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

16 STATE OF CALIFORNIA, *et al.*,

17 Plaintiffs,

18 v.

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

20 Defendants.

No. 4:19-cv-00872-HSG

No. 4:19-cv-00892-HSG

**NOTICE REGARDING FUNDING  
 OF BORDER BARRIER  
 PROJECTS PURSUANT TO 10  
 U.S.C. § 284 IN FISCAL YEAR 2020**

23 SIERRA CLUB, *et al.*,

24 Plaintiffs,

25 v.

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

27 Defendants.

1 Defendants hereby notify the Court and parties in the above-captioned cases that the  
2 Department of Defense (DoD) has approved making additional appropriated funds available for  
3 use on the existing border barrier projects undertaken pursuant to 10 U.S.C. § 284.

4 As explained in Defendants' prior submissions in these cases, in fiscal year 2019 DoD  
5 authorized \$2.5 billion in border barrier construction support to the Department of Homeland  
6 Security under 10 U.S.C. § 284(b)(7). *See, e.g.*, Third Declaration of Kenneth P. Rapuano ¶ 3  
7 (May 15, 2019) (ECF No. 151-2 in 19-cv-872; ECF No. 131-2 in 19-cv-892). The funding for  
8 these projects was provided using DoD's general transfer authority under § 8005 of the DoD  
9 Appropriations Act, 2019 (Pub. L. 115-235), and § 1001 of the John S. McCain National Defense  
10 Authorization Act for Fiscal Year 2019 (NDAA) (Pub. L. 115-232), as well as DoD's special  
11 transfer authority under § 9002 of the DoD Appropriations Act and § 1512 of the NDAA. *See*  
12 Declaration of Kenneth P. Rapuano ¶ 5 (April 25, 2019) (ECF No. 89-10 in 19-cv-872; ECF No.  
13 64-8 in 19-cv-892); Second Declaration of Kenneth P. Rapuano ¶ 7 (May 13, 2019) (ECF No. 143-  
14 1 in 19-cv-872; ECF No. 118-1 in 19-cv-892); Third Rapuano Decl. ¶ 4. None of these funds were  
15 drawn from direct appropriations to the counter-narcotics support line of the Drug Interdiction and  
16 Counter-Drug Activities, Defense, account (counter-narcotics account). *See* Defs.' Response to  
17 the Court's May 13, 2019 Order at 4 (ECF No. 151 in 19-cv-00872; ECF No. 131 in 19-cv-892);  
18 *see also Sierra Club v. Trump*, 379 F. Supp. 3d 883, 918 n.17 (N.D. Cal. 2019).

19 In fiscal year 2020, which begins on October 1, 2019, the U.S. Army Corps of Engineers  
20 (USACE) requires up to \$90 million in fiscal year 2020 funds from the counter-narcotics account  
21 to cover its operating costs, such as labor and travel costs, for the oversight and management of  
22 the § 284 construction contracts during fiscal year 2020. *See* Sixth Declaration of Kenneth P.  
23 Rapuano ¶¶ 3-4 (Sept. 30, 2019) (attached as Exhibit 1).<sup>1</sup> In fiscal year 2019, these operating costs  
24 were funded by the \$2.5 billion transferred to the counter-narcotics account. *Id.* ¶ 5. In fiscal  
25 year 2020, these costs will be covered by funds appropriated to the counter-narcotics account. *Id.*

26  
27  
28 <sup>1</sup> On September 27, 2019, the President signed into law H.R. 4378, the "Continuing  
Appropriations Act, 2020, and Health Extenders Act of 2019," which provides fiscal year 2020  
appropriations to federal agencies through November 21, 2019.

1 The funds will be disbursed to USACE in increments, subject to the availability of funds, as needed  
2 over the course of the fiscal year. *Id.* ¶ 4. The first increment of up to \$12 million will be available  
3 for USACE's use beginning on October 7, 2019. *Id.*

4       Additionally, DoD is making available \$129.085 million of expiring fiscal year 2019 funds  
5 from the counter-narcotics account to address any unanticipated, within-scope contract costs  
6 associated with fiscal year 2019 counter-narcotics projects, including the § 284 construction  
7 contracts. *Id.* ¶¶ 4, 7. The Military Departments returned \$129.085 million to the counter-  
8 narcotics account at the end of fiscal year 2019 because they determined those funds to be excess  
9 to need in fiscal year 2019. *Id.* ¶ 7. None of the excess fiscal year 2019 funds made available for  
10 contingency costs will be obligated unless (1) a contractor first makes a request for equitable  
11 adjustment, or the government identifies the need for an adjustment and makes a request for  
12 proposal to address that need, due to an unanticipated additional expense in performing the  
13 contract; (2) the contracting officer determines that the expense constitutes an antecedent liability  
14 under the terms of the contract (*e.g.*, changed site condition); and (3) the relevant official approves  
15 an upward obligation adjustment for the contract. *Id.* ¶ 8. USACE does not anticipate using any  
16 of these funds for upward obligation adjustments on the existing § 284 contracts before October  
17 7, 2019. *Id.*

18       For both the operating costs and contingency costs, the additional amounts of appropriated  
19 funds made available will not be used for any additional border barrier projects or to expand the  
20 scope of any existing projects. *Id.* ¶ 3. Further, funds for the Drug Demand Reduction program,  
21 the National Guard Counter-drug program, or the National Guard Counter-drug Schools program  
22 were not made available for these costs. *Id.* ¶¶ 6, 9.

1 DATE: September 30, 2019

Respectfully submitted,

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