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[19-cv-00892-HSG](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS  
MOTION FOR PRELIMINARY  
INJUNCTION**

Re: Dkt. No. 29

On February 19, 2019, Sierra Club and Southern Border Communities Coalition  
(collectively, Citizen Group Plaintiffs or Citizen Groups ) filed suit against Defendants Donald

1 Mexico border.

2 It is important at the outset for the Court to make clear what this case is, and is not, about.  
3 The case is not about whether the challenged border barrier construction plan is wise or unwise. It  
4 is not about whether the plan is the right or wrong policy response to existing conditions at the  
5 southern border of the United States. These policy questions are the subject of extensive, and  
6 often intense, differences of opinion, and this Court cannot and does not express any view as to  
7 them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court  
8 express[ed] no view on the soundness of the policy at issue there); *In re Border Infrastructure*  
9 *Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court cannot and does  
10 not consider whether underlying decisions to construct the border barriers are politically wise or  
11 prudent ). Instead, this case presents strictly legal questions regarding whether the proposed plan  
12 for funding border barrier construction exceeds the Executive Branch's lawful authority under the  
13 Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d  
14 255, 257 (D.C. Cir. 2013) ( The underlying policy debate is not our concern. . . . Our more  
15 modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set  
16 by Congress. ).

17 Assessing whether Defendants' actions not only conform to the Framers' contemplated  
18 division of powers among co-equal branches of government but also comply with the mandates of  
19 Congress set forth in previously unconstructed statutes presents a Gordian knot of sorts. But the  
20 federal courts' duty is to decide cases and controversies, and [t]hose who apply the rule to  
21 particular cases, must of necessity expound and interpret that rule. *See Marbury v. Madison*, 1  
22 Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie  
23 it—no small task given the number of overlapping legal issues. And at this stage, the Court then  
24 must further decide whether Plaintiffs have met the standard for obtaining the extraordinary  
25 remedy of a preliminary injunction pending resolution of the case on the merits.

26 After carefully considering the parties' arguments, the Court **GRANTS IN PART** and  
27 **DENIES IN PART** Plaintiffs' motion.

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1       tremendous if we want to do that, if we want to go that route. Again, there is no reason why  
2 we can't come to a deal. . . . [Congress] could stop this problem in 15 minutes if they wanted to.  
3 States RJN Ex. 13.

4           After the government shutdown ended, the President and others in his administration  
5 reaffirmed their intent to fund a border barrier, with or without Congress's blessing. On February  
6 9, 2019, the President explained that even if Congress provided less than the requested funding for  
7 a border barrier, the barrier [would] get built one way or the other! Citizen Groups RJN Ex. C.  
8 The next day, the Acting White House Chief of Staff explained that the Administration intended to  
9 accept whatever funding Congress would offer and then use other measures to reach the  
10 President's desired funding level for border barrier construction:

11                   The President is going to build a wall. You saw what the Vice-  
12 President said there, and that's our attitude at this point, which is:  
13 We'll take as much money as you can give us, and then we'll go off  
14 and find the money someplace else, legally, in order to secure that  
southern barrier. But this is going to get built, with or without  
Congress.

15       *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of*  
16 *Trump admin*, YouTube (Feb. 10, 2019), [https://www.youtube.com/watch?v=l\\_Z0xx\\_zS0M](https://www.youtube.com/watch?v=l_Z0xx_zS0M). He  
17 went on to detail that the Administration was prepared to both reprogram money and declare a  
18 national emergency to unlock funds:

19                   There are other funds of money that are available to [the President]  
20 through what we call reprogramming. There is money that he can get  
21 at and is legally allowed to spend, and I think it -- needs to be said  
22 again and again that all of this is going to be legal. There are statutes  
23 on the books as to how any President can do this. . . . There are certain  
funds of money that he can get to without declaring a national  
emergency and other funds that he can only get to after declaring a  
national emergency.

24       *Id.* All told, the whole pot of such funds was well north of \$5.7 billion. *Id.* And with respect  
25 to a national emergency declaration in particular, the Acting White House Chief of Staff  
26 explained: The President doesn't want to do it. . . . He would prefer legislation because that's  
27 the right way to go, and it's the proper way to spend money in this country. *Id.*

28           On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019



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

Proclamation No. 9844, 84 Fed. Reg. 4,949. The proclamation then invoked and made available to relevant DoD person12 Te600512 T\*1 tutory720( )-9(to)(uth)-1og0 e 0 0 1 1





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Treasury approved a request from the Department of Homeland Security (DHS) to make available up to \$601 million from the Treasury Forfeiture Fund, which Defendants



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Illegal Immigration Reform and Immigrant Responsibility Act of 1996

1 under Section 284, for four projects: one located in California El Centro Project 1 and three  
2 located in Arizona Tucson Sector Projects 1 3. *See* Rapuano Second Decl. ¶ 6; *see also*  
3 Rapuano Decl. Ex. A, at 3, 6 7 (describing project locations). To fund these projects, Defendant  
4 Shanahan again invoked Section 8005, as well i5 Section 8005,

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Mr. Conyers. . . . Mr. Chairman, my final participation in this debate revolves around the reason of this question: What happens if the President of the United States vetoes the congressional termination of the emergency power? Is that contemplable within the purview of this legislation?

...

Mr. Flowers. Mr. Chairman, on the advice of counsel we have researched that thoroughly. A concurrent resolution would not require Presidential signature of acceptance. It would be an impossibility that it would be vetoed.

Mr. Conyers. So there would be no way that the President could interfere with the Congress?

Mr. Flowers. The gentleman is correct.

*Id.*

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1 Administration sought \$5.7 billion from Congress to fund border barrier construction DHS  
2 requested \$681 million in Strategic Support funding for border security. *Id.* ¶ 24; *see also* States  
3 RJN Ex. 25 (January 6, 2019 request for \$5.7 billion in funding for border barrier construction).  
4 The Treasury ultimately determined that it could make available to CBP, DHS s enforcement  
5 agency, up to \$601 million from the TFF, in two tranches. Farley Decl. ¶¶ 24 25; Opp. at 9. The  
6 first tranche \$242 million was made available for obligation on March 14, 2019. *See* Opp. at  
7 9. Save for a small portion for program support on the TFF funded projects, CBP intends to obligate  
8 obligate the first tranche on an Interagency Agreement (IAA) with the U.S. Army Corps of  
9 Engineers . . . by June 2019. Dkt. No. 131-1 ( Flossman Third Decl. ) ¶ 4. Defendants represent  
10 that CBP intends to obligate all available TFF funds before the end of Fiscal Year 2019 or, if not,  
11 before the end of the 2019 calendar year. Flossman Second Decl. ¶ 11. The second tranche  
12 \$359 million is expected to be made available for obligation at a later date upon Treasury B  
13 receipt of additional anticipated forfeitures.

1 be made available to the larger audience that may also play a role in  
2 both the decisionmaking process and the implementation of that  
3 decision.

4 *WildEarth Guardians v. Provencio*, No. 17-17373, 2019 WL 1983455, at \*7 (9th Cir. May 6,  
5 2019) (quoting *WildEarth Guardians v. Mont. Snowmobile Ass n*, 790 F.3d 920, 924 (9th Cir.  
6 2015)). NEPA does not establish substantive environmental standards; rather, it sets action-  
7 forcing procedures that compel agencies to take a hard look at environmental consequences.  
8 *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989). NEPA's  
9 purpose is to ensure that the agency will not act on incomplete information, only to regret its  
10 decision after it is too late to correct. *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 557  
11 (9th Cir. 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)). And the  
12 Ninth Circuit commands that courts strictly interpret NEPA's procedural requirements to the  
13 fullest extent possible, as consistent with NEPA's policies. *Churchill Cty. v. Norton*, 276 F.3d  
14 1060, 1072 (9th Cir. 2001) (quoting *Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en  
15 banc)). [G]rudging, pro forma compliance will not do. *Id.* (quoting *Lathan*, 506 F.2d at 693).

16 Where an agency's project *might* significantly affect environmental quality, NEPA  
17 compels preparation of what is known as an Environmental Impact Statement (EIS). *Provencio*,  
18 2019 WL 1983455, at \*7 (emphasis added). To prevail on a claim that an agency violated its duty  
19 to prepare an EIS, a plaintiff need only raise substantial questions whether a project may have a  
20 significant [environmental] effect. *Id.* (quoting *Blue Mountains Biodiversity Project v.*  
21 *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). An action's significance depends on both  
22 context and intensity. 40 C.F.R. § 1508.27; *see also id.* § 1508.27(b) (setting forth ten factors to  
23 consider[] in evaluating intensity). Even where a project does not require an EIS, agencies  
24 generally must prepare an Environmental Assessment (EA) which, in part, serves to [b]riefly  
25 provide sufficient evidence and analysis for determining whether to prepare an environmental  
26 impact statement or a finding of no significant impact. *See* 40 C.F.R. § 1508.9(a)(1).

27 [A]gency action taken without observance of the procedure required by law will be set  
28 aside. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

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**III. LEGAL STANDARD**

A preliminary injunction is a matter of equitable discretion and is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking preliminary injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest. *Id.* at 20. Alternatively, an injunction may issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff s] favor, provided that the plaintiff can also demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits.

1 threshold issues first before turning to Plaintiffs individual bases for injunctive relief.

2 **A. Article III Standing**

3 A plaintiff seeking relief in federal court bears the burden of establishing the irreducible  
4 constitutional minimum of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)  
5 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have  
6 suffered an injury in fact. *Id.* This requires an invasion of a legally protected interest that is  
7 concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*,  
8 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff s injury must be fairly  
9 traceable to the challenged conduct of the defendant. *Spokeo*, 136 S. Ct. at 1547. Third, the  
10 injury must be likely to be redressed by a favorable judicial decision. *Id.* (citing *Lujan*, 504 U.S.  
11 at 560 61).

12 **1. Plaintiffs Have Standing for Their 8005 Claim.**

13 Defendants argue that Plaintiffs lack standing to challenge Defendants invocation of  
14 Section 8005 to reprogram funds into the drug interdiction fund, so that Defendants can then  
15 divert that money wholesale to border barrier construction using Section 284. *See Opp.* at 14F1 12 Tfl 0 C  
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1 the object of the Section 8005 reprogramming is anything but border barrier construction, even  
2 if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first  
3 announced that they would reprogram funds using Section 8005, they have uniformly described  
4 the object of that reprogramming as border barrier construction. *See* Rapuano Decl. ¶ 5 (providing  
5 that the Acting Secretary of Defense decided to use DoD's general transfer authority under  
6 section 8005 . . . to transfer funds between DoD appropriations to fund [border barrier  
7 construction in Arizona and New Mexico] ); *id.* Ex. D, at 1 (notifying Congress that the  
8 reprogramming action under Section 8005 is for construction of additional physical barriers  
9 and roads in the vicinity of the United States border ).

10 Nor does *Lujan* impose Defendants' proffered strict object test. The *Lujan* Court  
11 explained that when the plaintiff is not himself the object of the government action or inaction he  
12 challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.  
13 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in  
14 particular with causation and redressability, which are complicated inquiries when a plaintiff's  
15 standing depends on the unfettered choices made by independent actors not before the courts and  
16 whose exercise of broad and legitimate discretion the courts cannot presume either to control or to  
17 predict. *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As  
18 concerns causation, the Ninth Circuit recently explained that Article III standing only demands a  
19 showing that the plaintiff's injury is fairly traceable to the challenged action of the defendant, and  
20 not the result of the independent action of some third party not before the court. *Mendia v.*  
21 *Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167  
22 (1997)). Causation may be found even if there are multiple links in the chain connecting the  
23 defendres





1 barrier projects will be constructed pursuant to [Section] 2808, and that, if they are, they will be  
2 [sic] built in any location where Plaintiffs would have a claim to a cognizable injury. Opp. at 21.

3 Defendants ask too much of Plaintiffs. A plaintiff need not present undisputable proof of a  
4 future harm. The injury-in-fact requirement instead permits standing when a risk of future injury  
5 is at least *imminent*. See *Lujan*, 504 U.S. at 564 n.2. And while courts must ensure that the  
6 actual or imminent measure of harm is not stretched beyond its purpose, which is to ensure that  
7 the alleged injury is not too speculative for Article III purposes, *see id.*, the Ninth Circuit has  
8 consistently held that a credible threat that a probabilistic harm will materialize is enough, *see*  
9 *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (quoting *Covington v. Jefferson*  
10 *Cty.*, 358 F.3d 626, 641 (9th Cir. 2004)).

11 At this stage, Plaintiffs have carried their burden to demonstrate that there is a credible  
12 threat that Defendants will divert funds under Section 2808 for border barrier construction in a  
13 location where Plaintiffs would have a claim to a cognizable injury. As detailed in  
14 supporting declaration, a decision on the use of Section 2808 to authorize border barrier  
15 construction is forthcoming, as the DoD has now received necessary information which it intends  
16 to use to make decisions. See Rapuano Third Decl. ¶ 6. Further, the Court cannot ignore that the  
17 President invoked Section 2808 to enable the diversion of funds for border barrier construction.  
18 See Citizen Groups RJN Ex. D. T

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case, as Plaintiffs have demonstrated that their members

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some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been

1 APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987)  
2 ( Appellants need not, however, show that their interests fall within the zones of interests of the  
3 constitutional and statutory powers invoked by the President in order to establish their standing to  
4 challenge the interdiction program as *ultra vires.* ); *see also* 33 Charles Alan Wright et al., Federal  
5 Practice and Procedure § 8302 (2d ed. 2019) (explaining that the zone of interests test is to  
6 determine whether a plaintiff seeks to protect interests that arguably fall within the zone of  
7 interests protected by that provision

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1 should begin by determining whether the statutory authority supports the action challenged, and  
2 only reach the constitutional analysis if necessary.

3 **a. Sections 284 and 8005**

4 At the President's direction, Defendants intend to divert \$2.5 billion, \$1 billion of which is  
5 the subject of the pending motion, to the DoD's drug

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requested has been denied by Congress. Plaintiffs argue that Defendants





1 Defendants argue that Congress never denied DoD funding to undertake the [Section] 284  
2 projects at issue, Opp. at 16, such that S

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1 statute is fairly possible by which the question may be avoided. *Zadvydas v. Davis*, 533 U.S. 678,  
2 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is thus a  
3 means of giving effect to congressional intent, as it is presumed that Congress did not intend to  
4 create an alternative interpretation that would raise serious constitutional concerns. *Clark v.*  
5 *Martinez*, 543 U.S. 371, 382 (2005). Courts thus have read significant limitations into . . .  
6 statutes in order to avoid their constitutional invalidation. *Zadvydas*, 533 U.S. at 689 (citation  
7 omitted).

8 As Plaintiffs point out, the upshot of Defendants' argument is that the Acting Secretary of  
9 Defense is authorized to use Section 8005 to funnel an additional \$1 billion to the Section 284  
10 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate  
11 only \$1.375 billion for that purpose; (2) Congress's *total* fiscal year 2019 appropriation available  
12 under Section 284 for [c]onstruction of roads and fences and installation of lighting to block drug  
13 smuggling corridors across international boundaries of the United States was \$517 million, much  
14 of which already has been spent; and (3) Defendants have acknowledged that the Administration  
15 considered reprogramming funds for border barrier construction even before the President signed  
16 into law Congress

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United States District Court  
Northern District of California

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1 have funded substantially broader border barrier construction, as noted above, deciding in the end  
2 to appropriate only \$1.375 billion. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225,  
3 1234 (9th Cir. 2018) ( In fact, Congress has frequently considered and thus far rejected legislation  
4 accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this  
5 issue demonstrates the importance and divisiveness of the policies in play, reinforcing the  
6 Constitution s unmistakable expression of a determination that legislation by the national  
7 Congress be a step-by-step, deliberate and deliberative process. ) (citing *Chadha*, 462 U.S. at  
8 959). In short, the Constitution gives Congress the exclusive power not only to formulate

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motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 138 at 75:5 10. As counsel for Defendant put it, [Plaintiffs] want to say that something was denied by . . . But that is just not how these statutes are written *McIntosh*] tells us we interpret the appropriations statute. *Id.* at 75:13 20. But Defendant says we look that

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United States District Court  
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1 attempt to characterize the U.S.-Mexico border or a border barrier as a base, camp, post, station,  
2 yard, [or] center. Nor could they. Defendants instead contend that border barrier construction is  
3 authorized under the catch-all term other activity. See Dkt. No. 138 at 92:9-93:22.

4 In interpreting Section 2801 to determine whether Defendants plan to construct a barrier  
5 on the U.S.-Mexico border falls within the other activity category, the Court applies traditional  
6 tools of statutory construction. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d  
7 1250, 1257 (9th Cir. 1994), *amended on denial of reh'g* by 99 F.3d 321 (9th Cir. 1996). The Court  
8 begin[s] with the statute's language, which is conclusive unless literally applying the statute's  
9 text demonstrably contradicts Congress's intent. *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d  
10 1148, 1151 (9th Cir. 2019). When deciding whether the language is plain, courts must read the  
11 words in their context and with a view to their place in the overall statutory scheme. *Id.* (quoting  
12 *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016) (internal quotation marks and  
13 alterations omitted)).

14 Applying traditional tools of statutory construction, Section 2801 likely precludes treating  
15 the southern border as an other activity. Defendants on this point fail to appreciate that the  
16 words immediately preceding or other activity in Section 2801(c)(4) a base, camp, post,  
17 station, yard, [and] center provide contextual limits on the catch-all term. The Court thus relies  
18 on the doctrine of *noscitur a sociis*, which is that a word is known by the company it keeps.  
19 *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Courts apply this rule to avoid ascribing  
20 to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving  
21 unintended breadth to the Acts of Congress. *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S.  
22 303, 307 (1961)). The Supreme Court has relied on this canon of statutory interpretation many  
23 times when construing detailed statutory lists followed by catch-

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1 arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral  
2 forum. 138 S. Ct. 1612, 1625 (2018). Before that, in *Gustafson*, the Supreme Court construed  
3 the word “communication” as used in Section 2(10) of the Securities Act of 1933 to refer[] to a  
4 public communication and not any communication whatsoever, because the word followed a list  
5 of other terms—prospectus, notice, circular, advertisement, [and] letter—in consideration of  
6 which it [was] apparent that the list refers to documents of wide dissemination. 513 U.S. at 575.

7 *Noscitur a sociis* applies with equal force in the present circumstance. The term “other  
8 activity” appears after a list of closely related types of discrete and traditional military locations:  
9 a base, camp, post, station, yard, [and] center. It is thus proper to construe “other activity” as  
10 referring to similar discrete and traditional military locations. The Court does not readily see how  
11 the U.S.-Mexico border could fit this bill.

12 The Court also finds relevant the *eiusdem generis* canon of statutory interpretation, which  
13 counsels that [w]here general words follow specific words in a statutory enumeration, the general  
14 words are construed to embrace only objects similar in nature to those objects enumerated by the  
15 preceding specific words.

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To be clear, other activity is not an empty term. Congress undoubtedly contemplated that military installations would encompass more than just a base, camp, post, station, yard, [or] center. But the Court need not stake out the term's outer limits here. All that matters for present purposes is that, in context and with an eye toward the overall statutory scheme, nothing demonstrates that Congress ever contemplated that other activity has such an unbounded reading that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern border.

Despite its concerns with

1 Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim.  
2 Opp. at 26 (citing *In re Border Infrastructure Evtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)).  
3 Plaintiffs respond that DHS s authority to waive NEPA requirements for construction under  
4 IIRIRA does not extend to construction undertaken by DoD under its own spending authority.  
5 Reply at 18 19. Plaintiffs further contend that Defendants argument is incompatible with their  
6 own claim that they are not constructing the El Paso and Yuma sections of border wall under

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1 using funds reprogrammed and subsequently used under Sections 8005 and 284, Defendants have  
2 not committed to fund any border barrier construction using Section 2808. Because of this  
3 distinction, the Court addresses the two categories separately.

4 **a. Sections 8005 and 284**

5 The Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm to their  
6 members' aesthetic and recreational interests in the areas known as El Paso Sector Project 1 and  
7 Yuma Sector Project 1.

8 As the Ninth Circuit has explained, it would be incorrect to hold that all potential  
9 environmental injury warrants an injunction. *League of Wilderness Defs./Blue Mountains*  
10 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). Environmental injury,  
11 however, by its nature, can seldom be adequately remedied by money damages and is often  
12 permanent or at least of long duration, *i.e.*, irreparable. *Amoco Prod. Co. v. Vill. of Gambell,*  
13 *Alaska*, 480 U.S. 531, 545 (1987). Plaintiffs must nonetheless demonstrate that irreparable injury  
14 is *likely* in the absence of an injunction. *Winter*, 555 U.S. at 22. Mere possibility of  
15 irreparable harm does not merit a preliminary injunction. *Id.* But it is well-established in the  
16 Ninth Circuit that an organization can demonstrate irreparable harm by showing that the  
17 challenged action will injure its members' enjoyment of public land. *See All. for Wild Rockies*,  
18 632 F.3d at 1135.

19 Turning to Plaintiffs' aesthetic and recreational interests, Plaintiffs provide declarations  
20 from several members, detailing how Defendants' proposed use of funds reprogrammed under  
21 Section 8005 and then used under Section 284 for border barrier construction will harm their  
22 ability to recreate in and otherwise enjoy public land along the border. *See* Dkt. No. 30 ( Del Val  
23 Decl. ) ¶¶ 7-9 (alleging harm from border barrier construction and the accompanying lighting in  
24 the Yuma Sector Project 1 to declarant's ability to fish and general enjoyment of natural  
25 environment); Dkt. No. 31 ( Munro Decl. ) ¶ 11 (alleging harm from border barrier construction  
26 in El Paso Sector Project 1 to declarant's happiness and sense of fulfillment, which she  
27 derive[s] from visiting these beautiful landscapes ); Dkt. No. 34 ( Bixby Decl.

1 and camping interests); Dkt. No. 35 ( Walsh Decl. ) ¶¶ 8 12 (alleging harm from border barrier  
2 construction in El Paso Sector Project 1 to declarant s recreational interests, including bird  
3 watching and hiking ).

4 Defendants argue that Plaintiffs alleged recreational harms are insufficient for two  
5 reasons. First, Defendants argue that Plaintiffs have not demonstrated that any species-level  
6 impacts are likely as a result of border wall construction. See Opp. at 29. But Defendants here  
7 misunderstand Plaintiffs theory. Plaintiffs declarants nowhere state that their recreational  
8 interest is merely the enjoyment of a particular species. Defendants second argument is that their  
9 planned replacement of existing pedestrian border infrastructure . . . will not change conditions  
10 where Mr. Del Val fishes. Id. at 30 31. But Defendants here understate the effects of what they  
11 now characterize as mere replacement of existing pedestrian border infrastructure. By  
12 Defendants own description, they intend to replace four-to-six-foot vehicle barriers in the Yuma  
13 Sector Project 1 area with a thirty-foot bollard wall, where [t]he bollards are steel-filled  
14 concrete that are approximately six inches in diameter and spaced approximately four inches  
15 apart and accompanied by lighting. See Dkt. No. 64-9 ( Enriquez Decl. ) ¶ 12 & Ex. C, at 2-1.  
16 Even if the characteristics of the wall were unchanged which is not the case Mr. Del Val

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**b. Section 2808**

Because Defendants have not disclosed a plan for diverting funds under Section 2808 for border barrier construction, the Court cannot now determine a likelihood of harm to Plaintiffs members aesthetic and recreational interests. The Court thus turns to Plaintiffs other theories of irreparable injury.

To start, to the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009), for the principle that a constitutional violation alone suffices to show irreparable harm, the Court finds that principle unavailing. *See* Mot. at 25. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely irreparable harm in the absence of a preliminary injunction barring the challenged action, and not simply a constitutional violation. *See id.* (noting that the constitutional violation must be coupled with the damages incurred, which in that case involved a good deal of economic harm in the interim).

Plaintiffs primary alternative theory of irreparable injury is that Defendants invocation of and use of funds under Section 2808 for border barrier construction has harmed and continues to harm Plaintiff SBCC and its member organizations ability to carry out their missions. *See* Mot. at 23-25. To this end, Plaintiffs describe that several senior SBCC staff have devoted a majority of their time to analyzing and responding to Defendants



1 services. . Finally, in *League of Women Voters v. Newby*, plaintiffs demonstrated that their  
2 mission interest in registering voters faced likely irreparable injury absent a preliminary injunction  
3 because registration deadlines would pass before resolution of the case on the merits. 838 F.3d 1,  
4 9 (D.C. Cir. 2016) ( Because, as a result of the Newby Decisions, those new obstacles  
5 unquestionably make it more difficult for the Leagues to accomplish their primary mission of  
6 registering voters, they provide injury for purposes both of standing and irreparable harm. And  
7 that harm is irreparable because after the registration deadlines for the November election pass,  
8 there can be no do over and no redress. ) (internal quotation marks and citations omitted).

9 In all three cases, a counterfactual existed which demonstrated the need for a preliminary  
10 injunction. In *Valle*, injunctive relief meant the difference between prosecution under an  
11 unconstitutional statute or not. In *East Bay Sanctuary Covenant and County of Santa Clara*,  
12 injunctive relief meant the difference between organizations losing substantial funding or not. In  
13 *League of Women Voters*, injunctive relief meant the difference between registering voters for an  
14 election in keeping with organizations mission interests or not. Here, however, Plaintiffs present  
15 no evidence that injunctive relief will make any difference to the purported harm to their mission  
16 interests, which will continue until this case s resolution. Plaintiffs thus have not carried their  
17 burden to show that the extraordinary remedy of a preliminary injunction is warranted in this  
18 regard. *See Winter*, 555 U.S. at 20.

19 Although the Court finds that Plaintiffs have not yet met their burden of showing  
20 irreparable harm in the absence of a preliminary injunction, the Court fully expects that if and  
21 when Defendants identify border barrier construction locations where Section 2808 funds will be  
22 used, Plaintiffs will have the opportunity to submit materials in support of their irreparable harm  
23 claim. The Court takes Defendants at their word that they will inform the Court immediately  
24 once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131  
25 at 3.

### 26 3. Balance of Equities and Public Interest

27 When the government is a party to a case in which a preliminary injunction is sought, the  
28 balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747

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F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor, because their weighty interest in border security and immigration-law enforcement, as

1 appropriate funds, the Executive nonetheless may simply find a way to spend those funds without  
2 Congress does not square with fundamental separation of powers principles dating back to the  
3 earliest days of our Republic. *See City & Cty of San Francisco*, 897 F.3d at 1232 ( [I]f the  
4 decision to spend is determined by the Executive alone, without adequate control by the citizen s  
5 Representatives in Congress, liberty is threatened. ) (internal quotation marks and brackets  
6 omitted) (quoting *Clinton*, 524 U.S. at 451) (Kennedy, J., concurring). Justice Frankfurter wrote


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1 management conference, the parties should be prepared to discuss a plan for expeditiously  
2 resolving this matter on the merits, whether through a bench trial, cross-motions for summary  
3 judgment, or other means. The parties must submit a joint case management statement by May  
4 31, 2019.

5 **IT IS SO ORDERED.**

6 Dated: 5/24/2019

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9 HAYWOOD S. GILLIAM, JR.  
United States District Judge

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