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10 **UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 12 **OAKLAND DIVISION**

13 STATE OF CALIFORNIA, *et al.*,
 14 Plaintiffs,
 15 v.
 16 JOSEPH R. BIDEN, JR., *et al.*,
 17 Defendants.
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No. 4:19-cv-00872-HSG
 No. 4:19-cv-00892-HSG
 No. 4:20-cv-01494-HSG
 No. 4:20-cv-01563-HSG

**NOTICE OF DECISION BY THE
 DEPARTMENT OF DEFENSE TO
 CANCEL BORDER WALL
 PROJECTS UNDERTAKEN
 PURSUANT TO 10 U.S.C. § 284
 AND 10 U.S.C. § 2808**

19
 20 SIERRA CLUB, *et al.*,
 21 Plaintiffs,
 22 v.
 23 JOSEPH R. BIDEN, JR., *et al.*,
 24 Defendants.
 25
 26
 27
 28

1 Defendants hereby provide notice that the Department of Defense has decided to cancel
2 all border wall projects undertaken pursuant to 10 U.S.C. § 284 and 10 U.S.C. § 2808.

3 **A. Section 284 Projects**

4 In fiscal years 2019 and 2020, the Department of Defense authorized 38 border wall
5 projects and segments pursuant to 10 U.S.C. § 284(b)(7) based on multiple requests for assistance
6 from the Department of Homeland Security. *See* Administrative Record for FY19 § 284 Projects
7 (ECF No. 163 in *Sierra Club I* and ECF No. 173 in *California I*); Administrative Record for FY20
8 § 284 Projects (ECF No. 19 in *Sierra Club II* and ECF No. 25 in *California II*). In furtherance of
9 the Proclamation issued by the President on January 20, 2021, *see* Proclamation 10142, 86 Fed.
10 Reg. 7225, the Deputy Secretary of Defense has directed the Acting Secretary of the Army to take
11 immediate action to cancel all § 284 projects. *See* Action Memo re: Department of Defense
12 Actions Implementing Presidential Proclamation 10142 & Tab A (April 30, 2021) (attached as
13 Exhibit 1). The Department of the Army is authorized to use funds transferred for the § 284
14 projects to pay contract termination costs, including suspension and demobilization costs. *See*
15 Action Memo, Tab A. The Department of the Army also may use transferred funds for activities
16 necessary to make permanent any urgent measures that were needed to avert immediate physical
17 dangers during the pause directed by § 1(b) of Proclamation 10142. *Id.*

18 The funds transferred for the § 284 projects were available for obligation only during the
19 fiscal year in which they were transferred, and thus have expired. *See* Action Memo at 2;
20 Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2982, § 8003
21 (“No part of any appropriation contained in this Act shall remain available for obligation beyond
22 the current fiscal year, unless expressly so provided herein.”); Department of Defense
23 Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, § 8003 (same). Any unexpended
24 expired funds will remain in the Operation and Maintenance, Army, account, and are available to
25 liquidate obligations properly chargeable to the fiscal year during which the funds were available
26 for obligation (*e.g.*, contract termination costs). *See* Action Memo at 2; 31 U.S.C. § 1553(a).
27 After five years, the account will be closed and any remaining balance in the account will be
28 cancelled. *See* Action Memo at 2; 31 U.S.C. § 1552(a).

1 The Deputy Secretary of Defense also issued a memorandum to the Secretary of
2 Homeland Security stating that the Department of Homeland Security will accept custody of
3 border barrier infrastructure constructed pursuant to § 284, account for such infrastructure in its
4 real property records, and operate and maintain the infrastructure. *See* Action Memo, Tab B.

5 **B. Section 2808 Projects**

6 On September 3, 2019, the Secretary of Defense authorized 11 border barrier military
7 construction projects pursuant to 10 U.S.C. § 2808(a), as made available in the declaration of a
8 national emergency at the southern border in Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15,
9 2019). *See* Administrative Record for § 2808 Projects (ECF No. 206 in *Sierra Club I* and ECF
10 No. 212 in *California I*). On January 20, 2021, the President declared that the national emergency
11 “is terminated and that the authorities invoked in that proclamation will no longer be used to
12 construct a wall at the southern border.” Proclamation No. 10142. Section 2808(f) provides that
13 “[t]he authority described in subsection (a) shall terminate with respect to any war or national
14 emergency at the end of the war or national emergency.” The Deputy Secretary of Defense has
15 therefore determined that the authority provided in § 2808 is no longer available, and no further
16 construction may be undertaken pursuant to § 2808. *See* Action Memo at 1 & Tabs A, E.

17 Accordingly, the Deputy Secretary has directed the Department of the Army to take
18 immediate action to: (1) cancel all § 2808 border barrier construction projects, including
19 executing the necessary contract actions and providing requisite congressional notification; (2)
20 coordinate with the Department of the Interior to relinquish any lands withdrawn for § 2808
21 construction; and (3) coordinate with the Department of Homeland Security to transfer
22 administrative jurisdiction over other Federal property. *See* Action Memo at 2 & Tab A. The
23 Department of the Army is authorized to expend military construction funds made available for
24 the § 2808 projects only to pay contract termination costs, including suspension costs. *See* Action
25 Memo, Tab A.

26 The Deputy Secretary has further directed that approximately \$2.1 billion associated with
27 unawarded § 2808 contracts be released immediately to the relevant Department of Defense
28 components for use on military construction projects that were deferred to fund the § 2808

1 projects. See Action Memo at 1–2 & Tab A. Any additional funds that become available
2 following termination or de-scoping of awarded § 2808 contracts also will be released for use on
3 deferred military construction projects. *Id.*

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5 The review process called for in Proclamation 10142 otherwise remains ongoing and the
6 relevant federal agencies are continuing to coordinate on developing the plan required by section
7 2 of the Proclamation. Defendants will notify the Court and parties when that process is complete.

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10 DATE: April 30, 2021

Respectfully submitted,

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