, prohibiting Defendants from using funds  
 8 under Section 2808 to build border barriers.

9 As the Court has previously explained, these two cases are not about—and the Court offers  
 10 no opinion regarding—whether the challenged border barrier construction plan is sound policy.  
 11 *See City and County of San Francisco v. United States Citizenship and Immigration Services*, No.  
 12 19-17213, (9th Cir. Dec. 5, 2019), Dkt. No. 27 at 2–3 (Bybee, J., concurring) (explaining that  
 13 “even as we are embroiled in these controversies, no one should mistake our judgments for our  
 14 policy preferences,” and that “our thoughts on the efficacy of the one approach versus the other  
 15 are beside the point, since our business is not to judge the wisdom of the National Government’s  
 16 policy” (quotation omitted)); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the  
 17 Supreme Court “express[ed] no view on the soundness of the policy” at issue there); *In re Border*  
 18 *Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court  
 19 “cannot and does not consider whether underlying decisions to construct the border barriers are  
 20 politically wise or prudent”).<sup>3</sup> Neither does the Court here address any of the other sources of  
 21 funding that Defendants have identified to pay for the border barrier construction. Rather, the  
 22 issues currently before the Court are narrow: whether Defendants’ proposed plan for funding

---

24 <sup>2</sup> The Appropriations Clause of the Constitution provides that “No Money shall be drawn from the  
 Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art I., § 9, cl. 7.

25 <sup>3</sup> There also appears to be no dispute between the Executive and Congress that at least some  
 26 border barrier construction is warranted, as Congress has historically appropriated funds for this  
 27 purpose. For fiscal year 2018, for example, Congress appropriated \$1.571 billion for physical  
 barriers and associated technology along the southwest border. *See California*, No. 19-cv-00872-  
 HSG, Dkt. No. 161; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F,  
 tit. II, § 230(a) 132 Stat. 348 (2018). And even for fiscal year 2019, the Administration initially  
 28 requested \$1.6 billion for border barrier construction, *see California*, No. 19-cv-00872-HSG, Dkt.  
 No. 112-1, Ex. 51 at 58, and Congress appropriated \$1.375 billion, *see CAA*, 133 Stat. 13.



United States District Court  
Northern District of California

1 border barrier construction under Section 2808 (1) exceeds the Executive Branch’s statutory and  
2 constitutional authority; (2) is arbitrary and capricious under the Administrative Procedures Act, 5  
3 U.S.C. §§ 551 *et seq.*, (“APA”); and (3) violates the National Environmental Policy Act  
4 (“NEPA”).

5 Nevertheless, the Court assesses these issues against a complicated and unprecedented  
6 backdrop. As an initial matter, presidents have only invoked Section 2808 twice since it was  
7 enacted in 1982. *See* Michael J. Vassalotti & Brendan W. McGarry, *Military Construction*  
8 *Funding in the Event of a National Emergency*, Cong. Research Serv., IN11017 (Jan. 11, 2019) at  
9 2–3; Jennifer K. Elsea, Edward C. Lieu, & Jay B. Sykes, *Can the Department of Defense Build*  
10 *the Border Wall*, Cong. Research Serv., LSB10242 (Feb. 18, 2019) at 3–4. Of the military  
11 construction projects funded through Section 2808, only one was located in the United States, and  
12 that project related to securing facilities holding weapons of mass destruction shortly after the 9/11  
13 attacks. *See, e.g.*, Vassalotti, at 1–3; *see also Sierra Club*, 19-cv-00892-HSG, Dkt. No. 236-5, Ex.  
14 5. And critically, a president has never before invoked Section 2808 to secure funding for projects  
15 that Congress specifically declined to fund in its appropriations judgment. *Id.* Yet here the  
16 President has been explicit in his intention to obtain funds for border barrier construction, with or  
17 without Congress. *See, e.g., California*, 19-cv-00872-HSG, Dkt. No. 59-4, Exs. 13, 21; *Sierra*  
18 *Club*, 19-cv-00892-HSG, Dkt. No. 36-3, Ex. C. Accordingly, the President invoked Section 2808  
19 the day after Congress passed the CAA, which provided limited funding for, and contained  
20 restrictions regarding funding for, border barrier construction. *See* CAA, § 230(a)(1), 133 Stat. at  
21 28.

22 The Court heard argument on these motions on November 20, 2019. *See California*, 19-  
23 cv-00872-HSG, Dkt. No. 250; *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 248. After carefully  
24 considering the parties’ arguments, the Court **GRANTS IN PART** Sierra Club Plaintiffs’ partial  
25 motion for summary judgment; **GRANTS IN PART** State Plaintiffs’ partial motion for summary  
26 judgment; and **DENIES** Defendants’ motions.

27 //  
28 //

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**I. BACKGROUND**

**A. Factual Background**

The Court has detailed the lengthy history of these cases in its prior orders, and incorporates the factual background in full. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 144. The Court also briefly summarizes and notes subsequent factual developments as relevant to this order.

**i. Emergency Declaration**

Following the longest partial government shutdown in the nation’s history, Congress passed the CAA on February 14, 2019, making available \$1.375 billion “for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.” *See CAA*, § 230(a)(1), 133 Stat. at 28. On February 15, 2019, the President signed the CAA into law. *See generally id.* That same day, the President invoked his authority under the National Emergencies Act (“NEA”), Pub. L. 94–412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–51), and declared that “a national emergency exists at the southern border of the United States.” *See Proclamation No. 9844*, 84 Fed. Reg. 4,949 (Feb. 15, 2019) (“Proclamation No. 9844”). The proclamation further “declar[ed] that this emergency requires use of the Armed Forces,” and made available “the construction authority provided in [S]ection 2808.” *Id.* When announcing the proclamation, the President explained that he initially “went through Congress” for the \$1.375 billion in funding, but was “not happy with it.” *See California*, No. 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 50.

Since that time, Congress has sought to terminate the national emergency on two separate occasions. On March 14, 2019, Congress passed a joint resolution to terminate the emergency declaration. *See H.R.J. Res. 46*, 116th Cong. (2019). On March 15, 2019, the President vetoed the joint resolution. *See Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), <https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/>. Congress failed to override the President’s veto. *See 165 Cong. Rec. H2799, H2814–15* (2019). On September 27, 2019, Congress passed a second joint resolution to terminate the emergency declaration. *See S.J. Res. 54*, 116th Cong. (2019). And on

1 October 15, 2019, the President vetoed the second joint resolution. *See S.J. Res. 54 Veto Message*,  
 2 The White House (Oct. 15, 2019), [https://www.whitehouse.gov/presidential-actions/s-j-res-54-](https://www.whitehouse.gov/presidential-actions/s-j-res-54-veto-message/)  
 3 [veto-message/](https://www.whitehouse.gov/presidential-actions/s-j-res-54-veto-message/) (“S.J. Res. 54 Veto Message”). Again, Congress failed to override the veto. *See*  
 4 S.J. Res. 54, 116 Cong. (2019). Congress has an ongoing obligation to consider whether to  
 5 terminate the emergency every six months, but the President’s declaration of a national emergency  
 6 remains in effect.<sup>4</sup> *See* 50 U.S.C. § 1622(a)–(b).

7 **ii. Military Construction Funds and Diverted Projects**

8 On February 11, 2019, prior to the President’s proclamation and invocation of Section  
 9 2808, the Chairman of the Joint Chiefs of Staff submitted a preliminary assessment to the Acting  
 10 Secretary of Defense regarding whether and how military construction projects could support the  
 11 use of the armed forces in addressing a national emergency at the southern border. *See California*,  
 12 No. 19-cv-00872-HSG, Dkt. No. 212 (“Administrative Record” or “AR”)<sup>5</sup> at 119–124. The  
 13 memorandum explained that the Department of Homeland Security (“DHS”) identified specific  
 14 geographic areas in which border barriers could allow Department of Defense (“DoD”) personnel  
 15 and resources “to be employed more efficiently” and “reduce DHS requirements for DoD  
 16 support.” *Id.* However, although the President authorized use of military construction funds  
 17 under Section 2808 in his February 15 proclamation, Defendants did not exercise this authority for  
 18 several months.

19 Instead, in the intervening months, the Chairman of the Joint Chiefs of Staff submitted a  
 20 supplemental assessment on May 6, 2019, regarding military construction projects at the southern

21 \_\_\_\_\_  
 22 <sup>4</sup> Under the NEA as initially drafted in 1976, the national emergency would have ended once  
 23 Congress passed the first joint resolution. The NEA did not require a presidential signature on the  
 24 joint resolution, nor was it subject to a presidential veto, until the Supreme Court ruled in *INS v. Chadha*  
 25 that the president must have the power to approve or veto such congressional acts. *See* 462 U.S. 919,  
 26 944–58 (1983).

27 <sup>5</sup> The parties do not oppose the Court’s consideration of the administrative record, *see California*,  
 28 No. 19-cv-00872-HSG, Dkt. Nos. 212-2, 212-3, 212-4, or the Plaintiffs’ request to take judicial  
 notice of various documents. The Court finds it may take judicial notice of documents from the  
 administrative record and Plaintiffs’ requests that are cited in this order, all of which are:  
 (1) statements of government officials or entities that are not subject to reasonable dispute; or  
 (2) other public records and government documents available on reliable internet sources, such as  
 government websites. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5 (9th  
 Cir. 2018) (taking “judicial notice of government documents, court filings, press releases, and  
 undisputed matters of public record”).

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

border. *See* AR at 59–70. In the updated memorandum, the Chairman again concluded that such construction “can reasonably be expected to support the use of the armed forces by enabling more efficient use of DoD personnel, and may ultimately reduce the demand for military support over time.” *See id.* at 60. The Chairman explained that although “any border barrier construction supports the use of the armed forces on the border to some extent,” the Joint Chiefs prioritized fifteen projects, totaling \$3.6 billion. *See id.* at 63. On May 15, 2019, Defendants informed the Court that the Under Secretary of Defense had identified existing military construction project funding to divert for border barrier construction pursuant to Section 2808, but that the Acting Secretary of Defense had “not yet decided to undertake or authorize any barrier construction projects under § 2808.” *See California*, 19-cv-00872-HSG, Dkt. No. 151 at 3.

Then on September 3, 2019, the Secretary of Defense announced that he had decided to authorize eleven specific border barrier construction projects in California, Arizona, New Mexico, and Texas, pursuant to Section 2808. *See California*, 19-cv-00872-HSG, Dkt. Nos. 206, 206-1, Ex. 1. In doing so, he reiterated that these projects “will reduce the demand for DoD personnel and assets to other high-traffic areas on the border without barriers.” *See id.*, Dkt. No. 206-1, Ex. 1. He concluded that “[i]n short, these barriers will allow DoD to provide support to DHS more efficiently and effectively.” *Id.*

Collectively, the eleven projects total \$3.6 billion and include 175 miles of border barrier construction across four states. *Id.* These projects fall into three categories:

- Two projects on the Barry M. Goldwater Range military installation in Arizona;
- Seven projects on federal public domain land that is under the jurisdiction of the Department of the Interior; and
- Two projects on non-public land that would need to be acquired through either purchase or condemnation before construction could begin.

*See id.*, Dkt. Nos. 206 at 2–4, 206-1, Ex. 1. The Secretary of Defense authorized the Secretary of the Army “to expeditiously undertake the eleven border barrier military construction projects,” including taking the necessary steps to acquire the public domain and non-public land as part of “the Army’s real property inventory, either as a new military installation or as part of an existing

United States District Court  
Northern District of California

1 military installation.” *See id.*, Dkt. No. 206-1, Ex. 1 at 1; *see also* AR at 3–6, 9–10, 30–31. That  
2 same day, in a briefing on the use of Section 2808, DoD representatives explained that the \$3.6  
3 billion would “all go to adding significantly new capabilities to DHS’s ability to prevent illegal  
4 entry.” *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 17 at 5.

5 Two days later, on September 5, 2019, the Secretary of Defense identified which military  
6 construction projects DoD intended to defer in order to fund the border barrier construction  
7 projects. *See California*, 19-cv-00872-HSG, Dkt. Nos. 207, 207-1, Ex. 1. In total, the Secretary  
8 of Defense authorized diverting funding from 128 military construction projects, domestically and  
9 abroad. *See id.*, Dkt. No. 207-1, Ex. 1. Sixty-four of the defunded military construction projects  
10 are located within the United States; and nineteen projects, totaling over \$500 million, are within  
11 Plaintiff States California, Colorado, Hawaii, Maryland, New Mexico, Oregon, Virginia, and  
12 Wisconsin. *See id.*; *see also id.*, No. 19-cv-00872-HSG, Dkt. No. 220-5, Exs. 2–19.

13 The Secretary of Defense explained that he sought to identify projects for defunding and  
14 deferral based on the projects’ timing, and thus the 128 projects “are not scheduled for award until  
15 fiscal year 2020 or later.” *See* AR at 13. Doing so, he stated, would “provide [DoD] time to work  
16 with [Congress] to determine opportunities to restore funds for these important military  
17 construction projects . . . .” *California*, 19-cv-00872-HSG, Dkt. No. 206-2, Ex. 2 at 2; *cf.* S. 1790,  
18 116th Cong. § 2906 (“Replenishment of Certain Military Construction[] Funds”). The deferred  
19 projects include rebuilding hazardous materials warehouses at Norfolk and the Pentagon;  
20 replacing a daycare facility for servicemembers’ children at Joint Base Andrews, which reportedly  
21 suffers from “sewage backups, flooding, mold and pests”; and improving security to comply with  
22 anti-terrorism and force protection standards at Kaneohe Bay. *See Sierra Club*, No. 19-cv-00892-  
23 HSG, Dkt. No. 202-1, Ex. 1; *id.*, Dkt. No. 210-2, Ex. 18; *see also California*, No. 19-cv-00872-  
24 HSG, Dkt. No. 232 (Brief of *Amici Curiae* Iraq and Afghanistan Veterans of America) (“IAVA  
25 Brief”).

26 In accordance with the Secretary of Defense’s directive, the Secretary of the Army has  
27 taken steps over the past few months to obtain administrative jurisdiction over some of the land  
28 for the border barrier construction projects. On October 7, 2019, the Secretary of the Interior

United States District Court  
Northern District of California

1 announced the transfer of approximately 560 acres of federal lands to the Department of the Army  
 2 for a period of three years for border barrier construction in Arizona, California, and New Mexico.  
 3 *See California*, No. 19-cv-00872-HSG, Dkt. No. 220-5, Ex. 1. Additionally, on October 8, 2019,  
 4 the Secretary of the Army issued General Order No. 2019-36, which automatically assigns all land  
 5 transferred to the Army for Section 2808 border barrier construction projects to the U.S. Army  
 6 Garrison Fort Bliss, Texas, irrespective of the location of the land. *See id.*, Dkt. No. 236-7, Ex. 7.

7 During the hearing on the motions for partial summary judgment, Defendants’ counsel also  
 8 represented to the Court that there have been two contracts awarded related to the border barrier  
 9 construction projects. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 81:2–24. The first  
 10 contract relates to the projects on the Barry M. Goldwater Range, in Arizona: that contract was  
 11 awarded on November 6, 2019, and ground disturbing activity was anticipated to start no earlier  
 12 than November 27, 2019. *Id.* The second contract relates to a project in San Diego County,  
 13 California: that contract was awarded on November 19, 2019, and ground disturbing activity was  
 14 anticipated to start no earlier than December 9, 2019. *Id.*

**B. Procedural History**

15  
 16 Following the passage of the CAA and the President’s national emergency declaration in  
 17 February 2019, the State and Sierra Club Plaintiffs filed suit challenging Defendants’ anticipated  
 18 diversion of federal funds for border barrier construction pursuant to several statutory provisions.  
 19 These include reallocating funds from the Treasury Forfeiture Fund; DoD’s Appropriations Act of  
 20 2019 under Section 8005 and 10 U.S.C. § 284; and DoD appropriations for military construction  
 21 projects under Section 2808. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 36-7, Ex. G at 2–  
 22 4; *see also id.*, Dkt. No. 64-8, ¶¶ 5–6.

23 The Court first preliminarily enjoined Defendants’ use of funds for two border barrier  
 24 construction projects in New Mexico and Arizona under Section 8005. *See Sierra Club*, No. 19-  
 25 cv-00892-HSG, Dkt. No. 144. The Court reasoned that Plaintiffs were likely to show that (1) the  
 26 language and purpose of Section 8005 precluded Defendants’ transfer and use of funds for  
 27 construction of border barriers because Congress had already explicitly denied those requested  
 28 funds; (2) the need for such funds was not unforeseen as the Administration had requested such

United States District Court  
Northern District of California

1 funding as early as 2018; and (3) Defendants’ proposal likely would violate the Constitution’s  
 2 separation of powers principles to the extent it bypassed Congress’ appropriations authority. *Id.*  
 3 At the time, Sierra Club Plaintiffs also sought a preliminary injunction to preclude Defendants’  
 4 proposed use of Section 2808. *See id.*, Dkt. No. 29 at 13–15, 23–25. However, the Court found  
 5 that Plaintiffs could not show irreparable harm as needed to warrant an injunction because as of  
 6 May 2019, Defendants had not yet made a final decision as to whether to use Section 2808 funds.  
 7 *Id.*, Dkt. No. 144 at 51–53.

8 The Court subsequently affirmed its ruling on Defendants’ use of Section 8005, granting in  
 9 part the motions for partial summary judgment filed by California, New Mexico, and the Sierra  
 10 Club Plaintiffs, and denying Defendants’ motions for partial summary judgment. *See California*,  
 11 No. 19-cv-00872-HSG, Dkt. No. 185; *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 185. The  
 12 Court entered a permanent injunction, prohibiting Defendants from taking any action to construct  
 13 a border barrier in the six sectors that Defendants identified in New Mexico, Arizona, and  
 14 California, using funds reprogrammed by DoD under Section 8005. *Sierra Club*, No. 19-cv-  
 15 00892-HSG, Dkt. No. 185 at 10.

16 Following the Court’s summary judgment orders, Defendants filed an emergency  
 17 application with the Ninth Circuit for a stay of the injunction. On July 3, 2019, the Ninth Circuit  
 18 motions panel denied the stay application, finding that Defendants’ border barrier construction  
 19 was not authorized by any statutory appropriation, such that the proposed reprogramming and use  
 20 of these funds violated the Appropriations Clause. *See Sierra Club v. Trump*, 929 F.3d 670, 676–  
 21 77 (9th Cir. 2019). The motions panel further held—over Defendants’ objection—that Plaintiffs  
 22 have an equitable cause of action to challenge Defendants’ funding proposal as unconstitutional,  
 23 and that Plaintiffs satisfied any “zone of interests” test that may apply to their claim. *See id.* at  
 24 694–704; *see also* Section III.A below.

25 On July 26, 2019, the Supreme Court stayed the permanent injunction pending resolution  
 26 of the government’s appeal before the Ninth Circuit and any subsequent writ of certiorari. *See*  
 27 *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). In the one-paragraph decision, the Supreme Court  
 28 stated that “the Government has made a sufficient showing at this stage that the plaintiffs have no

United States District Court  
Northern District of California

1 cause of action to obtain review of the Acting Secretary’s compliance with Section 8005.” *Id.*  
2 The Supreme Court, however, provided no further explication of its reasoning, and the appeal  
3 before the Ninth Circuit regarding Section 8005 remains pending.

4 In the interim, the parties agreed to stay the summary judgment briefing schedule as to  
5 Section 2808 and the Treasury Forfeiture Fund until the Acting Secretary of Defense and U.S.  
6 Customs and Border Protection (“CBP”), respectively, reached a final decision to fund specific  
7 barrier construction projects under these provisions. *See California*, No. 19-cv-00872-HSG, Dkt.  
8 Nos. 199, 200; *Sierra Club*, No. 19-cv-00892-HSG, Dkt. Nos. 191, 197. Because the Secretary of  
9 Defense has since announced his authorization for border barrier construction projects pursuant to  
10 Section 2808, as detailed in Section I.A.ii above, the parties now move for partial summary  
11 judgment as to this proposal.

12 **II. LEGAL STANDARD**

13 Summary judgment is proper when a “movant shows that there is no genuine dispute as to  
14 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).  
15 A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*  
16 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is “genuine” if there is evidence  
17 in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.*  
18 But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from  
19 the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec.*  
20 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986), and “may not weigh the evidence  
21 or make credibility determinations,” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997),  
22 *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008). If a court  
23 finds that there is no genuine dispute of material fact as to only a single claim or defense or as to  
24 part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

25 **III. DISCUSSION**

26 **A. Plaintiffs’ Cause of Action**

27 As a threshold matter, Defendants contend that Plaintiffs lack a cause of action through  
28 which they may challenge the proposed use of military construction funds under Section 2808.



United States District Court  
Northern District of California

1 They argue that Plaintiffs may not seek equitable relief through an implied cause of action under  
 2 the Constitution, and that Plaintiffs fall outside the zone of interests protected by Section 2808 and  
 3 the CAA. As Defendants acknowledge, they raised the same arguments before this Court and the  
 4 Ninth Circuit motions panel in the context of Plaintiffs’ challenge to funding a border wall using  
 5 Section 8005. In response, the Ninth Circuit engaged in a detailed discussion—and rejection—of  
 6 each point, concluding that “Plaintiffs have an avenue for seeking relief.” *See Sierra Club*, 929  
 7 F.3d at 694–704; *see also Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 245 (Brief of *Amici*  
 8 *Curiae* Federal Courts Scholars).

9 *First*, the Ninth Circuit held that Plaintiffs could challenge the reprogramming of funds  
 10 under Section 8005 “through an equitable action to enjoin unconstitutional official conduct.”  
 11 *Sierra Club*, 929 F.3d at 694. Plaintiffs’ argument there, as here, is that Defendants’ attempt to  
 12 reprogram funds for border barrier construction violates the Appropriations Clause, and thus  
 13 separation of powers principles, because “Defendants lack any background constitutional authority  
 14 to appropriate funds.” *See id.* at 696. The Ninth Circuit confirmed that such a claim is  
 15 “fundamentally a constitutional one,” and “Plaintiffs may seek equitable relief to remedy an  
 16 alleged constitutional violation.” *Id.* at 695–97. That Defendants rely on Section 8005 (or here,  
 17 Section 2808) as the basis for their efforts to reallocate funds for border barrier construction does  
 18 not convert a constitutional claim into a statutory one. *See id.* at 697 (“It cannot be that simply by  
 19 pointing to any statute, governmental defendants can foreclose a constitutional claim.”).

20 *Second*, the Ninth Circuit expressed “doubt[] that any zone of interests test applies to  
 21 Plaintiffs’ equitable cause of action to enjoin a violation of the Appropriations Clause.” *Id.* at 700.  
 22 A zone of interests test is used “to ‘determine, using traditional tools of statutory interpretation,  
 23 whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.’” *Id.*  
 24 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)). The  
 25 test “ask[s] whether the plaintiff’s ‘interests fall within the zone of interests protected by the law  
 26 invoked.’” *Id.* (quoting *Lexmark*, 572 U.S. at 129). The Ninth Circuit highlighted the problems  
 27 with applying a zone of interests test to Plaintiffs’ constitutional claim: “[W]here the very claim is  
 28 that no statutory or constitutional provision authorized a particular governmental action, it makes

United States District Court  
Northern District of California

1 little sense to ask whether any statutory or constitutional provision was written for the benefit of  
2 any particular plaintiffs.” *Id.* at 701 (emphasis omitted). Moreover, “[b]ecause the Constitution  
3 was not created by any act of Congress, it is hard to see how the zone of interests test would even  
4 apply.” *Id.* at 702. Thus, the Court concluded that “it is likely sufficient here that Plaintiffs would  
5 be concretely injured by the alleged Appropriations Clause violation, and that no zone of interests  
6 test applies to their claim.” *Id.* at 701.

7 *Third*, even if a zone of interests test *did* apply to such a constitutional claim, the Ninth  
8 Circuit explained that the proper inquiry is whether Plaintiffs fall within the zone of interests of  
9 the constitutional provision, and not the statute Defendants raise in defense. *Id.* at 703–04. The  
10 Court explained that “individuals, too, are protected by the operations of separation of powers and  
11 checks and balances,” and thus, Plaintiffs’ contention “that their rights or liberties were infringed  
12 by a violation of the Appropriations Clause . . . falls within any zone of interests required to  
13 enforce that clause’s provisions.” *Id.* at 704 (quotation omitted).

14 **i. *Miller v. Gammie***

15 Defendants urge the Court to disregard the Ninth Circuit’s reasoning in light of the  
16 Supreme Court’s opinion staying the permanent injunction as to Section 8005. *See Trump*, 140 S.  
17 Ct. at 1. Defendants argue that the “Supreme Court decision sends a strong signal” that they  
18 ultimately will prevail on the claim that their exercise of authority under Section 8005 may not be  
19 challenged by these Plaintiffs. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 11. This  
20 claimed “strong signal” is based on a sentence in the Supreme Court’s stay order stating that “the  
21 Government has made a sufficient showing at this stage that the plaintiffs have no cause of action  
22 to obtain review of the Acting Secretary’s compliance with Section 8005.” *See Trump*, 140 S. Ct.  
23 at 1.<sup>6</sup> However, notwithstanding Defendants’ characterization of this “signal,” the Court may not

---

24  
25 <sup>6</sup> The October 15, 2019, veto message went further, claiming that the proclamation itself “has  
26 withstood judicial challenge in the Supreme Court.” *See* S.J. Res. 54 Veto Message. This is  
27 inaccurate: the injunction that was the subject of the stay involved a funding source that did not  
28 depend on the emergency declaration, and the validity of the proclamation has never been  
addressed by the Ninth Circuit or the Supreme Court. *See Sierra Club*, 929 F.3d at 686  
(explaining that the Ninth Circuit’s opinion “does not address any sources of funds Defendants  
might use to build a border barrier except those reprogrammed under section 8005”), 679, & n.1  
(explaining that DoD’s proposed use of funds reprogrammed under Section 8005 to provide

United States District Court  
Northern District of California

1 so readily disregard the Ninth Circuit’s opinion. The Ninth Circuit has cautioned that only in  
2 cases of “clear irreconcilability” can district courts “consider themselves bound by the intervening  
3 higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively  
4 overruled.” *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). “This is a high  
5 standard,” which “requires [the district court] to look at more than the surface conclusions of the  
6 competing authority.” *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir.  
7 2013) (quotation omitted).

8 At this stage, the Court can only speculate regarding the reasoning underlying the stay,  
9 including what it means for how the Supreme Court may ultimately assess the merits of these two  
10 cases.<sup>7</sup> As Justice Breyer explained, “[t]his case raises novel and important questions about the  
11 ability of private parties to enforce Congress’ appropriations power.” *Trump*, 140 S. Ct. 1  
12 (Breyer, J., concurring in part and dissenting in part). Because the Supreme Court opinion does  
13 not address these questions directly, the Court cannot find that it is “clearly irreconcilable with the  
14 reasoning or theory” in the Ninth Circuit panel opinion. *See Miller*, 335 F.3d at 899; *accord Close*  
15 *v. Sotheby’s, Inc.*, 894 F.3d 1061, 1074 (9th Cir. 2018) (holding that even where a prior panel  
16 opinion’s “reasoning would be suspect today, [] it is not clearly irreconcilable with intervening  
17 higher authority”); *Doe v. Trump*, 284 F. Supp. 3d 1182, 1184–85 (W.D. Wash. 2018) (“[T]his  
18 court is not at liberty to simply ignore binding Ninth Circuit precedent based on Defendants’  
19 divination of what the Supreme Court was thinking when it issued the stay orders . . . .”). The  
20 Ninth Circuit’s opinion in *Sierra Club v. Trump* therefore controls this Court’s analysis.

21 **ii. Zone of Interests**

22 Following the Ninth Circuit’s reasoning, as it must, the Court finds that Plaintiffs may  
23 challenge Defendants’ funding for border barrier construction under Section 2808. As with their  
24

---

25 support for other agencies under section 284 “does not require the declaration of a national  
26 emergency”).  
27 <sup>7</sup> During oral argument on the motions, counsel for Defendants also acknowledged that he did not  
28 know the precise grounds on which the Supreme Court stayed the permanent injunction. Counsel  
opined that the majority could have “meant there is not a cause of action period, or there’s not a  
cause of action for these plaintiffs because of the zone of interests test” applicable to their claim.  
*See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 53:17–20.

United States District Court  
Northern District of California

1 challenge to Defendants’ use of funds under Section 8005, Plaintiffs’ claim that Defendants’ use  
 2 of military construction authority under Section 2808 violates the Appropriations Clause is  
 3 “fundamentally a constitutional” claim. *See Sierra Club*, 929 F.3d at 696–97. And to the extent  
 4 Plaintiffs must fall within the zone of interests of the Appropriations Clause to assert this claim,  
 5 *see id.* at 703–04, the Court finds this “low bar” easily satisfied here. *See Cook v. Billington*, 737  
 6 F.3d 767, 771 (D.C. Cir. 2013) (Kavanaugh, J.) (“A plaintiff with Article III standing satisfies the  
 7 requirement unless his interests are so marginally related to or inconsistent with the purposes  
 8 implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the  
 9 suit.” (quotation omitted)).

10 The Court first looks to the fundamental interests protected by the Appropriations Clause,  
 11 and observes that the importance of those interests cannot be overstated. The Appropriations  
 12 Clause “is particularly important as a restraint on Executive Branch officers: If not for the  
 13 Appropriations Clause, the Executive would possess an unbounded power over the public purse of  
 14 the nation; and might apply all its monied resources at his pleasure.” *U.S. Dep’t of Navy v. Fed.*  
 15 *Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation omitted).  
 16 As such, members of the public, and not just Congress, have an interest in ensuring that the  
 17 Constitution’s checks on executive power are upheld. As the Ninth Circuit noted, “[t]he  
 18 Appropriations Clause is a vital instrument of separation of powers, which has as its aim the  
 19 protection of individual rights and liberties—not merely separation for separation’s sake.” *Sierra*  
 20 *Club*, 929 F.3d at 704. Both State and Sierra Club Plaintiffs assert that if Defendants proceed with  
 21 their proposed spending plan in contravention of Congress’ appropriations judgment, they will  
 22 suffer injury to their “environmental, professional, aesthetic, and recreational interests.” *Id.* In  
 23 short, the Court finds that Plaintiffs have a cause of action to challenge Defendants’ invocation of  
 24 Section 2808 as unconstitutional, and proceeds to analyze this claim below.

**B. Section 2808**

26 The Ninth Circuit’s opinion in *Sierra Club v. Trump* further guides the Court’s analysis of  
 27 Plaintiffs’ constitutional claim. *See Sierra Club*, 929 F.3d at 689–92. Plaintiffs’ claim—and the  
 28 legal theory undergirding both cases—is that Defendants seek to circumvent Congress’

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

appropriations power, and its judgment to provide the Administration with limited funds for specified and limited border barrier construction, by seeking funding through alternative channels. Defendants’ counsel characterized the Administration’s approach as “a full-court press,” meaning they are using any means that they contend are available to them to fund a border wall. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 73:5–19. Although Plaintiffs appear to challenge all funding for border barrier construction outside of the CAA, for purposes of this order, Defendants contend that in Section 2808, Congress allowed Defendants to make this reallocation from existing military construction projects to the border barrier construction. Because Congress only exercises its appropriations power through statutes, the Ninth Circuit accordingly focused its analysis on the text and purpose of Defendants’ asserted defense. *Sierra Club*, 929 F.3d at 689–92. The critical inquiry, therefore, is whether Section 2808 authorizes this reallocation. If it does not, “then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress’s appropriations decisions.” *Id.* at 689. The Court therefore analyzes whether Defendants’ conduct falls within the statutory authority provided by Section 2808.

Under Section 2808, the Secretary of Defense may use funds previously appropriated for other projects in limited circumstances where three factors are satisfied: (1) there is a national emergency that requires use of the armed forces, and (2) “military construction projects” are (3) “necessary to support such use of the armed forces.” *See* 10 U.S.C. § 2808(a). Plaintiffs challenge all three conditions, arguing that Defendants fail to satisfy any of them.

**i. Justiciability**

As a threshold matter, Defendants assert that the Court may not assess whether they have satisfied the statute’s requirements, because their decision to undertake military construction pursuant to Section 2808 was entirely committed to agency discretion. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 15–16, 19–20. Defendants reason that there is no meaningful standard against which the Court can determine whether the President or Secretary of Defense exceeded the authority granted by Congress by declaring a national emergency that required use of the armed forces; authorizing use of Section 2808; or undertaking military construction projects

United States District Court  
Northern District of California

1 under Section 2808. *Id.* In short, Defendants contend that the President and Secretary of Defense  
 2 have unreviewable discretion, under both the NEA and Section 2808, to determine whether an  
 3 emergency exists that meets the statutory criteria. Plaintiffs indicated during oral argument that  
 4 they are not challenging the President’s emergency declaration per se, but rather whether it meets  
 5 the statutory criteria for an emergency under Section 2808. *See California*, No. 19-cv-00872-  
 6 HSG, Dkt. No. 254 at 12:6–16:12. The Court addresses that narrow challenge as part of its  
 7 statutory analysis in Section III.B.ii. Here, however, the Court cabins its analysis to Defendants’  
 8 argument that their invocation of Section 2808 itself is committed to agency discretion by law, and  
 9 as such, is nonjusticiable. *See* 5 U.S.C. § 701(a)(2). The Court disagrees that its ability to review  
 10 Defendants’ conduct is so circumscribed.

11 As the Ninth Circuit has repeatedly held, “[t]he default rule is that agency actions are  
 12 reviewable under federal question jurisdiction, pursuant to 28 U.S.C. § 1331 . . . even if no statute  
 13 specifically authorizes judicial review.” *See Perez v. Wolf*, No. 18-35123, 2019 WL 6224421, at  
 14 \*5 (9th Cir. Nov. 11, 2019) (quoting *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004)). A  
 15 decision is generally committed to agency discretion by law, and thus not subject to judicial  
 16 review, when a court would have “no meaningful standard against which to judge the agency’s  
 17 exercise of discretion.” *Id.* at \*5 (quotation omitted). This is rare. “Only where there is truly ‘no  
 18 law to apply’ ha[s] [the Ninth Circuit] found an absence of meaningful standards of review.” *Id.*  
 19 at \*6 (quoting *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003)).  
 20 Courts must assess “the language of the statute and whether the general purposes of the statute  
 21 would be endangered by judicial review.” *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th  
 22 Cir. 2015) (quotation omitted).

23 Engaging in this exercise, the Ninth Circuit recently explained that “courts routinely treat  
 24 discretion-laden standards as providing ‘law to apply.’” *Perez*, 2019 WL 6224421, at \*8–\*9  
 25 (collecting cases). In *Perez v. Wolf*, the Ninth Circuit held that U-Visa determinations made by  
 26 the United States Citizenship and Immigration Service (“USCIS”) are subject to judicial review  
 27 because the statutory framework provides a meaningful standard against which to assess the  
 28 agency’s exercise of discretion. *Id.* at 15–16. The statutory provision requires that a U-Visa

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

applicant:

(1) has suffered “substantial physical or mental abuse” as a result of having been a victim of qualifying criminal activity; (2) “possesses information” about qualifying criminal activity; and (3) “has been helpful, is being helpful, or is likely to be helpful” to an authority “investigating or prosecuting” qualifying criminal activity.

*Id.* at \*8 (citing 8 U.S.C. § 1101(a)(15)(U)(i)). Although terms such as “substantial” and “helpful” contain an element of subjectivity, the Ninth Circuit nevertheless found that they constituted “law to apply.” *Id.*

The Court finds that Section 2808 likewise provides “meaningful standards” for reviewing Defendants’ compliance with its conditions. The diversion of funds from existing military construction projects is only authorized for (1) “military construction projects” that are (2) “necessary to support such use of the armed forces.” *See* 10 U.S.C. § 2808(a). Congress defined military construction as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road.” *Id.* § 2801(a). And Congress defined “military installation,” in turn, as “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.” *Id.* § 2801(c)(4). Section 2808 therefore establishes statutory standards that constrain its use. And applying these standards to determine “whether the reprogramming of funds is consistent with the Appropriations Clause and [Section 2808] . . . is a familiar judicial exercise.” *See Sierra Club*, 929 F.3d at 687 (quotation omitted).

That the statute conditions authorization on the existence of a national emergency and the use of the armed forces does not, on its own, convert the legal exercise of statutory interpretation into a purely political one. The Ninth Circuit’s opinion in *United States v. Spawr Optical Research, Inc.*, is illustrative. In *Spawr*, President Gerald Ford relied on the continued existence of two national emergencies to forbid the shipment of certain strategic items to foreign countries

United States District Court  
Northern District of California

1 under the Trading with the Enemy Act (“TWEA”). 685 F.2d 1076, 1079–80 (9th Cir. 1982).  
 2 During a national emergency, TWEA empowered the president to “regulate, . . . prevent or  
 3 prohibit . . . any exportation of . . . or transactions involving[] any property in which any foreign  
 4 country . . . has any interest.” 50 U.S.C. § 4305(b)(1)(B). The Ninth Circuit distinguished  
 5 between “the essentially political questions surrounding the declaration or continuance of a  
 6 national emergency,” on the one hand, and the legal question of “whether the actions taken  
 7 pursuant to a national emergency comport with the power delegated by Congress,” on the other.  
 8 *See Spawr*, 685 F.2d at 1080–81. The Ninth Circuit held that courts “are free to review” whether  
 9 the Executive Branch has legal authority to act, and went on to determine whether the regulations  
 10 at issue were rationally related to the emergencies. *See id.* at 1081 (concluding that “President  
 11 Ford’s effort to limit the exportation of strategic items clearly had a rational relationship to the  
 12 prevention of aggression and armed conflict”).

13 The Court fully appreciates that “[n]ational-security policy is the prerogative of the  
 14 Congress and President,” and that their military judgments are due deference. *See Ziglar v.*  
 15 *Abbasi*, 137 S. Ct. 1843, 1861 (2017); *see also Rostker v. Goldberg*, 453 U.S. 57, 66 (1981)  
 16 (acknowledging “a healthy deference to legislative and executive judgments in the area of military  
 17 affairs”). But “the judiciary appropriately exercises its constitutional function where the question  
 18 is whether Congress or the Executive is aggrandizing its power at the expense of another branch.”  
 19 *Sierra Club*, 929 F.3d at 687 (quotation omitted). As the Ninth Circuit explained, “courts cannot  
 20 avoid their responsibility merely because the issues have political implications.” *Id.* (quoting  
 21 *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). The Court accordingly may, and must,  
 22 determine whether Defendants have exceeded the limits set by Congress regarding spending under  
 23 Section 2808, while affording both branches due deference. As summarized by the Ninth Circuit  
 24 in another case in which the Executive Branch invoked national security concerns in support of its  
 25 nonjusticiability argument:

To declare that courts cannot even look to a statute passed by  
 Congress to fulfill international obligations turns on its head the role  
 of the courts and our core respect for a co-equal political branch,  
 Congress. Interpreting and applying [the statute at issue] does not



prevent the military from planning and building bases. It requires only that the executive take into account certain procedural obligations, required by Congress, before it takes steps forward. The courts may then look to whether the executive complied with its obligations. We may consider national security concerns with due respect when the statute is used as a basis to request injunctive relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress.

*Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 825–26 (9th Cir. 2017).

**ii. Statutory Interpretation**

Having found that Section 2808 provides meaningful standards against which the Court may analyze Defendants’ conduct under the statute, the Court reviews their compliance with those standards. The Court provided its initial impression as to Defendants’ compliance with Section 2808 in its preliminary injunction order in *Sierra Club v. Trump*. See *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 144 at 42–46. At the time, the Court expressed reservations that “border barrier construction could reasonably constitute a ‘military construction project’ such that Defendants’ invocation of Section 2808 would be lawful,” and also raised concerns that Defendants’ interpretation of Section 2808 would cede unbounded authority to Defendants to redirect military construction funds. See *id.* at 42–43. Now that Defendants have specified how they intend to use Section 2808, the Court confirms its preliminary analysis, finding that the eleven border barrier projects are not “military construction projects” that are “necessary to support such use of the armed forces.” See 10 U.S.C. § 2808(a).

**a. Emergency Requiring Use of the Armed Forces**

Sierra Club Plaintiffs alone challenge the President’s February 15 declaration of a national emergency to the extent that the President simultaneously concluded that this emergency required use of the armed forces.<sup>8</sup> See *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 9–11. Sierra Club Plaintiffs couch this as a statutory condition, and thus as a matter of statutory interpretation under Section 2808 rather than one of policy or politics. The Court is not persuaded.

<sup>8</sup> State Plaintiffs, on the other hand, explicitly note that for purposes of their motion for partial summary judgment they are not challenging the President’s declaration of a national emergency. See *California*, No. 19-cv-00872-HSG, Dkt. No. 220 at 8.

United States District Court  
Northern District of California

United States District Court  
Northern District of California

1 Sierra Club Plaintiffs assert that there is no true emergency at the southern border, and that  
2 even if there were, DHS, not DoD, has jurisdiction over protecting the nation’s borders. In  
3 support of their challenge, Sierra Club Plaintiffs point to the text of the proclamation itself, which  
4 states in relevant part:

[R]ecent 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 . . . [T]he Department of Defense has provided support and resources to the Department of Homeland Security 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.

10 Proclamation No. 9844. Plaintiffs contend that “unarmed parents and children seeking refuge do  
11 not require a military response.” *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 11.  
12 Plaintiffs also point to comments made by DoD officials outside the proclamation that the  
13 situation at the border is “not a military threat.” *See, e.g., id.*, Dkt. No. 210-2, Ex. 15 at 50–52  
14 (Acting U.S. Secretary of Defense Shanahan and General Joseph Dunford concurring that the  
15 “situation on the southern border” is a “security challenge” and “not a military threat”); Ex. 16 at 2  
16 (Admiral Michael M. Gilday, Operations Director of the Joint Staff, stating that “[n]one of the  
17 capabilities that we are providing are combat capabilities” and “[i]t’s not a war zone along the  
18 border”). Rather, in Plaintiffs’ view, Defendants are using DoD’s temporary and limited support  
19 of DHS—the civilian agency that Congress has tasked with border security and immigration  
20 enforcement—to justify funding the border barriers that DHS has sought to build. *See, e.g.,* 6  
21 U.S.C. §§ 202, 251; 8 U.S.C. §§ 1103(a)(5), (a)(10).

22 At bottom, Plaintiffs’ theory is premised on the idea that the proclamation was designed  
23 solely to avoid Congress’ appropriations judgment and that the emergency is a convenient pretext.  
24 The Court acknowledges that both the timing and nature of the emergency raise obvious questions.  
25 The Administration repeatedly and unsuccessfully sought appropriations from Congress for border  
26 barrier construction. When Congress and the President could not agree on such funding, the  
27 President suggested his willingness to declare a national emergency if Congress refused to  
28 appropriate the money he requested. *See, e.g., California*, 19-cv-00872-HSG, Dkt. No. 59-4, Ex.

United States District Court  
Northern District of California

1 21. When asked about his threshold for declaring an emergency, the President stated, “[m]y  
 2 threshold will be if I can’t make a deal with people that are unreasonable.” *See* George Sargent,  
 3 *Trump: I have the ‘absolute right’ to declare a national emergency if democrats defy me*, Wash.  
 4 Post (Jan. 9, 2019), <https://tinyurl.com/y5f5eqwg>. And the President then declared the national  
 5 emergency one day after Congress passed the CAA, which limited appropriations for border  
 6 barrier construction. *See* Proclamation No. 9844. In announcing the national emergency  
 7 declaration, the President explained, “I could do the wall over a longer period of time. I didn’t  
 8 need to do this. But I’d rather do it much faster. . . . And I think that I just want to get it done  
 9 faster, that’s all.” *See California*, No. 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 50.

10 All this said, there is no precedent for a court overriding a President’s discretionary  
 11 judgment as to what is and is not an emergency. That one of the conditions to invoke Section  
 12 2808 is that the emergency require use of the armed forces does not alter the nature of the inquiry.  
 13 Sierra Club Plaintiffs are still asking the Court to evaluate the “policy choice[] and value  
 14 determination[]” underlying the President’s emergency proclamation. *Japan Whaling Ass’n v.*  
 15 *Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). Plaintiffs have not cited, and the Court has not  
 16 found, any case in which a court has assessed the nature and validity of an emergency  
 17 proclamation. *Cf. California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 12:6–16:12. To the  
 18 contrary, as discussed in Section III.B.i above, the Ninth Circuit has characterized “the declaration  
 19 or continuance of a national emergency” as an “essentially political question[.]” *Spawr*, 685 F.2d  
 20 at 1080–81. The Court accordingly finds that whether the national emergency truly exists, and  
 21 requires use of the armed forces, are nonjusticiable political questions.

22 The Court nevertheless acknowledges the significant constitutional tension inherent in the  
 23 President’s invocation of a national emergency under the NEA for the avowed purpose of  
 24 accessing money to fund projects that Congress expressly considered and declined to fund. It is  
 25 apparent that at the time Congress enacted the NEA it did not envision the statute would (or even  
 26 could) be used to circumvent the will of Congress. As the Court previously explained, Congress  
 27 initially reserved the right to terminate a national emergency with a simple majority and without  
 28 the opportunity for a presidential veto. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 144 at

United States District Court  
Northern District of California

1 13–14, & n.8; *see also id.*, Dkt. No. 219 at 10–15 (Brief of *Amici Curiae* Brennan Center for  
 2 Justice and the Cato Institute) (“Brennan Center Brief”). Thus, prior to the Supreme Court’s  
 3 opinion in *INS v. Chadha*, it would have been impossible for the President to use the NEA to  
 4 somehow bypass the will of a congressional majority. *See* 462 U.S. at 944–58; *see also Sierra*  
 5 *Club*, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 15 (“The notion that  
 6 Congress intended the NEA as an affirmative delegation of unlimited discretion to the president—  
 7 one that would allow the president to circumvent the will of Congress on specific policy  
 8 proposals—is contradicted by this and every other aspect of the legislative history.”).

9 Still, Congress is not without recourse. Under the NEA, “[a]ny national emergency  
 10 declared by the President in accordance with this subchapter shall terminate if . . . there is enacted  
 11 into law a joint resolution terminating the emergency.” 50 U.S.C. § 1622(a)(1). Moreover, the  
 12 NEA not only allows, but in fact obligates, Congress to “consider a vote on a joint resolution to  
 13 determine whether that emergency shall be terminated” every six months. *See id.* § 1622(b).  
 14 Congress thus has the authority to monitor and if needed, reverse, the President’s determination  
 15 that circumstances at the southern border constitute a national emergency. That Congress has so  
 16 far been unable to override the President’s veto with a two-thirds majority vote does not somehow  
 17 transform this fundamentally political question into a legal one. Because the national emergency  
 18 remains in effect, the Court may not opine as to whether the President properly invoked the NEA  
 19 by declaring a national emergency requiring the use of the armed forces at the southern border.

**b. Military Construction Project**

21 Next, the parties disagree as to whether the border barrier construction projects constitute  
 22 “military construction projects” for purposes of Section 2808.<sup>9</sup> As noted above, Congress defined  
 23 the term “military construction” to “include[] any construction, development, conversion, or  
 24 extension of any kind carried out with respect to a military installation, whether to satisfy

---

26 <sup>9</sup> During the hearing, Sierra Club Plaintiffs explained that they are not challenging whether the two  
 27 projects on the Barry M. Goldwater Range, an existing military installation, constitute military  
 28 construction for purposes of Section 2808. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254  
 at 85:12–19. Defendants have identified these two projects as Yuma Project 2 and Yuma Project  
 10/27. But Plaintiffs still challenge whether any of the eleven projects are necessary to support  
 use of the armed forces. *See* Section III.B.ii.c.

United States District Court  
Northern District of California

1 temporary or permanent requirements, or any acquisition of land or construction of a defense  
2 access road . . . .” 10 U.S.C. § 2801(a). Because it is apparent that border barrier construction  
3 constitutes “construction,” the critical question before the Court is whether the eleven proposed  
4 projects are being “carried out with respect to a military installation.” *Id.*; *see also id.* § 2801(b)  
5 (“A military construction project includes all military construction work . . . necessary to produce  
6 a complete and useable facility or a complete and usable improvement to an existing facility.”).

7 A “military installation,” in turn, “means a base, camp, post, station, yard, center, or other  
8 activity under the jurisdiction of the Secretary of a military department . . . .” *Id.* § 2801(c)(4).  
9 Defendants do not attempt to characterize the projects as either a “base, camp, post, station, yard,  
10 [or] center.” *See id.* § 2801(c)(4). Instead, they reason that the 175 miles of proposed border  
11 barrier construction fall within the “other activity” definition because DoD has obtained—or will  
12 obtain—administrative jurisdiction over the land for these projects and assign it to Fort Bliss in  
13 Texas. *See California*, No. 19-cv-00872-HSG, Dkt. No. 236-7, Ex. 7 (General Order No. 2019-  
14 36). By obtaining administrative jurisdiction over the land in this way, they conclude, all eleven  
15 projects will be part of an existing military installation. *Id.* In other words, Defendants contend  
16 that “military installation” is “inclusive of [any] activities under the jurisdiction of the Secretary of  
17 a military department.” *See id.*, Dkt. No. 236 at 13. The Court finds several flaws with this  
18 expansive interpretation.

19 *First*, Defendants’ interpretation requires the Court to disregard the plain language of the  
20 statute. Defendants would have the Court transform the definition of “military installation” to  
21 include not just “other activity,” but “*any* activity” under military jurisdiction. That simply is not  
22 what the statute says.<sup>10</sup> As the Supreme Court has noted, when interpreting a statute, context  
23 matters. *See, e.g., McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (“[W]e look to the  
24

---

25 <sup>10</sup> In its opposition to Sierra Club Plaintiffs’ motion for a preliminary injunction as to Section  
26 2808, *see Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 64 at 21–23, Defendants initially posited  
27 that the as-yet unidentified border barrier projects would fall within the “other activity” category.  
28 Applying traditional tools of statutory construction, the Court explained that “a base, camp, post,  
station, yard, [and] center” are all discrete and traditional military locations, and “other activity”  
must refer to similar locations. The Court incorporates that reasoning again here, in all respects.  
*See id.*, Dkt. No. 144 at 44–45.

United States District Court  
Northern District of California

1 context in which the words appear.”); *see also ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d  
 2 1203, 1210 (9th Cir. 2015) (“[T]he plain language of a statute should be enforced according to its  
 3 terms, in light of its context.”). And here, as the Court cautioned before, the terms “base, camp,  
 4 post, station, yard, [or] center” are not mere surplusage to ignore, but rather supply meaning and  
 5 provide boundaries to the term “other activity.” *See, e.g., McDonnell*, 136 S. Ct. at 2369  
 6 (explaining that canons of construction are “wisely applied . . . to avoid the giving of unintended  
 7 breadth to the Acts of Congress” (quotation omitted)); *Yates v. United States*, 135 S. Ct. 1074,  
 8 1087 (2015) (“Had Congress intended ‘tangible object’ in § 1519 to be interpreted so generically  
 9 as to capture physical objects as dissimilar as documents and fish, Congress would have had no  
 10 reason to refer specifically to ‘record’ or ‘document.’ The Government’s unbounded reading of  
 11 ‘tangible object’ would render those words misleading surplusage.”); *CSX Transp., Inc. v. Ala.*  
 12 *Dept. of Revenue*, 562 U.S. 277, 295 (“We typically use *ejusdem generis* to ensure that a general  
 13 word will not render specific words meaningless.”). Defendants do not even attempt to explain  
 14 how the proposed projects are similar in nature or scope to “a base, camp, post, station, yard, [or]  
 15 center,” 10 U.S.C. § 2801(c)(4), and the Court finds that they are not.

16         Rather than engaging with the text of the statute, Defendants rely heavily on the Supreme  
 17 Court’s decision in *United States v. Apel*, 571 U.S. 359, 368 (2014). There, the Supreme Court  
 18 noted that “‘military duty’ and ‘military protection’ are synonymous with the exercise of military  
 19 jurisdiction,” and that the term “‘military installation’ is used [that way] elsewhere in federal law.”  
 20 *Id.* (emphasis omitted). The Supreme Court, however, was not analyzing the definition of military  
 21 installations under Section 2808 or 10 U.S.C. § 2801(c)(4). The case involved an entirely  
 22 different statute under Title 18, which imposed a criminal fine on anyone who reentered a  
 23 “military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation” after  
 24 being removed. *See* 18 U.S.C. § 1342. The question before the Court in *Apel* was whether a  
 25 public easement on an Air Force base was still considered part of the military installation. The  
 26 Court rejected “[t]he use-it-or-lose-it rule” that § 1342 only applied where the military had  
 27 exclusive use, possession, or control over the property in question. *Apel*, 571 U.S. at 372. In  
 28 doing so, the Court cited the language of 10 U.S.C. § 2801(c)(4), but did not engage in any

United States District Court  
Northern District of California

1 analysis of its possible limitations. *See id.* at 368. Indeed, to the extent *Apel* provides any insight  
2 for the interpretation of Section 2808, it is simply that statutes must be read in context, and with an  
3 eye toward common sense. *Id.* at 369–72.

4 Defendants also suggest that Congress intended “military installation” in Section 2808 to  
5 be read broadly because elsewhere it defined the term differently. Under 10 U.S.C. § 2687(g)(1),  
6 for example, Congress defined “military installation” in the context of base closures to “mean[] a  
7 base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the  
8 jurisdiction of the Department of Defense,” but excluded “any facility used primarily for civil  
9 works, rivers and harbors projects, or flood control projects.” *Id.* The Court acknowledges that  
10 Congress may provide different definitions in different statutes, but this does not open the door to  
11 a limitless definition of military installation in Section 2808. Again, part of the inquiry is context  
12 and congressional intent, but Defendants do not engage with either.

13 *Second*, Defendants’ interpretation would grant them essentially boundless authority to  
14 reallocate military construction funds to build anything they want, anywhere they want, provided  
15 they first obtain jurisdiction over the land where the construction will occur. Although Defendants  
16 attempt to reassure the Court that they “are *not* arguing that the entire southern U.S. border”  
17 constitutes a military installation for purposes of Section 2808, *see California*, No. 19-cv-00872-  
18 HSG, Dkt. No. 236 at 13, there is nothing in their interpretation to preclude them from doing so.  
19 When asked during the hearing whether Defendants’ reading of Section 2808 had a limiting  
20 principle, counsel could not articulate one. *See id.*, Dkt. No. 254 at 62:21–64:3.

21 The scale of what is possible under this reading is immense. The eleven projects at issue  
22 in the instant motions are illustrative. Defendants acknowledge that nine of the proposed projects  
23 are on federal public domain or non-public land, not previously under military jurisdiction. *See*  
24 *id.*, Dkt. Nos. 206 at 2–4, 206-1, Ex. 1. These nine projects, which cover 140 of the 175 total  
25 miles of border barrier construction at issue, are located on land spanning several hundred miles in  
26 Arizona, California, New Mexico, and Texas. But Fort Bliss, the military installation to which  
27 Defendants will administratively assign the land, is located near El Paso, Texas. Defendants  
28 suggest that projects located several hundred miles away from Fort Bliss are nevertheless “carried

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

out with respect to [that] military installation,” provided Defendants complete the right paperwork. See 10 U.S.C. § 2801(a).<sup>11</sup> Under this interpretation, construction can be considered “carried out with respect to a military installation” even if it is otherwise wholly unrelated to the installation’s functions, purpose, or even geography. Indeed, Defendants do not offer any substantive connection between the proposed construction here and Fort Bliss. Instead they acknowledge that the construction sites are assigned administratively to Fort Bliss “for real property accountability purposes.” See *California*, No. 19-cv-00872-HSG, Dkt. No. 251 at 4; see *id.*, Dkt. No. 251-1 at ¶¶ 7–11. They further state that “Fort Bliss is the largest, most capable Active Army installation in the vicinity of the southern border.” *Id.* The Court is not persuaded that Congress intended “military construction” to have no stronger connection to a military installation than Defendants’ own administrative convenience. If this were true, Defendants could redirect billions of dollars from projects to which Congress appropriated funds to projects of Defendants’ own choosing, all without congressional approval (and in fact directly *contrary* to Congress’ decision not to fund these projects). Elevating form over substance in this way risks “the Executive [] aggrandizing its power at the expense of [Congress].” *Sierra Club*, 929 F.3d at 687 (quotation omitted).

*Third*, Defendants’ interpretation contravenes clear congressional intent to limit—not expand—executive emergency powers. The NEA was passed in 1976 as a reform measure, following concern about the duration of the national emergencies that presidents had declared historically, and the scope of their related emergency powers. See L. Elaine Halchin, *National Emergency Powers*, Cong. Research Serv., 98-505 (Aug. 5, 2019). For example, an emergency declaration that was issued at the start of the Korean War in 1950 was still being used decades

---

<sup>11</sup> The Court notes that in an August 21, 2019, “Action Memo,” the Assistant Secretary of Defense, Homeland Defense and Global Security said that in order for border barrier projects to constitute military construction projects, a military department would need to report the land in its inventory “either as its own installation or as part of an existing, *nearby* military installation.” AR at 3 (emphasis added). Defendants now contend that this common-sense “nearby” condition is not actually a formal requirement of the statute. See *California*, No. 19-cv-00872-HSG, Dkt. No. 251 at 3–4. Even if that is technically true, the Court finds it plain that Defendants’ characterization of the breadth of the asserted power to cobble together far-flung parcels as part of one “military installation” goes far beyond any historical example they cite. See *id.*, Dkt. No. 249 at 7–8 (citing auxiliary landing field located 40 miles away from main military installation as an example of a “geographically separated location[] . . . part of, but physically separate from” that installation).



United States District Court  
Northern District of California

1 later with respect to the Vietnam War. *Id.* at 7. In 1973, there were four national emergencies still  
2 in effect from 1933, 1950, 1970, and 1971. *See id.* The Senate, therefore, created a special  
3 committee, known as the Special Committee on National Emergencies and Delegated Emergency  
4 Powers, to evaluate this issue. *See id.* at 7–8. Through its work, the Committee identified 470  
5 provisions of federal law that granted the president extensive emergency powers. *See id.* at 8.

6 The Committee developed legislation—the NEA—to limit the scope of such emergency  
7 powers. In support of the NEA, the Committee explained the need to place limits on the  
8 presidential use of emergency powers:

9  
10 Right now, hundreds of emergency statutes confer enough authority  
11 on the President to rule the country without reference to normal  
12 constitutional process. Revelations of how power has been abused by  
13 high government officials must give rise to concern about the  
14 potential exercise, unchecked by the Congress or the American  
15 people, of this extraordinary power. The National Emergencies Act  
16 would end this threat and [e]nsure that the powers now in the hands  
17 of the Executive will be utilized only in time of genuine emergency  
18 and then only under safeguards providing for Congressional review.

15 *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 12–13 (quoting  
16 *The National Emergencies Act (Public Law 94-412), Source Book: Legislative History, Text, and*  
17 *Other Documents* (1976) (“*NEA Source Book*”). In its report, the Committee noted that “[t]he  
18 National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute  
19 is an effort by the Congress to establish clear procedures and safeguards for the exercise by the  
20 President of emergency powers conferred upon him by other statutes.” *Id.* at 14 (quoting *NEA*  
21 *Source Book*).

22 In keeping with this narrower view of executive emergency powers, Section 2808 has  
23 rarely been used, and never to fund projects for which Congress withheld appropriations. Rather,  
24 Section 2808 has been used to build projects like aircraft hangars, barracks, airfield runways,  
25 detention facilities, logistics hubs, and waste water treatment plants. *See Vassalotti*, at 2–3.  
26 Defendants’ invocation of Section 2808 for border barrier construction, in conflict with Congress’  
27  
28

United States District Court  
Northern District of California

1 judgment on those projects, is simply unprecedented, contrary to the Administration’s claims.<sup>12</sup>  
 2 This, on its own, is enough to warrant close scrutiny: “When an agency claims to discover in a  
 3 long-extant statute an unheralded power to regulate a significant portion of the American  
 4 economy, we typically greet its announcement with a measure of skepticism.” *Util. Air*  
 5 *Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted). Put simply, the Court  
 6 does not find that Section 2808 was intended to be used to resolve policy disputes with Congress  
 7 or to provide the Executive Branch with unchecked power to transform the responsibilities  
 8 assigned by law to a civilian agency into military ones by reclassifying large swaths of the  
 9 southern border as “military installations.” Such an interpretation defies both the text and spirit of  
 10 the statute. The Court, therefore, finds that the border barrier construction projects, with the  
 11 exception of the two projects on the Barry M. Goldwater range, are not “carried out with respect to  
 12 a military installation” within the meaning of Section 2808.

**c. Necessary to Support Use of the Armed Forces**

13  
 14 Even assuming the border barrier construction could somehow be considered military  
 15 construction for purposes of Section 2808, the parties also disagree as to whether the proposed  
 16 projects are necessary to support the use of the armed forces. Defendants rely on a lengthy  
 17 administrative record, which, they say, explains why the projects are necessary to provide such  
 18 support. But even crediting all facts in the administrative record, and giving due deference to the  
 19 strategic and military determinations in it, the Court finds that Defendants have not established  
 20 that the projects are necessary to support the use of the armed forces.

21 The problem is twofold. Inherent in Defendants’ argument and the administrative record is  
 22 that the proposed border barrier projects are intended to support and benefit DHS, a civilian  
 23 agency, rather than the armed forces. And although the administrative record explains why such  
 24

---

25 <sup>12</sup> Compare S.J. Res. 54 Veto Message (“Proclamation 9844 was neither a new nor novel  
 26 application of executive authority. Rather it is the sixtieth Presidential invocation of the [NEA].  
 27 It relies upon the same statutory authority used by both of the previous two Presidents to  
 28 undertake more than 18 different military construction projects from 2001 through 2013.”), *with*  
*Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 20 (“Perhaps most  
 significantly, in none of these cases did presidents invoke emergency powers to take action after  
 Congress had explicitly considered and rejected legislation to authorize such action.”).

United States District Court  
Northern District of California

1 border barrier projects may be beneficial to DHS’s mission, Defendants have not established that  
2 they are in fact *necessary to support the use of the armed forces*—which is the statutory limitation  
3 set by Congress. The Court discusses each issue in turn.

4 On April 4, 2018, the President directed the Secretary of Defense to support DHS “in  
5 securing the southern border and taking other necessary actions” due to “[t]he crisis at our  
6 southern border.” *See California*, 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 27. The President  
7 further empowered the Secretary of Defense to “request use of National Guard personnel to assist”  
8 as needed. *Id.* As of August 13, 2019, DoD had approximately 5,500 personnel supporting DHS  
9 in its “border security mission.” *See AR* at 1, 45. DoD personnel are generally serving in  
10 “support roles that relieve DHS personnel of non-law enforcement duties,” such as “logistics,  
11 planning, and intelligence analysis” and “monitoring and detection support” through “operating  
12 mobile surveillance cameras units or providing aerial reconnaissance.” *Id.* at 42. DHS stated that  
13 the proposed border barrier projects that DHS recommended to DoD would “give a distinct and  
14 enduring advantage to [U.S. Border Patrol] as a force multiplier,” and would “likely reduce DHS’s  
15 reliance on DoD for force protection, surveillance support, engineering support, air support,  
16 logistical support, and strategic communications assistance.” *Id.* at 43 (quotation omitted). In  
17 sum, the Chairman of the Joint Chiefs of Staff and DHS summarized that the projects would  
18 “allow DoD to provide support to DHS more efficiently and effectively.” *See id.* at 48; *see also*  
19 *id.* at 59–71.

20 The administrative record therefore illustrates that the border barrier construction projects  
21 are intended to benefit DHS and its subagencies, including CBP and U.S. Border Patrol (“USBP”).  
22 The record explains that physical barriers, such as those proposed, may “[i]mprove CBP’s  
23 detection, identification, classification, and response capabilities,” *AR* at 4; “[r]educer  
24 vulnerabilities in key border areas and the time it takes for Border Patrol agents to apprehend  
25 illegal migrants,” *id.*; “reduce the challenges to CBP,” *id.* at 61; “serve to channel illegal  
26 immigrants towards locations that are operationally advantageous to DHS,” *id.*; “reduce the  
27 enforcement footprint and compress USBP operations,” *id.* at 43; “enable CBP agents to focus less  
28 on the rugged terrain,” *id.* at 69; and as noted above, “give a distinct and enduring advantage to

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

USBP as a force multiplier,” *id.* at 43; *see also id.* at 121–24. As DoD representatives have forthrightly explained, funding under Section 2808 would “all go to adding significantly new capabilities to DHS’s ability to prevent illegal entry.” *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 17 at 5.

That the border barrier projects would benefit DHS is unsurprising, as Congress empowered that agency to “[s]ecur[e] the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States.” 6 U.S.C. § 202; *see also* 8 U.S.C. §§ 1103(a)(5) (charging the Secretary of Homeland Security with “the power and duty to control and guard the boundaries and borders of the United States”). But this is a *civilian* agency, and not part of the armed forces. The commission of these responsibilities to DHS is no secret: the entire reason for the longest shutdown of the Federal government in history was that the President sought over \$5 billion in appropriations to *DHS* for these exact projects, and Congress exercised its constitutional prerogative to decline to authorize that spending. Put another way, the entire dispute in this case arises from the Executive’s efforts to find other ways to help DHS do what Congress directly said it would not authorize when it rejected the Executive’s DHS budget request.

Defendants suggest that the assistance to DHS is merely a byproduct of helping DoD. *See, e.g., California*, No. 19-cv-00872-HSG, Dkt. No. 249 at 10. Yet the administrative record suggests that the proposed projects may actually *reduce* DHS’s need for DoD support. *See, e.g., AR* at 4 (noting that the projects “could ultimately reduce the demand for DoD support at the southern border over time”). As the President put it, “[i]f we had a wall, we don’t need the military because we’d have a wall.” *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 13 at 5. Defendants do not explain how the projects are necessary to support the use of the armed forces while simultaneously obviating the need for those forces. This appears to defy the purpose of Section 2808, which specifically refers to construction that is necessary to support the use of the armed forces, not to construction that the armed forces will not use once constructed. Again, Defendants’ argument proves too much. Under their theory, any construction could be converted into military construction—and funded through Section 2808—simply by sending armed forces

United States District Court  
Northern District of California

1 temporarily to provide logistical support to a civilian agency during construction. But Congress,  
 2 and not Defendants, holds the power of the purse. The Court declines to interpret Section 2808 to  
 3 provide the Secretary of Defense with almost limitless authority to use billions of dollars of its  
 4 appropriations to build projects for the benefit of DHS, even when Congress specifically declined  
 5 to give DHS itself the funds to build those projects. *See, e.g., Util. Air Regulatory Grp.*, 573 U.S.  
 6 at 324 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast  
 7 economic and political significance.” (quotation omitted)).

8 The administrative record also fails to establish that the border barrier construction projects  
 9 are “*necessary* to support [] use of the armed forces.” *See* 10 U.S.C. § 2808(a) (emphasis added).  
 10 The Oxford English Dictionary defines “necessary” as “[i]ndispensable, vital, essential.” *See*  
 11 *Necessary*, OXFORD ENGLISH DICTIONARY ONLINE (last visited Nov. 20, 2019); *accord* MERRIAM-  
 12 WEBSTER ONLINE DICTIONARY (defining “necessary” as “absolutely needed: required”) (last  
 13 visited Nov. 20, 2019). Yet Defendants simply contend that the projects will “allow DoD to  
 14 provide support to DHS more efficiently and effectively.” *See* AR at 48. Even accepting this  
 15 conclusion as true, promoting efficiency and efficacy is not tantamount to necessity, given the  
 16 nature of the construction at issue. And the Court declines Defendants’ invitation to blur this  
 17 distinction. There is simply nothing in the record before the Court indicating that the eleven  
 18 border barrier projects—however helpful—are necessary to support the use of the armed forces.

19 The Court does not lightly reach the conclusion that the record does not support  
 20 Defendants’ claim of necessity here. The undersigned deeply respects the work of the United  
 21 States armed forces, and understands and is grateful for the innumerable sacrifices made by  
 22 military women and men, and their families, in service of our country. *See California*, No. 19-cv-  
 23 00872-HSG, Dkt. No. 232 (IAVA Brief) at 9 (“Service members are used to discomfort. They  
 24 signed up to endure hardships so that the rest of American society could live freely and  
 25 comfortably. . . . But they should never be asked to work in unnecessarily unsafe or harmful  
 26 conditions, or to wait even longer for basic facilities that are already long overdue.”). And the  
 27 Court has no doubt that Congress shares this respect and gratitude. Were this case about  
 28 constructing hangars for storage of aircraft used in “aerial reconnaissance,” or building a control

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

center for “operating mobile surveillance camera units,” AR at 42, the circumstances likely would be very different.

But the Court cannot blind itself to the plain reality presented in this case: the border barrier projects Defendants now assert are “necessary to support the use of the armed forces” are the very same projects Defendants sought—and failed—to build under DHS’s civilian authority, because Congress would not appropriate the requested funds. Even where review is “deferential,” courts “are ‘not required to exhibit a naiveté from which ordinary citizens are free.’” *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)); *see also Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (“Of course, deference does not mean abdication.”) (quotation omitted). DoD officials have forthrightly acknowledged that the border barrier projects are intended to fulfill the President’s priorities. During a congressional hearing on the reprogramming of funds for border barrier construction, Acting U.S. Secretary of Defense Shanahan explained that “given a legal order from the commander in chief, we are executing on that order.” *See* John Wagner, Paul Sonne, and Dan Lamothe, *Pentagon announces \$1 billion transfer for border barriers, angering Democrats*, Wash. Post (March 26, 2019), <https://tinyurl.com/y2njmvsj>. Similarly, when asked during the hearing about prioritizing the border wall over military readiness and modernization, U.S. Army Secretary Esper said “I’m saying that the Department of Defense made decisions based on what the president set as priorities, and we are following through. We are executing.” *Id.*

The parties do not suggest that additional factfinding would buttress or clarify the rationale or need for the projects. The Court therefore finds that the projects are not necessary to support the use of the armed forces. As the Supreme Court has explained, “[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quotation omitted).

Accordingly, taking into account the totality of the record, the Court finds that Defendants have not satisfied the mandatory conditions set by Congress in Section 2808, and that they thus are not authorized to redirect military construction funds to the eleven border barrier projects they have

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

identified.

**C. APA**

State Plaintiffs further contend that Defendants’ conduct is reviewable as unlawful under the APA. Plaintiffs first suggest that by failing to comply with the statutory conditions in Section 2808, Defendants have acted “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” See 5 U.S.C. § 706(2)(C). Such arguments, however, collapse into the same analysis of Section 2808 that the Court detailed in Section III.B above. See *Sierra Club*, 929 at 689–92. The Ninth Circuit acknowledged when analyzing Section 8005 that “Plaintiffs either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the Administrative Procedure Act, or both.” *Id.* at 676–77. However, the analysis—whether under the Constitution or the APA—remains the same. *Id.*<sup>13</sup>

State Plaintiffs also make a second and distinct claim that Defendants have violated the APA’s prohibition on arbitrary and capricious agency action. See *California*, No. 19-cv-00872-HSG, Dkt. No. 220 at 13–15. Plaintiffs argue that in identifying and reallocating funds from 128 existing military construction projects, Defendants did not “address any of the harms to public health and safety” that would result from defunding those projects. *Id.* at 13. The Court finds this argument meritless. “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Rather, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (quotation omitted). Here, the administrative record provides such an explanation, indicating that Defendants identified projects for defunding to “provide [DoD] time to work with [Congress] to determine opportunities to restore funds for these important military construction projects . . . .” *California*, No. 19-cv-

---

<sup>13</sup> Although *Sierra Club* Plaintiffs do not raise an independent claim under the APA, they note, as the Ninth Circuit has recognized, that the Court may consider their claim challenging the use of military construction funds either as an equitable action to enjoin unconstitutional conduct or under the APA as final agency action that violates the Constitution. See *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 21–22 (citing *Sierra Club*, 929 at 676–77).

United States District Court  
Northern District of California

1 00872-HSG, Dkt. No. 206-2, Ex. 2 at 2. For the same reasons discussed above, it is not the  
2 Court’s task to decide whether it finds the substance of Defendants’ rationale for defunding or  
3 delaying these projects persuasive or wise, and State Plaintiffs’ disagreement with that rationale  
4 does not make the decision arbitrary and capricious.

5 **D. National Environmental Policy Act**

6 Plaintiffs also seek a declaratory judgment deeming unlawful Defendants’ failure to  
7 comply with NEPA before undertaking the proposed military construction projects under Section  
8 2808.<sup>14</sup> NEPA is intended “to promote efforts which will prevent or eliminate damage to the  
9 environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.  
10 Under NEPA, federal agencies must assess the environmental impact of agency actions that  
11 “significantly affect[ ] the quality of the human environment.” *Id.* § 4332(C). Where an agency’s  
12 project “might significantly affect environmental quality,” NEPA compels preparation of an  
13 Environmental Impact Statement (“EIS”). *See WildEarth Guardians v. Provencio*, 923 F.3d 655,  
14 669 (9th Cir. 2019). Plaintiffs contend that Defendants were required to prepare an EIS for the  
15 proposed border barrier construction projects, but failed to do so here.

16 In response, Defendants point to the language of Section 2808, which by its terms,  
17 authorizes “the Secretary of Defense, without regard to any other provision of law, [to] undertake  
18 military construction projects . . .” 10 U.S.C. § 2808. The Secretary of Defense mirrored this  
19 language in directing the Secretary of the Army “to expeditiously undertake the eleven border

20 \_\_\_\_\_  
21 <sup>14</sup> State Plaintiffs also attempt to expand their NEPA cause of action to include the land transfer  
22 from the Department of the Interior for the proposed border barrier construction projects, but their  
23 complaint does not assert such a claim. *See California*, No. 19-cv-00872-HSG, Dkt. No. 47 at  
24 ¶¶ 392–99. Rather, their NEPA claim explicitly states that “Defendant DHS is in violation of  
25 NEPA and the APA because it failed to prepare an [Environmental Impact Statement] concerning  
26 border wall development projects that will have adverse effects on the environment . . .” *Id.* at  
27 ¶ 397. Even reading the complaint liberally, the operative complaint does not “give the defendant  
28 fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *See Pickern v.*  
*Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (holding district court did not err in  
finding plaintiff failed to provide adequate notice of her claims where she presented specific  
factual grounds for those claims for first time on summary judgment) (quotation omitted). The  
Court may not now grant summary judgment as to a claim that State Plaintiffs never asserted until  
their motion for summary judgment, when they never sought leave to amend the complaint. *See*  
*Wasco Prod., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“Simply put,  
summary judgment is not a procedural second chance to flesh out inadequate pleadings.”  
(quotation omitted)).



United States District Court  
Northern District of California

1 barrier military construction projects,” and “to do so without regard to any other provision of law  
2 that may impede the expeditious construction of such projects in response to the national  
3 emergency.” *See California*, No. 19-cv-00872-HSG, Dkt. No. 206-1, Ex. 1 at 1. The Court finds  
4 that the language in Section 2808 is clear on its face, and permits the Secretary of Defense, if  
5 properly acting within his authority under Section 2808, to undertake military construction  
6 projects without regard to NEPA.

7 Plaintiffs attempt to restrict this “notwithstanding” language by divorcing Defendants’  
8 ability to re-prioritize military construction projects from their ability to actually construct those  
9 projects. Plaintiffs urge that only the former power to “restructur[e] construction priorities” may  
10 be undertaken “without regard to any other provision of law.” *See, e.g., Sierra Club*, No. 19-cv-  
11 00892-HSG, Dkt. No. 210 at 19–20. The Court finds no evidence for this reading, as the statute  
12 permits the Secretary to “undertake military construction projects,” not just to prioritize them.

13 Plaintiffs next contend that the Court should still read the “notwithstanding” language  
14 narrowly because had Congress intended to waive NEPA’s requirements, the statute would have  
15 included language that the projects be undertaken “without delay” or “expeditiously.” *Id.* at 20.  
16 However, there are no magic words constraining Congress’ ability to empower Defendants to  
17 proceed without consideration of NEPA or other laws. Rather, the Court must “tak[e] into account  
18 the whole of the statutory context in which [the notwithstanding clause] appears.” *See United*  
19 *States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007). Here, Plaintiffs’ argument is belied by the  
20 statutory prerequisite that there be a declaration of war or a national emergency before Section  
21 2808 may be used for military construction. Such a condition, by its nature, normally would  
22 require speed. The Court finds it unreasonable to conclude that in the face of war or a national  
23 emergency, Congress would require Defendants to engage in the time-intensive EIS process prior  
24 to undertaking projects “necessary to support [] use of the armed forces.” *See* 10 U.S.C. § 2808.  
25 Plaintiffs’ concern that Section 2808 would “empower[] the Secretary of Defense to build almost  
26 anything, anywhere,” *see Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 21, ignores the  
27 conditions discussed in Section III.B.ii above. Section 2808 has limits. It may only be invoked in  
28 the event of war or a national emergency, and the Secretary of Defense still must establish that the

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

proposal is a military construction project necessary to support the use of the armed forces.

This does not, however, end the inquiry. To be sure, had Defendants acted within their authority under Section 2808 in proposing the eleven border barrier construction projects, the Court finds that their conduct likely would not violate NEPA. But the Court has already found that Defendants have not properly invoked Section 2808, so that the “without regard to any other provision of law” language is not triggered. Put another way, the question of whether Defendants are required to comply with NEPA with respect to the eleven projects is derivative of the parties’ Section 2808 arguments. The Court does not understand Defendants to suggest that any authority other than Section 2808 excuses them from complying with NEPA as to these projects. The Court thus need not reach whether a proper invocation of Section 2808 could theoretically still require compliance with NEPA under different circumstances.<sup>15</sup>

**E. Injunctive Relief**

Having found that Defendants’ intended use of military construction funds under Section 2808 is unlawful, the Court next considers Plaintiffs’ request for injunctive relief. It is a well-established principle of equity that a permanent injunction is appropriate when: (1) a plaintiff will “suffer[ ] an irreparable injury” absent an injunction; (2) available remedies at law are “inadequate;” (3) the “balance of hardships” between the parties supports an equitable remedy; and (4) the public interest is “not disserved.” *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Defendants do not challenge whether the available remedies at law are inadequate. *See, e.g., Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 28–34. The Court thus addresses the remaining factors.

**i. Irreparable Injury**

The State Plaintiffs identify several theories of irreparable injury that will occur in the absence of an injunction, including environmental and financial harm, as well as harm to their

---

<sup>15</sup> State Plaintiffs appear to seek reconsideration of the Court’s prior order regarding whether Defendants violated NEPA for purposes of Section 8005 and 10 U.S.C. § 284. *See California*, No. 19-cv-00872-HSG, Dkt. No. 220, at 5, 19–20, & n.3. State Plaintiffs acknowledge that they do so to preserve this issue for appeal. *Id.* at 5, n.3. The Court declines to reconsider its prior order given Plaintiffs have failed to provide any new law or factual evidence warranting further analysis.

United States District Court  
Northern District of California

1 ability to enforce state laws concerning the protection of environmental and natural resources. The  
2 Sierra Club Plaintiffs, in turn, identify aesthetic and recreational harm, as well as organizational  
3 harm to their missions in diverting resources to respond to Defendants’ proposed projects. The  
4 Court recognizes that these injuries are distinct, and first addresses the Sierra Club Plaintiffs’  
5 alleged injuries. Because, as explained more fully below, the Court finds that Sierra Club  
6 Plaintiffs have established that a permanent injunction is warranted as to all eleven proposed  
7 projects, the Court denies State Plaintiffs’ duplicative request for a permanent injunction as moot.

8 **a. Aesthetic and Recreational Harm**

9 Sierra Club Plaintiffs contend that absent a permanent injunction Defendants’ conduct will  
10 irreparably harm their members’ aesthetic and recreational interests as the construction “will  
11 impede [their] ability to enjoy, work, and create in the wilderness areas they have used for years  
12 along the U.S.-Mexico border.” *See Sierra Club*, 19-cv-00892-HSG, Dkt. No. 210 at 26. As this  
13 Court has previously noted, “it is well-established in the Ninth Circuit that an organization can  
14 demonstrate irreparable harm by showing that the challenged action will injure its members’  
15 enjoyment of public land. *See id.*, Dkt. No. 144 at 49 (citing *All. for the Wild Rockies v. Cottrell*,  
16 632 F.3d 1127, 1135 (9th Cir. 2011)). And here, Plaintiffs provide declarations from their  
17 members detailing how Defendants’ eleven proposed border barrier construction projects will  
18 harm their ability to recreate in and otherwise enjoy public land along the border. *See, e.g., id.*,  
19 Dkt. No. 210-1, Exs. 1–19.

20 In response, Defendants attempt to minimize Plaintiffs’ injuries by arguing that many of  
21 the challenged construction projects are surrounded by private land or are in areas previously  
22 disturbed by at least some border barrier construction. *See id.*, Dkt. Nos. 236 at 28–31, 236-6, Ex.  
23 6. Defendants further suggest that any access limitations imposed by the new construction would  
24 be de minimis, especially as to the two projects on the Barry M. Goldwater Range, where only a  
25 third of the miles scheduled for construction are accessible to the public. *See id.*, Dkt. No. 236 at  
26 30. Defendants conclude that Plaintiffs’ asserted harm is thus little more than their subjective  
27 opinion about whether a border wall would be unsightly. *Id.* The Court is not persuaded.

28 As an initial matter, the Ninth Circuit has “never required a plaintiff to show that he has a

United States District Court  
Northern District of California

1 right of access to the site on which the challenged activity is occurring, or that he has an absolute  
 2 right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest.”  
 3 *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). In *Cantrell*, for example, the  
 4 Ninth Circuit credited birdwatchers’ allegations that they would suffer harm from the defendant’s  
 5 construction, which would hinder them from viewing birds and nests on a naval station from  
 6 publicly accessible locations. Such an approach is sensible as “an area can be observed and  
 7 enjoyed from adjacent land,” such that plaintiffs may still suffer injury to their aesthetic and  
 8 recreational interests even when not physically *on* the affected land. *See id.* Here too, Plaintiffs  
 9 have explained that the proposed projects may be seen from miles away, and affect their  
 10 recreational and aesthetic interests, even when they are not standing directly on the areas proposed  
 11 for construction. *See, e.g., Sierra Club*, 19-cv-00892-HSG, Dkt. No. 210-1, Ex. 4; *id.*, Ex. 9.

12 Defendants’ reliance on *Center for Food Safety v. Vilsack* does not undermine the  
 13 significance of Plaintiffs’ injury. Defendants point to a sentence in a footnote that states “a  
 14 plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of  
 15 irreparable harm necessary to obtain it.” 636 F.3d 1166, 1171, n.6 (9th Cir. 2011). This point is  
 16 true as far as it goes, but the plaintiffs in *Vilsack* had only raised possible concerns about genetic  
 17 contamination, not a likelihood of injury. *Id.* at 1173. In *Vilsack*, the plaintiffs suggested that the  
 18 defendants’ genetically modified sugar beets could cross-pollinate with their crops, causing injury.  
 19 *See id.* at 1172. The Ninth Circuit explained that the undisputed evidence, however, indicated that  
 20 the defendants’ plants were “biologically incapable of flowering or cross-pollinating” in a way  
 21 that could affect the plaintiffs’ plants. *Id.* at 1173. Because the alleged harm was a biological  
 22 impossibility, the Ninth Circuit found that there was no likelihood of irreparable injury warranting  
 23 an injunction.

24 Here, in contrast, Plaintiffs have detailed the harm that would result if the border barrier  
 25 construction projects continue. Defendants’ argument in response is that the land for the  
 26 challenged projects “is already heavily disturbed with border infrastructure” as much of the land  
 27 occupies existing “law enforcement corridors.” *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 236 at  
 28 28. But as the Court has previously explained, Defendants’ proposal would significantly alter the

United States District Court  
Northern District of California

1 existing landscape, and even the proposed changes to the existing infrastructure are substantial.  
2 *See id.*, Dkt. No. 144 at 50.

3 The Court is also not persuaded that the preexistence of some construction means Plaintiffs  
4 here cannot suffer an injury from additional construction. Defendants do not cite a case that  
5 warrants such a sweeping limitation. In *Gallatin Wildlife Association v. U.S. Forest Services*, the  
6 plaintiffs sought to enjoin sheep grazing that had occurred for the past 150 years. *See* No. cv 15-  
7 27-BU-BMM, 2015 WL 4528611, at \*4 (D. Mont. July 27, 2015). The court found that the  
8 plaintiffs had “failed to demonstrate that allowing the domestic grazing to occur this year will  
9 cause any new harm to the landscape that has not already occurred in the past 150 years.” *Id.*  
10 That the sheep had grazed in the area before was not itself decisive; instead, the court considered  
11 the nature and scale of their continued and additive effect on the land at issue. And in *Center for*  
12 *Biological Diversity v. Hays*, the court found that the plaintiffs had not established irreparable  
13 injury where the land at issue could not be used for recreational purposes at all due to the scale of  
14 preexisting dead trees that threatened the safety of visitors. No. 2:15-cv-01627-TLN-CMK, 2015  
15 WL 5916739, at \*1, \*10 (E.D. Cal. Oct. 8, 2015). The plaintiff’s interest in studying these trees  
16 was thus irrelevant as he could not access them regardless of the defendant’s conduct. *Id.*

17 In sum, the Court finds that the funding and construction of these border barrier projects, if  
18 indeed barred by law, cannot be easily remedied after the fact. To the contrary, as the Ninth  
19 Circuit has acknowledged, “[t]he harm here, as with many instances of this kind of harm, is  
20 irreparable for the purposes of the preliminary injunction analysis.” *See League of Wilderness*  
21 *Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir.  
22 2014). Accordingly, the Court finds that Sierra Club Plaintiffs have established irreparable injury  
23 to their aesthetic and recreational interests in the absence of a permanent injunction.

**b. Organizational Harm**

25 Sierra Club Plaintiffs further contend that Defendants’ conduct has irreparably harmed the  
26 missions and activities of the Southern Border Communities Coalition (“SBCC”) and its member  
27 organizations, which include the Texas Civil Rights Project (“TCRP”), Southwest Environmental  
28 Center (“SWEC”), and American Friends Service Committee (“AFSC”). Each has had to divert

United States District Court  
Northern District of California

1 resources to combat the impact of the proposed construction.

2 The Supreme Court has recognized that an organization may suffer harm if the challenged  
3 conduct frustrates its activities and drains its resources. *See, e.g., Havens Realty Corp. v.*  
4 *Coleman*, 455 U.S. 363, 377–79 (1982). In *Havens Realty*, a nonprofit corporation challenged the  
5 defendants’ alleged “racial steering” practices, in which real estate brokers encouraged racial  
6 segregation by directing members of racial or ethnic groups to buildings or neighborhoods  
7 occupied primarily by members of the same race or ethnic group. *Id.* at 367, & n.1. The  
8 organization’s “purpose was to make equal opportunity in housing a reality . . . .” *Id.* at 368  
9 (quotation omitted). The Supreme Court explained that the organization’s need to divert resources  
10 “to identify and counteract” the defendants’ discriminatory practices “constitute[d] far more than  
11 simply a setback to the organization’s abstract social interests” in equal access to housing. *See id.*  
12 at 379–80. Similarly, in *National Council of La Raza v. Cegavske*, the Ninth Circuit further  
13 recognized that an organization may establish concrete harm if the defendant’s conduct changes  
14 “business as usual” for the organization, such that resources spent to counter a defendant’s  
15 conduct “would have [been] spent on some other aspect of their organizational purpose . . . or any  
16 other activity that advances their goals.” 800 F.3d 1032, 1040 (9th Cir. 2015) (quotation omitted).  
17 In *Cegavske*, the Ninth Circuit acknowledged that had the state complied with the National Voter  
18 Registration Act, the organization could have spent its resources elsewhere, such as increasing its  
19 voter education efforts, rather than on voter registration drives in communities where the  
20 defendant should have offered voter registration opportunities. *Id.*; *accord Fair Hous. Council of*  
21 *San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012).

22 That is precisely what Plaintiffs have established here, as Defendants’ conduct has  
23 significantly altered “business as usual” for the Plaintiff organizations, and will continue to do so  
24 without a permanent injunction:

- 25 • SBCC’s “principal goals are to protect human rights, dignity, and safety” in the  
26 border regions of the United States. *Sierra Club*, No. 19-cv-00892-HSG, Dkt.  
27 No. 210-1, Ex. 7 at 41–46. SBCC has spent considerable time and resources  
28 advocating against appropriations for border barrier construction and in urging

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Congress to terminate the national emergency. As a result, SBCC has diverted time and resources away from its “other initiatives, including Border Patrol accountability, community engagement on local health and education issues, and public education about immigration policies more broadly.” *Id.* at 45.

- TCRP has diverted resources to protect Texas landowners in Laredo who are at risk of having their non-public property condemned for the border barrier construction projects, *id.*, Ex. 6 at 35–39. They have staged events to educate communities about these projects and their rights, are working to create a network of advocates for this work. Because of this work, TCRP has had to divert time and resources away from their other projects to protect border communities outside of Laredo.
- SWEC’s mission is to “reverse the accelerating loss of plants and animals worldwide through protection and restoration of native wildlife and their habitats in the southwest.” *Id.*, Ex. 3 at 16–17. Though based in New Mexico, its restoration and education work extends into Eastern Arizona and West Texas. However, in light of the proposed border barrier projects, SWEC has significantly reduced its restoration work to divert resources to monitor construction and educate members and the public about the proposed construction and its likely impact.
- AFSC works with migrant communities in San Diego and El Centro to document abuses by law enforcement and collaborate with community groups to address local issues. *Id.*, Ex. 13 at 74–75. However, if the border barrier projects in these areas proceed, they will have to decrease the time and resources they spend on their other services, including know-your-rights trainings and leadership development courses, so they can monitor the construction and provide outreach resources to the affected communities.

Defendants counter that Plaintiffs’ missions as public advocacy groups have not been injured, and more critically still, that Plaintiffs have not established any nexus between their injury

United States District Court  
Northern District of California

1 and Defendants’ conduct. Defendants first contend that the organizations may continue their  
 2 advocacy work in the face of the border barrier projects, but as the Ninth Circuit recognized in  
 3 *Cegavske*, it is enough that these organizations “would have spent [resources] on some other  
 4 aspect of their organizational purpose . . . or any other activity that advances their goals,” in the  
 5 absence of the border barrier construction projects. *See* 800 F.3d at 1040. Here, the Plaintiff  
 6 organizations have spent resources creating new education, outreach, and monitoring programs  
 7 related to the construction projects, rather than on other activities related to their respective  
 8 missions. Defendants’ suggestion that there is no nexus between Plaintiffs’ harm and Defendants’  
 9 conduct is similarly unavailing. The organizations work in and with border communities to  
 10 protect and restore the environment, as is the case with SWEC, and promote the safety of border  
 11 communities, as is the case with SBCC, TCRP, and AFSC. But because the organizations believe  
 12 the border barrier projects impede these respective missions, they have altered “business as usual”  
 13 to combat these projects and educate others about them. Defendants’ blanket conclusion that the  
 14 border barrier construction projects “in no way impede or disrupt their day-to-day activities,”  
 15 *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 247 at 24, simply is not supported by the record.  
 16 The Court finds that Sierra Club Plaintiffs have thus established irreparable injury to their  
 17 organizational missions in the absence of a permanent injunction.

**i. Balance of Equities and Public Interest**

19 The parties all acknowledge that when the government is a party to a case in which a  
 20 preliminary injunction is sought, the balance of the equities and public interest factors merge. *See*  
 21 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). And in these cases, the  
 22 parties’ asserted injuries collapse into the equities they assert.

23 According to Defendants, these factors tilt in their favor, because they have “compelling  
 24 interests in safety and in the integrity of our borders,” and “in ensuring that [the country’s]  
 25 military forces are properly supported and have the necessary resources to ensure mission  
 26 success.” *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 33. As the Court has  
 27 previously acknowledged, “the public has a ‘weighty’ interest ‘in efficient administration of the  
 28 immigration laws at the border.’” *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779



United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

Yet Defendants’ argument again fails to recognize that Congress has already engaged in the difficult balancing of Defendants’ proffered interests and the need for border barrier construction in passing the CAA. *See* CAA, § 230(a)(1), 133 Stat. 13. Defendants have not pointed to any factual developments that were not before Congress and that may have altered its judgment to appropriate just \$1.375 billion in funding for limited border barrier construction. The Court appreciates the complexity of the policy judgments at hand, and further understands that Defendants may strongly disagree with Congress’ determination. But the Court has found that Defendants do not have the statutory authority under Section 2808 to redirect military construction funds for the planned border barrier construction. And as such, Defendants have not identified a mechanism by which they may override Congress’ appropriations judgment. As the Court explained in its orders related to Section 8005, “Defendants’ position on these factors boils down to an argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means. No case supports this principle.” *See Sierra Club*, 19-cv-00892-HSG, Dkt. No. 185 at 8. The Court finds that “the public [] has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat,” *E. Bay Sanctuary Covenant*, 932 F3d at 779, and that these constitutional separation of powers principles outweigh Defendants’ concerns about the efficiency of DHS. Accordingly, the Court follows the Ninth Circuit’s reasoning that the public interest “is best served by respecting the Constitution’s assignment of the power of the purse to Congress, and by deferring to Congress’s understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction.” *Sierra Club*, 929 F.3d at 677.

In his concurrence in the landmark 1952 case of *Youngstown Sheet and Tube Co. v. Sawyer*, which addressed the scope of executive power during a time of war on the Korean Peninsula, Justice Frankfurter articulated a principle that remains as important today as it was then:

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did

specifically address itself to a problem, as Congress did to that of seizure [of steel mills by the President], to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

343 U.S. 579, 610 (Frankfurter, J., concurring).

After a lengthy legislative process, Congress specifically declined to provide the funding sought by the Executive for the border barrier construction at issue in this case. The Executive has made plain its determination to nonetheless proceed with the construction by any means necessary, notwithstanding Congress' contrary exercise of its constitutionally-absolute power of the purse. As Justice Frankfurter explained long ago, that position both disregards the clear will of Congress and disrespects the whole legislative process and the separation of powers enshrined in the Constitution. Because the Court finds Defendants' proposed use of funds under Section 2808 unlawful, the Court finds that the balance of hardships and public interest favor Plaintiffs, and counsel in favor of a permanent injunction.<sup>16</sup>

**IV. STAY PENDING APPEAL**

Federal Rule of Civil Procedure 62(c) authorizes a district court to stay enforcement of a permanent injunction pending appeal. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation omitted). Rather, the decision to grant or deny a stay is committed to the district court's discretion. *Id.* In determining whether to issue a stay, a court examines several factors including: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the non-moving party; and (4) where the public interest lies. *See Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011).

<sup>16</sup> The Court further notes that on December 10, 2019, the United States District Court for the Western District of Texas also entered an order permanently enjoining "agency head Defendants Mark T. Esper, Chad F. Wilf, Todd, T. Semonite, David Bernhardt, and Steven T. Mnuchin . . . from using § 2808 funds beyond the \$1.375 billion in the 2019 Consolidated Appropriations Act for border wall construction." *See El Paso County v. Trump*, No. 3:19-cv-0066-DB (W.D. Tex.), Dkt. No. 136 at 21.

United States District Court  
Northern District of California

United States District Court  
Northern District of California

1           Although the Court has considered similar factors as part of its permanent injunction  
 2 analysis above, the Supreme Court’s stay of this Court’s prior injunction order appears to reflect  
 3 the conclusion of a majority of that Court that the challenged construction should be permitted to  
 4 proceed pending resolution of the merits. Accordingly, the Court finds in its discretion that the  
 5 lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth  
 6 Circuit on the merits of Plaintiffs’ Section 8005 claim, which will address several of the threshold  
 7 legal and factual issues raised in this order, warrant a stay of the permanent injunction pending  
 8 appeal. Plaintiffs may, of course, petition the Ninth Circuit to lift this stay.

9           **V. CERTIFICATION FOR APPEAL**

10           Given the parties’ express request to certify for appeal the Court’s prior orders regarding  
 11 Section 8005, the Court also considers whether certification is appropriate here. Appellate courts  
 12 generally only have jurisdiction to hear appeals from final orders. *See* 28 U.S.C. § 1291. Federal  
 13 Rule of Civil Procedure 54(b) allows for a narrow exception to this final judgment rule, permitting  
 14 courts to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties  
 15 only if the court expressly determines that there is no just reason for delay.” Entry of judgment  
 16 under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just  
 17 reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir.  
 18 2018) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–8 (1980)). The Court finds  
 19 both requirements satisfied here.

20           **A. Finality of Judgment**

21           A final judgment is “a decision upon a cognizable claim for relief” that is “an ultimate  
 22 disposition of an individual claim entered in the course of a multiple claims action.” *Curtiss-*  
 23 *Wright Corp.*, 446 U.S. at 7. The Court finds this requirement satisfied because the Court’s award  
 24 of partial summary judgment in this order is “an ultimate disposition” of Plaintiffs’ claims related  
 25 to Defendants’ purported reliance on Section 2808 for border barrier construction.

26           **B. No Just Reason for Delay**

27           As the Ninth Circuit has explained, “[j]udgments under Rule 54(b) must be reserved for  
 28 the unusual case in which the costs and risks of multiplying the number of proceedings and of

United States District Court  
Northern District of California

1 overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early  
 2 and separate judgment as to some claims or parties.” *Morrison-Knudsen Co. v. Archer*, 655 F.2d  
 3 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings “should include a determination  
 4 whether, upon any review of the judgment entered under the rule, the appellate court will be  
 5 required to address legal or factual issues that are similar to those contained in the claims still  
 6 pending before the trial court.” *Id.* at 965. “The greater the overlap the greater the chance that  
 7 [the Court of Appeals] will have to revisit the same facts—spun only slightly differently—in a  
 8 successive appeal.” *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). “[P]lainly,  
 9 sound judicial administration does not require that Rule 54(b) requests be granted routinely.” *Id.*  
 10 at 879 (quotation omitted).

11 As with its partial summary judgment order related to Section 8005, the Court finds there  
 12 is no just reason for delay under the circumstances. Whether Defendants’ actions comport with  
 13 the statutory requirements of Section 2808 and whether Defendants’ actions comport with the  
 14 remaining statutory requirements related to the outstanding claims are distinct inquiries, largely  
 15 based on distinct law. The Court therefore finds that “sound judicial administration” is best served  
 16 by the Court certifying this judgment for appeal, in light of the undisputedly significant interests at  
 17 stake in this case. *See Wood*, 422 F.3d at 879.

18 **VI. CONCLUSION**

19 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**  
 20 Plaintiffs’ motions for partial summary judgment and **DENIES** Defendants’ motions for partial  
 21 summary judgment. Specifically, the Court **GRANTS** Plaintiffs’ request for declaratory judgment  
 22 that Defendants’ intended use of military construction funds under Section 2808 for the eleven  
 23 border barrier construction projects that the Secretary of Defense identified as Yuma Project 2;  
 24 Yuma Project 10/27; Yuma Project 3; Yuma Project 6; San Diego Project 4; San Diego Project 11;  
 25 El Paso Project 2; El Paso Project 8; Laredo Project 5; Laredo Project 7; El Centro Project 5; and  
 26 El Centro Project 9, is unlawful. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. Nos. 201, 201-1,  
 27 & Ex. 1. The Court **DENIES** Plaintiffs’ request for declaratory judgment and injunctive relief  
 28 concerning Defendants’ (1) invocation of Section 2808 beyond these projects; (2) reliance on

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Section 2808 to excuse them from complying with NEPA as to the eleven proposed projects; and (3) decision to defer outstanding military construction projects.

The terms of the permanent injunction are as follows: Defendants Mark T. Esper, in his official capacity as Secretary of Defense; and Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security (collectively, "Defendants"), and all persons acting under their direction, are permanently enjoined from using military construction funds appropriated for other purposes to build a border wall in the areas Defendants have identified as Yuma Project 2; Yuma Project 10/27; Yuma Project 3; Yuma Project 6; San Diego Project 4; San Diego Project 11; El Paso Project 2; El Paso Project 8; Laredo Project 5; Laredo Project 7; El Centro Project 5; and El Centro Project 9. Nevertheless, as discussed in Section IV above, the Court exercises its discretion to **STAY** the permanent injunction pending appeal.

The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants with respect to Defendants' purported reliance on Section 2808 to fund border barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

**IT IS SO ORDERED.**

Dated: 12/11/2019



United States District Judge

# EXHIBIT 2

# **EXHIBIT 1**

## 2808 Deferrals in United States Territories (\$ in thousands)

State Country Title	Location Title	Award Date	Line Item Title	Fiscal Year Enactment	Amount
GUAM	Joint Region Marianas	December 2020	Earth Covered Magazines	2019	52,270
		September 2020	PRTC Roads	2016	2,500
		July 2020	Water Well Field	2018	56,088
		June 2020	Navy-Commercial Tie-In Hardening	2018	37,180
		March 2020	Machine Gun Range	2019	50,000
		February 2020	APR - Munitions Storage Igloos, Ph 2	2017	35,300
		February 2020	Hayman Munitions Storage Igloos MSA 2	2019	9,800
		January 2020	APR - SATCOM C4I Facility	2017	14,200
PUERTO RICO	Arroyo	January 2021	Readiness Center	2018	30,000
		March 2021	Company Headquarters Bldg -Transient Training	2018	47,000
	Camp Santiago	March 2021	Dining Facility, Transient Training	2018	13,000
		September 2020	Engineering/Housing Maintenance Shops (DPW)	2018	11,000
		September 2020	Maneuver Area Training Equipment Site	2018	80,000
		September 2020	National Guard Readiness Center	2018	50,000
		September 2020	Power Substation/Switching Station Building	2018	18,500
		January 2021	Vehicle Maintenance Shop	2018	28,000
	Punta Borinquen	December 2019	Ramey Unit School Replacement	2018	61,071
	San Juan	January 2021	Aircraft Maintenance Hangar (AASF)	2018	64,000
VIRGIN ISLANDS	St. Croix	January 2021	Vehicle Maintenance Shop	2018	20,000
	St. Thomas	September 2020	Power Substation/Switching Station Building	2018	3,500
		September 2020	National Guard Vehicle Maintenance Shop Add/A	2018	3,875
<b>Grand Total</b>					<b>687,284</b>

## 2808 Deferrals in the 50 United States (\$ in thousands)

State Country Title	Location Title	Award Date	Line Item Title	Fiscal Year Enactment	Amount
ALABAMA	Anniston Army Depot	March 2020	Weapon Maintenance Shop	2019	5,200
ALASKA	Eielson AFB	February 2021	Repair Central Heat/Power Plant Boiler PH 4	2018	41,000
		January 2020	Repair Central Heat & Power Plant Boiler Ph3	2016	34,400
	January 2020	Eielson AFB Improved CATM Range	2019	19,000	
	January 2021	Missile Field #1 Expansion	2019	8,000	
ARIZONA	Fort Huachuca	May 2020	Ground Transport Equipment Building	2018	30,000
CALIFORNIA	Channel Islands ANGS	July 2020	Construct C-130J Flight Simulator Facility	2019	8,000
COLORADO	Peterson AFB	September 2020	Space Control Facility	2018	8,000
FLORIDA	Tyndall AFB	January 2020	Fire/Crash Rescue Station	2018	17,000
HAWAII	Joint Base Pearl Harbor-Hickam	September 2020	Consolidated Training Facility	2018	5,500
	Kaneohe Bay	May 2020	Security Improvements Mokapu Gate	2018	26,492
INDIANA	Crane Army Ammunition Plant	March 2020	Railcar Holding Area	2019	16,000
	Hulman Regional Airport	February 2020	Construct Small Arms Range	2018	8,000
KENTUCKY	Fort Campbell, Kentucky	February 2020	Ft Campbell Middle School	2019	62,634
LOUISIANA	Joint Reserve Base New Orleans	January 2020	NORTHCOM - Construct Alert Apron	2019	15,000
		January 2020	NORTHCOM - Construct Alert Facilities	2019	24,000
MARYLAND	Fort Meade	June 2020	Cantonment Area Roads	2019	16,500
	Joint Base Andrews	June 2020	PAR Relocate Haz Cargo Pad and EOD Range	2019	37,000
		January 2020	Child Development Center	2019	13,000
MISSISSIPPI	Jackson IAP	August 2020	Construct Small Arms Range	2018	8,000
NEW MEXICO	Holloman AFB	March 2020	MQ-9 FTU Ops Facility	2019	85,000
	White Sands	February 2020	Information Systems Facility	2019	40,000
NEW YORK	U.S. Military Academy	June 2020	Engineering Center	2019	95,000
		June 2020	Parking Structure	2019	65,000
NORTH CAROLINA	Camp Lejeune, North Carolina	April 2020	2nd Radio BN Complex, Phase 2	2019	25,650
		January 2020	Ambulatory Care Center Addition/Alteration	2018	15,300
	Fort Bragg	Previously cancelled	Butner Elementary School Replacement	2016	32,944
	Seymour Johnson AFB	April 2020	KC-46A ADAL for Alt Mission Storage	2018	6,400
OKLAHOMA	Tulsa IAP	May 2020	Construct Small Arms Range	2018	8,000
OREGON	Klamath Falls IAP	February 2020	Construct Indoor Range	2018	8,000
SOUTH CAROLINA	Beaufort	January 2020	Replace Fuel Facilities	2016	2,500
		April 2020	Laurel Bay Fire Station Replacement	2019	10,750
TEXAS	Fort Bliss	January 2020	Defense Access Roads	2018	20,000
	Joint Base San Antonio	February 2020	Camp Bullis Dining Facility	2018	18,500
UTAH	Hill AFB	August 2020	Composite Aircraft Antenna Calibration Fac	2019	26,000
		January 2020	UTTR Consolidated Mission Control Center	2018	28,000
VIRGINIA	Joint Base Langley-Eustis	January 2020	Construct Cyber Ops Facility	2019	10,000
	Norfolk	January 2020	Replace Hazardous Materials Warehouse	2018	18,500
	Pentagon	Previously cancelled	Pentagon Metro Entrance Facility	2017	12,111
	Portsmouth	January 2020	Replace Hazardous Materials Warehouse	2018	22,500
	January 2020	Ships Maintenance Facility	2019	26,120	
WASHINGTON	Bangor	February 2021	Pier and Maintenance Facility	2019	88,960
WISCONSIN	Truax Field	March 2020	Construct Small Arms Range	2018	8,000
<b>Grand Total</b>					<b>1,075,961</b>



## 2808 Deferrals Outside of the United States (\$ in thousands)

State Country Title	Location Title	Award Date	Line Item Title	Fiscal Year Enactment	Amount
BAHRAIN ISLAND	SW Asia	February 2020	Fleet Maintenance Facility & TOC	2019	26,340
BELGIUM	Chievres AB	September 2020	Europe West District Superintendent's Office	2019	14,305
BULGARIA	Nevo Selo Fos	October 2020	EDI: Ammunition Holding Area	2019	5,200
CUBA	Guantanamo Bay	February 2020	Working Dog Treatment Facility Replacement	2019	9,080
ESTONIA	Unspecified Estonia	December 2020	EDI: SOF Operations Facility	2019	6,100
		December 2020	EDI: SOF Training Facility	2019	9,600
GERMANY	Baumholder	April 2021	SOF Joint Parachute Rigging Facility	2019	11,504
	East Camp Grafenwoehr	January 2020	Mission Training Complex	2019	31,000
	Panzer Kaserne	June 2021	MARFOREUR HQ Modernization and Expansion	2019	43,950
	Ramstein AB	September 2020	37 AS Squadron Operations/AMU	2017	13,437
		September 2020	EDI - KMC DABS-FEV/RH Storage Warehouses	2019	119,000
	Spangdahlem AB	July 2020	F/A-22 Low Observable/Composite Repair Fac	2017	18,000
		August 2021	EIC - Site Development and Infrastructure	2017	43,465
		March 2020	Spangdahlem Elementary School Replacement	2018	79,141
		March 2020	Upgrade Hardened Aircraft Shelters for F/A-22	2017	2,700
	Stuttgart	June 2022	Robinson Barracks Elem. School Replacement	2018	46,609
	Weisbaden	December 2022	Clay Kaserne Elementary School	2019	56,048
	Wiesbaden Army Airfield	November 2019	Hazardous Material Storage Building	2017	2,700
GREECE	Souda Bay	November 2019	EDI: Marathi Logistics Support Center	2019	6,200
		October 2019	EDI: Joint Mobility Processing Center	2019	41,650
HUNGARY	Kecskemet AB	October 2020	ERI: Airfield Upgrades	2018	12,900
		October 2020	ERI: Construct Parallel Taxiway	2018	30,000
		April 2020	ERI: Increase POL Storage Capacity	2018	12,500
ITALY	Sigonella	August 2020	EDI: P-8A Taxiway and Apron Upgrades	2019	66,050
JAPAN	Camp Mctureous	April 2020	Bechtel Elementary School	2019	94,851
	Iwakuni	March 2020	Fuel Pier	2019	33,200
		January 2020	Construct Bulk Storage Tanks PH 1	2018	30,800
	Kadena AB	June 2020	Truck Unload Facilities	2019	21,400
		May 2020	SOF Maintenance Hangar	2018	3,972
		May 2020	SOF Maintenance Hangar	2017	42,823
		January 2020	APR - Replace Munitions Structures	2017	19,815
	Yokota AB	February 2020	C-130J Corrosion Control Hangar	2017	23,777
		January 2020	Construct CATM Facility	2017	8,243
		December 2019	Hangar/Aircraft Maintenance Unit	2018	12,034
		December 2019	Hangar/AMU	2017	39,466
		December 2019	Operations and Warehouse Facilities	2018	8,590
		December 2019	Operations and Warehouse Facilities	2017	26,710
	Yokosuka	March 2020	Kinnick High School Inc 1	2019	40,000
KOREA	Camp Tango	December 2020	Command and Control Facility	2019	17,500
	Kunsan AB	December 2019	Unmanned Aerial Vehicle Hangar	2018	53,000
LUXEMBOURG	Sanem	April 2021	ERI: ECAOS Deployable Airbase System Storage	2018	67,400
NORWAY	Rygge	November 2020	ERI: Replace/Expand Quick Reaction Alert Pad	2018	10,300
POLAND	Poland	September 2020	EDI: Staging Areas	2019	34,000
		September 2020	EDI: Staging Areas	2019	17,000
		June 2020	EDI: Ammunition Storage Facility	2019	52,000
		April 2020	EDI: Rail Extension and Railhead	2019	6,400
	Powidz Air Base	November 2020	EDI: Bulk Fuel Storage	2019	21,000
ROMANIA	Mihail Kogalniceanu	November 2019	EDI: Explosives & Ammo Load/Unload Apron	2019	21,651
SLOVAKIA	Malacky	December 2020	EDI - Regional Munitions Storage Area	2019	59,000
		February 2020	ERI: Increase POL Storage Capacity	2018	20,000
		November 2019	ERI: Airfield Upgrades	2018	4,000
	Sliac Airport	November 2019	ERI: Airfield Upgrades	2018	22,000
SPAIN	Rota	January 2020	EDI: Port Operations Facilities	2019	21,590
TURKEY	Incirlık AB	August 2020	OCO: Relocate Base Main Access Control Point	2018	14,600
UNITED KINGDOM	Croughton RAF	January 2020	Croughton Elem/Middle/High School Replacement	2017	71,424
		October 2019	Main Gate Complex	2017	16,500
	Menwith Hill Station	February 2020	RAFMH Main Gate Rehabilitation	2018	11,000
	Royal Air Force Fairford	November 2019	EIC RC-135 Infrastructure	2018	2,150
		November 2019	EIC RC-135 Intel and Squad Ops Facility	2018	38,000
		November 2019	EIC RC-135 Runway Overrun Reconfiguration	2018	5,500
	Raf Fairford	September 2020	EDI - Munitions Holding Area	2019	19,000
		September 2020	EDI - Construct DABS-FEV Storage	2019	87,000
WORLDWIDE CLASSIFIED	Classified Location	January 2020	TACMOR - Utilities and Infrastructure Support	2019	18,000
WW unspecified	WW unspecified	February 2021	Planning and Design	2018	13,580
<b>Grand Total</b>					<b>1,836,755</b>

# EXHIBIT 3

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT W. BYRNE  
 SALLY MAGNANI  
 3 MICHAEL L. NEWMAN  
 Senior Assistant Attorneys General  
 4 MICHAEL P. CAYABAN  
 CHRISTINE CHUANG  
 5 EDWARD H. OCHOA  
 Supervising Deputy Attorneys General  
 6 BRIAN J. BILFORD  
 SPARSH S. KHANDESHI  
 7 LEE I. SHERMAN  
 JANELLE M. SMITH  
 8 JAMES F. ZAHRADKA II  
 HEATHER C. LESLIE (SBN 305095)  
 9 Deputy Attorney General  
 State Bar No. 305095  
 10 1300 I Street, Suite 125  
 P.O. Box 944255  
 11 Sacramento, CA 94244-2550  
 Telephone: (916) 210-7832  
 12 Fax: (916) 327-2319  
 E-mail: Heather.Leslie@doj.ca.gov  
 13 *Attorneys for Plaintiff State of California*

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION  
 17

18 **STATE OF CALIFORNIA et al.;**  
 19  
 20 Plaintiffs,  
 21  
 22 **v.**  
 23 **DONALD J. TRUMP, in his official**  
**capacity as President of the United States of**  
 24 **America et al.;**  
 25 Defendants.

Case No. 4:19-cv-00872-HSG  
**DECLARATION OF ALISON LYNN REASER IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTION 2808 AND NEPA**  
 Judge: Honorable Haywood S. Gilliam, Jr.  
 Trial Date: None Set  
 Action Filed: February 18, 2019

1 I, ALISON LYNN REASER, declare as follows:

2 1. I have personal knowledge of all the facts stated herein. This declaration is based  
3 on my personal knowledge, my review of publicly-available documents, and the knowledge and  
4 expertise I have acquired in the course of over 40 years as a trained business and academic  
5 economist, including analysis of the economic impacts of defense expenditures and military  
6 construction. If called and sworn as a witness, I could and would testify competently to the  
7 matters set forth herein.

### 8 **Qualifications and Background**

9 2. I have a B.A., M.A., and Ph.D. in Economics, all awarded by the University of  
10 California Los Angeles. Since 2009, I have been the Chief Economist for the Fermanian Business  
11 and Economic Institute (FBEI), a strategic unit of the Fermanian School of Business at Point  
12 Loma Nazarene University (PLNU), and have taught as an Adjunct Professor of Economics in the  
13 MBA program at PLNU. Attached hereto as Exhibit A is a true and correct copy of my  
14 curriculum vitae.

15 3. Previously, from 1996 through 2009, I served as Chief Economist for Barnett  
16 Banks, Inc. (acquired by Bank of America) and Bank of America's Investment Strategies Group.  
17 Prior to that, from 1992 through 1996, I served as the Chief Economist for First Interstate Bank  
18 (acquired by Wells Fargo Corporation), where I served in various other economic and managerial  
19 roles beginning in 1974.

20 4. I currently serve as a member of the California Chamber of Commerce Economic  
21 Advisory Council. I have recently served (through the end of 2018) as the Chair of the California  
22 State Treasurer's Council of Economic Advisors, as well as the National Association for Business  
23 Economics Foundation. I previously served as Chair of the California State Controller's Council  
24 of Economic Advisors and as the President of the National Association for Business Economics.

25 5. In my current role at PLNU, I serve as the director and principal economist for the  
26 FBEI. The Institute does consulting for companies, non-profit organizations, and government  
27 entities. Its purpose is to provide objective and actionable economic analysis, forecasts, and  
28 recommendations to entities that may not have a full staff of in-house economists. We study

Case 4:19-cv-00872-HSG Document 220-3 Filed 10/11/19 Page 3 of 10

1 issues such as the impact of the military on the region, water, homelessness, utilities, land use,  
2 housing policy, tourism, and transportation. I give frequent presentations on the economic  
3 outlook, covering the global, U.S., financial markets, and regional economies.

4         6.         From July 1, 2018 to June 30, 2019, I was interviewed 185 times by 27 sources  
5 (newspapers, TV, radio/podcasts, and internet) regarding my work. Some of these interviews  
6 were disseminated across multiple platforms, resulting in nearly 300 total media reports. I am a  
7 member of the CNBC Federal Reserve Forecasting Panel, comprised of Wall Street analysts, the  
8 Wall Street Journal Panel of Economic Forecasters, and the Economic Outlook Forecast Panel for  
9 the National Association for Business Economics.

10         7.         Beginning in 2012 and annually each year since, I have authored an Economic  
11 Impact Study calculating the economic impacts of all the spending from the Department of  
12 Defense that flows into San Diego. This comes in various channels, including payrolls of U.S.  
13 Navy and Marine Corps personnel, defense contracts, grants, and retirement benefits. During the  
14 past two years, I have also included spending linked to the Department of Veterans Affairs and  
15 the U.S. Coast Guard. This study includes a full analysis of the multiplier or ripple effects as  
16 defense dollars spread through supply chains of defense contractors and others who support  
17 various programs and military activities, as well as the effects on consumer spending. I have  
18 mapped the effects into the total impact on gross regional product (GRP), personal income, and  
19 jobs for the entire San Diego region (San Diego County). The study is sponsored by the non-  
20 profit San Diego Military Advisory Council (SDMAC), which is funded by various companies  
21 and other organizations. The study is widely respected as the authoritative document on the  
22 impact of military spending in the region and is regarded as a model of how such studies should  
23 be done. U.S. Navy and Marine Corps leadership in San Diego, Department of Defense officials  
24 in Washington, and political leaders in Congress and in California view the document as highly  
25 credible and valuable.

26         8.         The annual economic impact of military spending discussed above in Paragraph 7  
27 includes the effects of military construction as a vital element. I have also authored a separate  
28

1 study focusing exclusively on military construction spending, along with another report which  
2 analyzed a major development project tied to a new military facility.

### 3 Methodology

4 9. Before drafting this declaration, I reviewed the list of military construction  
5 projects announced by the Department of Defense from which funding is being diverted under 10  
6 U.S.C. § 2808 towards construction of border barriers along the southern border of the United  
7 States. I identified a total of nineteen projects that are within the jurisdictions of the plaintiff  
8 states in the above-captioned matter. Nine of these twenty plaintiff states have projects targeted  
9 for funds diversion: California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon,  
10 Virginia, and Wisconsin (the States). Information provided by counsel for the State of Virginia  
11 indicated that the Pentagon Metro Entrance Facility project in Virginia was unlikely to be  
12 constructed as intended before defendants' diversion of funds. The counsel for the State of  
13 Oregon also indicated that the project to replace the fuel facilities at Klamath Falls Airport was  
14 unlikely to go forward. These two projects were therefore excluded from my analysis. Seventeen  
15 projects in the States were therefore analyzed, which represented a total value of defunded  
16 projects equal to \$493 million. For each of those projects, I reviewed the Department of Defense  
17 form 1391 (1391 form), which contains basic information regarding each project.

18 10. I also reviewed the list prepared by the Department of Defense of proposed barrier  
19 borders to be constructed with the funds diverted under 10 U.S.C. § 2808. Offsetting positive  
20 impacts on the States from border barrier building were based on information from this report.

21 11. All of the estimated costs for each project as identified in the 1391 forms were  
22 carefully analyzed. The timing of fund expenditure was based on the timeframes identified for  
23 construction in each 1391 form. Construction expenditures were allocated to the appropriate  
24 industry or type of firm except in cases where it appeared likely that some items would have to be  
25 sourced primarily out of state. In addition to the expenditure amounts included in the construction  
26 dollar totals, two other types of effects were included. First, expenditures on equipment, furniture,  
27 or other items that are contingent on the project's completion were included in the analysis since  
28 these spending benefits would also be lost. These amounts were identified in the 1391 forms and

1 cited as being appropriated under separate bills. Second, where operations were scheduled or  
2 targeted to be expanded following the construction project's completion, the annual impact on  
3 direct military payrolls in terms of lost jobs and incomes was modeled.

4 12. The economic benefits of spending from construction of the proposed border  
5 barriers was based on the gross contract totals supplied by the Department of Defense noted in  
6 Paragraph 10 above. This affected two of the nine States analyzed: California and New Mexico.  
7 All construction was assumed to take place in 2020. The amounts of construction materials  
8 sourced within each state was estimated. Labor costs were based on their typical share of contract  
9 totals in similar projects.

10 13. The IMPLAN® model was used to analyze the total economic impact of military  
11 expenditure changes. This is a model widely used by economists to evaluate the various ripple or  
12 multiplier effects of an increase in spending on a region's sales, output, income, employment, and  
13 local tax revenues. These ripple effects encompass two stages: supply chain and consumer effects.  
14 The supply chain effects reflect the impact on other businesses when a local firm has to purchase  
15 additional goods or services to support its own increase in sales or activity. The consumer effects  
16 refer to the increase in household outlays due to the gain in jobs and income created by the direct  
17 impact of the increase in spending as well as the effects along the supply chain. I have used this  
18 model frequently in studies of various issues involving regional economies and have utilized it in  
19 all of the reports I have prepared on the impact of defense spending.

20 14. For this analysis, I built models to analyze the effects of proposed changes in  
21 spending for each of the nine states paired with each of the other eight states. For each state,  
22 models were built for each year between 2020 and 2022 where spending would be impacted. A  
23 total of 171 models were built. This process allowed me to assess not only the direct effects of  
24 changes in a given state, but also the feedback effect of other states as their spending was  
25 impacted.

26 15. The diversion of funds from military construction projects located outside of the  
27 plaintiff states would also have economic ripple effects on the plaintiff states. However, my  
28 analysis conservatively included only projects within the plaintiff states' boundaries because the

Case 4:19-cv-00872-HSG Document 220-3 Filed 10/11/19 Page 6 of 10

1 diversion of those projects would have primary effects on the plaintiff states. Because the  
2 secondary effects of defendants' diversion of military construction projects located in other states  
3 and countries were not considered in my analysis, the actual economic harm resulting from all of  
4 defendants' diversion of military construction projects would be greater than represented in this  
5 declaration. Those secondary effects, as well as the secondary effects of the projects considered in  
6 this analysis, would be felt in all of the plaintiff states as well as the states not involved in this  
7 action.

8 16. The use of the IMPLAN® involves five primary steps. First, spending for a project  
9 is allocated over time. For example, in the case of the Space Control Facility in Colorado  
10 proposed for defunding, the utilities and basic infrastructure would be installed before the  
11 building of the facility would begin. Second, the geographic direction of project dollars is  
12 determined. For example, in the case of the C-130J Flight Simulator Facility at the Channel  
13 Islands Air National Guard Station in California, the flight simulator would be built out of state.  
14 In contrast, construction dollars on various projects, such as for the Cyber Operations Facility in  
15 Hampton, Virginia, would typically be directed to firms within the state. Third, the spending on  
16 various projects is divided across different industries, such as construction firms, suppliers of  
17 electronics equipment, or providers of communications systems. Fourth, the impact of these  
18 dollars across the economy is modeled based on the historical relationships tracked by the U.S.  
19 Bureau of Economic Analysis and included in the IMPLAN® Model. For example, in a given  
20 state, a certain fraction of construction dollars is typically subcontracted out to other firms while  
21 other parts are spent on different types of building materials. The IMPLAN® Model also includes  
22 the historical data on the number of workers and wages used in the various industries that might  
23 be affected in supply chains and is used to estimate the impact on consumer spending for various  
24 goods and services that would typically occur in a given state. Fifth, the total effects of changes in  
25 the initial contract dollars, changes across various supply chains, and effects on consumer  
26 spending are summed to determine the total effects on jobs, income, GRP, and state and local  
27 taxes.

28





1 number of jobs. The loss of employment for all nine States in 2021 would reach nearly 1,600  
2 jobs.

3           20.     The tax revenues for state and local governments, through taxes on personal  
4 income, retail sales, corporate profits, and other sources, for the States of Colorado, Hawaii,  
5 Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin would be reduced by over  
6 \$36 million as a result of defendants' diversions from the military construction projects.

7           21.     Among all the States, California is the only state that would see net benefits to its  
8 economy and tax revenues as a result of the diversions over the 2020-2022 period. This is because  
9 only one project in California, the construction of a C-130J Flight Simulator Facility at the  
10 Channel Islands Air National Guard Station, would be defunded at a total cost of \$8.0 million.  
11 That loss is outweighed by the economic benefits resulting from the proposed border barrier  
12 construction in the state. However, the net benefits from the border barrier building would only  
13 occur in 2020, with economic losses following in 2021 and 2022.

14           22.     Colorado faces the defunding of one project, a Space Control Facility at the  
15 Peterson Air Force Base, at a cost of \$8.0 million. This would lead to a net loss of \$37 million in  
16 business sales over the 2020-22 period, while its GRP would lose over \$25 million. Personal  
17 income would be reduced by \$18 million and employment would be reduced by 82 jobs in 2020,  
18 growing to an impact of 129 jobs in 2022. The state would receive over \$1.0 million less in state  
19 and local tax revenues.

20           23.     Hawaii faces the defunding of two projects: a consolidated training facility at the  
21 Joint Base Pearl Harbor-Hickam and security improvements at the Mokapu Gate at the Marine  
22 Corps base at Kaneohe Bay, at a total cost of \$32 million. As a result, Hawaii would see a net loss  
23 of \$48 million in business sales over the 2020-22 period, while its GRP would lose \$27 million.  
24 Personal income would be reduced by \$17 million and employment in 2020 would be adversely  
25 affected with 163 fewer jobs. The state would receive \$2.5 million less in state and local tax  
26 revenues.

27           24.     Maryland faces the defunding of three projects: an expansion of cantonment area  
28 roads at Fort Meade, construction of a hazardous cargo loading and unloading pad and explosive

Case 4:19-cv-00872-HSG Document 220-3 Filed 10/11/19 Page 9 of 10

1 ordinance disposal training range at Joint Base Andrews, and construction of a child development  
2 center at Joint Base Andrews, at a total cost of \$66.5 million. Maryland would see a net loss of  
3 \$123 million in business sales over the 2020-22 period, while its GRP would lose \$63 million.  
4 Personal income would be reduced by \$42 million and employment in 2020 would be adversely  
5 affected with 319 fewer jobs, while employment would be reduced by 326 jobs in 2021. The state  
6 would receive over \$5.0 million less in state and local tax revenues.

7 25. New Mexico faces the defunding of two projects: the construction of an air combat  
8 training facility for unmanned vehicles at Holloman Air Force Base and an Information Systems  
9 Facility at White Sands Missile Range, at a total cost of \$125 million. Even with the economic  
10 boost from construction of the proposed border barriers the state would receive, New Mexico  
11 would see a net loss of nearly \$165 million in business sales over the 2020-22 period, while its  
12 GRP would lose \$70 million. Personal income would be reduced by \$39 million and employment  
13 in 2020 would be adversely affected by close to 450 fewer jobs, while employment would be  
14 reduced by over 300 jobs in 2021. The state would receive nearly \$9 million less in state and local  
15 tax revenues.

16 26. New York faces the defunding of two projects: an Engineering Center and Parking  
17 Structure, both at the U.S. Military Academy at West Point, at a total cost of \$160 million. New  
18 York would see a net loss of \$260 million in business sales over the 2020-22 period, while its  
19 GRP would lose close to \$150 million. Personal income would be reduced by more than \$100  
20 million and employment in 2020 would be adversely affected with over 1,000 fewer jobs, while  
21 employment would be reduced by about 400 jobs in 2021. The state would receive \$13 million  
22 less in state and local tax revenues.

23 27. Excluding the project to replace the fuel facilities at Klamath Falls Airport, Oregon  
24 faces the defunding of the construction of an indoor small arms training range at the Klamath  
25 Falls International Airport, at a total cost of \$8 million. This would result in a net loss of \$13  
26 million in total business sales in the 2020-22 period and \$7 million in GRP. The state's personal  
27 income would be down by \$5 million, while the state would also see the loss of about 70 jobs in  
28 2020. The state would receive about \$0.6 million less in state and local tax revenues.



# EXHIBIT 4

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT W. BYRNE  
 SALLY MAGNANI  
 3 MICHAEL L. NEWMAN  
 Senior Assistant Attorneys General  
 4 MICHAEL P. CAYABAN  
 CHRISTINE CHUANG  
 5 EDWARD H. OCHOA  
 Supervising Deputy Attorneys General  
 6 BRIAN J. BILFORD  
 SPARSH S. KHANDESHI  
 7 LEE I. SHERMAN  
 JANELLE M. SMITH  
 8 JAMES F. ZAHRADKA II  
 HEATHER C. LESLIE  
 9 Deputy Attorney General  
 State Bar No. 305095  
 10 1300 I Street, Suite 125  
 P.O. Box 944255  
 11 Sacramento, CA 94244-2550  
 Telephone: (916) 210-7832  
 12 Fax: (916) 327-2319  
 E-mail: Heather.Leslie@doj.ca.gov  
 13 Attorneys for Plaintiff State of California

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION  
 17

18 **STATE OF CALIFORNIA et al.;**  
 19 Plaintiffs,  
 20 v.  
 21 **DONALD J. TRUMP, in his official capacity**  
 22 **as President of the United States of America**  
 23 **et al.;**  
 24 Defendants.

Case No. 4:19-cv-00872-HSG  
**PLAINTIFF STATES OF CALIFORNIA,  
 COLORADO, HAWAII, MARYLAND,  
 NEW MEXICO, NEW YORK, OREGON,  
 VIRGINIA, AND WISCONSIN'S  
 NOTICE OF MOTION AND MOTION  
 FOR PARTIAL SUMMARY JUDGMENT  
 REGARDING SECTION 2808 AND  
 NEPA; MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT  
 THEREOF**  
 Date: November 20, 2019  
 Time: 10:00 am  
 Judge: Honorable Haywood S. Gilliam,  
 Jr.  
 Trial Date: None Set  
 Action Filed: February 18, 2019

Case 4:19-cv-00872-HSG Document 220 Filed 10/11/19 Page 29 of 47

1 Secretary of Homeland Security's authority under section 102 of the Illegal Immigrant  
2 Responsibility and Immigrant Reform Act (IIRIRA) (8 U.S.C. 1103 note) in order to expedite  
3 construction of the barriers constructed pursuant to Section 284. States PI Reply, ECF 112, 16-17.  
4 Section 102(c)(1) explicitly states that the waiver authority is limited to barriers constructed  
5 "under this section," meaning section 102 of IIRIRA. Since the barriers at issue are being  
6 constructed by DoD pursuant to a different statutory provision, any waiver issued by DHS under  
7 IIRIRA would be inapplicable and DoD must comply with NEPA. *See* Determination Pursuant to  
8 Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as  
9 Amended, 84 Fed. Reg. 17,185, 17,187 (Apr. 24, 2019); 84 Fed. Reg. 21,800-01 (May 15, 2019);  
10 *see also* PI RJN Exs. 34-35; Second Decl. of Kenneth P. Rapuano, ECF No. 143-1.

11 With respect to Defendants' multifaceted scheme to build the border barrier projects under  
12 § 2808, the obligation to conduct environmental review under NEPA falls on two agencies. First,  
13 DoD should have prepared an environmental impact statement concerning the construction of the  
14 border barrier projects. On February 15, 2019, President Trump declared a national emergency  
15 and stated his intent to use up to \$3.6 billion to build border barriers under Section § 2808. PI  
16 RJN Ex. 28. This proposal crystalized on September 3, 2019 when the Secretary of Defense  
17 authorized and identified the location of 11 border barrier projects in California, Arizona, New  
18 Mexico, and Texas under § 2808. Sept. 3 Notice. This was a major federal action requiring DoD  
19 to engage in a public environmental review process. DoD violated NEPA by failing to conduct  
20 any such review.

21 Second, DOI should have complied with NEPA before transferring land to DoD. A decision  
22 to transfer jurisdiction over land to another agency to enable construction is a "major federal  
23 action[]" significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In  
24 *Anacostia Watershed Soc. v. Babbitt*, 871 F.Supp. 475, 481-483 (D.C. Cir. 1994), the Court held  
25 the National Park Service (NPS) violated NEPA by failing to conduct environmental review  
26 before transferring jurisdiction of National Parks land to the District of Columbia. The Court  
27 rejected the NPS's attempt to classify the transfer as a "mere paper transaction." *Id.* at 481. The  
28 NPS knew the District of Columbia planned to develop a theme park on the transferred land and

1 thus “had sufficient information regarding potential environmental effects” to “comply with  
 2 NEPA before making its decision to transfer jurisdiction.” *Id.* at 483. Here, the intent to build  
 3 border barriers on the land transferred from DOI to DoD is well known and therefore DOI had  
 4 sufficient information regarding the potential effects of the border barrier projects to comply with  
 5 NEPA before making its decision to transfer jurisdiction. Thus, DOI also violated NEPA.

6 Defendants argue § 2808 authorizes the Secretary of Defense to undertake military  
 7 construction projects without complying with NEPA. 2808 AR at 9 (the Secretary of Defense  
 8 authorized and directed the Acting Secretary of the Army to construct the border barriers  
 9 “without regard to any other provision of law,” including NEPA). Regardless of whether or not  
 10 this language exempts the Secretary of Defense from complying with NEPA in some  
 11 circumstances, it cannot excuse NEPA compliance here where the border barrier projects cannot  
 12 be built under § 2808 for all the reasons described above. Further, even if this Court found the  
 13 proposed border barriers could be built under § 2808 and DoD was exempt from NEPA, DOI  
 14 would still need to comply with NEPA. The plain language of § 2808 does not extend the ability  
 15 to take action “without regard to any other provision of law” to DOI. The States are thus entitled  
 16 to summary judgment with respect to NEPA.

17 **III. THIS COURT SHOULD ENJOIN DEFENDANTS’ USE OF § 2808 TO DEFUND MILITARY**  
 18 **CONSTRUCTION PROJECTS IN THE STATES AND CONSTRUCT BORDER BARRIERS IN**  
 19 **CALIFORNIA AND NEW MEXICO**

20 **A. Defendants’ Actions Irreparably Harm the States**

21 California and New Mexico have been and will further be irreparably harmed in two ways  
 22 from the border barriers built under § 2808. First, by constructing the border barriers without  
 23 complying with state environmental laws, Defendants will and already have harmed those states’  
 24 sovereign interests. Second, Defendants’ construction activities and border barriers will  
 25 irreparably injure wildlife and plants in the sensitive desert environments where the barriers are to  
 26 be constructed.

27 In addition, New Mexico, Colorado, Hawaii, Maryland, New York, Oregon, Virginia, and  
 28 Wisconsin face irreparable harm from Defendants’ unlawful diversion of funds from military



1 construction projects that would otherwise bring valuable financial benefits, including lost tax  
2 revenue, directly to those states.

3 **1. Construction and Operation of Defendants' Border Barriers Harm**  
4 **California's and New Mexico's Sovereign Interests in Enforcing**  
5 **Their State Laws**

6 Defendants' diversion of funds, border barrier construction, and disregard for  
7 environmental law undermine California's and New Mexico's sovereign interests in enforcing  
8 state laws, and these injuries to the States' "sovereign interests and public policies" constitute  
9 irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001); *see also*  
10 *Brackeen v. Bernhardt*, 937 F.3d 406, 424 (5th Cir. 2019) (holding if federal authorities  
11 "promulgated a rule binding on states without the authority to do so, then State Plaintiffs have  
12 suffered a concrete injury to their sovereign interest.").

13 **a. Defendants' Actions Prevent California from Enforcing Its**  
14 **Laws**

15 California has many laws designed to protect the State's water and air quality; wildlife,  
16 land, and other environmental resources; and public health. *See, e.g.*, Porter-Cologne Water  
17 Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal.  
18 Fish and Game Code §§ 2050-2089.26. Defendants' unlawful diversion of funds to construct the  
19 California Projects and refusal to comply with these environmental laws that apply to their  
20 actions prevent California from exercising its sovereign right to enforce these laws.

21 **(1) Water Quality Laws**

22 Construction of the California Projects will involve dredge and fill activities that could  
23 impair water quality in violation of federal and state law. Ordinarily, before such dredge and fill  
24 activities can proceed, federal officials must obtain certification of compliance with California's  
25 water quality standards. Cal. Water Code § 13260 (imposing requirements on "persons" prior to  
26 discharging waste); *id.* § 13050(c) (defining "person" to include "the United States, to the extent  
27 authorized by federal law"); *see also* 33 U.S.C. § 1341(a)(1) (requiring *state* water quality  
28 certification as part of *federal* permit). Indeed, as required by federal and state law, federal  
officials have previously sought such certifications for construction projects in the project areas.

Case 4:19-cv-00872-HSG Document 220 Filed 10/11/19 Page 32 of 47

1 App'x of Decls. Re: Env'tl Harms ISO Partial MSJ on 2808 and NEPA (2808 Env. App'x) Ex. 2  
 2 (Dunn Decl. ¶¶ 11-13); Ex. 3 (Gibson Decl. ¶ 12). Further, under the *federal* Clean Water Act,  
 3 Defendants must adopt water-pollution-mitigation measures to obtain a *state* permit certification  
 4 from a California regional water board. 33 U.S.C. § 1341(a)(1); 2808 Env. App'x Ex. 2 (Dunn  
 5 Decl. ¶¶ 8-10, 21); Ex. 3 (Gibson Decl. ¶¶ 9-11, 19). The conditions and mitigation measures  
 6 imposed during the state permit and certification process are a primary means by which  
 7 California implements its water quality objectives and enforces its water quality laws. *Id.*

8 By disregarding environmental law, Defendants undermine California's sovereign interests  
 9 "in the conservation, control, and utilization of the water resources of the state" and in protecting  
 10 "the quality of all the waters of the state . . . for use and enjoyment by the people of the state."  
 11 Cal. Water Code § 13000. Defendants' actions are particularly injurious because the California  
 12 Projects "pose a high risk for storm water run-off impacting . . . water quality during the  
 13 construction phase." 2808 Env. App'x Ex. 2 (Dunn Decl. ¶ 20); Ex. 3 (Gibson Decl. ¶ 18).

## 14 (2) Air Quality Laws

15 Defendants also would ordinarily be required to ensure the California Projects conform to  
 16 California's air quality standards by complying with the federal Clean Air Act as set forth in  
 17 California's State Implementation Plan (SIP). 42 U.S.C. § 7506(c)(1). The Clean Air Act  
 18 prohibits federal agencies from engaging in, supporting, or financing any activity that does not  
 19 conform to a SIP. 40 C.F.R. § 93.150(a). "Conformity" violations include "caus[ing] or  
 20 contribut[ing] to any new violation of any standard," "increas[ing] the frequency or severity of  
 21 any existing violation of any standard in any area," or "delay[ing] timely attainment of any  
 22 standard . . . in any area." 42 U.S.C. § 7506(c)(1)(B)(i)-(iii). These safeguards prevent federal  
 23 agencies from interfering with states' abilities to comply with the Clean Air Act. *Id.*

24 But for the funding diversion and Defendants' failure to comply with environmental law,  
 25 the local air districts with jurisdiction over the California Project areas would enforce rules to  
 26 reduce the amount of fine particulate matter generated from Defendants' construction activities,  
 27 by requiring Defendants to develop and implement a dust control plan. Pls.' RJN ISO 284 MSJ,  
 28 [ECF No. 176-3] ("284 RJN") Ex. 4; 2808 RJN Ex. 20; 42 U.S.C. §§ 7418(a); 7506(c)(1); 40

1 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366 (July 8, 2010). In addition to protecting  
 2 Californians by supporting federal health standards, these rules mitigate blowing dust that can  
 3 cause additional acute regional or local health problems. 284 RJN Ex. 5. Thus, by proceeding  
 4 with the unlawfully funded construction without complying with California’s laws, Defendants  
 5 will impair California’s sovereign interests in protecting its environment and public health.

6 **(3) Endangered Species Laws**

7 Finally, but for Defendants’ diversion of funds under § 2808 and refusal to comply with  
 8 environmental law, Defendants could not build the California Projects without ensuring the  
 9 project “is not likely to jeopardize the continued existence of any endangered species or  
 10 threatened species or result in the destruction or adverse modification of [critical] habitat of such  
 11 species.” 16 U.S.C. § 1536(a)(2). Compliance with this provision would protect species  
 12 threatened, endangered, or of special concern under California law and allow California to  
 13 continue implementing habitat conservation agreements with federal agencies that impose  
 14 limitations on habitat-severing projects like the California Projects. 284 RJN Ex. 6; 2808 Env.  
 15 App’x Ex. 1 (Clark Decl. ¶¶ 22, 34, 36-37). Defendants’ disregard for these protections  
 16 undermines California’s ability to enforce the California Endangered Species Act and “the policy  
 17 of the state to conserve, protect, restore, and enhance any endangered species or any threatened  
 18 species and its habitat.” Cal. Fish & Game Code § 2052.

19 **b. Defendants’ Actions Prevent New Mexico from Enforcing its**  
 20 **Laws**

21 New Mexico also has enacted and enforces environmental laws to protect its air quality and  
 22 wildlife. By using the disputed funds to construct the New Mexico Projects without complying  
 23 with these laws, Defendants impair New Mexico’s “protection of the state’s beautiful and  
 24 healthful environment,” which is “of fundamental importance to the public interest, health, safety  
 25 and the general welfare.” N.M. Const., art. XX, § 21.

26 **(1) Air Quality Laws**

27 El Paso Project 2, a portion of which falls within Luna County, would normally be subject  
 28 to a dust control plan that New Mexico adopted under the Clean Air Act. 284 RJN Ex. 7; 40

1 C.F.R. § 51.930(b); N.M. Admin. Code §§ 20.2.23.108-113. The plan “limit[s] human-caused  
 2 emissions of fugitive dust into the ambient air by ensuring that control measures are utilized to  
 3 protect human health and welfare.” N.M. Admin. Code § 20.2.23.6. Defendants’ unlawful funds  
 4 transfer and disregard of environmental law would thus impair New Mexico’s ability to vindicate  
 5 its sovereign interest in protecting human health and welfare.

6 **(2) Wildlife Corridors and Endangered Species Laws**

7 Defendants’ § 2808 funding diversion, refusal to comply with environmental law, and  
 8 resulting construction also will impede New Mexico’s ability to implement its Wildlife Corridors  
 9 Act, which aims to protect large mammals’ habitat corridors from human-caused barriers such as  
 10 roads and walls, 2019 N.M. Laws Ch. 97, and requires New Mexico agencies to create a “wildlife  
 11 corridors action plan” to protect species’ habitat. Supp. PI RJN [ECF No. 112-1] Ex. 53. Several  
 12 important wildlife corridors run through, or adjacent to, the New Mexico Projects including in  
 13 Hidalgo and Luna Counties. 2808 Env. App’x Ex. 5 (Traphagen Decl. ¶¶ 19, 22-24). Pronghorn  
 14 antelope, mule deer, mountain lions, and bighorn sheep are all “large mammals” protected under  
 15 the Act. 2019 N.M. Laws Ch. 97 § 2.B. The New Mexico Projects will completely block habitat  
 16 corridors for these species and impair New Mexico’s ability to protect these important corridors.  
 17 2808 Env. App’x Ex. 5 (Traphagen Decl ¶ 23).

18 Further, the New Mexico Projects will harm species that New Mexico’s laws were enacted  
 19 to protect such as the white-sided jackrabbit and the Mexican wolf, which is endangered under  
 20 both New Mexico and federal endangered species acts. *See* N.M. Stat. Ann. § 17-2-41; 2808 Env.  
 21 App’x Ex. 5 (Traphagen Decl. ¶¶ 16-19, 24). The New Mexico Projects will bisect important  
 22 wildlife habitats, impairing the access of the Mexican Wolf and other endangered species to those  
 23 habitats. *Id.* Ex. 4 (Nagano Decl. ¶ 25); Ex. 5 (Traphagen Decl. ¶¶ 18-19, 23-24). Absent a ruling  
 24 in the States’ favor and issuance of an injunction, New Mexico’s sovereign ability to enforce  
 25 these laws and protect these interests will be impaired.

26  
 27  
 28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**c. Defendants Irreparably Harm California’s and New Mexico’s Sovereign Interests by Preventing Them from Enforcing State Laws**

There is irreparable harm whenever a government cannot enforce its own laws. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). States possess undeniable sovereign interests in their “power to create and enforce a legal code,” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982), including codes protecting the natural resources and public health within their borders. *See also Maine v. Taylor*, 477 U.S. 131, 151 (1986) (the State “retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”). Courts recognize that these sovereign interests are undermined where federal action impedes enforcement of state statutes. *See, e.g., State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (holding states have sovereign interests in enforcing state consumer protection laws impeded by federal actions). And any time a state is prevented “from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury” separate from any injury to the persons or things those statutes are designed to protect. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

Defendants argue § 2808 authorizes the Secretary of Defense to undertake military construction projects without following environmental laws. 2808 AR at 4. In addition to being wrong for the reasons described above, this position also impedes the States’ ability to enforce and effectuate duly enacted state environmental laws protecting the States, their residents, and their wildlife from Defendants’ construction projects—which will result in nearly 58 linear miles of permanent border wall in California and New Mexico. Defendants’ use of § 2808 to effectuate their plan and override otherwise applicable state laws infringes on the States’ sovereign interests and causes irreparable harm as a result.

**2. Construction and Operation of Defendants’ Border Barriers Harm California’s and New Mexico’s Environment, Wildlife, and Natural Resources**

The California and New Mexico Projects will also irreparably harm protected wildlife and other natural resources within those states. The Projects pose a threat of demonstrable harm to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: October 11, 2019

Respectfully submitted,

XAVIER BECERRA  
Attorney General of California  
ROBERT W. BYRNE  
SALLY MAGNANI  
MICHAEL L. NEWMAN  
Senior Assistant Attorneys General  
MICHAEL P. CAYABAN  
CHRISTINE CHUANG  
EDWARD H. OCHOA  
Supervising Deputy Attorneys General

/s/ Heather C. Leslie

HEATHER C. LESLIE  
BRIAN J. BILFORD  
SPARSH S. KHANDESHI  
LEE I. SHERMAN  
JANELLE M. SMITH  
JAMES F. ZAHRADKA II  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California*

PHILIP J. WEISER  
Attorney General of Colorado  
ERIC R. OLSON (*appearance pro hac vice*)  
Solicitor General  
*Attorneys for Plaintiff State of Colorado*

CLARE E. CONNORS  
Attorney General of Hawaii  
ROBERT T. NAKATSUJI (*appearance pro hac vice*)  
Deputy Solicitor General  
*Attorneys for Plaintiff State of Hawaii*

BRIAN E. FROSH  
Attorney General of Maryland  
JEFFREY P. DUNLAP (*appearance pro hac vice*)  
Assistant Attorney General  
*Attorneys for Plaintiff State of Maryland*

HECTOR BALDERAS  
Attorney General of New Mexico  
TANIA MAESTAS (*appearance pro hac vice*)  
Chief Deputy Attorney General  
NICHOLAS M. SYDOW  
Civil Appellate Chief  
JENNIE LUSK  
Civil Rights Bureau Chief  
*Attorneys for Plaintiff State of New Mexico*

1 LETITIA JAMES  
 Attorney General of New York  
 2 MATTHEW COLANGELO (*appearance pro hac*  
*vice*)  
 3 Chief Counsel for Federal Initiatives  
 STEVEN C. WU  
 4 Deputy Solicitor General  
 ERIC R. HAREN  
 5 Special Counsel  
 GAVIN MCCABE  
 6 Special Assistant Attorney General  
 AMANDA MEYER  
 7 Assistant Attorney General  
*Attorneys for Plaintiff State of New York*

ELLEN ROSENBLUM  
 Attorney General of Oregon  
 J. NICOLE DEFEVER  
 Senior Assistant Attorney General  
*Attorneys for Plaintiff State of Oregon*

8 MARK R. HERRING  
 9 Attorney General of Virginia  
 TOBY J. HEYTENS  
 10 Solicitor General, Counsel of Record  
 MICHELLE S. KALLEN  
 11 MARTINE E. CICCONI  
 Deputy Solicitors General  
 12 JESSICA M. SAMUELS  
 Assistant Solicitor General  
 13 ZACHARY R. GLUBIAK (*pro hac vice pending*)  
 Attorney  
 14 *Attorneys for the Commonwealth of Virginia*

JOSHUA L. KAUL  
 Attorney General of Wisconsin  
 GABE JOHNSON-KARP (*appearance pro*  
*hac vice*)  
 Assistant Attorney General  
*Attorneys for Plaintiff State of Wisconsin*

15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ATTESTATION OF SIGNATURES**

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

/s/ Heather C. Leslie  
HEATHER C. LESLIE  
Deputy Attorney General  
*Attorney for Plaintiff*  
*State of California*



# EXHIBIT 5

UNCLASSIFIED//FOUO



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

9/3/19

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
ACTING UNDER SECRETARY OF DEFENSE  
(COMPTROLLER)/CHIEF FINANCIAL OFFICER

SUBJECT: Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code

On February 15, 2019, in accordance with the National Emergencies Act, the President declared that a national emergency exists at the southern border requiring the use of the armed forces. This declaration made available, among other statutes, 10 U.S.C. § 2808, which authorizes the Secretary of Defense, without regard to any other provision of law, to undertake military construction projects not otherwise authorized by law that are necessary to support the use of the armed forces in connection with the national emergency.

Based on analysis and advice from the Chairman of the Joint Chiefs of Staff and input from the Commander, U.S. Army Corps of Engineers, the Department of Homeland Security (DHS), and the Department of the Interior and pursuant to the authority granted to me in Section 2808, I have determined that 11 military construction projects along the international border with Mexico, with an estimated total cost of \$3.6 billion, 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. They will reduce the demand for DoD personnel and assets at the locations 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.

I therefore authorize and direct the Acting Secretary of the Army to expeditiously undertake the eleven border barrier military construction projects specified in the attachment, and, as authorized by section 2808, to do so without regard to any other provision of law that could impede such expeditious construction in response to the national emergency. Such laws include, but are not limited to, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Clean Water Act, and provisions in Chapter 137 ("Procurement Generally") of title 10, U. S. Code. The Acting Secretary of the Army shall immediately apply for and accept administrative jurisdiction of real property from other Federal departments and agencies, including DOI, and acquire the non-Federal real property necessary to undertake the specified military construction projects. Once the Department of the Army obtains administrative jurisdiction of the requisite land, the Acting Secretary of the Army shall add such land to the Department of the Army's real property inventory, either as a new installation or as part of an existing military installation, consistent with DoD Instruction (DoDI) 4165.14, "Real Property Inventory (RPI) and Forecasting," and DoDI 4165.71, "Real Property Management."



OSD008866-19/CMD011427-19

UNCLASSIFIED//FOUO

UNCLASSIFIED//FOUO

Case 4:19-cv-00872-HSG Document 212-2 Filed 09/16/19 Page 10 of 54

The Acting Secretary of the Army is directed to immediately proceed to construct 33 miles of border barrier on the Barry M. Goldwater Range (BMGR), identified as Yuma 10/27 and Yuma 2, to the extent the land is already under the jurisdiction of the Secretary of the Navy. As the land holding agency for BMGR, the Secretary of the Navy shall ensure USACE has the access and information necessary to undertake these military construction projects on BMGR. The Acting Secretary of the Army shall proceed with construction of the remaining projects as soon as the requisite land is under the administrative jurisdiction of the Department of the Army and reflected in its records as a military installation.

I further authorize and direct the Acting Under Secretary of Defense (Comptroller)/Chief Financial Officer to ensure that up to \$3.6 billion in unobligated military construction funds are available for the purpose of undertaking the eleven specified military construction projects. As will be detailed in separate guidance, the Comptroller will prioritize deferred military construction projects to ensure that, initially, only funds associated with projects outside of the United States will be provided to the Department of the Army for construction of section 2808 projects.

The Secretaries of the other Military Departments will assist the Acting Secretary of the Army with any staffing shortfalls related to undertaking these tasks.



Attachment:  
As stated

cc:  
Chairman, Joint Chiefs of Staff  
Under Secretary of Defense (Policy)  
Under Secretary of Defense (Acquisition & Sustainment)  
General Counsel of the Department Of Defense  
Assistant Secretary of Defense for Legislative Affairs  
Assistant to the Secretary of Defense for Public Affairs  
Commander, U.S. Army Corps of Engineers

UNCLASSIFIED//FOUO

# EXHIBIT 6

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT W. BYRNE  
 SALLY MAGNANI  
 3 MICHAEL L. NEWMAN  
 Senior Assistant Attorneys General  
 4 MICHAEL P. CAYABAN  
 CHRISTINE CHUANG  
 5 EDWARD H. OCHOA  
 Supervising Deputy Attorneys General  
 6 BRIAN J. BILFORD  
 SPARSH S. KHANDESHI  
 7 LEE I. SHERMAN  
 JANELLE M. SMITH  
 8 JAMES F. ZAHRADKA II  
 HEATHER C. LESLIE (SBN 305095)  
 9 Deputy Attorney General  
 State Bar No. 305095  
 10 1300 I Street, Suite 125  
 P.O. Box 944255  
 11 Sacramento, CA 94244-2550  
 Telephone: (916) 210-7832  
 12 Fax: (916) 327-2319  
 E-mail: Heather.Leslie@doj.ca.gov  
 13 Attorneys for Plaintiff State of California

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION

18 STATE OF CALIFORNIA et al.;

19 Plaintiffs,

20 v.

21  
 22  
 23  
 24 DONALD J. TRUMP, in his official capacity  
 as President of the United States of America  
 25 et al.;

26 Defendants.

Case No. 4:19-cv-00872-HSG

**PLAINTIFFS' REQUEST FOR  
 JUDICIAL NOTICE IN SUPPORT OF  
 MOTION FOR PARTIAL SUMMARY  
 JUDGMENT REGARDING SECTION  
 2808 AND NEPA**

Date: November 20, 2019  
 Time: 10:00 am  
 Judge: Honorable Haywood S. Gilliam,  
 Jr.  
 Trial Date: None Set  
 Action Filed: February 18, 2019

1 Plaintiffs hereby respectfully request, pursuant to Federal Rule of Evidence 201, that this  
2 Court take judicial notice of the following documents.

3 1. Attached hereto as **Exhibit 1** is a true and correct copy of a press release from the  
4 United States Department of the Interior, Bureau of Land Management regarding the  
5 Secretary of the Interior’s transfer of the jurisdiction of land to the Department of the  
6 Army. As of October 7, 2019, this press release is posted on the Bureau of Land  
7 Management’s website, at [https://www.blm.gov/press-release/interior-secretary-](https://www.blm.gov/press-release/interior-secretary-transfers-five-parcels-land-department-army)  
8 [transfers-five-parcels-land-department-army](https://www.blm.gov/press-release/interior-secretary-transfers-five-parcels-land-department-army).

9 2. Attached hereto as **Exhibit 2** is a true and correct copy of the Department of Defense  
10 (DoD) form 1391 for construction of the C-130J Flight Simulator Facility at the  
11 Channel Islands Air National Guard Station in California. The Department of Defense  
12 submitted this form to Congress in support of DoD’s request for funding for this  
13 project.

14 3. Attached hereto as **Exhibit 3** is a true and correct copy of the DoD form 1391 for  
15 construction of the Space Control Facility at the Peterson Air Force Base in Colorado.  
16 The Department of Defense submitted this form to Congress in support of DoD’s  
17 request for funding for this project.

18 4. Attached hereto as **Exhibit 4** is a true and correct copy of the DoD form 1391 for  
19 construction of the Consolidated Training Facility at the Joint Base Pearl Harbor-  
20 Hickam in Hawaii. The Department of Defense submitted this form to Congress in  
21 support of DoD’s request for funding for this project.

22 5. Attached hereto as **Exhibit 5** is a true and correct copy of the DoD form 1391 for  
23 construction of security improvements at Mokapu Gate at Kaneohe Bay in Hawaii. The  
24 Department of Defense submitted this form to Congress in support of DoD’s request for  
25 funding for this project.

26 6. Attached hereto as **Exhibit 6** is a true and correct copy of the DoD form 1391 for  
27 construction of the Cantonment Area roads at Fort Meade in Maryland. The Department  
28

1 of Defense submitted this form to Congress in support of DoD’s request for funding for  
2 this project.

3 7. Attached hereto as **Exhibit 7** is a true and correct copy of the DoD form 1391 for  
4 construction of the PAR Relocate Haz Cargo Pad and EOD Range at Joint Base  
5 Andrews in Maryland. The Department of Defense submitted this form to Congress in  
6 support of DoD’s request for funding for this project.

7 8. Attached hereto as **Exhibit 8** is a true and correct copy of the DoD form 1391 for  
8 construction of a child development center at Joint Base Andrews in Maryland. The  
9 Department of Defense submitted this form to Congress in support of DoD’s request for  
10 funding for this project.

11 9. Attached hereto as **Exhibit 9** is a true and correct copy of the DoD form 1391 for  
12 construction of the MQ-9 FTU Ops Facility at Holloman Air Force Base in New  
13 Mexico. The Department of Defense submitted this form to Congress in support of  
14 DoD’s request for funding for this project.

15 10. Attached hereto as **Exhibit 10** is a true and correct copy of the DoD form 1391 for  
16 construction of the Information Systems Facility at White Sands in New Mexico. The  
17 Department of Defense submitted this form to Congress in support of DoD’s request for  
18 funding for this project.

19 11. Attached hereto as **Exhibit 11** is a true and correct copy of the DoD form 1391 for  
20 construction of the Engineering Center and Parking Structure at the U.S. Military  
21 Academy in New York. The Department of Defense submitted this form to Congress in  
22 support of DoD’s request for funding for this project.

23 12. Attached hereto as **Exhibit 12** is a true and correct copy of the DoD form 1391 for  
24 construction of an indoor range at Klamath Falls International Airport. The Department  
25 of Defense submitted this form to Congress in support of DoD’s request for funding for  
26 this project.

27 13. Attached hereto as **Exhibit 13** is a true and correct copy of the DoD form 1391 for  
28 construction of replacement fuel facilities at the Klamath Falls International Airport.

- 1           The Department of Defense submitted this form to Congress in support of DoD's  
2           request for funding for this project.
- 3           14. Attached hereto as **Exhibit 14** is a true and correct copy of the DoD form 1391 for  
4           construction of a cyber ops facility at Joint Base Langley-Eustis in Virginia. The  
5           Department of Defense submitted this form to Congress in support of DoD's request for  
6           funding for this project.
- 7           15. Attached hereto as **Exhibit 15** is a true and correct copy of the DoD form 1391 for  
8           construction to replace a hazardous materials warehouse in Norfolk, Virginia. The  
9           Department of Defense submitted this form to Congress in support of DoD's request for  
10          funding for this project.
- 11          16. Attached hereto as **Exhibit 16** is a true and correct copy of the DoD form 1391 for  
12          construction at the Pentagon Metro Entrance Facility at the Pentagon in Virginia. The  
13          Department of Defense submitted this form to Congress in support of DoD's request for  
14          funding for this project.
- 15          17. Attached hereto as **Exhibit 17** is a true and correct copy of the DoD form 1391 for  
16          construction to replace a hazardous materials warehouse in Portsmouth, Virginia. The  
17          Department of Defense submitted this form to Congress in support of DoD's request for  
18          funding for this project.
- 19          18. Attached hereto as **Exhibit 18** is a true and correct copy of the DoD form 1391 for  
20          construction of a ships maintenance facility in Portsmouth, Virginia. The Department of  
21          Defense submitted this form to Congress in support of DoD's request for funding for  
22          this project.
- 23          19. Attached hereto as **Exhibit 19** is a true and correct copy of the DoD form 1391 for  
24          construction of a small arms range at Truax Field in Wisconsin. The Department of  
25          Defense submitted this form to Congress in support of DoD's request for funding for  
26          this project.
- 27          20. Attached hereto as **Exhibit 20** is a true and correct copy of the San Diego Air Pollution  
28          Control District's Fugitive Dust Control Rule. As of October 8, 2019, this document is



1 posted on the San Diego Air Pollution Control District's website at:

2 [https://www.sdapcd.org/content/dam/sdc/apcd/PDF/Rules\\_and\\_Regulations/Prohibition](https://www.sdapcd.org/content/dam/sdc/apcd/PDF/Rules_and_Regulations/Prohibition)  
3 [s/APCD\\_R55.pdf](https://www.sdapcd.org/content/dam/sdc/apcd/PDF/Rules_and_Regulations/Prohibition).

4 21. Attached hereto as **Exhibit 21** is a true and correct copy of the Congressional Research  
5 Service's Report entitled "The Trump Administration's 'Zero Tolerance' Immigration  
6 Enforcement Policy" dated July 20, 2018.

7 Each of these exhibits is a matter of public record and is therefore subject to judicial notice.  
8 Fed. R. Evid. 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (a court may  
9 judicially notice matters of public record unless the matter is a fact subject to reasonable dispute).

10 **Exhibits 1-21** are judicially noticeable because government memoranda, bulletins, letters,  
11 statements and opinions are matters of public record appropriate for judicial notice. *See Brown v.*  
12 *Valoff*, 422 F.3d 926, 933 n.9 (9th Cir. 2005) (judicially noticing an administrative bulletin);  
13 *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (court may take judicial  
14 notice of records and reports of state administrative bodies), *overruled on other grounds by*  
15 *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991); *Interstate Nat. Gas. Co. v.*  
16 *S. Cal. Gas. Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (judicially noticing government agency  
17 records and reports); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 520 nn.5, 8, 11 (N.D.  
18 Cal. 2017) (taking judicial notice of government memoranda and letters).

19 **Exhibits 1 and 20** are judicially noticeable because they are posted on official government  
20 websites. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (judicially  
21 noticing information contained on a government website); *Paralyzed Veterans of America v.*  
22 *McPherson*, No. C 06-4670 SBA, 2008 WL 4183981, at \*5 (N.D. Cal. Sept. 9, 2008) (finding  
23 that courts commonly take judicial notice of information and documents on government websites,  
24 citing cases from various jurisdictions). Thus, the statements of government departments and  
25 agencies contained within these exhibits are not subject to reasonable dispute, as the statements  
26 "can be accurately and readily determined from sources whose accuracy cannot reasonably be  
27 questioned." Fed. R. Evid. § 201(b)(2).

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: October 11, 2019

Respectfully submitted,

XAVIER BECERRA  
Attorney General of California  
ROBERT W. BYRNE  
SALLY MAGNANI  
MICHAEL L. NEWMAN  
Senior Assistant Attorneys General  
MICHAEL P. CAYABAN  
CHRISTINE CHUANG  
EDWARD H. OCHOA  
Supervising Deputy Attorneys General

/s/ Heather Leslie

HEATHER C. LESLIE  
BRIAN J. BILFORD  
SPARSH S. KHANDESHI  
LEE I. SHERMAN  
JANELLE M. SMITH  
JAMES F. ZAHRADKA II  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California*

# EXHIBIT 2

①

1. COMPONENT ANG	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE Feb 2018
3. INSTALLATION AND LOCATION CHANNEL ISLANDS ANG STATION, CALIFORNIA		4. PROJECT TITLE CONSTRUCT C-130J FLIGHT SIMULATOR FACILITY		
5. PROGRAM ELEMENT 54332F	6. CATEGORY CODE 171-212	7. PROJECT NUMBER DJCF149001	8. PROJECT COST(\$000) \$8,000	
9. COST ESTIMATES				
ITEM	U/M	QUANTITY	UNIT COST	COST (\$000)
C-130J FLIGHT SIMULATOR TRAINING FACILITY	SM	985		4,082
CONSTRUCT FLIGHT SIMULATOR (171212)	SM	985	4,144	( 4,082)
SUPPORTING FACILITIES				3,122
UTILITIES	LS			( 494)
PAVEMENTS	LS			( 336)
SITE IMPROVEMENTS	LS			( 346)
COMMUNICATIONS SUPPORT	LS			( 99)
FIRE PROTECTION SUPPORT	LS			( 1,481)
SEISMIC CONDITIONS	LS			( 247)
SUSTAINABILITY AND ENERGY MEASURES	LS			( 119)
SUBTOTAL				7,204
CONTINGENCY (5%)				360
TOTAL CONTRACT COST				7,564
SUPERVISION, INSPECTION AND OVERHEAD (6%)				453
TOTAL REQUEST				8,017
TOTAL REQUEST (ROUNDED)				8,000
10. Description of Proposed Construction: Construct a C-130-J Simulator Facility utilizing conventional design and construction methods to accommodate the mission of the facility. Facility shall be designed as permanent construction in accordance with the DoD Unified Facilities Criteria. The facility should be compatible with applicable DoD, Air Force, and base design standards. In addition, local materials and construction techniques shall be used where cost effective. This project will comply with DoD antiterrorism/force protection requirements per unified facilities criteria. Special construction requirements: Simulator will require high bay construction with specialized flooring. To the greatest extent possible interior spaces shall be open office configuration with demountable partitions and systems furniture/prewired workstations. Exterior work includes: all necessary exterior utilities, sidewalks, paved areas, fire protection, site work, communications support and parking area. Air Conditioning: 350 KW.				
11. REQUIREMENT: 985 SM ADEQUATE: 0 SM SUBSTANDARD: 0 SM PROJECT: C-130J Flight Simulator Training Facility (New Mission) REQUIREMENT: The installation requires a properly sited, adequately sized and appropriately configured flight simulator facility house a six-axis flight simulator to train aircrews to fly the 8 PAA C-130J aircraft assigned to the 146th Airlift Wing. Functional areas include a two-story high bay in which to house flight simulator, briefing rooms, administrative areas for training and support staff, equipment and maintenance rooms, storage spaces, communications room supporting simulator operations, mechanical and electrical utility rooms and latrine facilities. CURRENT SITUATION: Air Mobility Command is establishing C-130J Aircraft Flight Simulator Training Program and selected Channel Islands Air National Guard Station to receive the equipment for this function. The installation does not have a facility that can be modified to accommodate a flight simulator. Crews currently perform training and meet qualification requirements by either flying existing based aircraft or performing temporary duty at an installation that has an appropriate simulator device.				

1. COMPONENT ANG	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE Feb 2018	
3. INSTALLATION AND LOCATION CHANNEL ISLANDS ANG STATION, CALIFORNIA			
5. PROJECT TITLE CONSTRUCT C-130J FLIGHT SIMULATOR FACILITY		7. PROJECT NUMBER DJCF149001	
12. SUPPLEMENTAL DATA:			
a. Estimated Design Data:			
(1) Status:			
(a) Date Design Started		DEC 2017	
(b) Parametric Cost Estimates used to develop costs		NO	
(c) Percent Complete as of Jan 2018		6%	
* (d) Date 35% Designed		MAR 2018	
(e) Date Design Complete		JUL 2018	
(f) Type of Design Contract		IDIQ	
(g) Energy Study/Life-Cycle analysis was/will be performed		YES	
(2) Basis:			
(a) Standard or Definitive Design -		NO	
(b) Where Design Was Most Recently Used -		N/A	
(3) Total Cost (c) = (a) + (b) or (d) + (e): (\$000)			
(a) Production of Plans and Specifications		370	
(b) All Other Design Costs		180	
(c) Total		550	
(d) Contract		550	
(e) In-House			
(4) Contract Award (Month/Year)		DEC 2018	
(5) Construction Start		FEB 2019	
(6) Construction Completion		JAN 2020	
* Indicates completion of Project Definition with Parametric Cost Estimate which is comparable to traditional 35% design to ensure valid scope and cost and executability.			
b. Equipment associated with this project will be provided from other appropriations:		YES	
EQUIPMENT NOMENCLATURE C-130J Flight Simulator	PROCURING APPROPRIATION 3010	FY APPROPRIATED OR REQUESTED 2018	COST (\$000) 30,000
POINT OF CONTACT: NGB / A4AD (240) 612-8070			

# EXHIBIT 3

2

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE May 2017
3. INSTALLATION AND LOCATION PETERSON AFB, COLORADO			4. PROJECT TITLE SPACE CONTROL FACILITY	
5. PROGRAM ELEMENT C5116F	6. CATEGORY CODE 141-454	7. PROJECT NUMBER TDKA169004	8. PROJECT COST(\$000) \$8,000	
9. COST ESTIMATES				
ITEM	U/M	QUANTITY	UNIT COST	COST (\$000)
SPACE CONTROL FACILITY	SM	1,124		5,354
OPERATIONAL AREA (141454)	SM	1,096	4,822	( 5,285)
HAZARDOUS STORAGE (442257)	SM	28	2,465	( 69)
SUPPORTING FACILITIES	LS			1,672
UTILITIES	LS			( 394)
EQUIPMENT PAD	SM	2,090	172	( 359)
PAVEMENTS	SM	2,090	110	( 230)
SITE IMPROVEMENTS	LS			( 525)
COMM SUPPORT	LS			( 164)
SUSTAINABILITY AND ENERGY MEASURES	LS			196
SUBTOTAL				7,222
CONTINGENCY (5%)				361
TOTAL CONTRACT COST				7,583
SUPERVISION, INSPECTION AND OVERHEAD (6%)				454
TOTAL REQUEST				8,037
TOTAL REQUEST (ROUNDED)				8,000
10. Description of Proposed Construction: Construct a Space Control Facility utilizing conventional design and construction methods. Facilities will be designed as permanent construction in accordance with the DoD Unified Facilities Criteria (UFC) 1-200-01, General Building Requirements and UFC 1-200-02, High Performance and Sustainable Building Requirements. This facility will be compatible with applicable DoD, Air Force, and base design standards. In addition, local materials and construction techniques shall be used where cost effective. This project will comply with DoD antiterrorism/force protection requirements per unified facilities criteria. Special Construction Requirements: Provide for open floor plan with Secure Compartmentalized Information Facility (SCIF) space capable of accommodating 88 personnel. Exterior site improvements, equipment pad, utility services, roadways, sidewalks, parking lots, access pavements, drainage, fencing, and gates. HAZMAT Storage to include space for fuel storage, used oil depositary and flammable storage locker. Facility and equipment require Protection Level 3. Air Conditioning: 175 KW.				
11. REQUIREMENT: 1,124 SM ADEQUATE: 0 SM SUBSTANDARD: 0 SM <u>PROJECT:</u> Space Control Facility (New Mission) <u>REQUIREMENT:</u> The Colorado Air National Guard requires adequately sized and properly configured space to support a Space Control Squadron functions in accordance with force structure changes identified by the FY18 Program Action Memorandum. The facility must provide adequate space to support the squadron's operations, maintenance, security, command and administration, and storage areas. Facility must have an unobstructed view of the southern horizon. <u>CURRENT SITUATION:</u> A new Space Control Squadron will be created in Colorado, most likely at Peterson AFB. The squadron does not currently existing and there are no adequate facilities located at either Peterson or Buckley AFBs for this space control squadron. The only solution that meets all mission requirements is to construct a new facility on Peterson AFB. <u>IMPACT IF NOT PROVIDED:</u> Unable to beddown the space control mission and equipment, with operational and strategic mission impacts due to inadequate facilities.				

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE May 2017																							
3. INSTALLATION AND LOCATION PETERSON AFB, COLORADO																									
5. PROJECT TITLE SPACE CONTROL FACILITY	7. PROJECT NUMBER TDKA169004																								
<p><u>ADDITIONAL:</u> Sustainable principles, to include Life Cycle cost effective practices, will be integrated into the design, development, and construction of the project in accordance with Executive Order 13423, 10 USC 2802 (c) and other applicable laws and Executive Orders. An economic analysis is being prepared comparing the alternatives of new construction, and status quo operation. Based on the net present values and benefits of the respective alternatives, new construction will be the most cost efficient alternative over the life of the project.</p>																									
<table border="0"> <thead> <tr> <th>CatCode</th> <th>Requirement</th> <th>Adequate</th> <th>Substandard</th> </tr> </thead> <tbody> <tr> <td>141-454 SPECIAL OPERATIONS</td> <td>1,096 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> <tr> <td>132-133 EQUIPMENT PAD</td> <td>6,271 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> <tr> <td>852-262 NON-ORGANIZATIONAL VEHICLE PKN</td> <td>1,923 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> <tr> <td>852-261 OPERATIONAL VEHICLE PARKING</td> <td>167 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> <tr> <td>442-257 BASE HAZARDOUS STORAGE</td> <td>28 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> </tbody> </table>	CatCode	Requirement	Adequate	Substandard	141-454 SPECIAL OPERATIONS	1,096 SM	0 SM	0 SM	132-133 EQUIPMENT PAD	6,271 SM	0 SM	0 SM	852-262 NON-ORGANIZATIONAL VEHICLE PKN	1,923 SM	0 SM	0 SM	852-261 OPERATIONAL VEHICLE PARKING	167 SM	0 SM	0 SM	442-257 BASE HAZARDOUS STORAGE	28 SM	0 SM	0 SM	
CatCode	Requirement	Adequate	Substandard																						
141-454 SPECIAL OPERATIONS	1,096 SM	0 SM	0 SM																						
132-133 EQUIPMENT PAD	6,271 SM	0 SM	0 SM																						
852-262 NON-ORGANIZATIONAL VEHICLE PKN	1,923 SM	0 SM	0 SM																						
852-261 OPERATIONAL VEHICLE PARKING	167 SM	0 SM	0 SM																						
442-257 BASE HAZARDOUS STORAGE	28 SM	0 SM	0 SM																						
<p>OPERATIONAL AREA (141454) HAZARDOUS STORAGE (442257) EQUIPMENT PAD PAVEMENTS</p>	<p>1,096 SM = 11,800 SF 28 SM = 300 SF 2,090 SM = 2,500 SY 2,090 SM = 2,500 SY</p>																								



1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE May 2017																												
3. INSTALLATION AND LOCATION PETERSON AFB, COLORADO																														
5. PROJECT TITLE SPACE CONTROL FACILITY		7. PROJECT NUMBER TDKA169004																												
<p>12. SUPPLEMENTAL DATA:</p> <p>a. Estimated Design Data:</p> <p>(1) Status:</p> <table border="0"> <tr><td>(a) Date Design Started</td><td>NOV 2016</td></tr> <tr><td>(b) Parametric Cost Estimates used to develop costs</td><td>No</td></tr> <tr><td>(c) Percent Complete as of Jan 2017</td><td>10%</td></tr> <tr><td>* (d) Date 35% Designed</td><td>APR 2017</td></tr> <tr><td>(e) Date Design Complete</td><td>NOV 2017</td></tr> <tr><td>(f) Type of Design Contract</td><td>IDIQ</td></tr> <tr><td>(g) Energy Study/Life-Cycle analysis was/will be performed</td><td>No</td></tr> </table> <p>(2) Basis:</p> <table border="0"> <tr><td>(a) Standard or Definitive Design -</td><td>No</td></tr> <tr><td>(b) Where Design Was Most Recently Used -</td><td></td></tr> </table> <p>(3) Total Cost (c) = (a) + (b) or (d) + (e): (S000)</p> <table border="0"> <tr><td>(a) Production of Plans and Specifications</td><td>240</td></tr> <tr><td>(b) All Other Design Costs</td><td>480</td></tr> <tr><td>(c) Total</td><td>720</td></tr> <tr><td>(d) Contract</td><td>720</td></tr> <tr><td>(e) In-House</td><td></td></tr> </table> <p>(4) Contract Award (Month/Year) MAR 2018</p> <p>(5) Construction Start JUN 2018</p> <p>(6) Construction Completion AUG 2019</p> <p>* Indicates completion of Project Definition with Parametric Cost Estimate which is comparable to traditional 35% design to ensure valid scope and cost and executability.</p> <p>b. Equipment associated with this project will be provided from other appropriations: N/A</p> <p>POINT OF CONTACT: NGB/A4AD (240) 612-8083</p>			(a) Date Design Started	NOV 2016	(b) Parametric Cost Estimates used to develop costs	No	(c) Percent Complete as of Jan 2017	10%	* (d) Date 35% Designed	APR 2017	(e) Date Design Complete	NOV 2017	(f) Type of Design Contract	IDIQ	(g) Energy Study/Life-Cycle analysis was/will be performed	No	(a) Standard or Definitive Design -	No	(b) Where Design Was Most Recently Used -		(a) Production of Plans and Specifications	240	(b) All Other Design Costs	480	(c) Total	720	(d) Contract	720	(e) In-House	
(a) Date Design Started	NOV 2016																													
(b) Parametric Cost Estimates used to develop costs	No																													
(c) Percent Complete as of Jan 2017	10%																													
* (d) Date 35% Designed	APR 2017																													
(e) Date Design Complete	NOV 2017																													
(f) Type of Design Contract	IDIQ																													
(g) Energy Study/Life-Cycle analysis was/will be performed	No																													
(a) Standard or Definitive Design -	No																													
(b) Where Design Was Most Recently Used -																														
(a) Production of Plans and Specifications	240																													
(b) All Other Design Costs	480																													
(c) Total	720																													
(d) Contract	720																													
(e) In-House																														

# EXHIBIT 4

<b>1. COMPONENT</b> AIR FORCE RESERVE	<b>FY 2018 MILITARY CONSTRUCTION PROJECT DATA</b>	<b>2. DATE</b>  MAY 2017	
<b>3. INSTALLATION AND LOCATION</b> JOINT BASE PEARL HARBOR-HICKAM, HI			
<b>4. PROJECT TITLE</b>  CONSOLIDATED TRAINING FACILITY		<b>5. PROJECT NUMBER</b>  KNMD624007	
<b>12. SUPPLEMENTAL DATA:</b>			
A. DESIGN DATA (Estimated)			
1. STATUS			
a. Date Design Started:		Sep 2017	
b. Parametric estimates have been used to develop project cost.			
c. Percentage Complete as of January 1, 2016		35%	
d. Date Design 35% Complete		Dec 2017	
e. Date Design Complete - (If design-build, construction complete)		Sep 2019	
2. BASIS			
a. Standard or Definitive Design - Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>			
b. Where Design Was Most Recently Used <u>N/A</u>			
3. COST (Total ) = c = a + b or d + e		(\$495)	
a. Production of Plans and Specifications (35% design)		(294)	
b. All Other Design Costs (Design-build)		(201)	
c. Total		(495)	
d. Contract (A-E)		( )	
e. In-house (management)		( )	
4. CONSTRUCTION AWARD /START / COMPLETION		Aug 2018 / Sep 2018 / Sep 2019	
B. EQUIPMENT ASSOCIATED WITH THIS PROJECT WHICH WILL BE PROVIDED FROM OTHER APPROPRIATIONS:			
<u>Equipment</u>	<u>Procuring</u>	<u>Fiscal Year</u>	<u>Cost</u>
<u>Nomenclature</u>	<u>Appropriation</u>	<u>Appropriated</u>	<u>(\$000)</u>
Furniture / Storage Equipment	3740	FY 2018	350
Interior Design Services	3740	FY 2018	200
Communications Equipment	3740	FY 2018	65

<b>1. COMPONENT</b> AIR FORCE RESERVE	<b>FY 2018 MILITARY CONSTRUCTION PROJECT DATA</b>	<b>2. DATE</b>  MAY 2017
<b>3. INSTALLATION AND LOCATION</b>  JOINT BASE PEARL HARBOR-HICKAM, HI		
<b>11. PERSONNEL STRENGTH AS OF JAN 2017</b>		
	<b>PERMANENT (ARTs, AGRs, Non-ART Civilians)</b>	<b>GUARD/RESERVE</b>
	<u>TOTA</u> <u>OFFICER</u> <u>ENLISTED</u> <u>CIVILIAN</u>	<u>TOTAL</u> <u>OFFICER</u> <u>ENLISTED</u>
	<u>L</u>	
AUTHORIZE	44      5      32      7	393      62      331
D		
ACTUAL	38      9      27      2	490      89      401
<b>12. RESERVE UNIT DATA</b>		
<u>UNIT DESIGNATION</u>	<u>AUTHORIZED</u>	<u>STRENGTH</u> <u>ACTUAL</u>
624 Aeromed STG Squadron	81	97
624 Civil Engineer Squadron	139	129
647 Security Forces Squadron	0	6
624 Regional Support Group	43	51
647 Force Support Squadron	0	4
701 Combat Operations Squadron	20	15
713 Combat Operations Squadron	21	19
15 Wing WG	0	27
AFR West Recruit Squadron	3	3
HQ AF Reserve / PACAF	1	53
IR Read and Integ Organization	4	4
48 Aerial Port Squadron	125	120
Total	442	528
<b>13. MAJOR EQUIPMENT AND AIRCRAFT</b>		
<u>TYPE</u>	<u>AUTHORIZED</u>	<u>ASSIGNED</u>
Non -Flying Unit -Civil Engineering, Aerial Port, and Medical Support Unit		

1. COMPONENT AIR FORCE RESERVE	<b>FY 2018 MILITARY CONSTRUCTION PROJECT DATA</b>	2. DATE  MAY 2017
3. INSTALLATION AND LOCATION: JOINT BASE PEARL HARBOR-HICKAM, HI		
4. PROJECT TITLE: CONSOLIDATED TRAINING FACILITY	5. PROJECT NUMBER KNMD624007	
<u>JOINT USE CERTIFICATION:</u> This facility can be used by other components on an "as available" basis; however, the scope of the project is based on Air Force Reserve requirements.		

# EXHIBIT 5

4

1. Component NAVY		FY 2018 MILITARY CONSTRUCTION PROGRAM		2. Date 23 MAR 2018	
3. Installation(SA) & Location/UIC: M00318 MARINE CORPS BASE HAWAII KANEHOE BAY, HAWAII			4. Project Title Mokapu Gate Entry Control AT/FP Compliance		
5. Program Element 0216496M	6. Category Code 87210	7. Project Number P877	8. Project Cost (\$000) 26,492		
<b>9. COST ESTIMATES</b>					
Item		UM	Quantity	Unit Cost	Cost (\$000)
MOKAPU GATE ENTRY CONTROL AT/FP COMPLIANCE		LS			9,560
ECP OVER WATCH TOWER CC73025		EA	1	1,353,295.69	(1,350)
ECP GENERATOR/TOILET/COMM BUILDING CC73025 (431SF)		m2	40	30,846.43	(1,230)
PERIMETER GATE GENERATOR/TOILET/COMM BLDG (430SF) CC73025 (431SF)		m2	40	28,529.6	(1,140)
ECP GATE HOUSE & GUARD BOOTH CANOPY CC73025		EA	1	971,860.08	(970)
ECP GATE/CONTROLS HOUSE CC73025 (118SF)		m2	11	58,406.09	(640)
PERIMETER GATE/CONTROLS HOUSE CC73025 (118SF)		m2	11	58,406.09	(640)
ECP POV SEARCH CANOPY CC73025		EA	1	625,411.07	(630)
ECP OVER WATCH STATION CC73025		EA	1	410,277.41	(410)
ECP GUARD BOOTH CC73025		EA	1	83,808.87	(80)
BUILT-IN EQUIPMENT		LS			(700)
SPECIAL COSTS		LS			(1,660)
OPERATION & MAINTENANCE SUPP INFO (OMSI)		LS			(110)
SUPPORTING FACILITIES					14,190
SITE PREPARATIONS		LS			(1,860)
PAVING AND SITE IMPROVEMENTS		LS			(3,190)
ANTI-TERRORISM/FORCE PROTECTION		LS			(1,840)
ELECTRICAL UTILITIES		LS			(6,860)
MECHANICAL UTILITIES		LS			(430)
DEMOLITION		LS			(10)
SUBTOTAL					23,750
CONTINGENCY (5%)					1,190
TOTAL CONTRACT COST					24,940
SIOH (6.2%)					1,550
SUBTOTAL					26,490
TOTAL REQUEST ROUNDED					26,490

1. Component NAVY		FY 2018 MILITARY CONSTRUCTION PROGRAM		2. Date 23 MAR 2018	
3. Installation(SA) & Location/UIC: M00318 MARINE CORPS BASE HAWAII KANEHOE BAY, HAWAII			4. Project Title Mokapu Gate Entry Control AT/FP Compliance		
5. Program Element 0216496M		6. Category Code 87210	7. Project Number P877	8. Project Cost (\$000) 26,492	
<p>Site preparation includes site clearing and grubbing work and earthwork for the project.</p> <p>Paving and site improvements include asphalt-concrete roadways and parking area (approximately 15 stalls), concrete roadway crossing, concrete sidewalks and ramps, landscaping, chain-link fence and gates, and site demolition.</p> <p>Anti-Terrorism/Force Protection (Outside) improvements include mechanical vehicle barriers, a POV search pad, earth berms at the POV search area, vehicle barrier curbs, bollards, and movable barriers for the center separation wall.</p> <p>Electrical utilities include primary electrical distribution, secondary electrical distribution, transformer, area lighting, and exterior telecommunications infrastructure.</p> <p>Mechanical utilities include potable water and fire protection water distribution systems, gravity sanitary sewer systems, and a sanitary sewer pump station and force main.</p> <p>Demolition includes restroom/equipment room Building #1188 (10.87 M2) and gate control Building #886 (5.02 M2) to be demolished after the new gate/controls house at the perimeter gate is completed.</p> <p>Facilities will be designed to meet or exceed the useful service life specified in DoD Unified Facility Criteria. Facilities will incorporate features that provide the lowest practical life cycle cost solutions satisfying the facility requirements with the goal of maximizing energy efficiency.</p>					
<b>11. Requirement:</b>		<b>Adequate:</b>		<b>Substandard:</b>	
<b>PROJECT:</b>					
Construct entry control point, perimeter gate improvements, and supporting facilities to comply with current AT/FP standards.					
The entry control point facilities will include a new gate/control house with canopy, over watch tower, generator/toilet/communications building, privately-owned-vehicle (POV) inspection area with canopy, and over watch station.					
(Current Mission)					



1. Component NAVY		FY 2018 MILITARY CONSTRUCTION PROGRAM		2. Date 23 MAR 2018																					
3. Installation(SA) & Location/UIC: M00318 MARINE CORPS BASE HAWAII KANEHOE BAY, HAWAII			4. Project Title Mokapu Gate Entry Control AT/FP Compliance																						
5. Program Element 0216496M	6. Category Code 87210	7. Project Number P877	8. Project Cost (\$000) 26,492																						
(B) Date 35% Design or Parametric Cost Estimate complete 03/2017 (C) Date design completed 09/2017 (D) Percent completed as of September 2016 15% (E) Percent completed as of January 2017 15% (F) Type of design contract Design Bid Build (G) Parametric Estimate used to develop cost Yes (H) Energy Study/Life Cycle Analysis performed Yes 2. Basis: (A) Standard or Definitive Design No (B) Where design was previously used No 3. Total Cost (C) = (A) + (B) = (D) + (E): (A) Production of plans and specifications \$1,320 (B) All other design costs \$944 (C) Total \$2,264 (D) Contract \$1,848 (E) In-house \$416 4. Contract award: 08/2018 5. Construction start: 09/2018 6. Construction complete: 03/2020 B. Equipment associated with this project which will be provided from other appropriations: <table border="1"> <thead> <tr> <th><u>Equipment</u></th> <th colspan="2"><u>Procuring FY Approp</u></th> <th><u>Cost (\$000)</u></th> </tr> <tr> <th><u>Nomenclature</u></th> <th><u>Approp</u></th> <th><u>or Requested</u></th> <th></th> </tr> </thead> <tbody> <tr> <td>C4I, IT</td> <td>O&amp;MMC</td> <td>2020</td> <td>172</td> </tr> <tr> <td>PSE</td> <td>O&amp;MMC</td> <td>2020</td> <td>212</td> </tr> <tr> <td>Smart Grid Equipment</td> <td>PMC</td> <td>2020</td> <td>30</td> </tr> </tbody> </table>						<u>Equipment</u>	<u>Procuring FY Approp</u>		<u>Cost (\$000)</u>	<u>Nomenclature</u>	<u>Approp</u>	<u>or Requested</u>		C4I, IT	O&MMC	2020	172	PSE	O&MMC	2020	212	Smart Grid Equipment	PMC	2020	30
<u>Equipment</u>	<u>Procuring FY Approp</u>		<u>Cost (\$000)</u>																						
<u>Nomenclature</u>	<u>Approp</u>	<u>or Requested</u>																							
C4I, IT	O&MMC	2020	172																						
PSE	O&MMC	2020	212																						
Smart Grid Equipment	PMC	2020	30																						
JOINT USE CERTIFICATION: The Director Land Use and Military Construction Branch, Installations and Logistics Department, Headquarters Marine Corps certifies that this project has been considered for joint use potential. Unilateral Construction is recommended. This is an installation utility/infrastructure project and does not qualify for joint use at this location, however, all tenants on this installation will benefit from this project.																									
Activity POC: Project Development Lead      Phone No: (808) 257-3687																									

# EXHIBIT 6

5

## Case 4:19-cv-00872-HSG Document 220-5 Filed 10/11/19 Page 35 of 116

1. COMPONENT  Army		FY 2021 MILITARY CONSTRUCTION PROJECT DATA			2. DATE 13 APR 2018 02 SEP 2014	
3. INSTALLATION AND LOCATION Fort George G Meade Maryland				4. PROJECT TITLE Cantonment Area Roads		
5. PROGRAM ELEMENT		6. CATEGORY CODE 851 10	7. PROJECT NUMBER 86767		8. PROJECT COST (\$000) 16,500	
9. COST ESTIMATES						
ITEM				UM	QUANTITY	COST(\$000)
PRIMARY FACILITY						9,994
Roads, Surfaced				SY	80,643	118.28 (9,539)
Sustainability/Energy Measures				LS	--	-- (260)
Antiterrorism Measures				LS	--	-- (195)
SUPPORTING FACILITIES						4,986
Electric Service				LS	--	-- (680)
Paving, Walks, Curbs And Gutters				LS	--	-- (974)
Storm Drainage				LS	--	-- (2,226)
Site Imp(816) Demo(290)				LS	--	-- (1,106)
ESTIMATED CONTRACT COST						14,980
CONTINGENCY (5.00%)						749
SUBTOTAL						15,729
SUPERVISION, INSPECTION & OVERHEAD (5.70%)						897
TOTAL REQUEST						16,626
TOTAL REQUEST (ROUNDED)						16,500
INSTALLED EQT-OTHER APPROPRIATIONS						(0)
10. Description of Proposed Construction Construct additional road surface by widening the travel lanes of Cooper Avenue from Rockenbach Road to Mapes Road. Increase transit lanes from two to four lanes. Similarly widen Reece Road from Cooper Avenue to the point east of Rose Street to adjoin the new four lane road from the Access Control Point at the Reece gate. Increase the travel lanes of Rose Street from two to four lanes. Facilities will be designed to a minimum life of 40 years in accordance with DoD's Unified Facilities Criteria (UFC 1-200-02) including energy efficiencies, building envelope and integrated building systems performance.						
11. REQ: 1,504,240 SY      ADQT: 827,410 SY      SUBSTD: 551,608 SY						
PROJECT: Widen existing two lane roadways to four lanes and modify existing intersections to establish continuity of travel.						
REQUIREMENT: Improve the timely, efficient and safe transit within the cantonment area. Connect the three primary east-west roads on the installation with a primary route, of similar capacity, to maintain traffic flow.						
CURRENT SITUATION: Daily traffic counts measured at the ACPs can exceed 53,000 vehicles. Traffic						

# EXHIBIT 7

6

1. COMPONENT AIR FORCE		FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE			
3. INSTALLATION, SITE AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND				4. PROJECT TITLE PAR RELOCATE HAZ CARGO PAD AND EOD RANGE				
5. PROGRAM ELEMENT 41319		6. CATEGORY CODE 112-211	7. RPSUID/PROJECT NUMBER 1377/AJXF163002		8. PROJECT COST (\$000) 37,000			
9. COST ESTIMATES								
ITEM					U/M	QUANTITY	UNIT	COST (\$000)
PRIMARY FACILITIES								12,704
ACCESS TAXIWAY (112-211)					SM	28,533	232	( 6,620 )
HAZARDOUS CARGO PAD (116-662)					SM	7,791	232	( 1,808 )
HCP/TAXIWAY PAVED SHOULDERS (116-642)					SM	24,682	156	( 3,850 )
EOD PROFICIENCY RANGE (831-173)					SM	37	5,310	( 196 )
SUSTAINABILITY/ENERGY MEASURES					LS			( 230 )
SUPPORTING FACILITIES								20,476
ACTIVE/PASSIVE BARRIERS					EA	2	90,630	( 181 )
PERIMETER FENCING					LS			( 759 )
LIGHTING					LS			( 1,314 )
ACCESS ROAD					LS			( 766 )
UTILITIES					LS			( 2,117 )
SITE PREPARATION					LS			( 15,339 )
SUBTOTAL								33,180
CONTINGENCY (5.0%)								1,659
TOTAL CONTRACT COST								34,839
SUPERVISION, INSPECTION AND OVERHEAD (5.7%)								1,986
TOTAL REQUEST								36,825
TOTAL REQUEST (ROUNDED)								37,000
10. Description of Proposed Construction: Construct a Hazardous Cargo Pad (HCP) and Access Taxiway that complies with Airfield and Explosive Safety criteria. Construct Explosive Ordnance Disposal (EOD) proficiency range and supporting infrastructure in compliance with AF standards for safe training of EOD technicians and maintaining EOD qualifications. Add to and alter base perimeter fencing and install security/traffic control barriers. HCP consists of a concrete aircraft parking apron, asphalt shoulders, aircraft grounding system, and aircraft tie down points. HCP also requires a concrete access taxiway with asphalt shoulders. Project also includes site preparation, airfield taxiway and HCP lighting and markings, HCP and EOD range access roads, site improvements, necessary utilities rerouting and installation, airfield storm drainage features, required demolition, and all other necessary work. All work will utilize economical design and construction methods to accommodate the mission of the facilities and will be compatible with applicable DoD, Air Force, and base design standards. Facilities will be designed as permanent construction in accordance with DoD Unified Facilities Criteria (UFC) 1-200-01, General Building Requirements and UFC 1-200-02, High Performance and Sustainable Building Requirements. This project will comply with DoD antiterrorism/force protection requirements per UFC 4-010-01.								

DD FORM 1391, DEC 99

Previous editions are obsolete.

1. COMPONENT AIR FORCE		FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)		2. DATE	
3. INSTALLATION, SITE AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND			4. PROJECT TITLE PAR RELOCATE HAZ CARGO PAD AND EOD RANGE		
5. PROGRAM ELEMENT 41319	6. CATEGORY CODE 112-211	7. RPSUID/PROJECT NUMBER 1377/AJXF163002	8. PROJECT COST (\$000) 37,000		
<p>11. Requirement: 7791 SM Adequate: 0 SM Substandard: 0 SM</p> <p>PROJECT: Relocate Hazardous Cargo Pad and Explosive Ordnance Disposal Proficiency Range</p> <p>REQUIREMENT A hazardous cargo pad is required to load/unload explosives or other dangerous materials on cargo aircraft. This mission requires a location that meets both Airfield and Explosive Safety requirements. The pad will be sited to accommodate 30,000 pounds of net explosive weight (NEW). The taxiway provides aircraft access to the cargo pad. Pavement will be medium load with tie down anchors and grounding points. Maintaining qualified EOD technicians necessitates construction of an appropriately sited proficiency range.</p> <p>CURRENT SITUATION: The Secretary of the Air Force approved basing the PAR program at Joint Base Andrews (JBA), MD pending National Environmental Policy Act analysis. As a direct result of this bed down, the existing HCP and JADOC Satellite sites at JBA were displaced to allow construction of the new PAR Complex. The JADOC Satellite site construction caused relocation of the EOD Proficiency Range site. Siting the EOD range next to the HCP and the new Munitions Storage Area (MSA) makes the most functional sense as it allows for overlap of the explosive quantity-distance arcs associated with those facilities.</p> <p>IMPACT IF NOT PROVIDED: A temporary HCP will provided on taxiway Charlie for use during the construction of the new HCP (limited to 450 pound NEW, far below the required 30,000 pound NEW). Failing to replace the HCP will cause JBA to have enduring systemic weaknesses in its ability to support required military activities. Lack of an EOD proficiency range will adversely impact EOD training and force training to be accomplished at an off-base location at an increased cost.</p> <p>ADDITIONAL: This project meets the criteria/scope specified in Air Force Handbook 32-1084, Facility Requirements, UFC 3-260-01, Airfield and Heliport Planning and Design. An analysis of reasonable options for accomplishing this project indicates construction of the HCP on the selected southeast corner of the airfield will economically meet mission needs. The economic analysis of reasonable options for this project (status quo, and various new construction options) indicated new construction is required to meet mission needs. The analysis concluded that construction on the south east side of the airfield provided the greatest cost benefit without adversely impacting airfield safety. This option requires land acquisition and restrictive easements included in an FY18 MILCON, AJXF163002A - PAR Land Acquisition/Easement. Significant supporting facility costs are associated with development of off base land.</p> <p>Base Civil Engineer (11 CES/CC): 301-981-7281.</p> <p>Access Taxiway 28,533 SM equals 307,015 SF Pa ed Shoulders 24,682 SM equals 265,578 SF EOD Range 37 SM equals 398 SF</p>					

1. COMPONENT AIR FORCE	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE
3. INSTALLATION, SITE AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND			4. PROJECT TITLE PAR RELOCATE HAZ CARGO PAD AND EOD RANGE	
5. PROGRAM ELEMENT  41319	6. CATEGORY CODE  112-211	7. RPSUID/PROJECT NUMBER  1377/AJXF163002	8. PROJECT COST (\$000)  37,000	
<p>This design shall conform to criteria established in the Air Force Corporate Facilities Standards (AFCFS), the Installation Facilities Standards (IFS) [if available], but will not employ a standard facility design because there is no applicable standard facility design for this project and there is no applicable standard design from AFCEC.</p> <p>Sustainable principles, to include Life Cycle cost-effective practices, will be integrated into the design, development, and construction of the project and will follow the guidance detailed in the AF Sustainable Design and Development Implementing Guidance Memorandum (dated June 2, 2011) in accordance with applicable laws and Executive Orders. 11th Wing Base Civil Engineer: Comm:. 301-981-7281.</p> <p>JOINT USE CERTIFICATION: This facility can be used by other components on an as available basis; however, the scope of the project is based on Air Force requirements.</p>				

1. COMPONENT AIR FORCE	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)		2. DATE																										
3. INSTALLATION AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND		4. PROJECT TITLE PAR RELOCATE HAZ CARGO PAD AND EOD RANGE																											
5. PROGRAM ELEMENT 41319	6. CATEGORY CODE 112-211	7. PROJECT NUMBER 1377/AJXF163002	8. PROJECT COST (\$000) 37,000																										
<p>12. SUPPLEMENTAL DATA: This design shall conform to criteria established in the Air Force Corporate Facilities Standards (AFCFS), the Installation Facilities Standards (IFS) [if available], but will not employ a standard facility design because there is no AF standard facility design for this project and there is no applicable standard design from AFCEC.</p> <p>a. Estimated Design Data:</p> <p>(1) Status:</p> <table border="0"> <tr><td>(a) Date Design Started</td><td>01-NOV-17</td></tr> <tr><td>(b) Parametric Cost Estimates used to develop costs</td><td>YES</td></tr> <tr><td>* (c) Percent Complete as of 01 JAN 2018</td><td>15%</td></tr> <tr><td>* (d) Date 35% Designed</td><td>30-MAR-18</td></tr> <tr><td>(e) Date Design Complete</td><td>03-SEP-18</td></tr> <tr><td>(f) Energy Study/Life-Cycle analysis was/will be performed</td><td>NO</td></tr> </table> <p>(2) Basis:</p> <table border="0"> <tr><td>(a) Standard or Definitive Design -</td><td>NO</td></tr> <tr><td>(b) Where Design Was Most Recently Used -</td><td></td></tr> </table> <p>(3) Total Cost (c) = (a) + (b) or (d) + (e): (\$000)</p> <table border="0"> <tr><td>(a) Production of Plans and Specifications</td><td>2,220</td></tr> <tr><td>(b) All Other Design Costs</td><td>1,110</td></tr> <tr><td>(c) Total</td><td>3,330</td></tr> <tr><td>(d) Contract</td><td>2,775</td></tr> <tr><td>(e) In-house</td><td>555</td></tr> </table> <p>(4) Construction Contract Award 19 SEP</p> <p>(5) Construction Start 19 OCT</p> <p>(6) Construction Completion 21 OCT</p> <p>* Indicates completion of Project Definition with Parametric Cost Estimate which is comparable to traditional 35% design to ensure valid scope, cost and executability.</p> <p>b. Equipment associated with this project provided from other appropriations: N/A</p>				(a) Date Design Started	01-NOV-17	(b) Parametric Cost Estimates used to develop costs	YES	* (c) Percent Complete as of 01 JAN 2018	15%	* (d) Date 35% Designed	30-MAR-18	(e) Date Design Complete	03-SEP-18	(f) Energy Study/Life-Cycle analysis was/will be performed	NO	(a) Standard or Definitive Design -	NO	(b) Where Design Was Most Recently Used -		(a) Production of Plans and Specifications	2,220	(b) All Other Design Costs	1,110	(c) Total	3,330	(d) Contract	2,775	(e) In-house	555
(a) Date Design Started	01-NOV-17																												
(b) Parametric Cost Estimates used to develop costs	YES																												
* (c) Percent Complete as of 01 JAN 2018	15%																												
* (d) Date 35% Designed	30-MAR-18																												
(e) Date Design Complete	03-SEP-18																												
(f) Energy Study/Life-Cycle analysis was/will be performed	NO																												
(a) Standard or Definitive Design -	NO																												
(b) Where Design Was Most Recently Used -																													
(a) Production of Plans and Specifications	2,220																												
(b) All Other Design Costs	1,110																												
(c) Total	3,330																												
(d) Contract	2,775																												
(e) In-house	555																												



# EXHIBIT 8

7

1. COMPONENT AIR FORCE		FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE
3. INSTALLATION, SITE AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND			4. PROJECT TITLE CHILD DEVELOPMENT CENTER		
5. PROGRAM ELEMENT 41976	6. CATEGORY CODE 740-884	7. RPSUID/PROJECT NUMBER 1377/AJXF093005	8. PROJECT COST (\$000) 13,000		
9. COST ESTIMATES					
ITEM		U/M	QUANTITY	UNIT	COST (\$000)
PRIMARY FACILITIES					7,466
CHILD DEVELOPMENT CENTER		SM	2,711	2,700	( 7,320 )
SUSTAINABILITY AND ENERGY MEASURES		LS			( 146 )
SUPPORTING FACILITIES					4,328
UTILITIES		LS			( 500 )
PAVEMENTS		LS			( 700 )
SITE IMPROVEMENTS		LS			( 800 )
COMMUNICATION SUPPORT		LS			( 275 )
PLAYGROUND AREA		LS			( 650 )
DEMOLITION		SM	2,065	350	( 723 )
STORM WATER MANAGEMENT		LS			( 230 )
UTILITIES CONNECTION FEE		LS			( 250 )
CAMERA/SECURITY SYSTEM		LS			( 200 )
SUBTOTAL					11,794
CONTINGENCY (5.0%)					590
TOTAL CONTRACT COST					12,384
SUPERVISION, INSPECTION AND OVERHEAD (5.7%)					706
TOTAL REQUEST					13,089
TOTAL REQUEST (ROUNDED)					13,000
EQUIPMENT FROM OTHER APPROPRIATIONS (NON-ADD)					( 1,550.0 )
10. Description of Proposed Construction: Construct a Child Development Center (CDC) utilizing economical design and construction methods in accordance with Joint Base Andrews' (JBA) Architectural Compatibility Plan to accommodate the mission of the facility. The facility should be compatible with applicable DoD, Air Force, and base design standards to include UFC 4-740-14, Design: Child Development Centers and Section 01 10 10, Design Requirements For A Child Development Center. In addition, local materials and construction techniques shall be used where cost effective. Includes pick-up/drop-off area, reception area, lobby area, multi-purpose rooms, administrative space, access road, parking, outdoor fenced playground areas, restrooms, storage rooms, kitchen and equipment, space for walk-in freezer and refrigeration units, camera/security system, utility spaces, utilities, site preparation, landscaping, storm water management, electrical, communications, gas, water and sewer utilities and connection fees, fire detection & suppression systems and all other associated support necessary to provide a complete and useful facility. Integrates facility space to accommodate the Family Childcare Center. Demolishes existing CDC facility (building 4575) totaling 2065 SM. Facilities will be designed as permanent construction in accordance with the DoD Unified Facilities Criteria (UFC) 1-200-01, General Building Requirements and UFC 1-200-02, High Performance and Sustainable Building Requirements. This project					

1. COMPONENT AIR FORCE	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE
3. INSTALLATION, SITE AND LOCATION JOINT BASE ANDREWS-NAVAL AIR FACILITY WASHINGTON ANDREWS SITE # 1 MARYLAND			4. PROJECT TITLE CHILD DEVELOPMENT CENTER	
5. PROGRAM ELEMENT  41976	6. CATEGORY CODE  740-884	7. RPSUID/PROJECT NUMBER  1377/AJXF093005	8. PROJECT COST (\$000)  13,000	
<p>Base Civil Engineer: Comm 301- 981-7281.  Child Development Center: 2,711 SM = 29,181 SF  Demo 2,065 SM Child Development Center = 22,227 SF  JOINT USE CERTIFICATION: This facility can be used for other components on an "as available" basis; however, the scope of the project is based on Air Force requirements.</p>				

# EXHIBIT 9



1. COMPONENT AIR FORCE	FY 2019 MILITARY CONSTRUCTION PROJECT DATA	2. DATE
3. INSTALLATION AND LOCATION HOLLOMAN AIR FORCE BASE, HOLLOMAN SITE #1 NEW MEXICO		
4. PROJECT TITLE MQ-9 FTU OPS FACILITY		5. PROJECT NUMBER 2352/KWRD163000
<p>Squadrons (6th, 9th and 29th) to each have five FGCS, six simulators, four classified training classrooms, twenty classified brief/debrief rooms, a secure server room, classified student study/mission planning rooms and adequate space for squadron administrative functions for 120 personnel and 32 contractors. Additionally, 16th Training Squadron, 429th Air Combat Training Squadron and support contractors must be collocated with the Attack Squadrons to maximize efficiencies throughout the full duration of the syllabus.</p> <p><u>CURRENT SITUATION:</u> The 2008 RPA beddown hinged on use of vacant facilities at the time in order meet CSAF-directed aircrew production. B302, a 1943-vintage Sqd Ops, was used to house the MQ-1 Predator FTU (6 RS) with only minor modifications. The 6th ATKS is now transitioning to the MQ-9 without facility modifications. B302 is in a severe state of disrepair, including bat infestation, sink holes and is only partially covered by functional fire alarms. The 50-person ACMU currently operates out of B303 (2,727 sf) maintaining all mobile (current) and fixed (future) GCS equipment. The space in B318 renovated during the beddown to house the 9th and 29th Attack Squadrons, while in good physical condition, has become extremely limited in mission capability by the stand-up of an informal "International Schoolhouse", focused on training aircrews from partner nations, such as: Italy, UK and France. Expansion capability adjacent to B318 is not possible in the near future due to environmental contamination present on the site. MQ-9 formal training sorties are currently flown from Mobile Ground Control Stations (MGCS) located within a fenced compound, but will transition to FGCS equipment in 2020/2021. This conversion will free up the existing MGCS equipment to be transferred to forward locations as the equipment was designed to operate. The Block 50 FGCS is 30% larger than previous versions, rendering the space renovated during initial beddown to house the 9th/29th ATKS useless. Additionally, the MQ-9 FTU is the only combat airframe FTU operating 100% in an Unclassified environment, while the airframe's mission is conducted nearly exclusively in a Top Secret environment. Not only does this fact limit the ability to train aircrews to realistically train for their future mission, it also prevents the MQ-9 FTU from participating in electronically-linked training scenarios with other airframes/resources from other training units around the globe (via Distributed Mission Operations). Most importantly, a classified environment enables the use of Link-16 and Blue Force Tracker to provide significantly enhanced safety in the airspace and on the ranges. Link-16 allows aircraft to see each other even with radar outages – enhancing flight safety by providing adequate de-confliction. Blue Force Tracker allows MQ-9 aircrew to see JTAC position on the ground – enhancing life-safety by verifying JTAC position prior to employing live/inert weapons. Academic portions of the formal training syllabus are routinely held in a relocatable trailer. The trailer was originally purchased to provide swing space during the execution of initial beddown renovations in B318, but recurring explosive growth and the lack of fixed space alternatives has driven the continued use of the trailer with no end to the requirement in sight. Additionally, there are insufficient classrooms to execute the syllabus optimally. Likewise, the FTU squadrons currently operate in a severe shortage of brief/debrief spaces dispersed throughout the existing facilities. While this shortfall could be addressed through scheduling in a traditional FTU, the MQ-9 training flow requires students to rotate through "sorties" flying an aircraft already airborne during and after their mission. While one aircrew is flying the aircraft for a training sortie, the last aircrew to fly the aircraft is debriefing their mission and the next aircrew is briefing for their mission to follow. This cyclical flow requires reliable availability of brief/debrief rooms to enable smooth transition between flights. Lastly, students currently have no access to classified mission planning/study space. This limits their ability to focus on the classified aspects of the training requirements of the syllabus. These critical facility condition, capacity and classification shortfalls severely limit the overall effectiveness and efficiency of the FTU in performing its core task of generating properly trained aircrews to feed CAF demands.</p> <p><u>IMPACT IF NOT PROVIDED:</u> If properly configured MQ-9 FTU facilities are not provided, the quantity and/or timeliness of aircrew produced will be less than HHQ expects while artificially increasing PERSTEMPO to make up for lack of appropriate equipment and facilities. Low quantity and late graduations negatively impact US power projection for multiple CDRs. Additionally, due to the lack of secure operational spaces, the newly trained aircrews will continue to be thrust into Top Secret environments with little to no experience operating in these types of situations. Additionally, failure to enable use of Link-16 and BFT will inhibit improvements to safety margins in airspace and ranges.</p> <p><u>ADDITIONAL:</u> This project meets the criteria/scope in Air Force Manual 32-1084, Facility Requirements. A preliminary analysis of alternatives indicates that constructing a new facility to house MQ-9 FTU Operations is the only feasible option. This is a new mission beddown (MQ-9) specific to the mission and no other suitable facilities exist on Holloman AFB. A certification of exception is being prepared. Sustainable principles, to include life cycle cost effective practices, will be integrated into the design, development, and construction of the project. Base Civil Engineer: Comm. (575) 572-3071; (MQ-9 Ops Facility: 19702 SM = 212,000 SF)</p> <p><u>JOINT USE CERTIFICATION:</u> This facility can be used by other components on an "as available" basis; however, the scope of this project is based on Air Force requirements.</p>		

DD Form 1391, DEC 99 (E-Form)

PREVIOUS EDITIONS MAY BE USED INTERNALLY

FEBRUARY 2018

# EXHIBIT 10

Case 4:19-cv-00872-HSG Document 220-5 Filed 10/11/19 Page 48 of 116

1. COMPONENT ARMY		FY 2019 MILITARY CONSTRUCTION PROGRAM								2. DATE 01 FEB 2018	
3. INSTALLATION AND LOCATION White Sands Missile Range New Mexico				4. COMMAND US Army Installation Management Command				5. AREA CONSTRUCTION COST INDEX 0.95			
6. PERSONNEL STRENGTH:		(1) PERMANENT			(2) STUDENTS			(3) SUPPORTED			(4) TOTAL
		OFFICER	ENLIST	CIVIL	OFFICER	ENLIST	CIVIL	OFFICER	ENLIST	CIVIL	
A. AS OF 31 OCT 2017		64	61	1830	0	0	0	466	1178	3668	7,267
B. END FY 2023		73	155	1695	0	0	0	466	1178	3326	6,893
7. INVENTORY DATA (\$000)											
A. TOTAL AREA.....		936,364 ha		(2,313,797 AC)							
B. INVENTORY TOTAL AS OF 05 JUL 2017.....							4,354,107				
C. AUTHORIZATION NOT YET IN INVENTORY.....							221,182				
D. AUTHORIZATION REQUESTED IN THE FY 2019 PROGRAM.....							40,000				
E. AUTHORIZATION INCLUDED IN THE FY 2020 PROGRAM.....							0				
F. PLANNED IN NEXT THREE YEARS (NEW MISSION ONLY).....							0				
G. REMAINING DEFICIENCY.....							75,730				
H. GRAND TOTAL.....							4,691,019				
8. PROJECT APPROPRIATIONS REQUESTED IN THE FY 2019 PROGRAM:											
CAT							COST		DESIGN STATUS		
CODE	PROJECT TITLE	SCOPE/UM			(\$000)		START	COMPLETE			
13115	Information Systems Facility	56,268.00/SF (5227.47/m2)			40,000		06/2017	10/2018			
						TOTAL		40,000			
9. FUTURE PROJECT APPROPRIATIONS:											
CATEGORY							COST				
CODE	PROJECT TITLE				(\$000)						
A. INCLUDED IN THE FY 2020 PROGRAM: NONE											
B. PLANNED NEXT THREE PROGRAM YEARS (NEW MISSION ONLY): NONE											
C. DEFERRED SUSTAINMENT, RESTORATION, AND MODERNIZATION (SRM):							N/A				
10. MISSION OR MAJOR FUNCTIONS:											
White Sands Missile Range (WSMR), birthplace of America's missile and space activity, provides Army, Navy, Air Force, Department of Defense (DoD), and other organizations with high quality services for experimentation, test, research, assessment, development, and training in support of the Nation. WSMR always provides the best value; focusing on affordability and stewardship of resources, providing results that consistently exceed expectations while providing a high quality of life for our service members, civilians, and families.											
11. OUTSTANDING POLLUTION AND SAFETY DEFICIENCIES:											
						(\$000)					
A. AIR POLLUTION							0				
B. WATER POLLUTION							0				
C. OCCUPATIONAL SAFETY AND HEALTH							0				



THIS PAGE INTENTIONALLY LEFT BLANK

1. COMPONENT <b>Army</b>		FY 2019 MILITARY CONSTRUCTION PROJECT DATA			2. DATE <b>01 FEB 2018</b>	
3. INSTALLATION AND LOCATION <b>White Sands Missile Range New Mexico</b>				4. PROJECT TITLE <b>Information Systems Facility</b>		
5. PROGRAM ELEMENT <b>72896A</b>		6. CATEGORY CODE <b>13115</b>	7. PROJECT NUMBER <b>33584</b>		8. PROJECT COST (\$000) <b>Approp 40,000</b>	
9. COST ESTIMATES						
ITEM		UM (M/E)	QUANTITY		UNIT COST	COST(\$000)
<u>PRIMARY FACILITY</u>						30,124
13115 Information Systems Facility		m2 (SF)	5,227 ( 56,268)		3,707	(19,376)
81160 Redundant Power		LS	--		--	(1,598)
13120 Communications Center		m2 (SF)	185.81 ( 2,000)		5,294	(984)
88020 IDS Installation		LS	--		--	(104)
89220 EMCS Connection		LS	--		--	(52)
Total from Continuation page(s)						(8,010)
<u>SUPPORTING FACILITIES</u>						6,141
Electric Service		LS	--		--	(522)
Water, Sewer, Gas		LS	--		--	(77)
Paving, Walks, Curbs And Gutters		LS	--		--	(161)
Storm Drainage		LS	--		--	(240)
Site Imp(3,658) Demo(462)		LS	--		--	(4,120)
Information Systems		LS	--		--	(1,021)
ESTIMATED CONTRACT COST						36,265
CONTINGENCY (5.00%)						1,813
SUBTOTAL						38,078
SUPV, INSP & OVERHEAD (5.70%)						2,170
TOTAL REQUEST						40,248
TOTAL REQUEST (ROUNDED)						40,000
INSTALLED EQT-OTHER APPROP						(13,360)
10. Description of Proposed Construction Construct an Information Systems Facility (ISF) and a Communications Center with redundant power, an Intrusion Detection System (IDS) and connection to the Energy Monitoring and Control System (EMCS). The facilities will have state of the art network systems, telephonic, voice, and enterprise storage equipment to support installation wide communication network services. The project includes administrative offices, laboratory space, a server farm area, enterprise storage systems, telephone switch room, information assurance secure operations center, customer support branch, data center Non-classified Internet Protocol Router (NIPR) Network space, Network Operations Center (NOC), secure room with vault for Outside Plant (OSP), Red NOC, Communications Security (COMSEC), Technical Support Network(TSN) data center, computer help desk, Secure Video Teleconferencing Center (VTC), telecommunications center, building information systems, Secret Internet Protocol Router (SIPR) Network data center, reception area, conference room, battery storage area, break room and, rest rooms. Heating and air conditioning will be provided by self-contained system. Measures in accordance with the Department of Defense (DoD) Minimum Antiterrorism for Buildings standards will be provided. Comprehensive building and furnishings related interior design services are required. Access for individuals with disabilities will be provided. Cyber Security Measures will be incorporated into this project. Sustainability/Energy measures will be provided. Facilities will be designed to a minimum life of 40 years in accordance with DoD's Unified Facilities Criteria (UFC 1-200-02) including energy efficiencies, building envelope and integrated building systems performance. Demolish 2						

1. COMPONENT Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA		2. DATE 01 FEB 2018	
3. INSTALLATION AND LOCATION White Sands Missile Range New Mexico			4. PROJECT TITLE Information Systems Facility		
5. PROGRAM ELEMENT 72896A	6. CATEGORY CODE 13115	7. PROJECT NUMBER 33584	8. PROJECT COST (\$000) Approp 40,000		
9. COST ESTIMATES (CONTINUED)					
ITEM		UM (M/E)	QUANTITY	UNIT COST	COST (\$000)
PRIMARY FACILITY (CONTINUED)					
00000 Cybersecurity Measures		LS	--	--	(750)
Sustainability/Energy Measures		LS	--	--	(416)
Antiterrorism Measures		LS	--	--	(416)
Building Information Systems		LS	--	--	(6,428)
				Total	8,010
DESCRIPTION OF PROPOSED CONSTRUCTION: (CONTINUED)					
buildings at White Sands Missile Range, NM (Total 2,061 m2/22,180 SF). Air Conditioning (Estimated 2,198 kW/625 Tons).					
11. REQ:	5,312 m2	ADQT:	85 m2	SUBSTD:	NONE
PROJECT: Construct an Information Systems Facility at White Sands Missile Range (WSMR), New Mexico. (Current Mission)					
REQUIREMENT: This project is required to provide WSMR with an adequate ISF necessary to provide a mission essential operational interaction affecting a 24-hour Information Technology and Information Management (IT/IM) between Command, tenants, and Other Government Agency (OGA) partners. The facility includes space for a command center for operations support, system and network administrators, operations floor, technical laboratory, Multi-service Technical Control Facility (MTCF), Defense Switched Network (DSN), operations center, administrative offices, customer service center, technical assistance for IT and land mobile radios. The facility also serves the Installation as a Docking Station (IAADS) in its baseline services. The ISF will contain a Network Operations Center (NOC), technical laboratory, Video Teleconferencing (VTC), classroom(s), training room(s), conference room(s) and offices.					
CURRENT SITUATION: Currently the ISF occupies both limited and fragmented space in ten separate buildings located at WSMR. Each assigned building has undergone varying levels of retrofit to accommodate the current ISF mission. None of which have been successful for long-term planning. The cooling systems are highly inefficient and inadequate, partly due to the necessary alterations of past floor plans to accommodate equipment expansions throughout the years. The heating system is limited in that the temperature control in the personnel areas cannot be maintained at comfortable limits without overheating equipment areas. Hazardous materials like asbestos and lead are dealt with on a case-by-case basis. Existing building design lacks appropriate workstation space and circulation, is encumbered with safety concerns including poor air quality and limited reliable electrical redundancy, no grounding/bonding/shielding, and noncompliance with the Americans with Disabilities Act (ADA). Assigned geographically separated space cannot provide the operational synergy required for 24-hour information management and the necessary workforce fusion required for network defense.					
IMPACT IF NOT PROVIDED: If this project is not provided, the WSMR ISF operations, situational awareness, and security of information and information systems may be compromised due to the inability to provide complete and continuous surveillance and response measures. The inability to expand and support existing and future network systems will negatively effect DoD efforts relating to IT/IM and information security. As					

1. COMPONENT  Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA			2. DATE  01 FEB 2018
3. INSTALLATION AND LOCATION White Sands Missile Range New Mexico			4. PROJECT TITLE Information Systems Facility		
5. PROGRAM ELEMENT  72896A	6. CATEGORY CODE  13115	7. PROJECT NUMBER  33584	8. PROJECT COST (\$000)  Approp 40,000		
IMPACT IF NOT PROVIDED: (CONTINUED)					
<p>new military technologies and operational concepts grow and mature WSMR will need to position itself to process and transport vast amounts of electronic test data more reliably, efficiently, faster, and securely. The risk to the segment of the Global Information Grid (GIG) will affect the integrity and reliability of the global networks, adversely affecting field commanders' capability to reach-back which is a vital mission requirement for the warfighter. Secure and reliable information may not be readily available to installation and field commanders and will compromise the integrity and confidentiality of information systems available to the warfighter.</p> <p><u>ADDITIONAL:</u> Required assessments have been made for supporting facilities and the project is not in a 100-year floodplain in accordance with Executive Order 11988. This project has been coordinated with the installation physical security plan, and all physical security measures are included. All required antiterrorism protection measures are included. Alternative methods of meeting this requirement have been explored during project development. This project is the only feasible option to meet the requirement. The Deputy Assistant Secretary of the Army (Installations, Housing and Partnerships) certifies that this project has been considered for joint use potential. The facility will be available for use by other components. A parametric cost estimate based upon project engineering design was used to develop this budget estimate. Sustainable principles, to include life cycle cost effective practices, will be integrated into the design, development and construction of the project and will follow the guidance detailed in the Army Sustainable Design and Development Policy - complying with applicable laws and executive orders.</p>					
12. SUPPLEMENTAL DATA:					
A. Estimated Design Data:					
(1) Status:					
(a) Date Design Started.....					JUN 2017
(b) Percent Complete as of January 2018.....					35.00
(c) Date 35% Designed.....					JAN 2018
(d) Date Design Complete.....					OCT 2018
(e) Parametric Cost Estimating Used to Develop Costs..					YES
(f) Type of Design Contract: Design-bid-build					
(g) An energy study and life cycle cost analysis will be documented during the final design.					
(2) Basis:					
(a) Standard or Definitive Design: YES					
(b) Where Design Was Most Recently Used:					
(c) Percentage of Design utilizing Standard Design ...					50
(3) Total Design Cost (c) = (a)+(b) OR (d)+(e): (\$000)					
(a) Production of Plans and Specifications.....					2,160
(b) All Other Design Costs.....					1,440

1. COMPONENT  Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA		2. DATE  01 FEB 2018	
3. INSTALLATION AND LOCATION White Sands Missile Range New Mexico			4. PROJECT TITLE Information Systems Facility		
5. PROGRAM ELEMENT  72896A		6. CATEGORY CODE  13115	7. PROJECT NUMBER  33584	8. PROJECT COST (\$000)  Approp 40,000	
12. SUPPLEMENTAL DATA (CONTINUED..)					
A. Estimated Design Data: (CONTINUED..)					
(c) Total Design Cost.....				3,600	
(d) Contract.....				2,880	
(e) In-house.....				720	
(4) Construction Contract Award.....				APR 2019	
(5) Construction Start.....				JUN 2019	
(6) Construction Completion.....				JUN 2021	
B. Equipment associated with this project which will be provided from other appropriations:					
<u>Equipment Nomenclature</u>		<u>Procuring Appropriation</u>	<u>Fiscal Year Appropriated Or Requested</u>	<u>Cost (\$000)</u>	
Equipment		OPA	2020	130	
IDS Equipment		OPA	2020	100	
Electronic Access Control		OPA	2020	100	
Clean Agent Supp System w/ VES		OPA	2020	100	
UPS Equipment		OPA	2020	40	
Info Sys - ISC		OPA	2020	2,532	
Info Sys - PROP		RDT&E	2020	10,358	
Total				13,360	
Installation Engineer: Phone Number: 575-678-2252					

# EXHIBIT 11

10

1. COMPONENT Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA			2. DATE 11 APR 2019 29 AUG 2017			
3. INSTALLATION AND LOCATION West Point Military Reservation New York				4. PROJECT TITLE Engineering Center and Parking Structure				
5. PROGRAM ELEMENT		6. CATEGORY CODE 171 38	7. PROJECT NUMBER 78804		8. PROJECT COST (\$000) 197,000			
9. COST ESTIMATES								
ITEM					UM	QUANTITY	UNIT COST	COST(\$000)
PRIMARY FACILITY								161,225
Instructional Building					SF	136,000	667.63	(90,797)
Parking Structure					EA	450	43,736	(19,681)
Rock Removal					LS	--	--	(45,221)
Guard Booth					SF	100	2,770	(277)
Cyber Security					LS	--	--	(1,065)
Total from Continuation page								(4,184)
SUPPORTING FACILITIES								16,616
Electric Service					LS	--	--	(2,680)
Water, Sewer, Gas					LS	--	--	(744)
Steam And/Or Chilled Water Distribution					LS	--	--	(1,939)
Paving, Walks, Curbs And Gutters					LS	--	--	(1,771)
Storm Drainage					LS	--	--	(1,548)
Site Imp(7,333) Demo(369)					LS	--	--	(7,702)
Information Systems					LS	--	--	(232)
ESTIMATED CONTRACT COST								177,841
CONTINGENCY (5.00%)								8,892
SUBTOTAL								186,733
SUPERVISION, INSPECTION & OVERHEAD (5.70%)								10,644
TOTAL REQUEST								197,377
TOTAL REQUEST (ROUNDED)								197,000
INSTALLED EQT-OTHER APPROPRIATIONS								(53,214)
10. Description of Proposed Construction								
<p>This is an incrementally funded project. Congress initially authorized the project in FY2019 as two separate projects, PN 78804, Engineering Center (authorized at \$95M) and PN 78805, Parking Structure (authorized at \$65M). A second funding increment of \$37M will be requested in FY2022. Construct an Engineering Center to provide a state-of-the-art collaborative educational space in support of multi-disciplinary project based engineering education for science, technology, engineering and mathematics (STEM). Construct a Parking Structure for faculty and staff to support the academic program within the central Cadet Zone. Primary facility includes an instructional building with space for mission-critical laboratories and laboratory support; project fabrication areas; and space for project display, collaborative effort, and capstone work. The instructional building will also contain conference rooms, spray booths, double height space (high bay) with overhead lift capability, and a loading dock. A guard booth supports the building and multi-story parking structure equipped with electronic security system. Significant rock removal is required. Project includes cyber security measures, a mass notification system, information systems, fire detection system (smoke detection) and sprinklers, building information systems, intrusion detection system (IDS) installation, and energy monitoring control systems (EMCS) connection to the installation central system. Sustainability/energy measures will be provided. Measures in accordance with the Department of Defense (DoD) Minimum</p>								

1. COMPONENT <b>Army</b>		FY 2019 MILITARY CONSTRUCTION PROJECT DATA		2. DATE 11 APR 2019 29 AUG 2017																															
3. INSTALLATION AND LOCATION West Point Military Reservation New York			4. PROJECT TITLE Engineering Center and Parking Structure																																
5. PROGRAM ELEMENT	6. CATEGORY CODE 171 38	7. PROJECT NUMBER 78804	8. PROJECT COST (\$000) 197,000																																
9. COST ESTIMATES (CONTINUED)																																			
<table border="1"> <thead> <tr> <th>ITEM</th> <th>UM</th> <th>QUANTITY</th> <th>UNIT COST</th> <th>COST (\$000)</th> </tr> </thead> <tbody> <tr> <td colspan="5">PRIMARY FACILITY (CONTINUED)</td> </tr> <tr> <td>Sustainability/Energy Measures</td> <td>LS</td> <td>--</td> <td>--</td> <td>(1,107)</td> </tr> <tr> <td>Antiterrorism Measures</td> <td>LS</td> <td>--</td> <td>--</td> <td>(1,110)</td> </tr> <tr> <td>Building Information Systems</td> <td>LS</td> <td>--</td> <td>--</td> <td>(1,967)</td> </tr> <tr> <td colspan="4">Total</td> <td>4,184</td> </tr> </tbody> </table>						ITEM	UM	QUANTITY	UNIT COST	COST (\$000)	PRIMARY FACILITY (CONTINUED)					Sustainability/Energy Measures	LS	--	--	(1,107)	Antiterrorism Measures	LS	--	--	(1,110)	Building Information Systems	LS	--	--	(1,967)	Total				4,184
ITEM	UM	QUANTITY	UNIT COST	COST (\$000)																															
PRIMARY FACILITY (CONTINUED)																																			
Sustainability/Energy Measures	LS	--	--	(1,107)																															
Antiterrorism Measures	LS	--	--	(1,110)																															
Building Information Systems	LS	--	--	(1,967)																															
Total				4,184																															
<p>Antiterrorism for Buildings standards to include a fence will be provided. Supporting facilities include utilities (electric, water, sewer, gas); paving, parking, walks, curbs and gutters; storm drainage; vehicular drives; site improvements to include extension of existing historic pedestrian walk and stone retaining walls; relocation of existing passive and active barriers; landscaping; signage; and information systems. Heating and air conditioning will be provided by self-contained systems. The project will include a solar array on the roof, electric service, outdoor security lighting, electric car charging stations, Common Access Card (CAC) readers enabled control access gates, fire protection (to include additional fire hydrants), an elevator and stairs. Access for individuals with disabilities will be provided. Comprehensive building and furnishings related interior design services are required. Facility shall be constructed to standards for historically significant facilities. Operations and maintenance manuals will be provided. Facilities will be designed to a minimum life of 40 years in accordance with DoD's Unified Facilities Criteria (UFC 1-200-02) including energy efficiencies, building envelope and integrated building systems performance. Demolish 5 buildings at West Point Military Reservation, NY (14,700 Total SF). Air Conditioning (Estimated 600 Tons).</p>																																			
11. REQ: 136,000 SF		ADQT: NONE		SUBSTD: 33,201 SF																															
<p>PROJECT: Construct an Engineering Center and multi-level parking structure at West Point Military Reservation, New York. (Current Mission)</p> <p>REQUIREMENT: This project is required to provide flexible multi-disciplinary project based educational space for science, engineering, technology and mathematics (STEM) that achieves compliance with academic standards. The facility is required to compete with peer institutions for recruitment of STEM students and, in particular, highly recruited minority candidates. This project will provide open, unstructured project areas, high-bay space, collaborative workspaces and laboratories essential for project-based learning. By bringing the engineering and cyber programs from several different academic buildings into one, cross-disciplinary collaboration and project-based education will be brought up to 21st Century practices. High-bay space and overhead lift capability will allow Cadets to work on projects exceeding 8ft and to work thru the winter months. Open and unstructured project areas will</p>																																			



1. COMPONENT Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA		2. DATE 11 APR 2019 29 AUG 2017	
3. INSTALLATION AND LOCATION West Point Military Reservation New York			4. PROJECT TITLE Engineering Center and Parking Structure		
5. PROGRAM ELEMENT		6. CATEGORY CODE 171 38	7. PROJECT NUMBER 78804		8. PROJECT COST (\$000) 197,000

## REQUIREMENT: (CONTINUED)

allow proper materials handling capabilities. A proper loading dock, adjacencies for rapid fabrication, and visibility into fabrication and project spaces will cut down life, health, safety challenges. This project will provide air handling and fume ventilation for application of coatings, glues, paints and chemical treatments. There are no alternate permanent facilities, either adequate or available, which could be used to support this mission. Parking and circulation studies conducted by the Garrison indicate the need to eliminate existing parking due to antiterrorism force protection violations; the need to restrict vehicle access within the academic campus for safety and security purposes; and the need to provide additional parking for staff and faculty. The location along Thayer Road will support the parking demands of faculty and staff, and accommodate displaced parking to be removed in accordance with minimum antiterrorism force protection standards.

## CURRENT SITUATION:

Currently, neither adequate existing permanent facilities nor buildings of opportunity are available at West Point to support compliance with engineering academic standards and the requirements to turn out high caliber, Army ready Soldiers. As functions and requirements have changed, existing facilities have become inadequate for the success of the program mission. Functions are scattered throughout the buildings, so preferred adjacencies, utilities, climate control, ceiling height and material handling capacity are not available. Adequate facilities for the support of project-based learning and Cyber Security Studies do not exist, and there are on-going issues with water infiltration, insufficient provision of air and circulation, inflexibility of layout spaces, and difficulty in providing new utilities. Existing laboratories have insufficient headroom and separation of functions, and classrooms need additional audio visual infrastructure and blackboard/chalkboard surfaces. Parking within the academic campus area is critically short, and does not meet the requirement of numerous faculty and staff that work within this area. Additionally, much of the parking is in violation of Antiterrorism force protection standards, and needs to be relocated. The structure will enable the required 450 parking spaces to fit within the dense urban campus, minimize the amount of land needed, and account for the steep slopes. The steep terrain and rock conditions will require extensive rock blasting and removal/disposal.

## IMPACT IF NOT PROVIDED:

If this project is not provided, West Point's engineering education facilities will fail to meet the standards set by peer Universities (Mission failure), Cadet injury, potential loss of Engineering Accreditation (Mission failure), and loss of prime Collegiate recruits (Mission failure). The quality of the engineering education at West Point would be deteriorated, particularly as compared to peer and near-peer institutions. The nationally-ranked engineering programs absolutely require this modernization to maintain the edge, and a failure to act will have a significant negative impact on the accession of trained engineers and cyber-security personnel into the Army as cadets and potential Cadets choose other academic majors and other universities. Further, recruiting of new cadets,

1. COMPONENT  Army		FY 2019 MILITARY CONSTRUCTION PROJECT DATA		2. DATE 11 APR 2019 29 AUG 2017	
3. INSTALLATION AND LOCATION West Point Military Reservation New York			4. PROJECT TITLE Engineering Center and Parking Structure		
5. PROGRAM ELEMENT	6. CATEGORY CODE 171 38	7. PROJECT NUMBER 78804	8. PROJECT COST (\$000) 197,000		
<p>IMPACT IF NOT PROVIDED: (CONTINUED)</p> <p>particularly those not familiar with West Point, such as under-represented groups, would be negatively impacted as the deteriorated existing facility looks progressively less competitive with peer institutions. If the project does not include parking, a gross deficit in parking throughout the academic campus will continue to be a critical issue at the installation. The need for faculty and staff parking within the campus will necessitate the continued use of parking on and adjacent to Thayer and Mahan Halls. This will prolong violations of minimum antiterrorism force protection standards. Distant parking lots are beyond the acceptable distance to principal buildings per international building codes.</p> <p>ADDITIONAL:</p> <p>Required assessments have been made for supporting facilities and the project is not in a 100-year floodplain in-accordance-with Executive Order 11988. This project has been coordinated with the installation physical security plan, and all physical security measures are included. All required antiterrorism protection measures are included. Alternative methods of meeting this requirement have been explored during project development. This project is the only feasible option to meet the requirement. A parametric cost estimate based upon project engineering design was used to develop this budget estimate. Sustainable principles, to include life cycle cost effective practices, will be integrated into the design, development and construction of the project and will follow the guidance detailed in the Army Sustainable Design and Development Policy - complying with applicable laws and executive orders.</p>					
<p>Installation Engineer: Mr. Matthew Talaber Phone Number: 845-938-3415</p>					

# EXHIBIT 12

12

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE May 2017
3. INSTALLATION AND LOCATION KLAMATH FALLS INTERNATIONAL AIRPORT, OREGON		4. PROJECT TITLE CONSTRUCT INDOOR RANGE		
5. PROGRAM ELEMENT 52276F	6. CATEGORY CODE 179-475	7. PROJECT NUMBER KJAQ159096	8. PROJECT COST(\$000) \$8,000	
9. COST ESTIMATES				
ITEM	U/M	QUANTITY	UNIT COST	COST (\$000)
CONSTRUCT INDOOR RANGE	SM	1,142		6,018
SMALL ARMS RANGE (179-475)	SM	975	5,490	( 5,353)
COMBAT ARMS TRNG & MAINT (171-476)	SM	167	3,983	( 665)
SUPPORTING FACILITIES				1,000
UTILITIES AND COMMUNICATIONS SUPPORT	LS			( 500)
SITE IMPROVEMENTS	LS			( 250)
PAVEMENTS	LS			( 250)
SUSTAINABILITY AND ENERGY MEASURES	LS			150
SUBTOTAL				7,168
CONTINGENCY (5%)				358
TOTAL CONTRACT COST				7,526
SUPERVISION, INSPECTION AND OVERHEAD (6%)				451
TOTAL REQUEST				7,977
TOTAL REQUEST (ROUNDED)				8,000
10. Description of Proposed Construction: Construct a small arms indoor range and CATM training & maintenance facility utilizing conventional design and construction methods to accommodate the mission of the facility. Facility shall be designed as permanent construction in accordance with the DOD Unified Facilities Criteria. The facility should be compatible with applicable DoD, Air Force, and base design standards. In addition, local materials and construction techniques shall be used where cost effective. This project will comply with DoD antiterrorism/force protection requirements per unified facilities criteria. Special construction requirements: Use modular small arms range construction to the maximum extent possible. all necessary exterior utilities, access pavements, fire protection, site work, and support. Provide utility connections for modular small arms range equipment components. Provide doors to ensure ease of access to modular small arms range equipment to facilitate maintenance. Air Conditioning: 105 KW.				
11. REQUIREMENT: 1,143 SM ADEQUATE: 0 SM SUBSTANDARD: 0 SM PROJECT: Small Arms Range/CATM Training (Current Mission) REQUIREMENT: The installation requires an adequately sized, properly configured, and correctly sited small arms range to train and certify security forces, battlefield airmen, and mobility personnel in accordance with AFI 36-2226. The facility will house a MCSATS (Modular Containerized Small Arms Training Set) for a total of 12 to 14 firing lanes. A combat arms training and maintenance (CATM) facility, to provide classroom training space, administrative space, and arms cleaning and inspection areas for members using the small arms range. The ANG has both members that are required to perform armed duties in-garrison and others only in contingency operations on both pistol and rifle in accordance with AFI 36-2226, Table 2-1. CURRENT SITUATION: The installation does not have an organic small arms range capability. Drill status members cannot be qualified on base during their 2-days-per-month drill attendance. Work-arounds include traveling off-site at considerable expense per qualification. Given the new course of fire includes a full 8-hour firing day, plus pre-firing classroom familiarization training, combat arms training can occupy the majority of a drill weekend, leaving no time for other functional or ancillary training. On base training is considered the preferred course of action because it minimizes impacts to				

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE May 2017																												
3. INSTALLATION AND LOCATION KLAMATH FALLS INTERNATIONAL AIRPORT, OREGON																														
5. PROJECT TITLE CONSTRUCT INDOOR RANGE		7. PROJECT NUMBER KJAQ159096																												
<p>12. SUPPLEMENTAL DATA:</p> <p>a. Estimated Design Data:</p> <p>(1) Status:</p> <table border="0"> <tr><td>(a) Date Design Started</td><td>JAN 2017</td></tr> <tr><td>(b) Parametric Cost Estimates used to develop costs</td><td>No</td></tr> <tr><td>(c) Percent Complete as of Jan 17</td><td>6%</td></tr> <tr><td>* (d) Date 35% Designed</td><td>SEP 2017</td></tr> <tr><td>(e) Date Design Complete</td><td>DEC 2017</td></tr> <tr><td>(f) Type of Design Contract</td><td>IDIQ</td></tr> <tr><td>(g) Energy Study/Life-Cycle analysis was/will be performed</td><td>No</td></tr> </table> <p>(2) Basis:</p> <table border="0"> <tr><td>(a) Standard or Definitive Design -</td><td>No</td></tr> <tr><td>(b) Where Design Was Most Recently Used -</td><td></td></tr> </table> <p>(3) Total Cost (c) = (a) + (b) or (d) + (e): (\$000)</p> <table border="0"> <tr><td>(a) Production of Plans and Specifications</td><td>400</td></tr> <tr><td>(b) All Other Design Costs</td><td>300</td></tr> <tr><td>(c) Total</td><td>700</td></tr> <tr><td>(d) Contract</td><td>700</td></tr> <tr><td>(e) In-House</td><td></td></tr> </table> <p>(4) Contract Award (Month/Year) APR 2018</p> <p>(5) Construction Start MAY 2018</p> <p>(6) Construction Completion JUL 2019</p> <p>* Indicates completion of Project Definition with Parametric Cost Estimate which is comparable to traditional 35% design to ensure valid scope and cost and executability.</p> <p>b. Equipment associated with this project will be provided from other appropriations: N/A</p> <p>POINT OF CONTACT: NGB/A4AD (240) 612-4498</p>			(a) Date Design Started	JAN 2017	(b) Parametric Cost Estimates used to develop costs	No	(c) Percent Complete as of Jan 17	6%	* (d) Date 35% Designed	SEP 2017	(e) Date Design Complete	DEC 2017	(f) Type of Design Contract	IDIQ	(g) Energy Study/Life-Cycle analysis was/will be performed	No	(a) Standard or Definitive Design -	No	(b) Where Design Was Most Recently Used -		(a) Production of Plans and Specifications	400	(b) All Other Design Costs	300	(c) Total	700	(d) Contract	700	(e) In-House	
(a) Date Design Started	JAN 2017																													
(b) Parametric Cost Estimates used to develop costs	No																													
(c) Percent Complete as of Jan 17	6%																													
* (d) Date 35% Designed	SEP 2017																													
(e) Date Design Complete	DEC 2017																													
(f) Type of Design Contract	IDIQ																													
(g) Energy Study/Life-Cycle analysis was/will be performed	No																													
(a) Standard or Definitive Design -	No																													
(b) Where Design Was Most Recently Used -																														
(a) Production of Plans and Specifications	400																													
(b) All Other Design Costs	300																													
(c) Total	700																													
(d) Contract	700																													
(e) In-House																														

# EXHIBIT 13

1. Component DEFENSE (DLA)		FY 2016 MILITARY CONSTRUCTION PROGRAM						2. Date FEBRUARY 2015			
3. Installation And Location AIR NATIONAL GUARD KLAMATH FALLS INTERNATIONAL AIR PORT, OREGON				4. Command DEFENSE LOGISTICS AGENCY			5. Area Construction Cost Index 1.11				
6. PERSONNEL ANG FACILITY		(1) PERMANENT			(2) STUDENTS			(3) GUARD/RESERVE			(4) TOTAL
		OFF	ENL	CIV	OFF	ENL	CIV	OFF	ENL	CIV	
a. ACTUAL AS OF											
b. AUTHORIZED											
7. INVENTORY DATA (\$000)											
A. TOTAL ACREAGE											
B. INVENTORY TOTAL AS OF											
C. AUTHORIZED NOT YET IN INVENTORY											
D. AUTHORIZATION REQUESTED IN THIS PROGRAM											
E. AUTHORIZATION INCLUDED IN FOLLOWING PROGRAM											
F. PLANNED IN NEXT THREE YEARS											
G. REMAINING DEFICIENCY											
H. GRAND TOTAL											
8. PROJECTS REQUESTED IN THIS PROGRAM:											
a. CATEGORY				b. COST		c. DESIGN STATUS					
(1) CODE	(2) PROJECT TITLE			(3) SCOPE	(\$000)	(1) START mm/yy		(2) COMPLETE mm/yy			
126	Replace Fuel Facilities			2 OL	2,500	10/10		12/14			
9. FUTURE PROJECTS											
a. INCLUDED IN FOLLOWING PROGRAM											
CATEGORY CODE	PROJECT NUMBER	PROJECT TITLE				COST (\$000)					
		None									
b. PLANNED IN NEXT FOUR YEARS											
CATEGORY CODE	PROJECT NUMBER	PROJECT TITLE				COST (\$000)					
		None									
10. MISSION OR MAJOR FUNCTION											
<p>These fuel facilities provide essential storage and distribution systems to support the mission of assigned Air National Guard units and transient aircraft at Klamath Falls International Airport (IAP), Oregon.</p> <p>Deferred sustainment, restoration, and modernization for fuel facilities at this location is \$0.4 million.</p>											
11. OUTSTANDING POLLUTION AND SAFETY DEFICIENCIES:											
A. AIR POLLUTION											
B. WATER POLLUTION											
C. OCCUPATIONAL SAFETY AND HEALTH											
										(\$000)	
										0	
										0	
										0	

Case 4:19-cv-00872-HSG Document 220-5 Filed 10/11/19 Page 64 of 116

1. Component DEFENSE (DLA)		FY 2016 MILITARY CONSTRUCTION PROJECT DATA		2. Date FEBRUARY 2015	
3. Installation and Location AIR NATIONAL GUARD KLAMATH FALLS, KINGSLEY FIELD, OREGON			4. Project Title REPLACE FUEL FACILITIES		
5. Program Element 0702976S		6. Category Code 126	7. Project Number DESC14U2	8. Project Cost (\$000) 2,500	
<p>IMPACT IF NOT PROVIDED: Loading and unloading of refueler tank trucks will continue to be a lengthy, inefficient operation. The environment and operators will be at risk due to lack of adequate containment surfaces and operating from a facility that does not have all the current DoD safety features.</p> <p>ADDITIONAL: This project meets all applicable DoD criteria. The Defense Logistics Agency certifies that this facility has been considered for joint use, as applicable, by other components. Mission requirements, operational considerations, and location are incompatible with use by the other components.</p>					
12. Supplemental Data:					
A. Estimated Design Data:					
1. Status					
(a) Date Design Started:					10/10
(b) Parametric Cost Estimate Used to Develop Costs (Yes/No):					No
(c) Percent Complete as of February 2015:					95
(d) Date 35 Percent Complete:					03/11
(e) Date Design Complete:					12/14
(f) Type of Design Contract:					D/B/B
2. Basis					
(a) Standard or Definitive Design:					No
(b) Date Design was Most Recently Used:					N/A
3. Total Cost (c) = (a) + (b) or (d) + (e) (\$000)					
(a) Production of Plans and Specifications:					100
(b) All Other Design Costs:					100
(c) Total:					200
(d) Contract:					150
(e) In-House:					50
4. Contract Award:					03/16
5. Construction Start:					04/16
6. Construction Complete:					06/17
B. Equipment associated with this project that will be provided from other appropriations:					
<u>PURPOSE</u>		<u>APPROPRIATION</u>	<u>FISCAL YEAR REQUIRED</u>	<u>AMOUNT (\$000)</u>	
Environmental Remediation		DWCF	2016	50	
Point of Contact is DLA Civil Engineer at 703-767-2326					



# EXHIBIT 14

14

1. COMPONENT ANG	<b>FY 2019 GUARD AND RESERVE MILITARY CONSTRUCTION</b>			2. DATE Feb 2018																			
3. INSTALLATION AND LOCATION JOINT BASE LANGLEY-EUSTIS, HAMPTON				4. AREA CONSTR COST INDEX .91																			
5. FREQUENCY AND TYPE OF UTILIZATION 192nd Fighter Wing																							
6. OTHER ACTIVE/GUARD/RESERVE INSTALLATIONS WITHIN 15 MILES RADIUS																							
7. PROJECTS REQUESTED IN THIS PROGRAM																							
<table border="0" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; border-bottom: 1px solid black;">CATEGORY CODE</th> <th style="text-align: left; border-bottom: 1px solid black;">PROJECT TITLE</th> <th style="text-align: left; border-bottom: 1px solid black;">SCOPE</th> <th style="text-align: left; border-bottom: 1px solid black;">COST \$(000)</th> <th colspan="2" style="text-align: left; border-bottom: 1px solid black;">DESIGN STATUS</th> </tr> <tr> <th></th> <th></th> <th></th> <th></th> <th style="text-align: left; border-bottom: 1px solid black;">START</th> <th style="text-align: left; border-bottom: 1px solid black;">COMPLETE</th> </tr> </thead> <tbody> <tr> <td>171-447</td> <td>Construct Cyber Ops Facility</td> <td>966 SM (10,400 SF)</td> <td>10,000</td> <td>Sep 17</td> <td>Oct 18</td> </tr> </tbody> </table>						CATEGORY CODE	PROJECT TITLE	SCOPE	COST \$(000)	DESIGN STATUS						START	COMPLETE	171-447	Construct Cyber Ops Facility	966 SM (10,400 SF)	10,000	Sep 17	Oct 18
CATEGORY CODE	PROJECT TITLE	SCOPE	COST \$(000)	DESIGN STATUS																			
				START	COMPLETE																		
171-447	Construct Cyber Ops Facility	966 SM (10,400 SF)	10,000	Sep 17	Oct 18																		
8. STATE RESERVE FORCES FACILITIES BOARD RECOMMENDATION The Board recommendations are:																							
				04 Feb 16 (Date)																			
9. LAND ACQUISITION REQUIRED																							
				None (Number of Acres)																			
10. PROJECTS PLANNED IN NEXT FOUR YEARS																							
<table border="0" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; border-bottom: 1px solid black;">CATEGORY CODE</th> <th style="text-align: left; border-bottom: 1px solid black;">PROJECT TITLE</th> <th style="text-align: left; border-bottom: 1px solid black;">SCOPE</th> <th style="text-align: left; border-bottom: 1px solid black;">COST \$(000)</th> </tr> </thead> </table>						CATEGORY CODE	PROJECT TITLE	SCOPE	COST \$(000)														
CATEGORY CODE	PROJECT TITLE	SCOPE	COST \$(000)																				
R&M Unfunded Requirement: \$0																							

1. COMPONENT ANG	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE Feb 2018															
3. INSTALLATION AND LOCATION JOINT BASE LANGLEY-EUSTIS, VIRGINIA																	
5. PROJECT TITLE CONSTRUCT CYBER OPS FACILITY	7. PROJECT NUMBER MUHJ179000																
<p>As a tenant unit on an Active Duty base with a TFI agreement, the 192d FW does not have the ability to allocate buildings on Joint Base Langley-Eustis. The host 633d ABW does not currently have the availability in any building that would meet the COS mission requirements. In order for the unit to attain operating capability, temporary leased space has been obtained off base. Continued use of that space is costly, and it involves an increased security risk, which is not appropriate to continue.</p> <p><u>IMPACT IF NOT PROVIDED:</u> The 185th COS will be unable to reach Full Operating Capability (FOC) without a facility that includes the required SCIF space from which to operate. Having the required SCIF space is necessary for the team to receive the intel and perform the training required to perform in the cyber mission space. The squadron is required for the ANG to meet their USCC mobilization requirements. Not having a facility that enables the unit to reach FOC risks the ANG being unable to fulfill their obligation to USCC. Continued use of leased space is costly and represents an enhanced security risk.</p> <p><u>ADDITIONAL:</u> Sustainable principles, to include Life Cycle cost effective practices, will be integrated into the design, development and construction of the project in accordance with Executive Order 13423, 10 USC 2802(c) and other applicable laws and Executive Orders. An economic analysis is being prepared comparing the alternatives of new construction, revitalization, leasing and status quo operation. This project is considered capitalization based on the following rule from ANGETL 17-06: New Construction.</p>																	
<table border="0"> <tr> <td>CatCode</td> <td></td> <td>Requirement</td> <td>Adequate</td> <td>Substandard</td> </tr> <tr> <td>171-447</td> <td>RES FORCES COMM/ELECTRONIC TRN</td> <td>455 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> <tr> <td>171-447</td> <td>RES FORCES COMM/ELECTRONIC TRN</td> <td>511 SM</td> <td>0 SM</td> <td>0 SM</td> </tr> </table>	CatCode		Requirement	Adequate	Substandard	171-447	RES FORCES COMM/ELECTRONIC TRN	455 SM	0 SM	0 SM	171-447	RES FORCES COMM/ELECTRONIC TRN	511 SM	0 SM	0 SM		
CatCode		Requirement	Adequate	Substandard													
171-447	RES FORCES COMM/ELECTRONIC TRN	455 SM	0 SM	0 SM													
171-447	RES FORCES COMM/ELECTRONIC TRN	511 SM	0 SM	0 SM													
<p>CONSTRUCT CYBER ADMINISTRATION (171447) CONSTRUCT CYBER SCIF (171447)</p>	<p>455 SM = 4,900 SF 511 SM = 5,500 SF</p>																

1. COMPONENT ANG	FY 2019 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE Feb 2018																												
3. INSTALLATION AND LOCATION JOINT BASE LANGLEY-EUSTIS, VIRGINIA																														
5. PROJECT TITLE CONSTRUCT CYBER OPS FACILITY		7. PROJECT NUMBER MUHJ179000																												
<p>12. SUPPLEMENTAL DATA:</p> <p>a. Estimated Design Data:</p> <p>(1) Status:</p> <table border="0"> <tr><td>(a) Date Design Started</td><td>SEP 2017</td></tr> <tr><td>(b) Parametric Cost Estimates used to develop costs</td><td>No</td></tr> <tr><td>(c) Percent Complete as of Jan 2018</td><td>6%</td></tr> <tr><td>* (d) Date 35% Designed</td><td>APR 2018</td></tr> <tr><td>(e) Date Design Complete</td><td>OCT 2018</td></tr> <tr><td>(f) Type of Design Contract</td><td>Standard</td></tr> <tr><td>(g) Energy Study/Life-Cycle analysis was/will be performed</td><td>YES</td></tr> </table> <p>(2) Basis:</p> <table border="0"> <tr><td>(a) Standard or Definitive Design -</td><td>No</td></tr> <tr><td>(b) Where Design Was Most Recently Used -</td><td></td></tr> </table> <p>(3) Total Cost (c) = (a) + (b) or (d) + (e): (\$000)</p> <table border="0"> <tr><td>(a) Production of Plans and Specifications</td><td>\$470</td></tr> <tr><td>(b) All Other Design Costs</td><td>\$270</td></tr> <tr><td>(c) Total</td><td>\$740</td></tr> <tr><td>(d) Contract</td><td>\$740</td></tr> <tr><td>(e) In-House</td><td></td></tr> </table> <p>(4) Contract Award (Month/Year) FEB 2019</p> <p>(5) Construction Start APR 2019</p> <p>(6) Construction Completion JAN 2020</p> <p>* Indicates completion of Project Definition with Parametric Cost Estimate which is comparable to traditional 35% design to ensure valid scope and cost and executability.</p> <p>b. Equipment associated with this project will be provided from other appropriations: N/A</p> <p>POINT OF CONTACT: NGB / A4AD (240) 612-8070</p>			(a) Date Design Started	SEP 2017	(b) Parametric Cost Estimates used to develop costs	No	(c) Percent Complete as of Jan 2018	6%	* (d) Date 35% Designed	APR 2018	(e) Date Design Complete	OCT 2018	(f) Type of Design Contract	Standard	(g) Energy Study/Life-Cycle analysis was/will be performed	YES	(a) Standard or Definitive Design -	No	(b) Where Design Was Most Recently Used -		(a) Production of Plans and Specifications	\$470	(b) All Other Design Costs	\$270	(c) Total	\$740	(d) Contract	\$740	(e) In-House	
(a) Date Design Started	SEP 2017																													
(b) Parametric Cost Estimates used to develop costs	No																													
(c) Percent Complete as of Jan 2018	6%																													
* (d) Date 35% Designed	APR 2018																													
(e) Date Design Complete	OCT 2018																													
(f) Type of Design Contract	Standard																													
(g) Energy Study/Life-Cycle analysis was/will be performed	YES																													
(a) Standard or Definitive Design -	No																													
(b) Where Design Was Most Recently Used -																														
(a) Production of Plans and Specifications	\$470																													
(b) All Other Design Costs	\$270																													
(c) Total	\$740																													
(d) Contract	\$740																													
(e) In-House																														

# EXHIBIT 15

15

1. Component DEFENSE (DLA)		FY 2018 MILITARY CONSTRUCTION PROJECT DATA			2. Date May 2017							
3. Installation and Location NORFOLK NAVAL STATION, NORFOLK, VA				4. Project Title REPLACE HAZARDOUS MATERIALS WAREHOUSE								
5. Program Element 0702976S		6. Category Code 44130		7. Project Number DDNV1801		8. Project Cost (\$000) 18,500						
9. COST ESTIMATES												
					Item		U/M	Quantity	Unit Cost	Cost (\$000)		
PRIMARY FACILITIES.....					-	-	-	-	8,894			
HAZMAT WAREHOUSE & ADMIN NAVSTA (CC 44130).....					SF	35,904	207	-	(7,432)			
GAS CYLINDER STORAGE SHED NAVSTA (CC 44135).....					SF	13,000	95	-	(1,235)			
FORKLIFT STORAGE SHED (CC 44135).....					SF	682	268	-	(183)			
GATE HOUSE NAVSTA (CC 73025).....					SF	100	440	-	(44)			
SUPPORTING FACILITIES.....					-	-	-	-	7,774			
SITE PREP, PAVING & IMPROVEMENTS.....					LS	-	-	-	(2,797)			
SPECIAL FOUNDATIONS.....					LS	-	-	-	(2,038)			
SITE UTILITIES.....					LS	-	-	-	(1,891)			
DEMOLITION.....					LS	-	-	-	(1,048)			
SUBTOTAL.....					-	-	-	-	16,668			
CONTINGENCY (5%) .....					-	-	-	-	833			
ESTIMATED CONTRACT COST .....					-	-	-	-	17,501			
SUPERVISION, INSPECTION & OVERHEAD (SIOH) (5.7%)..					-	-	-	-	998			
TOTAL.....					-	-	-	-	18,499			
TOTAL (ROUNDED) .....					-	-	-	-	18,500			
EQUIPMENT FROM OTHER APPROPRIATIONS .....					-	-	-	-	(1,670)			
10. Description of Proposed Construction:												
Construct a non-combustible Hazardous Materials (HAZMAT) Warehouse. It will include sufficient clear stacking height storage, concrete floors at dock height, weather-sealed truck doors, loading docks with dock levelers, shipping and receiving areas, admin office space, restrooms with lockers, employee lunch/break/training room, and utility spaces. The project will also include a gas cylinder storage shed with forklift storage and charging capability. Supporting facilities include site improvements, dumpster enclosures, utilities, fire protection, storm drainage, site information systems, site lighting, paving (access roadways, hardstand aprons, parking), fencing, walks, landscaping, and related improvements. Provide aboveground fire protection water storage tank(s) and associated fire pumps, piping, etc. Site work includes improvements to parking areas to replace displaced parking.												
Demolition at NAVSTA Norfolk includes a portion of existing warehouse CEP-156 (approx. 110,668 SF, FCI=67), the adjacent gatehouse CEP-180 (approx. 108 SF, FCI=76) and the existing gas cylinder storage shed (Shed X380, approx. 67,300 SF, FCI=64). The existing warehouse will return to the host installation for reuse.												
11. REQUIREMENT: 105,600 Square Feet (SF)							ADEQUATE: 0 SF		SUBSTANDARD: 201,792 SF			
PROJECT: Construct modern hazmat warehouse with appropriate administrative areas, gas cylinder storage and forklift storage and charging facilities. (C)												

1. Component DEFENSE (DLA)		FY 2018 MILITARY CONSTRUCTION PROJECT DATA		2. Date May 2017	
3. Installation and Location NORFOLK NAVAL STATION, NORFOLK, VA			4. Project Title REPLACE HAZARDOUS MATERIALS WAREHOUSE		
5. Program Element 0702976S		6. Category Code 44130	7. Project Number DDNV1801	8. Project Cost (\$000) 18,500	
2. Basis (a) Standard or Definitive Design: (b) Date Design was Most Recently Used:					No N/A
3. Total Cost (c) = (a)+(b) or (d)+(e) (\$000) (a) Production of Plans and Specifications (b) All Other Design Costs (c) Total (d) Contract (e) In-House					1,150 650 1,755 1,432 323
4. Contract Award					06/18
5. Construction Start					07/18
6. Construction Complete					05/20
B. Equipment associated with this project that will be provided from other appropriations:					
<u>PURPOSE</u>		<u>APPROPRIATION</u>	<u>FISCAL YEAR REQUIRED</u>	<u>AMOUNT (\$000)</u>	
Furniture		DWCF	2018	65	
Security/Access Control System		DWCF	2018	100	
Rack System & MHE		DWCF	2018	1,500	
Info Sys		DWCF	2018	5	
Point of Contact is DLA Civil Engineer at 703-767-2326					

# EXHIBIT 16



## Case 4:19-cv-00872-HSG Document 220-5 Filed 10/11/19 Page 73 of 116

1. COMPONENT WHS		FY 2017 MILITARY CONSTRUCTION PROJECT DATA			2. DATE Feb 2016
3. INSTALLATION AND LOCATION Pentagon Reservation			4. PROJECT TITLE Pentagon Metro Entrance Facility		
5. PROGRAM ELEMENT	6. CATEGORY CODE 144 13	7. PROJECT NUMBER 80916	8. PROJECT COST (\$000) 12,111		
9. COST ESTIMATES					
ITEM		UM	QUANTITY	UNIT COST	COST(\$000)
PRIMARY FACILITY					9,358
Entrance Screening Facility		SF	10,400	431.9	(4,493)
Existing Canopy Removal/Modifications		SF	9,125	155	(1,414)
Fixed Equipment		LS	--	--	(538)
Security Equipment Infrastructure		LS	--	--	(1,584)
Intrusion Detection Infrastructure		LS	--	--	(28)
Total from Continuation page(s)					(1,301)
SUPPORTING FACILITIES					679
Electric Service		LS	--	--	(74)
Steam And/Or Chilled Water Distribution		LS	--	--	(271)
Paving, Walks, Curbs And Gutters		LS	--	--	(39)
Site Imp(244) Demo( )		LS	--	--	(244)
Antiterrorism Measures		LS	--	--	(32)
Info Systems		LS	--	--	(19)
ESTIMATED CONTRACT COST					10,037
CONTINGENCY (10.00%)					<u>1,004</u>
SUBTOTAL					<u>11,041</u>
SUPERVISION, INSPECTION & OVERHEAD (5.70%)					629
DESIGN/BUILD - DESIGN COST (4.0000%)					<u>442</u>
TOTAL REQUEST					12,111
TOTAL REQUEST (ROUNDED)					12,200
INSTALLED EQT - OTHER APPROPRIATIONS					2,324
10. Description of Proposed Construction Construct a new Pedestrian Access Control Point (PACP) for employee screening at the Pentagon Metro Entrance. This addition to the existing building will include all required security equipment and systems; anti-terrorism/force protection (AT/FP); intrusion detection system, information system (IT/communications); safety and surveillance measures; screening and unauthorized personnel and hazardous materials detection capabilities; systems commissioning; utility services; lighting, heating, ventilation and air conditioning; interior renovations; demolition; and site work for conformance with Homeland Security Presidential Directive (HSPD) -12, Pentagon Integrated Security Master Plan (ISMP), Pentagon Exterior Standards, Architectural Barriers Act (ABA), Historical Preservation, Green Build/Leadership in Energy and Environmental Design (LEED) Silver, Sustainability and Energy Policy Act features, Unified Facilities Criteria (UFC) and all applicable Federal, State and local codes and requirements. The new employee screening facility will provide increased throughput capacity to safely and efficiently handle the large daily volume of Pentagon employees and badged personnel traffic using the Pentagon Metro Entrance and to decrease threats and risks to the attending police officers.  Interior renovations to the existing Metro Entrance screening area will be required for integration and efficient functioning of the new employee screening					

1. COMPONENT  WHS	FY 2017 MILITARY CONSTRUCTION PROJECT DATA		2. DATE  Feb 2016
3. INSTALLATION AND LOCATION  Pentagon Reservation		4. PROJECT TITLE  Pentagon Metro Entrance Facility	
5. PROGRAM ELEMENT	6. CATEGORY CODE  144 13	7. PROJECT NUMBER  80916	8. PROJECT COST (\$000)  12,111

IMPACT IF NOT PROVIDED: (CONTINUED)

Pentagon access control points. This project is also needed to complete integration with the new Metro Entrance Visitor Screening Facility for maximum operational efficiency.

ADDITIONAL:

All applicable Federal, State, local codes, regulations and criteria will be integrated into this project including all applicable Pentagon standards. The Director WHS certifies that this project has been considered for joint use potential. The facility will be available for use by other components.



1. COMPONENT  WHS		FY 2017 MILITARY CONSTRUCTION PROJECT DATA			2. DATE  Feb 2016
3. INSTALLATION AND LOCATION Pentagon Reservation (Raven Rock Mountain Complex			4. PROJECT TITLE Upgrade IT Facilities Infrastructure-RRMC		
5. PROGRAM ELEMENT	6. CATEGORY CODE  132 90	7. PROJECT NUMBER  87744	8. PROJECT COST (\$000)  8,105		
PROJECT: (CONTINUED)					
<p>REQUIREMENT: Provide adequate information systems infrastructure both classified and unclassified and to meet the site's mission. Centrally located Telecommunication Rooms paired with upgraded cabling plant will require less maintenance, provide more accessibility to IT personnel, and provide for additional information throughput to serve a greater user population with increasing bandwidth needs.</p> <p>CURRENT SITUATION: The facility currently has an IT infrastructure with inadequate capacity to serve current data needs and a layout that is inefficient and requires multiple hops which causes signal degradation and slow network speed. Additionally the lack of dedicated IT rooms on each floor of the main facility causes maintenance personnel to take an average of eight (8) hours per service ticket to track down and resolve problems with cabling not being properly routed, and equipment spread throughout the facility often in tenant spaces that should be centrally located for ease of access. The unnecessary complexity and inadequate capacity of the current infrastructure and equipment access constraints require work-arounds and delay both the information systems operators and end users. This could be eliminated by a more modern, higher capacity, information systems infrastructure.</p> <p>IMPACT IF NOT PROVIDED: If this project is not constructed site information systems users will not have the bandwidth available to efficiently perform their missions nor will information systems personnel have the ability to effectively upgrade proponent sponsored equipment as data needs continue to increase to meet user needs. Trouble-shooting delays will continue to result from the unnecessary complexity of the existing system.</p> <p>ADDITIONAL: All applicable codes will be integrated into this project. This project has been coordinated with the installation physical security plan, and all physical security measures are included. All required antiterrorism protection measures are included. Alternative methods of meeting this requirement have been explored during project development. This project is the only feasible option to meet the requirement. The Director WHS certifies that this project has been considered for joint use potential. Mission requirements, operational considerations, and location are incompatible with user by other components. Sustainable principles, to include life cycle cost effective practices, will be integrated into the design, development and construction of the project.</p>					

# EXHIBIT 17

1. Component DEFENSE (DLA)		FY 2018 MILITARY CONSTRUCTION PROJECT DATA			2. Date May 2017			
3. Installation and Location NORFOLK NAVAL SHIPYARD, PORTSMOUTH, VA				4. Project Title REPLACE HAZARDOUS MATERIALS WAREHOUSE				
5. Program Element 0702976S		6. Category Code 44130		7. Project Number DDNV1802		8. Project Cost (\$000) 22,500		
9. COST ESTIMATES								
Item					U/M	Quantity	Unit Cost	Cost (\$000)
PRIMARY FACILITIES .....					-	-	-	11,916
HAZMAT WAREHOUSE & ADMIN NNSY (CC 44130) .....					SF	52,500	207	(10,878)
GAS CYLINDER STORAGE SHED NNSY (CC 44135).....					SF	9,000	95	(855)
FORKLIFT STORAGE SHED (CC 44135).....					SF	682	268	(183)
SUPPORTING FACILITIES .....					-	-	-	8,287
SITE PREP, PAVING & IMPROVEMENTS .....					LS	-	-	(2,797)
SPECIAL FOUNDATIONS.....					LS	-	-	(2,551)
SITE UTILITIES .....					LS	-	-	(1,891)
DEMOLITION .....					LS	-	-	(1,048)
SUBTOTAL .....					-	-	-	20,203
CONTINGENCY (5%) .....					-	-	-	<u>1,010</u>
ESTIMATED CONTRACT COST .....					-	-	-	21,213
SUPERVISION, INSPECTION & OVERHEAD (SIOH) (5.7%)..					-	-	-	<u>1,209</u>
TOTAL .....					-	-	-	22,422
TOTAL (ROUNDED) .....					-	-	-	22,500
EQUIPMENT FROM OTHER APPROPRIATIONS .....					-	-	-	(1,670)
10. Description of Proposed Construction:								
Construct a non-combustible Hazardous Materials (HAZMAT) Warehouse. It will include sufficient clear stacking height storage, concrete floors at dock height, weather-sealed truck doors, loading docks with dock levelers, shipping and receiving areas, admin office space, restrooms with lockers, employee lunch/break/training room, and utility spaces. The project will also include a gas cylinder storage shed with forklift storage and charging capability. Supporting facilities include site improvements, dumpster enclosures, utilities, fire protection, storm drainage, site information systems, site lighting, paving (access roadways, hardstand aprons, parking), fencing, walks, landscaping, and related improvements. Provide aboveground fire protection water storage tank(s) and associated fire pumps, piping, etc. Site work includes improvements to parking areas to replace displaced parking.								
Relocate ready service lockers (RSL's) and demolish gas cylinder storage shed (Shed 1567, approx. 15,400 SF, FCI=76) and a shed area office (approx. 96 SF).								
11. REQUIREMENT: 105,600 Square Feet (SF) ADEQUATE: 0 SF SUBSTANDARD: 201,792 SF								
PROJECT: Construct a modern hazmat warehouse with appropriate administration areas, gas cylinder storage and forklift storage & charging facilities. (C)								

1. Component DEFENSE (DLA)		FY 2018 MILITARY CONSTRUCTION PROJECT DATA		2. Date May 2017	
3. Installation and Location NORFOLK NAVAL SHIPYARD, PORTSMOUTH, VA			4. Project Title REPLACE HAZARDOUS MATERIALS WAREHOUSE		
5. Program Element 0702976S		6. Category Code 44130	7. Project Number DDNV1802	8. Project Cost (\$000) 22,500	
2. Basis (a) Standard or Definitive Design: (b) Date Design was Most Recently Used:					No N/A
3. Total Cost (c) = (a)+(b) or (d)+(e) (\$000)					
(a) Production of Plans and Specifications					1,391
(b) All Other Design Costs					735
(c) Total					2,126
(d) Contract					1,803
(e) In-House					323
4. Contract Award					06/18
5. Construction Start					07/18
6. Construction Complete					05/20
B. Equipment associated with this project that will be provided from other appropriations:					
<u>PURPOSE</u>		<u>APPROPRIATION</u>	<u>FISCAL YEAR REQUIRED</u>	<u>AMOUNT (\$000)</u>	
Furniture		DWCF	2018	65	
Security/Access Control System		DWCF	2018	100	
Rack System & MHE		DWCF	2018	1,500	
Info Sys		DWCF	2018	5	
Point of Contact is DLA Civil Engineer at 703-767-2326					

# EXHIBIT 18



1. Component NAVY		FY 2019 MILITARY CONSTRUCTION PROGRAM		2. Date 05 FEB 2018	
3. Installation (SA) & Location/UIC: N32443 NAVAL SUPPORT STATION NREFK NSY PORTSMOUTH, VIRGINIA			4. Project Title Ships Maintenance Facility		
5. Program Element 0703676N	6. Category Code 21357	7. Project Number P256	8. Project Cost (\$000) 26,120		
<b>9. COST ESTIMATES</b>					
Item		UM	Quantity	Unit Cost	Cost (\$000)
SHIPS MAINTENANCE FACILITY (370,989SF)		m2	34,466		23,080
ELECTRIC/ELECTRONICS SHOP CC21357 (370,989SF) (RENOVATE)		m2	34,466	543.52	(18,730)
ANTI-TERRORISM/FORCE PROTECTION		LS			(3,020)
BUILT-IN EQUIPMENT		LS			(150)
SPECIAL COSTS		LS			(950)
OPERATION & MAINTENANCE SUPP INFO (OMSI)		LS			(230)
SUPPORTING FACILITIES					450
PAVING AND SITE IMPROVEMENTS		LS			(30)
ELECTRICAL UTILITIES		LS			(220)
MECHANICAL UTILITIES		LS			(40)
ENVIRONMENTAL MITIGATION		LS			(160)
SUBTOTAL					23,530
CONTINGENCY (5%)					1,180
TOTAL CONTRACT COST					24,710
SIOH (5.7%)					1,410
SUBTOTAL					26,120
TOTAL REQUEST ROUNDED					26,120
TOTAL REQUEST					26,120
EQUIPMENT FROM OTHER APPROPRIATIONS (NON ADD)					(1,384)
<b>10. Description of Proposed Construction:</b>					
<p>Converts the fifth and sixth floor in Building #510 to accommodate the relocation of the nuclear containment and life raft shops. The altered floor plan will include shop equipment areas, maintenance space, pallet racks, fire rated walls around storage areas, administrative office, break room, personnel support areas, bathrooms, and a conference room. Existing stairwells, from ground floor to sixth floor will be repaired to meet code requirements. All non-code compliant combustible construction throughout the building will be removed and the egress deficiency on the third floor will be corrected. Code compliant fire alarm/mass notification, standpipe and sprinkler systems will be installed throughout the facility. Progressive collapse retrofits are included.</p>					

1. Component NAVY		FY 2019 MILITARY CONSTRUCTION PROGRAM		2. Date 05 FEB 2018	
3. Installation (SA) & Location/UIC: N32443 NAVAL SUPPORT STATION NRFK NSY PORTSMOUTH, VIRGINIA			4. Project Title Ships Maintenance Facility		
5. Program Element 0703676N	6. Category Code 21357	7. Project Number P256	8. Project Cost (\$000) 26,120		
<b>CURRENT SITUATION:</b>					
<p>Building #510 was constructed in 1957. The building has been cited for a number of life safety violations. These violations include having no sprinkler protection, inadequate fire alarm placement, lack of a mass notification system and inadequate egress. Most of the occupants on fifth and sixth floors have been relocated into trailers. Current mitigation includes roving fire watches on each floor, 24 hours per day, seven days a week, by existing shop personnel, thus reducing available manpower for ship maintenance and repair activities.</p> <p>The most efficient use of the vacant space in building #510 would be the relocation of the nuclear containment and life raft shops from an existing facility. This existing facility has severe life safety and environmental concerns that would require significantly more funding to repair than Building #510.</p> <p>The shipyard has the only life raft inspection, repairs and certification facility for the east coast, servicing life rafts from Navy and Coast Guard ships. This represents an annual work load of 750 raft inspections, repairs and certifications per year, with 50-100 rafts in active maintenance at any time.</p>					
<b>IMPACT IF NOT PROVIDED:</b>					
<p>The nuclear containment and life raft shops will stay in their existing facility, resulting in increased risk to critical ship maintenance activities. Approximately 330 personnel, working more than 256,000 man-hours annually, will remain in a high risk environment, with continuing significant rework, higher stress, and additional operating costs due to inadequate working environment. Shop operations will continue to require the rental of a portable sixty ton HVAC system to provide the minimum required climate control for the shops required to operate under specified temperature and/or humidity levels. Even with the temporary climate control, this facility still routinely operates at high summertime temperatures and/or high humidity. The result is negative impacts on availability schedules due to rework, and time delays caused by equipment overheating and failed seams on the contaminated materials containment bags and enclosures.</p>					
<b>12. Supplemental Data:</b>					
A. Estimated Design Data:					
1. Status:					
(A) Date design or Parametric Cost Estimate started					09/2016
(B) Date 35% Design or Parametric Cost Estimate complete					02/2017
(C) Date design completed					11/2018

# EXHIBIT 19

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)			2. DATE AUG 14, 2018
3. INSTALLATION AND LOCATION DANE COUNTY REGIONAL-TRUAX FIELD, WISCONSIN		4. PROJECT TITLE CONSTRUCT SMALL ARMS RANGE		
5. PROGRAM ELEMENT 52276F	6. CATEGORY CODE 179-475	7. PROJECT NUMBER XGFG179036	8. PROJECT COST(\$000) \$8,000	
9. COST ESTIMATES				
ITEM	U/M	QUANTITY	UNIT COST	COST (\$000)
CONSTRUCT SMALL ARMS RANGE	SF	12,300		6,021
SMALL ARMS RANGE (179475)	SF	10,500	510	( 5,355)
COMBAT ARMS TRNG & MAINT (171476)	SF	1,800	370	( 666)
SUPPORTING FACILITIES				1,000
UTILITIES AND COMMUNICATIONS SUPPORT	LS			( 500)
SITE IMPROVEMENTS	LS			( 250)
PAVEMENTS	LS			( 250)
SUSTAINABILITY AND ENERGY MEASURES	LS			150
SUBTOTAL				7,171
CONTINGENCY (5%)				359
TOTAL CONTRACT COST				7,530
SUPERVISION, INSPECTION AND OVERHEAD (6%)				451
TOTAL REQUEST				7,981
TOTAL REQUEST (ROUNDED)				8,000
10. Description of Proposed Construction: Construct a small arms range and CATM training & maintenance facility utilizing conventional design and construction methods to accommodate the mission of the facility. Facility shall be designed as permanent construction in accordance with the DOD Unified Facilities Criteria. The facility should be compatible with applicable DoD, Air Force, and base design standards. In addition, local materials and construction techniques shall be used where cost effective. This project will comply with DoD antiterrorism/force protection requirements per unified facilities criteria. Special construction requirements: all necessary exterior utilities, access pavements, fire protection, site work, and support. Provide utility connections for modular small arms range equipment components. Air Conditioning: 30 Tons.				
11. REQUIREMENT: 12,300 SF ADEQUATE: 0 SF SUBSTANDARD: 0 SF PROJECT: Small Arms Range/CATM Training (Current Mission) REQUIREMENT: The installation requires an adequately sized, properly configured, and correctly sited small arms range to train and certify security forces, battlefield airmen, and mobility personnel in accordance with AFI 36-2226. The facility will house a MCSATS (Modular Containerized Small Arms Training Set) for a total of 12 to 14 firing lanes. A combat arms training and maintenance (CATM) facility, to provide classroom training space, administrative space, and arms cleaning and inspection areas for members using the small arms range. The ANG has both members that are required to perform armed duties in-garrison and others only in contingency operations on both pistol and rifle in accordance with AFI 36-2226, Table 2-1. CURRENT SITUATION: The installation does not have an organic small arms range capability. Drill status members cannot be qualified on base during their 2-days-per-month drill attendance. Work-arounds include traveling off-site at considerable expense per qualification. Given the new course of fire includes a full 8-hour firing day, plus pre-firing classroom familiarization training, combat arms training can occupy the majority of a drill weekend, leaving no time for other functional or ancillary training. On base training is considered the preferred course of action because it minimizes impacts to drill time. The ANG's 89 wings each have Airmen who need to qualify on rifle or pistol. However, most ANG bases have too little real estate to support enclosed outdoor firing ranges due to the sizable				

1. COMPONENT ANG	FY 2018 MILITARY CONSTRUCTION PROJECT DATA (computer generated)	2. DATE AUG 14, 2018
3. INSTALLATION AND LOCATION DANE COUNTY REGIONAL-TRUAX FIELD, WISCONSIN		
5. PROJECT TITLE CONSTRUCT SMALL ARMS RANGE		7. PROJECT NUMBER XGFG179036

surface danger zone behind the target line; units seek indoor ranges to minimize the range footprint, maximize training efficiency for drill status Airmen and CATM instructors, and allow required Security Forces "night" firing by using low light levels inside the indoor range. In an NGB/A4S study which considered the cost of travel and lost time, this site had the third highest cost-per-qualification in the ANG, at more than \$1,116 per student qualified.

IMPACT IF NOT PROVIDED: Installation personnel will continue to travel considerable distances to qualify on weapons, negatively affecting all wing readiness and severely degrading their wartime mission. The installation will have to continue to travel over 5 hours round trip, plus 4 hours of training forces the unit to stay over night near the range, costing \$15K annually. Safety, security, and physical protection of Wing personnel is hampered, endangering both life and property. Additionally, installation security forces will not have adequate training and qualifications which reduces overall base security and also endangers both life and property. Accept risk to the deployment mission and the protection of valuable mobility aircraft on site due to inadequate training.

ADDITIONAL: The ANG currently has 28 installations with a small-arms range. An additional 24 ANG installations are units hosted on an installation with an operational small arms range, leaving 46 installations which lack organic range capability. This project will construct a facility to provide a modular small arms range plus provide classroom and weapons maintenance/administrative space. This project is considered capitalization based on the following rule from ANGETL 17-06: New Construction.

CatCode	Requirement	Adequate	Substandard
179-475 SMALL ARMS RANGE SYSTEM	10,500 SF	0 SF	0 SF
171-476 COMBAT ARMS TRNG & MAINT	1,800 SF	0 SF	0 SF
SMALL ARMS RANGE (179475)	10,500 SF = 975 SM		
COMBAT ARMS TRNG & MAINT (171476)	1,800 SF = 167 SM		

# EXHIBIT 7

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT W. BYRNE  
 SALLY MAGNANI  
 3 MICHAEL L. NEWMAN  
 Senior Assistant Attorneys General  
 4 MICHAEL P. CAYABAN  
 CHRISTINE CHUANG  
 5 EDWARD H. OCHOA  
 Supervising Deputy Attorneys General  
 6 BRIAN BILFORD  
 SPARSH KHANDESHI  
 7 LEE I. SHERMAN  
 JANELLE M. SMITH  
 8 JAMES F. ZAHRADKA II  
 HEATHER C. LESLIE (SBN 305095)  
 9 Deputy Attorney General  
 State Bar No. 305095  
 10 1300 I Street, Suite 125  
 P.O. Box 944255  
 11 Sacramento, CA 94244-2550  
 Telephone: (916) 210-7832  
 12 Fax: (916) 327-2319  
 Attorneys for Plaintiff State of California

13  
 14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION  
 17

18  
 19 **STATE OF CALIFORNIA, et al.;**  
 20 Plaintiffs,  
 21 v.  
 22 **DONALD J. TRUMP, in his official capacity**  
 23 **as President of the United States of America;**  
 24 **et al.;**  
 25 Defendants.

Case No. 4:19-cv-00872-HSG  
**DECLARATION OF COLONEL  
 WILLIAM GREEN IN SUPPORT OF  
 PLAINTIFFS’ MOTION FOR  
 SUMMARY JUDGMENT re: SECTION  
 2808 AND NEPA**  
 Date: November 20, 2019  
 Time: 10:00 am  
 Judge: Honorable Haywood S. Gilliam,  
 Jr.  
 Trial Date: None Set  
 Action Filed: February 18, 2019

Case 4:19-cv-00872-HSG Document 220-2 Filed 10/11/19 Page 2 of 7

1 I, Col. William Green, declare as follows:

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

4 2. I am a Colonel with the California Air National Guard (ANG) and currently serve as  
5 the California ANG's Director of Operations. In this capacity, I advise the Adjutant General and  
6 other California Military Department senior leaders on federal issues affecting the State of  
7 California. Additionally, I advise the Commander of the California ANG on the readiness of over  
8 4800 military and civilian personnel across five wings and ensure that they are postured and  
9 prepared to support national defense requirements and emergency response, relief and recovery  
10 operations throughout the State of California. I am also a command pilot with more than 6000  
11 military and civilian flying hours in the C-130J, WC130J, EC-130J, B-787, S80, B727, T-38, T-  
12 37 and T-41 aircraft. I have accrued over 400 combat hours in the tactical environment in support  
13 of multiple deployments. I have served as a C-130J Instructor Pilot and a C-130J Command  
14 Evaluator Pilot. I am also an instructor and designated Subject Matter Expert with respect to the  
15 Modular Aerial Fire Fighting System (MAFFS).

16 3. The California ANG is a component of the California National Guard, a federally  
17 funded California military force that is part of the National Guard of the United States. The  
18 California National Guard is the second largest National Guard force in the United States with a  
19 total authorized strength of over 23,000 soldiers and airmen. The Constitution of the United  
20 States charges the National Guard with dual federal and state missions.

21 4. The California ANG is comprised of citizen airmen that fill the ranks of five air  
22 wings strategically positioned across California to support the state and nation in times of need.  
23 The California ANG's highly specialized servicemen and women leverage a variety of aviation  
24 platforms and combat tested expertise to perform a full spectrum of missions. Their missions  
25 include providing homeland air defense for all of the Western United States and providing direct  
26 support to combatant commanders overseas, as well as assisting in search and rescue missions  
27 along the Pacific Coast and combatting wildfires throughout the state of California and throughout  
28 the United States.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

5. The California ANG’s 146<sup>th</sup> Airlift Wing is part of the reserve component of the United States Air Force supporting Air Mobility Command and is headquartered at the Channel Islands Air National Guard Base (ANGB) in Port Hueneme, California. The 146<sup>th</sup> Airlift Wing is a combat ready organization prepared to support the U.S. and allied forces, as well as provide disaster response, humanitarian relief, and large scale aerial firefighting capabilities to the state of California and the nation.

6. The 146<sup>th</sup> Airlift Wing employs the Lockheed C-130J “Super Hercules” aircraft. The 146<sup>th</sup> Airlift Wing’s tactical airlift mission is one of the most training-intensive in the Mobility Air Forces.

7. In addition to standard military flight training, the 146<sup>th</sup> Airlift Wing is responsible to train to its demanding aerial firefighting mission. The 146<sup>th</sup> Airlift Wing is one of only four units in the country equipped with MAFFS, an integrated airborne delivery system for battling large fires. The MAFFS modules, which are loaded into the cargo bays of the C-130J aircraft, are capable of discharging 3,000 gallons of water or fire retardant in less than five seconds, covering an area a quarter mile long by 100 feet, specializing in large fire containment operations.

8. As part of the California ANG’s function in responding to state emergencies, the 146<sup>th</sup> Airlift Wing is frequently called-up to combat wildfires in California and the western United States. Over the past six years, they have been activated 11 times, performing over 775 fire drops supporting efforts to combat 45 different wildfires. These have included large and increasingly common destructive incidents in California, such as the Rim, Thomas, Mendocino Complex, Carr and recent Woolsey fires. The 2018 fire season was the largest and most destructive in California history.

9. With the exception of flights within combat zones where anti-aircraft defenses are present, the firefighting mission presents the greatest risk to the 146<sup>th</sup> Airlift Wing C-130J aircrew. This is because the firefighting mission requires the C-130J pilots to fly aircraft at lower than standard altitudes, slow air speeds and nonstandard configurations in order to deliver retardant in the prescribed manner. Additionally, these flights often take place in mountainous

1  
2 terrain with reduced visibility and rapidly changing weather conditions. The mission also requires  
3 California C-130J flight crews to train and operate with civil agency partners that fly dissimilar  
4 aircraft, such as the United States Forest Service (USFS) and the California Department of  
5 Forestry and Fire Protection (CalFire).

6 10. I am familiar with the training requirements for airmen piloting the C-130J aircraft.  
7 In addition to monthly ground and in-flight training, C-130J aircrew are required to participate in  
8 at least one week of refresher simulator training emphasizing complex emergency procedures,  
9 challenging and unusual aircraft maneuvers and crew coordination at a certified C-130J flight  
10 simulator on annual basis. Aircrew from the 146<sup>th</sup> Airlift Wing currently travel to Keesler Air  
11 Force Base in Biloxi, Mississippi, at an approximate cost of \$360,000 annually, to accomplish  
12 this simulator training.

13 11. C-130J flight crews also participate in an annual, one-week training course relating to  
14 firefighting missions. This one-week training course, which includes flight training and water  
15 drops, is coordinated with the USFS. Similar to actual firefighting missions, the training often  
16 takes place over mountainous terrain, at lower-than-normal altitudes and at slow air speeds.

17 12. Rising aircraft sustainment costs, extensive flight training requirements and limited  
18 military budgets inspired military acquisition of the C-130J flight simulators, which are designed  
19 to provide realistic training at a fraction of the cost of actual aircraft flight operations.

20 13. Flight simulators have been installed or programmed for installation at all C-130J  
21 mobility air bases to meet current and future training demands. Based on currently scheduled  
22 installation dates, in 2022, Channel Islands ANGB will be the only remaining C-130J base in the  
23 Mobility Air Forces without a flight simulator.

24 14. The C-130J flight simulator is designed to provide the majority of all initial, mission,  
25 continuation and upgrade C-130J training. Command training managers estimate that on site  
26 simulators account for approximately 40% of all training requirements previously conducted in  
27 the aircraft alone. This reduced training demand on the aircraft has resulted in increased  
28 availability for required maintenance and operational missions.

1  
2 15. During the FY2019 budgeting cycle, after undergoing the lengthy process to evaluate  
3 and prioritize proposed military construction projects, Congress appropriated \$8,000,000 for the  
4 purpose of constructing a facility at the Channel Islands ANGB to house a C-130J flight simulator,  
5 which was secured by the U.S. Air Force's Air Mobility Command at a cost of  
6 \$29,000,000. Initial efforts by California ANG to secure the simulator began over ten years ago.

7 16. The California ANG anticipates delivery of the C-130J flight simulator at the  
8 Channel Islands ANGB in March 2022. However, the Channel Islands ANGB cannot receive a  
9 fully functional simulator unless and until the simulator facility is constructed.

10 17. Access to the flight simulator at the Channel Islands ANGB is essential because it  
11 would provide the 146<sup>th</sup> Airlift Wing's flight crews with realistic flight training opportunities  
12 without the expense or risks associated with flight training in the aircraft. In fact, the simulator  
13 was specifically designed to provide the most realistic training simulation of all critical mission  
14 sets for two California C-130J units. It is fully reconfigurable to support both the tactical airlift  
15 mission of the 146<sup>th</sup> Airlift Wing at Channel Islands Air National Guard Station, as well as the  
16 aerial refueling mission of the 129<sup>th</sup> Rescue Wing at Moffett Field in Sunnyvale, California. It is  
17 also scheduled to be modified in 2024, to network with other flight simulators around the world  
18 allowing aircrew at Channel Islands ANGB to participate in large, complex integrated training  
19 scenarios and exercises without ever leaving home station. It can also be used to train aircrew  
20 whenever new software modifications are employed on the aircraft.

21 18. Finally, the flight simulator at the Channel Islands ANGB would include an enhanced  
22 software suite that simulates aerial firefighting, one of California's most critical domestic threats.  
23 This training capability is significant because, as noted, the firefighting mission is extremely  
24 challenging and the threat of large wild fires remains high. The flight simulator would enable the  
25 California ANG to provide its C-130J flight crews with firefighting-specific training in  
26 circumstances that simulate these dangerous conditions. Importantly, the California ANG would  
27 be able to augment its annual week-long aerial firefighting training program, greatly enhancing  
28 mission proficiency and thereby improving the California ANG's ability to safely and effectively  
respond to wildfire threats.

1  
2 19. With the availability of higher-paying commercial aviation jobs, it is becoming  
3 increasingly difficult for the California ANG to retain aircrew with the requisite experience  
4 necessary to participate safely in its firefighting mission. The availability of enhanced aerial  
5 firefighting training in a flight simulator is particularly important to the California ANG because  
6 it would allow the 146<sup>th</sup> Airlift Wing to introduce aerial firefighting training to all of its air crews,  
7 regardless of experience, in a safe, efficient and effective manner. With additional training  
8 opportunities made possible through the use of a flight simulator, it would also accelerate the  
9 development of crews with less firefighting experience, which helps offset the loss of experienced  
10 aerial firefighters leaving the organization for careers with commercial airlines.

11 20. Recently, the California Military Department was advised that \$8,000,000 in funds to  
12 construct a C-130J Simulator Facility at the Channel Islands ANGB were being diverted to other  
13 executive branch projects.

14 21. Over the past several years, large, rapidly-moving wildfires have become increasingly  
15 common in California. Aircraft equipped with firefighting systems, such as the C-130J equipped  
16 with the MAFFS, have proven to be essential tools in protecting Californians and their  
17 communities by slowing the spread of these massive wildfires. Use of aerial firefighting tools aid  
18 firefighters on the ground attempting to contain these fires and often give citizens needed time to  
19 escape dangerous areas. Aerial firefighting has saved lives and property.

20 22. The additional simulator training was intended to ensure mission preparedness and  
21 minimize the costs and risks associated with the robust flight training requirements associated  
22 with the tactical combat airlift mission. The availability of a C-130J flight simulator at the  
23 Channel Islands ANGB would have permitted the California ANG to provide its aircrews with  
24 more combat mission training and more training specific to firefighting missions throughout the  
25 year.

26 23. As a consequence of the decision to defund the project to construct the facility that is  
27 needed to house the C-130J flight simulator, the California ANG's C-130J flight crews will not  
28 receive the intended benefits of the additional simulator training throughout the year and the 146<sup>th</sup>

1 Airlift Wing’s flight crews will receive less training in aerial firefighting than they would have  
2 following receipt of the simulator.

3 24. Also, because the availability of flight simulator training would have offset the loss  
4 of experienced aerial firefighters to the commercial airlines, the defunding of the flight simulator  
5 facility would also make it more difficult for the 146<sup>th</sup> Airlift Wing to maintain its current level  
6 of aerial firefighting experience potentially impacting its ability to meet increasing mission  
7 demands.

8 25. Accordingly, the defunding of this project will have significant negative impacts on  
9 the Channel Island ANGB’s operations, placing at risk the California ANG’s ability to maintain  
10 its current level of effectiveness in responding to the growing threat of California wildfires and  
11 causing a potential increased risk to public health and safety of Californians and their  
12 communities.

13 I declare under penalty of perjury that the foregoing is true and correct and that this  
14 declaration was executed on October 10, 2019, in Port Hueneme, California.



\_\_\_\_\_  
nel CA ANG

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 8

1 MARK R. CONRAD (CA Bar No. 255667)  
 2 WILLIAM J. COOPER (CA Bar No. 304524)  
 3 COURTNEY C. AASEN (CA Bar No. 307404)  
**CONRAD & METLITZKY LLP**  
 4 Four Embarcadero Center, Suite 1400  
 San Francisco, CA 94111  
 5 Tel: (415) 343-7100  
 Fax: (415) 343-7101  
 6 Email: mconrad@conradmetlitzky.com  
 Email: wcooper@conradmetlitzky.com  
 Email: caasen@conradmetlitzky.com

7 LINDSAY L. RODMAN (*pro hac vice* forthcoming)  
**IRAQ AND AFGHANISTAN VETERANS OF AMERICA**  
 8 85 Broad Street  
 New York, NY 10004  
 9 212-982-9699  
 lindsay@iava.org  
 10 *Attorneys for Iraq and Afghanistan Veterans of America*

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 OAKLAND DIVISION

15  
 16 STATE OF CALIFORNIA, et al.,  
 17 *Plaintiffs,*  
 18 v.  
 19 DONALD J. TRUMP, in his official capacity  
 as President of the United States of America,  
 20 et al.,  
 21 *Defendants.*

CASE NO. 4:19-cv-00872-HSG  
 BRIEF OF IRAQ AND AFGHANISTAN  
 VETERANS OF AMERICA AS *AMICUS CURIAE*  
 IN SUPPORT OF PLAINTIFFS' MOTION FOR  
 PARTIAL SUMMARY JUDGMENT  
 Summary Judgment Hearing: Nov. 20, 2019  
 Time: 10:00 a.m.

**INTEREST OF AMICUS CURIAE**

1  
2 Iraq and Afghanistan Veterans of America (“IAVA”) submits this brief as *amicus curiae* on  
3 behalf of Plaintiffs. IAVA is the leading non-profit devoted to the interests of the post-9/11 generation  
4 of veterans, with 425,000 members comprising mostly veterans of the wars in Iraq and Afghanistan,  
5 including service members still on active duty. IAVA’s membership also includes active-duty service  
6 members, military spouses and dependents, and veterans who served domestically or during other  
7 conflicts.

8 IAVA’s membership is diverse and represents the full spectrum of political persuasions. IAVA  
9 will not opine about the merits of the national policy to build a border wall, the existence of a national  
10 emergency, or the constitutionality of the President’s declaration. IAVA instead writes to provide its  
11 unique perspective on the impact of the President’s decision to divert funding from much-needed  
12 military construction projects. This diversion of funds to build a border wall exacerbates a longstanding  
13 military construction budget crunch, with profound consequences for military service members and  
14 families. It endangers the wellbeing of currently serving military members and their families and  
15 diminishes their quality of life. For that reason, IAVA opposes the diversion of military construction  
16 funding to the border wall.

**FACTUAL BACKGROUND**

17  
18 Military construction is funded through a painstaking, time-consuming process. By statute, no  
19 funds may be appropriated for military construction unless “specifically authorized by law.” 10 U.S.C.  
20 § 114(a)(6). The process of seeking such authorization starts on the ground, with engineering staff  
21 evaluating the need for new or rehabilitated facilities.<sup>1</sup> Identified construction needs in each military  
22 branch then pass through a multilayered chain of evaluation and prioritization before being submitted to  
23 the Office of the Secretary of Defense, which further narrows the projects for which funding will be  
24 requested.<sup>2</sup> Legislation for construction project appropriation is then considered by congressional  
25

26 <sup>1</sup> Lynn M. Williams, Cong. Research Serv., *Military Construction: Process, Outcomes, and*  
*Frequently Asked Questions* 5-6 (May 16, 2018), <https://fas.org/sgp/crs/natsec/R44710.pdf>.

27 <sup>2</sup> See *id.* at 6-11.

28 (continued on next page)



1 committees and subcommittees before it reaches a vote by Congress.<sup>3</sup> Even for the highest-priority  
2 projects, it can take “three or more years” before an identified need makes it into a budget request, and  
3 years longer for “congressional authorization and appropriations, implementation of the federal  
4 contracting process, and the physical construction of the project.”<sup>4</sup>

5 The perpetual problem of underfunded military construction has been exacerbated by the Budget  
6 Control Act of 2011, which passed to avert a government shutdown and has been amended in response  
7 to subsequent budget impasses. That Act places spending limits on defense discretionary budget  
8 authority.<sup>5</sup> Military construction funding is being depleted year after year to meet those spending caps.  
9 As a result, the living and working conditions of service members and their families have already “been  
10 neglected in favor of other priorities,” and “many construction projects are long overdue.”<sup>6</sup> Indeed, as  
11 recently as last June, the Director of the White House’s Office of Management and Budget complained  
12 that the Senate Appropriations Committee’s proposal would not “fully fund[] military construction  
13 projects” and would thus “delay[] critical resources to complete high-priority budgets . . . put[ting] the  
14 burden on future budgets to make up the difference.”<sup>7</sup>

15 In early 2019, when President Trump declared a national emergency and signaled his intention to  
16 divert military construction funding to fund a border wall, IAVA grew concerned about the potential  
17 impacts on military servicemembers, veterans, and their families.<sup>8</sup> Those concerns became reality when,  
18 on September 4, 2019, the Pentagon released a list of military construction projects that are being

19  
20 <sup>3</sup> See *id.* at 11.

21 <sup>4</sup> *Id.* at 1.

22 <sup>5</sup> See generally Budget Control Act of 2011 (as amended), P.L. No. 112-25, P.L. No. 112- 240,  
P.L. No. 113-67, P.L. No. 114-74, P.L. No. 115-123, & P.L. No. 116-37.

23 <sup>6</sup> Aaron Gregg & Erica Werner, *Pentagon Has Warned of Dire Outcomes If Military Projects*  
24 *Canceled for Wall Don’t Happen*, Washington Post (Sept. 18, 2019), [https://www.washingtonpost.com/business/economy/pentagon-has-warned-of-dire-outcomes-if-military-projects-canceled-for-wall-dont-happen/2019/09/18/03e99ac6-d988-11e9-ac63-3016711543fe\\_story.html](https://www.washingtonpost.com/business/economy/pentagon-has-warned-of-dire-outcomes-if-military-projects-canceled-for-wall-dont-happen/2019/09/18/03e99ac6-d988-11e9-ac63-3016711543fe_story.html).

25 <sup>7</sup> Letter from Mick Mulvaney, Director of the Office of Management and Budget, to Sen.  
26 Richard Shelby 2 (June 18, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/Shelby-MilCon.pdf>.

27 <sup>8</sup> See generally Brief of Iraq and Afghanistan Veterans of America as *Amicus Curiae*, *El Paso*  
*County v. Donald J. Trump*, No. 3:19-cv-66-DB (W.D. Tex. filed May 3, 2019), ECF 61-1.

28 (continued on next page)

1 deferred so that \$3.6 billion in funding can be diverted to the border wall.<sup>9</sup> As discussed below, each of  
2 these projects would improve safety, quality of life, or work environment for military service members  
3 and their families—improvements that will not be made if the Administration’s diversion of funds is  
4 permitted to proceed.

5 **ARGUMENT**

6 Putting aside the wisdom of the Administration’s policies at the Southern border, these decisions  
7 must not come at the expense of U.S. service members or their families. The Department of Defense is  
8 reprogramming funding that was intended to keep military service members and their families safe—  
9 both at home and abroad—and to improve the quality of their lives. Our American heroes, who have  
10 already sacrificed so much, should not bear these costs of the political dispute over building the wall.

11 **I. DIVERTING DEFENSE FUNDS TO THE BORDER THREATENS THE SAFETY OF**  
12 **SERVICE MEMBERS AND DIMINISHES THEIR QUALITY OF WORK LIFE**

13 Even the limited publicly available information shows that the Administration’s planned funding  
14 diversions places service members in harm’s way. These consequences begin at home, where service  
15 members at U.S. military bases keep the world’s greatest fighting force ready to face an array of  
16 complex threats. The Administration’s proposal diverts much-needed funds to address outdated and  
17 unsafe conditions at critical sites. The following are just a few examples of deferred military  
18 construction that will make service members stationed in the United States less safe:

- 19 • *Unsafe weapons construction and maintenance.* Soldiers at an ammunition plant in Indiana  
20 currently work in violation of Army safety standards while handling and storing explosives.  
21 The \$16 million required to revamp the rail holding area, allowing for safer storage of  
22 munitions, has been diverted to the border wall. Similarly, without needed maintenance for  
23 weapons facilities in Alabama, troops there continue to face an increased risk of accidents  
24 due to what the Pentagon has deemed “unnecessary movement of artillery pieces.”<sup>10</sup>

26 <sup>9</sup> Claudia Grisales, *These are the Military Projects Losing Funding to Trump’s Border Wall*,  
27 National Public Radio (Sept. 4, 2019), [https://www.npr.org/2019/09/04/757463817/these-are-the-11-  
border-projects-getting-funds-intended-for-military-constructio](https://www.npr.org/2019/09/04/757463817/these-are-the-11-border-projects-getting-funds-intended-for-military-constructio).

28 <sup>10</sup> Gregg & Werner, *supra* note 6.

- 1 • ***Dangerously outdated vehicle and aircraft facilities.*** Diverted funding also means  
2 cancellation of construction projects for maintenance buildings at Fort Huachuca in Arizona  
3 that date as far back as the 1930s. The current facilities do not meet Army standards for  
4 military vehicle testing and maintenance, requiring service members to work in “unsafe”  
5 facilities that “jeopardize personnel health, security and safety.” In New Orleans, diversion  
6 of funding to the border wall delays replacement of an aircraft parking ramp abutting a public  
7 roadway. Service members and even civilians passing by the military base currently face  
8 what the Air Force has called an “unacceptable risk” of harm from an explosive accident.  
9 Similarly delayed are proposed repairs to sinking concrete parking slabs inside aircraft  
10 shelters, which are causing pipes and electrical wiring to pull loose and increasing the risk of  
11 fires and explosions.<sup>11</sup>
- 12 • ***Displaced facilities for specialized training.*** Another casualty is a \$37 million specialized  
13 Air Force facility in Maryland for unloading hazardous cargo and a range for bomb-defusing  
14 training—which has been deferred, even though it was made necessary by the relocation of  
15 an aircraft hangar to hold President Trump’s new, bigger Air Force One plane.
- 16 • ***Inadequate aviation facilities.*** New Mexico’s Holloman Air Force Base has halted plans for  
17 a new training facility for drone pilots, whose existing facility suffers from sink holes and a  
18 bat infestation. Without repair, that facility also cannot be operated at the classified level, so  
19 that trainees cannot use safety systems designed to prevent aircraft from crashing into each  
20 other and to alert pilots about the location of ground-based personnel. The Hill Air Force  
21 Base in Utah has similarly been deprived of the \$28 million required to build a new control  
22 center designed to replace two “dilapidated WWII-era” warehouses, one used for air traffic  
23 control and one for mission control. Those warehouses have been labeled “structurally  
24 deficient,” due in part to “roof leaks from failing asbestos panel roof systems.”<sup>12</sup>
- 25 • ***Service members will be denied basic living necessities and emergency services.*** For  
26 instance, the Air Force needs \$41 million to replace a failing central heat power plant boiler

27 <sup>11</sup> *Id.*

28 <sup>12</sup> *Id.*

1 at Eielson Air Force Base in Alaska, where winter temperatures reach 65 degrees below zero.  
 2 And at the Marine Corps Air Station Beaufort in South Carolina, diverted funds would have  
 3 been used to build a satellite fire station—without which, the Pentagon warns, “personnel . . .  
 4 will continue to work from a significantly undersized and unsafe facility.”<sup>13</sup>

5 Service members overseas will also be affected by the deferral of numerous projects that would  
 6 have significantly improved their safety and well-being:

- 7 • ***A special operations joint parachute-rigging facility in Baumholder, Germany.*** Parachute-  
 8 rigging is among the most important jobs for keeping special operators safe, but the current  
 9 facilities in Germany are “substandard, severely undersized[,] and poorly configured.”<sup>14</sup> The  
 10 planned diversion delays the construction of a new anti-terrorism/force protection compliant  
 11 facility to support the operations, training, and deployment of forces.<sup>15</sup>
- 12 • ***Two special operations maintenance hangars in Okinawa, Japan and two operations and***  
 13 ***warehouse facilities in Honshu, Japan.*** Dilapidated and abandoned infrastructure is evident  
 14 on all too many bases in Japan, where decades-old buildings await funding for  
 15 improvements. These include warehouses, hangars, and other facilities at the Kadena and  
 16 Yokota Air Bases, which are critical for the day-to-day work that keeps the military ready to  
 17 fight.<sup>16</sup>
- 18 • ***Munitions structures and truck unload facilities in Japan.*** Working with munitions and  
 19 unloading truck cargo are among the more dangerous non-combat jobs performed in the  
 20 military. Kadena Air Base, the largest and most active U.S. Air Force base in East and  
 21 Southeast Asia, requires replacement munitions structures, and its truck unloading facilities  
 22 currently fail to meet resiliency standards. These deficiencies, which would be addressed  
 23

24 <sup>13</sup> *Id.* (ellipsis in original).

25 <sup>14</sup> Dep’t of Defense, *Fiscal Year (FY) 2019 Budget Estimates 201* (Feb. 2018), [https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/budget\\_justification/pdfs/07\\_Military\\_Construction/21-Military\\_Construction\\_Defense-Wide\\_Consolidated.pdf](https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/budget_justification/pdfs/07_Military_Construction/21-Military_Construction_Defense-Wide_Consolidated.pdf).

26 <sup>15</sup> *Id.* at 200.

27 <sup>16</sup> Grisales, *supra* note 9.

28 (continued on next page)

absent the planned funding diversions, lessen the base’s capability to provide adequate support to regional flying missions.<sup>17</sup>

- **Working dog treatment facility replacement in Guantanamo Bay.** Working dogs are an essential part of the mission in Guantanamo, including for detecting and locating weapons and explosives and conducting searches. The dogs, moreover, become like family to their service-member handlers. The treatment facility is necessary not only to ensure that working dogs receive proper veterinary and surgical care, including for dogs suffering from combat wounds and post-traumatic stress, but also for the prevention of zoonotic disease.<sup>18</sup>

All of these projects would have significantly improved the safety of our service members. They also would have had the important added benefit of providing the military with a work environment that is worthy of their service. Any working professional can appreciate the improvement to effectiveness and morale that results from improved working conditions. The Administration’s proposed funding diversions would force the U.S. military to do without those improvements.

**II. DIVERTING DEFENSE FUNDS TO THE BORDER WALL ENDANGERS THE WELL-BEING OF SERVICE MEMBERS’ FAMILIES**

The disastrous consequences of deferring military construction in favor of the border wall do not end there—the planned funding diversions would also harm the health and welfare of service members’ families. Service members and their families, already asked to sacrifice for the good of their country on a daily basis, would be forced to continue doing so with substandard healthcare. And their children, who often share those sacrifices as they follow their parents to military bases both here and abroad, would not get the help they need to ensure the schools they attend are safe and effective.

For example, the list of projects to be deferred includes an ambulatory care facility at Camp Lejeune, North Carolina, that would have helped address the problem of medical and dental care “provided in ‘substandard, inefficient, decentralized and uncontrolled facilities.’”<sup>19</sup> Those facilities—

<sup>17</sup> *Id.* at 67.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> Gregg & Werner, *supra* note 6.

(continued on next page)

1 already suffering from storm damage in the aftermath of 2018’s hurricane season—serve not just  
2 military service members, but others entitled to healthcare in the military system, including military  
3 families. According to the Pentagon itself, not funding the Camp Lejeune project “will result in  
4 compromised readiness, uncoordinated care delivery, and inappropriate use of medical resources.”<sup>20</sup>

5 There are also two dining facilities on the list of canceled projects: one in Puerto Rico and  
6 another in San Antonio.<sup>21</sup> Without access to dining facilities on base, service members often only have  
7 access to fast food, leaving them with few if any healthy and affordable options.

8 Worse still, the list of canceled projects includes *nine different schools*, including a  
9 daycare/preschool in Maryland, three elementary schools in Germany, one elementary school in the  
10 United States, one elementary school in Japan, an elementary/middle/high school in the United  
11 Kingdom, a middle school in Kentucky, and a high school in Japan. These schools all suffer from  
12 varied states of disrepair and overcrowding. The current middle school at Joint Base Andrews in  
13 Maryland, which has a waitlist of 115 children, suffers from mold and pest infestations as well as  
14 sewage backups and heating and ventilation failures.<sup>22</sup> The middle school at Fort Campbell in Kentucky  
15 is not only undersized and inadequate to serve the current student population, but also suffers from leaks  
16 and a broken heating system in certain classrooms.<sup>23</sup> And Bechtel Elementary School in Germany,  
17 described as “in failing condition,” does not meet U.S. fire suppression standards and needs extensive  
18 infrastructure work ranging from electrical branch circuits to lighting to plumbing and piping.<sup>24</sup> Each of  
19 these construction projects would help military families, especially those stationed overseas in areas  
20 where local schools might not cater to English speakers or an American teaching style.

21  
22  
23 <sup>20</sup> *Id.*

24 <sup>21</sup> Grisales, *supra* note 9.

25 <sup>22</sup> *Id.*

26 <sup>23</sup> *Id.*; see also Helene Cooper, *No New School at Fort Campbell: The Money Went to Trump’s*  
27 *Border Wall*, *The New York Times* (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/trump-border-wall-military-families.html?auth=login-email&login=email>.

28 <sup>24</sup> *Fiscal Year (FY) 2019 Budget Estimates*, *supra* note 14, at 92-93.

(continued on next page)

**III. CANCELATION OF THIS FUNDING WILL TRICKLE DOWN: FUTURE REQUIRED MILITARY CONSTRUCTION MUST NOW BE DELAYED IN FAVOR OF RESURRECTING THESE PROJECTS**

In order for service members and their families to be made whole, the President’s diversion of funding should be cancelled, and these projects reinstated. Even if Congress decides to fund these projects again in later years, that would lead to the deferral of other high-priority military construction even further down the line.<sup>25</sup> A quick restoration of funding by this Court would allow the Department of Defense to get this much-needed military construction back on track.

Service members are used to discomfort. They signed up to endure hardships so that the rest of American society could live freely and comfortably. And they are used to seeing dilapidated buildings and living and working in substandard conditions. But they should never be asked to work in unnecessarily unsafe or harmful conditions, or to wait even longer for basic facilities that are already long overdue. That is the result of the funding diversions, and this Court should bear that result in mind as it considers the issues before it.

**CONCLUSION**

This Court’s decision will have an outsized impact on the lives of military service members and their families. Those men and women, who swear an oath to support and defend the Constitution of the United States dutifully execute all lawful orders, even when they are asked to put themselves in harm’s way. But they should not needlessly be placed in harm’s way, nor should their quality of life be unnecessarily impacted, through the deferral of already-stretched military construction budgets in favor of an unrelated political policy. For these reasons, IAVA respectfully asks this Court to take heed of the impacts on military service members and their families as it considers Plaintiffs’ motion for summary judgment.

---

<sup>25</sup> See Williams, *supra* note 1, at 17 (“A newly identified requirement may be assessed as having a higher priority than projects already in the planning process. Therefore, some construction, while worthy, may be deferred to later years.”).

1 DATED: October 21, 2019

Respectfully submitted,

2 IRAQ AND AFGHANISTAN VETERANS OF  
3 AMERICA

4 /s/ Lindsay L. Rodman  
LINDSAY L. RODMAN\*  
5 \*pro hac vice forthcoming  
6 Attorney for *Amicus Curiae* IAVA

7 CONRAD & METLITZKY LLP

8 /s/ Mark R. Conrad  
MARK R. CONRAD  
9 WILLIAM J. COOPER  
10 COURTNEY C. AASEN  
Local Counsel for *Amicus Curiae* IAVA

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28