

I, Antoinette R. Gant, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.
2. I am a Colonel in the United States Army, and I am currently the Commanding Officer for the South Pacific Border District (“Border District”) for the U.S. Army Corps of Engineers (“Corps”), South Pacific Division. I am stationed in Phoenix, Arizona.
3. The Border District’s primary mission is to plan, design, and construct Department of Defense-approved border barrier projects on the southern border of the United States.
4. In my capacity as the Commanding Officer of the Border District, I have overall responsibility for, and authority over, the Border District and its operations, consistent with relevant policy, regulations, and laws. In this respect, my responsibilities include providing oversight, direction, and management of all systems and personnel, including contracting officers involved in executing the Border District’s mission. In particular, I currently oversee performance of work on border barrier construction projects either under contract or soon to be awarded, and that are funded under the authority of 10 U.S.C. § 2808 (“Section 2808”).
5. An injunction prohibiting construction of border barrier and associated infrastructure for Section 2808 projects will result in irreparable harm to the Government, as discussed further below.

### **Section 2808 Projects**

6. In the course of my duties, I currently oversee performance of work on the following eleven border barrier construction projects that are funded under the authority of 10 U.S.C. § 2808: Yuma 2; Yuma 10/27; San Diego 4; Yuma 3; Yuma 6; El Paso 2-3<sup>1</sup>; El Paso 2-2 and 8; San Diego 11, El Centro 5, Laredo 7, and El Centro 9. The Corps has entered into a number of contracts to undertake these eleven projects. All projects are being constructed using stand-alone contracts, unless specifically noted.

#### **A. Border Barrier Construction Contracts**

7. *Yuma 2*: The Corps awarded a single contract for construction of both the Yuma 2 and 10/27 projects on November 6, 2019, for border barrier construction along the southern border of the Barry M. Goldwater Range (“BMGR”), which began with the construction of Yuma 10/27. The Yuma 2 project replaced approximately 2.3 miles of pedestrian fencing. Substantial construction activities for this project began on May 4, 2020 and completed construction on June 2, 2020.

8. *Yuma 10/27*: The Yuma 10/27 project will provide approximately 31 miles of new secondary pedestrian fencing in Arizona. Substantial construction activities for this project began on

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<sup>1</sup> El Paso 2 is divided into four distinct segments referred to as Segments 1, 2, 3, and 8. Segments 2, 3, and 8 are in active construction, as discussed below, and Segment 1 is still in the planning phase.

January 27, 2020 and is projected to complete construction of the physical barrier (though not the construction of the project's electrical attributes<sup>2</sup>) on November 11, 2020. Approximately 28.5 miles of border barrier for Yuma 10/27 has been emplaced, which equates to approximately 92 percent of the total contracted 31 miles. In addition, on July 9, 2020, the Corps awarded an electrical attributes<sup>2</sup> modification to the contract in the amount of \$138,335,454.80. To date, the electrical attributes are approximately 4.3 percent complete.

9. *San Diego 4*: The Corps awarded the contract for the San Diego 4 project on November 19, 2019, which will provide approximately 1.5 miles of new primary pedestrian fencing and approximately 2 miles of new secondary pedestrian fencing in California. Substantial construction activities commenced on March 9, 2020. To date, approximately 1.34 miles of border barrier has been emplaced, which equates to approximately 89 percent of the total contracted 1.5 miles. The option to install electrical attributes was exercised on March 13, 2020, in the amount of \$14,042,000.00. To date, the electrical attributes are 2 percent complete.

10. *Yuma 3*: The Corps awarded the contract for the Yuma 3 project on December 2, 2019, which will replace approximately 31 miles of vehicle barrier with new pedestrian fencing in Arizona. The Government issued the Notice to Proceed<sup>3</sup> for this contract on January 9, 2020. Substantial construction activities commenced on February 10, 2020. To date, approximately 24.4 miles of border barrier has been emplaced, which equates to approximately 78 percent of the total contracted 31.1 miles. The option to install electrical attributes was exercised March 9, 2020, which was subsequently modified, in the total amount of \$135,699,970.00. To date, approximately 10.2 percent of the electrical attributes are complete.

11. *Yuma 6*: The Corps awarded the contract for the Yuma 6 project on January 10, 2020. This project will replace approximately 1 mile of primary vehicle barrier with new pedestrian fencing and install approximately 2.5 miles of new secondary barrier in Arizona and California. Substantial construction activities commenced in early July. To date, 0.97 miles of border barrier have been emplaced, which equates to approximately 28 percent of the total contracted 3.5 miles. An electrical attributes option was exercised on March 12, 2020, which was subsequently modified, in the total amount of \$8,407,621.00. To date, approximately 1.2 percent of the electrical attributes are complete.

12. *El Paso 2-3*: The Corps awarded the contract for the El Paso 2 (Segment 3) project on January 17, 2020, and issued a Notice to Proceed on January 26, 2020. This project will replace approximately 13 miles of vehicle barrier with new pedestrian fencing. Substantial construction activities began on April 1, 2020. To date, approximately 11.6 miles of border barrier has been emplaced, which equates to approximately 91 percent of the total contracted 12.8 miles. An electrical attributes option was exercised on March 9, 2020 that included a follow-on

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<sup>2</sup> Lighting, cameras, and Linear Ground Detection System (LGDS)

<sup>3</sup>A Notice to Proceed is a written notice to the contractor to proceed with some or all of the work as specified in the contract. It fixes the time for the commencement of the work and, if appropriate, will fix the time for completion of the work.

modification, in the total amount of \$19,926,561.00. To date, the contractor has not yet invoiced the Corps for any work related to the electrical attributes.

13. *El Paso 2-2 and 8*: The Corps awarded a single contract for the El Paso 2 (Segment 2) and El Paso 8 projects on January 17, 2020. This project will replace approximately 12 miles of primary vehicle barrier with new pedestrian fencing. Substantial construction activities began on July 1, 2020. To date, 4.0 miles of border barrier has been emplaced, which equates to approximately 33 percent of the total contracted 12.0 miles.

14. The following five projects are in the design/construction planning phase as real estate acquisition efforts continue.

a. *San Diego 11*: This project will provide approximately 3.0 miles of new secondary pedestrian fencing in California.

b. *El Paso 2 (Segment 1)*: This project will replace 4.55 miles of existing vehicle barrier with new 30-foot primary pedestrian bollard wall.

c. *El Centro 5*: This project will provide approximately 1.0 mile of new secondary pedestrian fencing in California.

d. *Laredo 7*: This project will provide approximately 52.0 miles of new 30-foot primary pedestrian bollard wall in Texas.

e. *El Centro 9*: This project will provide approximately 12.0 miles of new secondary pedestrian fencing in California.

#### B. Construction Support Contracts

15. In addition to contracts for the construction projects identified above, I am aware that the Corps has contracts for real estate land acquisition services. A contract in the amount of \$219,800.00 was awarded on February 25, 2020, for San Diego 11, El Centro 5, and El Centro 9. A modification to this contract was awarded in the amount of \$150,000.00 on March 30, 2020. The Corps awarded another modification to this contract in the amount of \$93,067.00 on June 30, 2020. The Corps awarded a support contract for aerial imaging of boundary surveys for the El Centro 5, El Centro 9, San Diego 4, and San Diego 11 projects on November 21, 2019, in the amount of \$278,350.00. A separate \$59,920.00 contract for aerial imaging of boundary surveys for the El Paso 2-1 project was awarded on August 11, 2020. To date, the contractor has invoiced for \$43,412.40. A preliminary design contract for Laredo 7 was awarded on April 22, 2020, in the amount of \$5,840,448.03. The work for this contract is 70 percent complete. The contractor has not yet invoiced for \$3,316,028.00. An aerial imaging of boundary surveys contract for Laredo 7 was awarded on September 3, 2020, in the amount of \$1,456,060.95. The work for this contract is 70 percent complete. The contractor has not yet invoiced for

\$387,242.00. Finally, a final-design contract for Laredo 7 was recently awarded on October 16, 2020, in the amount of \$31,691,623.63. The work for this contract has not yet commenced.

16. The Government has also entered into support contracts for Section 2808 construction. The Yuma 2 and Yuma 10/27 projects are located on a military munitions range, which required the Corps to award a munitions debris and removal contract on November 27, 2019, in the amount of \$797,061.00. To date, the contractor has invoiced for \$286,971.51. The Corps awarded a construction representatives and scheduler support contract for the Yuma 2, Yuma 10/27, and Yuma 6 projects on March 13, 2020. To date, the contractor has invoiced for \$313,237.85. The Corps awarded a quality assurance contract for San Diego 4, in the amount of \$1,902,420.00. To date, the contractor has incurred \$405,376.74 in costs, of which \$316,610.66 have been invoiced and paid. The Corps awarded a quality assurance representatives support contract for Yuma 3, in the amount of \$4,326,535.00. To date, the contractor has invoiced for \$222,342.95. Additionally, the Corps awarded a quality assurance representatives support contract for the El Paso 2 and 8 projects in the amount of \$4,407,262.00. To date, the contractor has incurred \$1,093,072.35 in costs, \$808,898.40 of which have been invoiced. Finally, the Corps awarded a scheduling support contract for El Paso 2-2 and 8, Yuma 2, Yuma 10/27, Yuma 3, Yuma 6, El Centro 5 and 9, San Diego 4, San Diego 11, and Laredo 7, in the amount of \$876,156.77, \$25,485.84 of which has been invoiced.

17. The Corps awarded a support contract for aerial imaging for the BMGR, Yuma 3, Yuma 6, El Paso 2, and El Paso 8 projects on March 12, 2020, in the amount of \$700,000.00. To date, the contractor has incurred \$10,000.00 in costs, which have not been invoiced.

18. The Corps has also entered into support contracts for environmental monitoring services to assist the Corps with various environmental monitoring, documentation, and program management support functions associated with the Yuma 2, Yuma 10/27, Yuma 3, Yuma 6, San Diego 4, San Diego 11, El Centro 5, El Centro 9, El Paso 2, and El Paso 8 projects. A single Yuma 10/27, 2, 3, and 6 contract for environmental monitoring services was awarded on February 7, 2020, in the amount of \$2,465,128.37. To date, the contractor has completed approximately 50 percent of the work and has submitted invoices, totaling \$1,076,042.76, under this contract. An environmental monitoring contract supporting San Diego 11 and El Centro 5 and 9 was awarded on February 20, 2020, in the amount of \$2,471,257.80. To date, the contractor has completed approximately 35 percent of the work and has submitted invoices totaling \$1,266,343.74. A modification for additional support services on this contract was awarded on July 11, 2020, in the amount of \$1,134,198.00. A third contract for El Paso 2 and 8 was awarded on February 27, 2020, in the amount of \$2,675,348.92. To date, the contractor has completed approximately 50 percent of the work and submitted invoices totaling \$1,262,987.42. An option on the El Paso 2 and 8 contract was exercised to provide cultural assessment work in the amount of \$229,000.00 on February 27, 2020.

19. In addition, the Corps awarded a support contract for Tribal monitoring services supporting the Yuma 3, Yuma 10/27, and Yuma 6 projects. The contract provides Tribal monitors who assist the Corps with identifying, and mitigating impacts to, Tribal cultural resources on lands associated with border barrier construction. The contract was awarded on July, 2020, in the amount of \$172,428.15. To date, invoices have not been received from the contractor.

20. All of the work under the contracts discussed above—both barrier construction contracts and support contracts—is funded, and can only be funded, by unobligated military construction funds made available pursuant to 10 U.S.C. § 2808.

### C. Harms to the Government from an Injunction Regarding Section 2808 Projects

21. The Government will suffer irreparable harm from an injunction against the Section 2808 projects due to the Government's contractual obligations with numerous contractors. As will be discussed below, an injunction that immediately stops construction activities by suspending existing contracts, thereby preventing the Government from taking necessary steps to complete the construction projects as contracted, budgeted, and scheduled, would cause the Government to incur daily costs. These are costs that the Government has not budgeted for and would not have to pay but for an injunction. The inability to pay contractors due to the suspension of contracts will eventually become unsustainable for the Government if the contract suspension required by an injunction persists for an extended time period, at which point the Government will be forced to reduce the scope of work or terminate the contracts to cover the contractors' overhead cost during the work stoppage. The costs associated with terminating these existing contracts are also detailed below. Moreover, even if an injunction were to be lifted at the conclusion of litigation, the Government would then face significant costs to re-start and re-mobilize construction efforts. These costs are discussed in detail in the following three sections.

#### 1. Harms from Section 2808 Contract Suspension

22. As the Commander of the Border District, I have been made aware, by construction personnel and contracting officers, that suspending work on the Section 2808 projects will cause significant, immediate, and irreparable harm to the Government as described below.

23. Should the Court enjoin construction of the 2808 projects, I will immediately direct the District to cease all actions involving construction of the border barrier in those areas. The contracting officers for the projects would then direct the respective contractors to suspend all work on these projects, pursuant to Federal Acquisition Regulation ("FAR") 52.242-14, Suspension of Work (Apr. 1984).

24. Under FAR Clause 52.242-14, a contractor is entitled to an adjustment for any increase in the cost of performance of the contract (excluding profit) necessarily caused by an unreasonable period of time during which the contract is suspended or delayed. For the Section 2808 projects, despite the suspension of work, the contractors will nevertheless continue to incur costs for every day that the contracts are suspended. For the Yuma 2 and 10/27, San Diego 4, Yuma 3, Yuma 6, El Paso 2 (Segment 3) and El Paso 2 (Segment 2), and El Paso 8 contracts, the Government estimates that these costs are likely to include significant costs for equipment the contractors must keep ready for use at multiple locations, costs for security to keep the equipment and materials from being stolen or vandalized, labor costs for the personnel managing the contracts, labor costs for the personnel who have been trained and who are dedicated to execute the tasks under the contracts (i.e., workers whom the contractors would be reluctant to release due to the risk of not being able to rehire them), and potential costs associated with storing construction materials. The Government will be obligated to reimburse these additional costs, which would not have been incurred but for an injunction. Moreover, the Government will be obligated to

reimburse these additional costs from funds that would otherwise be spent on actual border barrier construction.

25. The Government estimates that suspension costs, during the period of inactivity, for the Section 2808 projects currently under contract would be as follows:

a. For San Diego 4, the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$85,744.38 per day (approximately \$2,606,629.00 per month), assuming standard mitigation measures are taken. In addition, the contractor has entered into a lease agreement with an adjacent landowner to give road access to a laydown yard, for which payments in the amount of \$35,078.00 per month will be required to be paid regardless of the status of the work.

b. For Yuma 3, the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$396,582.66 per day (approximately \$12,056,113.00 per month), assuming standard mitigation measures are taken.

c. For Yuma 6, the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$44,235.79 per day (approximately \$1,344,768.00 per month), assuming standard mitigation measures are taken.

d. For El Paso 2 (Segment 3), the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$101,200.61 per day (approximately \$3,076,499 per month), assuming standard mitigation measures are taken.

e. For El Paso 2 (Segment 2) and El Paso 8, the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$130,384.44 per day (approximately \$3,963,687.00 per month), assuming standard mitigation measures are taken.

f. For Yuma 10/27, the total labor, equipment, and overhead costs expected to be incurred while the contract is suspended are currently estimated to be \$423,736.00 per day (approximately \$12,881,574.00 per month), assuming standard mitigation measures are taken.

26. In sum, it is estimated the suspension of the Yuma 10/27, San Diego 4, Yuma 3, Yuma 6, El Paso 2 (Segment 3), and El Paso 2 (Segment 2) and El Paso 8 contracts will cost the Government an additional \$35,929,270.00 per month, plus interest. Additional costs and outstanding payments totaling approximately \$715,175.00 will be incurred for suspending the support contracts described above.

27. In addition to the costs described above, which will be incurred during contract inactivity, there are outstanding invoices for work performed on the Yuma 3 and Yuma 6 contracts and the San Diego 4 contract. Should the Court enjoin construction of the 2808 projects, the Government would be prohibited from paying the outstanding invoices. The contractor

performing the Yuma 3 and Yuma 6 contracts last received its progress payment in August. Since that time, the contractor has requested payment for Yuma 3 in the amount of \$30,348,868.13 and Yuma 6 in the amount of \$1,374,080.00, which are both due in late October. The status of other invoices is as follows:

a. The contractor performing work on San Diego 4 has requested payment and the request is in the process of being approved, in the amount of \$2,161,011.00. Payment is due no later than October 31, 2020.

b. Invoices for progress payments, for work completed in September 2020, have not been submitted and are expected to be submitted for the Yuma 10/27, El Paso 2 (Segment 2) and 8, and El Paso 2 (Segment 3) contracts no later than October 31, 2020. The Government estimates these progress payments, combined, will be in the total amount of approximately \$25,000,000.00, which the Government would not be able to pay if an injunction is imposed.

28. Timely satisfaction of payments that the Government owes protects the solvency of the contractors, who are responsible for millions of dollars in weekly costs to employees, subcontractors, and suppliers. These contractors rely on an expectation that the Government will pay its bills promptly; an injunction would block the Government from fulfilling this essential contractual obligation. In particular, the contractors performing the contracts identified above will likely be forced to self-finance millions of dollars in costs incurred for border barrier work they have already completed, which will cause the Government significant reputational harm, diminish the appetite of builders to pursue important Federal contracts, and thus likely increase the future cost to the Government of similar construction projects.

29. Because an injunction would not prevent a contractor from requesting payment for work previously performed, but would prevent the Government from paying for such work, the Government will be subject to penalties for failure to make prompt payment. As discussed above, the prompt payment interest penalty for July through December 2020 is 1.125 percent per annum, and will accrue if the Government is unable to pay invoices for progress payments within 14 days after receipt of a proper request or to pay invoices for final payment within 30 days after receipt of a proper request. *See FAR 52.232-27 Prompt Payment for Construction Contracts (Jan. 2017) (citing 5 C.F.R. Parts 1315.10(a)(3); 1315.10(a)(10)).*

30. The additional expenses described above would not be incurred but for an injunction. Therefore, to compensate for the additional costs in the event an injunction is not stayed but is later vacated, the Government must suffer the irreparable harm of reducing border barrier mileage, modifying border barrier design to eliminate features (such as lighting, cameras, or sensors), or deferring more military construction projects in order to finance the additional project costs stemming from the injunction. The Corps estimates that for each day the contracts are suspended the expenses associated with an injunction would be equivalent to \$35,000,000.00 per day, which equates to the cost of building 2.8 miles per day of border barrier and attributes. Similarly, any period of suspension will likely result in the payment of acceleration costs to maintain project schedules in the event that the suspension is lifted.

## 2. Harms from Section 2808 Contract Termination

31. If the contracts remain suspended for too long, the Government will be forced to reduce the scope of the contracts or terminate the contracts for the convenience of the Government. The affirmative responsibility to mitigate cost impacts to protect the best interests of the Government and the best interests of our contractors would require to the Corps to consider de-scoping or terminating the Section 2808 contracts within a matter of weeks or months. Standby costs alone are estimated to be approximately \$1,181,884.00 per day, or \$35,929,270.00 per month.

a. Currently, the contracting officer estimates that the cost to terminate the Yuma 2 and 10/27 contract to be at least \$15,986,326.00, in addition to the daily suspension costs discussed above.

b. The estimated cost to terminate the San Diego 4 contract is at least \$4,470,740.00, in addition to the daily suspension costs discussed above.

c. The estimated cost to terminate the Yuma 3 contract, is at least \$16,539,895.00, in addition to the daily suspension costs discussed above.

d. The estimated cost to terminate the Yuma 6 contract is at least \$1,871,238.00, in addition to the daily suspension costs discussed above.

e. The estimated cost to terminate the El Paso 2 (Segment 3) contract is at least \$3,681,179.00, in addition to the daily suspension costs discussed above.

f. The estimated cost to terminate the El Paso 2 (Segment 2) and El Paso 8 contract is at least \$5,277,206.00, in addition to the daily suspension costs discussed above.

32. In the event the Government must terminate for convenience each of the six contracts now in performance and funded through Section 2808, fiscal laws will likely prevent later re-use of some of these funds for any purpose other than a replacement contract for the same border infrastructure. If these funds are unused or unusable, they would automatically return to the Treasury.

33. In addition, if the injunction is vacated after the contractors have demobilized, the costs of remobilizing manpower and resources will be significant.

### 3. Harms from Section 2808 Contract Reprocurement

34. In the event a final judicial ruling favors the Government, but comes after partial termination or termination of these contracts, the Government would also face onerous administrative costs for procuring new contracts to complete the unfinished work left after partial termination or termination. The Corps estimates the reprocurement cost would be approximately \$89,555.00 per contract. But for the injunction, the Corps would not need to expend duplicative administrative costs procuring these same requirements twice.

35. The Government expects the costs of any reprocured contracts to be significantly greater than the original contract costs, in part because the price of compensating replacement contractors willing to take the proven risk of project suspension and nonpayment will be high.



Prices for reprourement contracts will likely reflect increased market prices for labor, materials, and equipment (e.g., steel and concrete). The Government's need to pay these higher costs would be a burden that the Government would not have incurred but for an injunction. Moreover, the Government will be obligated to pay for these additional costs by reducing the mileage of barrier fencing constructed, modifying barrier fencing projects by eliminating features (such as electrical attributes), or deferring more military construction projects.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 19th Day of October, 2020.



Antoinette R. Gant  
Colonel, U.S. Army  
Commanding