

NOS.19-17501, 19-17502, 20-15044

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

SIERRA CLUB, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States,
et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees/Cross-
Appellants,

v.

DONALD J. TRUMP, in his official capacity as President of the United States,
et al.,
Defendants-Appellants/Cross-
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN
SUPPORT OF APPELLEES**

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I. INTERESTS OF AMICUS

The State of Washington respectfully submits this brief as amicus curiae in support of Appellees. Like Appellees, Washington has filed suit challenging Appellants' seizure of military construction funds to build a border wall. *State of Washington v. Donald J. Trump, et al.*, Case No. 2:19-cv-01502-BJR (W.D. Washington) ("*Washington v. Trump*"). The Parties' Cross-Motions for Summary Judgment are fully briefed, and a decision on the Motions is expected in February 2020.

Like many of the Appellee States, Washington is directly injured by Defendants' seizure of \$3.6 billion, in defiance of Congress, to build a border wall. Among the 128 congressionally authorized projects Appellants have cancelled to fund their wall is an \$88.96 million pier and maintenance facility at the Naval Submarine Base Bangor (Bangor) in Washington.

Bangor is part of Naval Base Kitsap on the Kitsap Peninsula. It is home to the U.S. Pacific Fleet of Trident Ballistic Missile submarines.¹ As of September 30, 2017, the base had over 9,000 personnel, including over 6,200 enlisted personnel and over 600 officers.² When that number is expanded to

¹ *Washington v. Trump*, ECF # 17-1 (Exhibit A to the Declaration of Andrew Hughes, attached hereto as Appendix A) at 6–7.

² *Id.* at 3.

include indirect workers, the figure is approximately 45,532.³ The Navy states that “[Naval Base Kitsap] and its supported commands produce substantial economic benefits to its surrounding communities.”⁴ It estimates \$129 million in state and local tax revenues annually, and a total contribution to the regional economy of around \$4 billion.⁵

Congress authorized funding for the pier and maintenance facility (Bangor Project) as part of the John S. McCain National Defense Authorization Act (McCain NDAA) to address important requirements for the security escort for nuclear submarines at this strategically vital base. Pub. Law No. 115-232, § 2201 (Aug. 13, 2018). The project includes a pier for two 250-foot blocking vessels, a boat shop capable of supporting 30 vessels, a fueling station, and a fuel storage tank. According to the Navy these “[f]acilities are required to support the Maritime Force Protection Unit (MFPU) Bangor’s operational mission to provide security escort for submarines” as they move between base and dive

³ *About Us*, CNIC NAVAL BASE KITSAP, https://www.cnic.navy.mil/regions/cnrnw/installations/navbase_kitsap/about.html (last accessed February 19, 2020).

⁴ *Welcome to Naval Base Kitsap*, CNIC NAVAL BASE KITSAP, https://www.cnic.navy.mil/regions/cnrnw/installations/navbase_kitsap.html (last accessed February 19, 2020).

⁵ *Washington v. Trump*, ECF # 17-2 (Exhibit B to the declaration of Andrew Hughes, attached hereto as Appendix B).

points. “This mission supports the stand-up of the Nuclear Weapons Security (NWS) Program mission as mandated by National Security Presidential Directive and Instructions.”⁶

According to the Navy, Bangor no longer has “adequate facilities to support the [Transit Protection Service] mission.” The lack of pier space requires vessels to shift berths extensively and sailors to spend unnecessary days away from home. Fueling for small vessels is currently provided by a converted barge, which was meant to be temporary, due to its high operating costs and heightened risk of oil spills. The Navy has said that, without the Bangor Project, “[f]ull operational capability of the Transit Protection Mission cannot be executed.” The lack of maintenance space in particular “jeopardizes the readiness conditions of escort vessels.” The Bangor Project was expected to be contracted in March 2019 and completed by February 2021.⁷ It is now effectively cancelled.

If funding for the Bangor Project is not restored, the Washington State Department of Revenue estimates that the State will lose over \$2.6 million in direct tax revenues, with local governments losing an additional \$880,000.⁸

⁶ App’x A at 7.

⁷ *Id.* at 8–9.

⁸ *Washington v. Trump*, ECF # 18 (Declaration of Kathy L. Oline, attached hereto as Appendix C) at ¶¶ 19, 22

These losses do not include indirect economic, environmental, and security benefits from the project. For the reasons Appellees explain, these injuries, stemming directly from Defendants' seizure of funds, place Washington squarely within any applicable zone of interests. Cal. Op. Br. 29–34, 45–50.

On September 19, 2019, Washington filed suit to stop Appellants' seizure of military construction funds, including the funds for the Bangor Project. *Washington v. Trump*, ECF # 1. The Parties cross-moved for summary judgment, and the Court heard oral argument on January 23, 2020. *Washington v. Trump*, ECF # 5. A decision on those motions is expected this month.

Washington files this brief as amicus curiae, urging the Court to affirm the district court's declaratory judgment in the States' favor and order an injunction against Defendants' seizure of military construction funding to construct a border wall.

II. ARGUMENT⁹

A. Defendant's Border Wall Is Not "Military Construction" under 10 U.S.C. § 2808.

"When an agency claims to discover in a long-extant statute an unheralded power" with sweeping effects, courts "typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). Defendants are making the unprecedented claim that Section 2808 gives them essentially boundless authority to seize billions in federal funds to build a civil works project Congress has repeatedly considered and refused to build. But Section 2808 does no such thing. Instead, the statute imposes clear limits on what and when the Executive can reprogram funds. Defendants' scheme to take money Congress refused to appropriate for a border wall spread across hundreds of miles is not authorized by Section 2808.

Among the limitations Section 2808 places on the Executive is the "military construction" requirement. This is a substantive limitation on the Executive's power, not merely a paperwork requirement. As Appellees show, Defendants' claim that they can satisfy the "military construction" requirement

⁹ Washington joins Appellees in each of the arguments they raise. Rather than reiterate those arguments here, Washington writes to separately highlight certain additional issues that may aid the Court's decision-making.

merely by paper transfers of land to Fort Bliss would effectively read the “military construction” requirement out of the statute and lead to an unprecedented and likely unconstitutional expansion of the Executive’s authority. Cal. Op. Br. at 17–18; *see also* ER 26 (“Defendants’ interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land.”). For these reasons alone, Defendants’ interpretation of the statute must be rejected.

But Defendants’ reasoning also violates another core principle of statutory interpretation, namely, that courts “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The purpose of Section 2808 is to enable the executive to respond swiftly to military emergencies by building the things necessary to support military mobilization or defense, such as bases, posts, camps, and the like. Nothing in the text or history of Section 2808 indicates that Congress intended to delegate to the Secretary of Defense the authority to build a multi-billion dollar border wall in peacetime, in direct contravention of Congress. It defies common sense to suppose that

Congress intended to effect such a significant result via such an oblique measure. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not . . . hide elephants in mouseholes.”); *Util. Air Regulatory Grp.* at 324 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”) (internal quotation marks omitted).

Defendants’ argument also leads to absurd and contradictory results, as highlighted by their use of Section 284 drug interdiction funds to build their wall. DoD has already authorized the transfer of \$2.5 billion to their interdiction budget for wall construction, using its transfer authority under Section 8005 of the FY 19 DoD Appropriations Act. *See, e.g., State of California v. Trump*, 19-cv-00872-HSG (N.D. California), ECF # 204. But under Section 8005, DoD may only transfer money “for military functions (*except military construction*)[.]” Pub. L. No 115-245, 132 Stat 2981, § 8005 (2018) (emphasis added). That is, the funds DoD transferred under Section 8005 *cannot* be used for military construction functions. DoD’s reliance on Section 8005 to fund a border wall is thus an implicit acknowledgement that border wall projects are *not* “military construction.” Defendants try to smooth over this patent contradiction by arguing that sections of wall built under Section 284 are *not* military construction

because “none of the land is part of a military construction,” but sections of the wall built under Section 2808 “are all being undertaken with respect to a military installation.” *Washington v. Trump*, ECF # 43 at 25. But of course, it is all the same project, in the same sectors of the border, carried out pursuant to a unitary plan.¹⁰ The only difference between the Section 284 projects and the Section 2808 projects is that, according to Defendants, the land underneath the latter has been administratively transubstantiated into Fort Bliss. That Defendants’ favored reading of the statute leads to such arbitrary results is yet another reason to reject it. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) (“[S]tatutory interpretations which would produce absurd results are to be avoided.”).

Moreover, Defendants’ argument runs squarely into their claim that building a wall will enable the removal of troops from areas in which the wall is built. *See* ER 92. By any reasonable definition, a “military installation” is a place where military activity occurs. *See* 32 C.F.R. § 552.31 (“An installation is real estate and the improvements thereon which is under the control of

¹⁰ *See* President Donald J. Trump’s Border Security Victory, Feb. 15, 2019, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/> (describing plan to seize \$8.1 billion to build border wall from three funding sources, including Section 284 and Section 2808 funding); *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 897–98 (N.D. Cal 2019) (identifying Section 284 projects in, *inter alia*, Yuma, El Paso, and El Centro sectors); ER 94 (identifying Section 2808 projects in same sectors).

the Department of the Army, *at which functions of the Department of the Army are carried on[.]*”) (emphasis added); *United States v. Phisterer*, 94 U.S. 219, 222 (1876) (defining the term “military post” to mean “a place where troops are assembled, where military stores . . . are kept or distributed, where military duty is performed or military protection afforded, where something, in short, more or less closely connected with arms or war is kept or is to be done”). Defendants cannot make land part of a “military installation” for the express purpose of *withdrawing* the military from it and replacing them with a law enforcement wall.

Finally, Defendants’ wall construction is not “with respect to” any “military installation,” *contra* 10 U.S.C. § 2801(a), because Defendants have failed to articulate any meaningful connection between Fort Bliss (or the Goldwater Range) and a border wall. *See* ER 25 (casting doubt on whether the military construction requirement can be satisfied when the construction “is otherwise wholly unrelated to the installation’s functions, purpose, or even geography”). Even in the context of an otherwise “capacious phrase[.]” the Supreme Court has warned against “‘uncritical literalism’ leading to results that ‘no sensible person could have intended.’” *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion) (quoting *Gobeille v. Liberty Mut. Ins.*

Co., 136 S. Ct. 936, 943 (2016)); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (extending phrase “relate to” to “the furthest stretch of its indeterminacy . . . would be to read Congress’s words of limitation as mere sham.”); *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (phrase “related to” as used in preemption statute did not include “tenuous, remote, or peripheral” connections (citation and internal quotation marks omitted)). Given Section 2808’s intent to authorize *military* construction for *military* purposes, it is clear that the construction must have some functional, i.e., military, connection to the installation. Defendants have failed to articulate any such connection. Rather, Defendants have offered a purely civilian rationale—assistance to DHS’s civilian mission to deter unlawful migration. But Section 2808 does not permit construction that has no functional relationship to any military installation.

Defendants’ scheme to assign land under some, but not all, proposed sections of border wall is patently a litigation tactic. To make matters worse, it is not clear that anything would prevent Defendants from re-assigning land back to DHS following construction of border wall segments. The obvious intent of Section 2808 is to permit the armed forces to act swiftly to secure our nation in times of emergency; it is not to promote this kind of gamesmanship. Defendants

cannot evade the clear limits of Section 2808 by purporting to “assign” land across four states to a military base outside El Paso, to build projects Congress refused to fund and the military will not use.

B. The Border Wall Does Not Serve a Military Purpose and Therefore Does not “Support [the] Use of the Armed Forces.”

Moving to the question whether the border wall is “necessary to support [the] use of the armed forces,” 10 U.S.C. § 2808(a), Defendants argue that the Secretary of Defense’s claim of necessity is either unreviewable or entitled to maximal deference because it concerns the military. Gov’t Op. Br. at 40–42.

As Appellees correctly explain, however, Defendants’ deference argument lacks merit because this case does not “concern[] the relative importance of a particular military interest.” *Contra* Gov’t Op. Br. at 40 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). Rather, as Defendants have admitted, it turns primarily on whether the text of the statute gives the Secretary the authority he claims. *See Sierra Club v. Trump*, Case No. 19-cv-00892-HSG (N.D. California), ECF # 236 (Def.’s Mot. for Partial Sum. Judg.), at 24 (“Plaintiffs’ claims turn on the meaning and interpretation of § 2808[.]”). Determining whether Defendants acted consistent with a statute is plainly within this Court’s competence. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Indeed, “refus[ing] to give effect to a statute that regulated

Executive conduct, . . . necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action,” and “would systematically favor the Executive Branch over the Legislative Branch.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

As Appellees explain, Defendants’ claim fails at the threshold because their *stated* justifications for the border wall are facially inadequate under Section 2808. Under the statute, the Secretary is authorized to build military construction projects only if they are necessary to support a military mission. Defendants’ invocation of Section 2808 is facially deficient because they rely on fundamentally law enforcement—not military—justifications.

In his decisional memo, Secretary Esper says the wall will “deter illegal entry, increase the vanishing times of those illegally crossing the border, and channel migrants to ports of entry.” ER 92. Elsewhere, defendant agencies write that the wall may “[i]mprove CBP’s detection, identification, classification, and response capabilities,” ER 87; “reduce the challenges to CBP,” ER 144; “serve to channel illegal immigrants towards locations that are operationally advantageous to DHS,” *id.*; and “give a distinct and enduring advantage to USBP as a force multiplier,” ER 126. But “[s]ecuring the border . . . [is], of course, law

enforcement activit[y].” *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). Moreover, it is an activity that the military is largely prohibited from engaging in under the Posse Comitatus Act, 18 U.S.C. § 1385. In fact, to the extent that “an actual or imminent mass influx of aliens . . . near a land border, presents urgent circumstances requiring an immediate Federal response,” the Immigration and Naturalization Act specifically provides that the Attorney General may call upon “State or local law enforcement officer[s]”—not the armed forces—to assist in carrying out DHS’ law enforcement functions. 8 U.S.C. § 1103(a)(10).

Defendants may not salvage their facially deficient rationale by arguing that the wall will reduce DoD’s role in supporting DHS’ civilian mission. Gov’t Op. Br. at 42.¹¹ Even if this were true, the fact remains that the purpose of a border wall is to secure the border, which is simply not a military function. Moreover, Section 2808 authorizes only construction necessary to support the armed forces, not construction that replaces the armed forces and that they will

¹¹ Defendants’ attempt to analogize border wall construction to “construction of fencing . . . around a military base” is unavailing. Gov’t Op. Br. at 42. By design, the United States is not a giant military base with “troops . . . guard[ing] the perimeter.” *Id.* Instead, border security in America is a law enforcement function, carried out by a civilian agency subject to civilian control.

not use. The Secretary's stated reasons for his actions thus fail under Section 2808.

Any argument for deference evaporates in the face of clear and contrary congressional intent. Congress, too, is owed deference in its national security judgments. *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (“[The President] may not disregard limitations that Congress has, in proper exercise of its own [military] powers, placed on his powers.”). Congress has repeatedly made clear that a border wall *is not* necessary to secure our southern border. It has gone so far as to vote to disapprove of the President's Proclamation twice. *See* H.R.J. Res. 46, 116th Cong. (2019); S.J. Res. 54, 116th Cong. (2019); 165 Cong. Rec. H8061-71 (daily ed. Sept. 27, 2019). Meanwhile, Congress has determined that the 128 projects Defendants now seek to cancel *are* necessary to ensure military preparedness. Defendants fail to explain why *their* claim of military necessity is entitled to deference, even as they run roughshod over Congress'. As Justice Jackson famously put it: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Congress has exercised its domestic policymaking prerogative to determine that a multi-billion-dollar border wall is not necessary to secure our southern border. Section 2808 does not give Defendants unreviewable discretion to overrule Congress.

C. This Court’s Prior Published Opinion on the Zone-of-Interests Test Is Binding.

For the reasons explained in Appellees’ opening brief, no zone-of-interests test applies to Appellees’ *ultra vires* claims. Cal. Op. Br. at 29–30. This is true whether these claims are construed as standalone *ultra vires* claims or claims that Defendants acted “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” under the APA. 5 U.S.C. § 706(2)(C). When a statutory violation is asserted under the APA, “the relevant zone of interests is not that of the APA itself, but rather ‘the zone of interests to be protected or regulated by the statute that [the plaintiff] says was violated.’” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)). But when the claim is that *no statute* permits agency action, the plaintiff is not required to show that its interests are protected by inapplicable statutes invoked by the agency. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n. 14 (D.C. Cir. 1987). “Otherwise, a meritorious litigant, injured by

ultra vires action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest.” *Id.* Accordingly, in its earlier *Sierra Club* opinion, this Court expressed doubt “that there could be a zone of interests requirement for a claim alleging that official action was taken in the absence of all authority.” *Sierra Club v. Trump*, 929 F.3d 670, 700–01 (2019).

But to the extent such a test applied, Defendants are incorrect that Section 2808 provides the relevant zone of interests. In *Sierra Club v. Trump*, a three-judge motions panel of this Court held that if the zone-of-interests test applies at all to Defendants’ diversion of appropriated funds, “it requires [the Court] to ask whether Plaintiffs fall within the zone of interests of the Appropriations Clause,” not the statute Defendants claimed authorized their action. *Id.* at 703. The Court further wrote that, “[t]o the extent any zone of interests test were to apply to Plaintiffs’ constitutional claims, we hold that it would be satisfied here.” *Id.* at 677.

Sierra Club is binding under well-settled circuit authority. Under this Court’s rules, published orders of motions panels are binding law of the circuit. *See* Ninth Circuit Rule 36-1; *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015)

(“[A] a motions panel’s published opinion binds future panels the same as does a merits panel’s published opinion[.]”).

Defendants suggestion that the panel’s decision is irreconcilable with the Supreme Court’s order in *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019), is incorrect. *Contra* Defs’ Br. at 26. The Supreme Court’s order merely stated that “the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with Section 8005 [of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, 132 Stat. 2981 (2018)].” The Supreme Court did not explain its reasoning. It is impossible to discern the specific basis for the Supreme Court’s summary disposition, let alone whether that basis is irreconcilable with the Ninth Circuit’s zone-of-interests analysis. Even if the Court had reached the specific zone-of-interests issue raised here, the standard it applied was too tentative to meet the “high standard” of being “clearly irreconcilable” with the Ninth Circuit’s decision, which was conclusive. *See Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (describing irreconcilability as a “high standard”). Therefore, with respect to the zone of interests, the Court is required to adhere to the well-reasoned holding in the prior decision in *Sierra Club*.

D. Vacatur of the Secretary’s Decision to Unlawfully Divert Funds Is an Appropriate Remedy.

If this Court concludes that Defendants’ seizure of funds violates the APA, it should remand to the District Court with instructions that it vacate Defendants’ seizure of military construction funds. Under the APA, “[t]he reviewing court *shall* . . . set aside [unlawful] agency action.” 5 U.S.C. § 706(2) (emphasis added). Thus, where a plaintiff “prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency’s order.” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *see also Se. Alaska Conserv. Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 654 (9th Cir. 2007) (“Under the APA, the normal remedy for an unlawful agency action is to ‘set aside’ the action.”).

Vacatur by its nature has complete effect. Following the APA’s clear statutory command, unlawful agency action is generally vacated or “set aside” in its entirety, not somehow limited in application to persons other than the plaintiffs. *See, e.g., Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (“[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”) (quotation omitted).

While agency action in violation of the APA is “ordinarily” held “invalid,” unlawful agency action “can be left in place” during remand “when equity demands.” *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). As Appellees amply demonstrate, there is no equitable basis for permitting Defendants to continue down their unlawful, unconstitutional path. Nor is there any reason to think that Defendants can somehow remedy their unlawful scheme on remand. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (holding remand without vacatur was inappropriate where the agency action had a “fundamental flaw”). Consequently, vacatur, the relief mandated by the APA, is appropriate here.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in Appellees’ briefs, this Court should: (1) affirm the district court’s declaratory judgment in the States’ favor; (2) reverse the district court’s denial of an injunction to the States; and (3) remand with instructions to vacate and enjoin Defendants’ seizure of military construction funding to construct a border wall.

RESPECTFULLY SUBMITTED this 20th day of February, 2020.

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Appendix A

Exhibit A

DEPARTMENT OF THE NAVY FISCAL YEAR (FY) 2019 BUDGET ESTIMATES



JUSTIFICATION OF ESTIMATES FEBRUARY 2018

<p>Military Construction Active Force (MCON) and Family Housing</p>

1. Component NAVY		FY 2019 MILITARY CONSTRUCTION PROGRAM						2. Date 05 FEB 2018			
3. Installation and Location: N68436 NAVAL BASE KITSAP BREMERTON WA BANGOR, WASHINGTON				4. Command Commander Navy Installations Command			5. Area Const Cost Index 1.12				
6. Personnel Strength:		PERMANENT			STUDENTS			SUPPORT			TOTAL
		OFF	ENL	CIV	OFF	ENL	CIV	OFF	ENL	CIV	
A. As Of 09-30-17		620	6212	2416	0	94	0	33	34	0	9409
B. End FY 2022		602	5952	2416	0	94	0	33	34	0	9131
7. INVENTORY DATA (\$000)											
A. TOTAL ACREAGE ..(13649 Acres)											
B. INVENTORY AS OF 30 SEP 2017 4,267,844											
C. AUTHORIZATION NOT YET IN INVENTORY 486,992											
D. AUTHORIZATION REQUESTED IN THIS PROGRAM 88,960											
E. AUTHORIZATION INCLUDED IN FOLLOWING PROGRAM 0											
F. PLANNED IN NEXT THREE PROGRAM YEARS 0											
G. REMAINING DEFICIENCY 932,198											
H. GRAND TOTAL 5,775,994											
8. Projects Requested In This Program											
<u>Cat</u>						<u>Design Status</u>				<u>Cost</u>	
<u>Code</u>	<u>Project Title</u>			<u>Start</u>	<u>Complete</u>			<u>Scope</u>			<u>(\$000)</u>
15120	Pier and Maintenance Facility			10/2016	10/2018			0 LS			88,960
TOTAL										88,960	
9. Future Projects:											
A. Included In The Following Program:											
B. Major Planned Next Three Years:											
C. R&M Unfunded Requirement (\$000):										2,440,340	
10. Mission or Major Functions:											
Supports the Trident Submarine Launched Ballistic Missile System by maintaining and operating facilities for administration and personnel support for operations of the submarine force. Homeport for guided missile submarines (SSGN) and ballistic missile submarines (SSBN). Provides logistics support to other activities in the area and acts as host for the following: Trident Submarine Group, Puget Sound Navy Shipyard and Intermediate Maintenance Facility, Trident Training Facility, Strategic Weapons Facility, Pacific, Marine Corps Security Force.											
11. Outstanding Pollution and Safety Deficiencies (\$000):											
A. Pollution Abatement(*):										0	
B. Occupational Safety and Health(OSH) (#):										0	

1. Component NAVY	FY 2019 MILITARY CONSTRUCTION PROGRAM	2. Date 05 FEB 2018
3. Installation and Location: N68436 NAVAL BASE KITSAP BREMERTON WA BANGOR, WASHINGTON	4. Command Commander Navy Installations Command	5. Area Const Cost Index 1.12

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1. Component NAVY	FY 2019 MILITARY CONSTRUCTION PROGRAM			2. Date 05 FEB 2018
3. Installation(SA) & Location/UIC: N68436(BA) NAVAL BASE KITSAP BREMERTON WA (BANGOR WA) BANGOR, WASHINGTON			4. Project Title Pier and Maintenance Facility	
5. Program Element 0212176N	6. Category Code 15120	7. Project Number P907	8. Project Cost (\$000) 88,960	
9. COST ESTIMATES				
Item	UM	Quantity	Unit Cost	Cost(\$000)
PIER AND MAINTENANCE FACILITY	LS			57,150
TPS PIER CC15120 (28,265SF)	m2	2,625.91	10,160.2	(26,680)
ACCESS TRESTLE TO PIER CC15190 (16,640SF)	m2	1,545.91	11,505.53	(17,790)
BOAT SHOP CC21358 (18,290SF)	m2	1,699.2	4,469.22	(7,590)
SMALL CRAFT FUELING STATION CC12220	OL	4	148,377.56	(590)
SMALL CRAFT READY FUEL STORAGE CC12230 (40,000GA)	L	151,416.47	8.45	(1,280)
BUILT-IN EQUIPMENT	LS			(220)
SPECIAL COSTS	LS			(2,510)
OPERATION & MAINTENANCE SUPP INFO (OMSI)	LS			(440)
SUSTAINABILITY AND ENERGY FEATURES	LS			(50)
SUPPORTING FACILITIES				23,000
SPECIAL CONSTRUCTION FEATURES	LS			(2,320)
SITE PREPARATIONS	LS			(1,220)
SPECIAL FOUNDATION FEATURES	LS			(490)
PAVING AND SITE IMPROVEMENTS	LS			(770)
ANTI-TERRORISM/FORCE PROTECTION	LS			(50)
ELECTRICAL UTILITIES	LS			(450)
MECHANICAL UTILITIES	LS			(1,320)
ENVIRONMENTAL MITIGATION	LS			(16,380)
SUBTOTAL				80,150
CONTINGENCY (5%)				4,010
TOTAL CONTRACT COST				84,160
SIOH (5.7%)				4,800
SUBTOTAL				88,960
TOTAL REQUEST ROUNDED				88,960
TOTAL REQUEST				88,960
EQUIPMENT FROM OTHER APPROPRIATIONS (NON ADD)				(2,107)

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10. Description of Proposed Construction: <p>Constructs a pile-supported reinforced concrete berthing pier for two 250-foot Blocking Vessels (BVs) with integrated wave screens to protect adjacent shoreline from short period waves, underside pier utilities from floating debris, and to provide shelter for Transit Protection System (TPS) small craft during severe weather conditions.</p> <p>Constructs a pile-supported reinforced concrete access trestle to the pier.</p> <p>Constructs a steel framed, metal insulated paneled wall and roof pre-engineered building boat shop with high bay, mezzanine, pedestal jib cranes and reinforced concrete foundation, slab on grade capable of supporting approximately 30 small craft. The facility will include personnel support spaces with associated information systems. Project includes facility elements to support relocation and installation of existing equipment.</p> <p>Constructs a small craft fueling station to dispense diesel fuel marine with four outlets, dispensing pedestal-type commercial pumps, piping to fuel storage tank, hoses, floodlights and grounding devices, electrical power, and fire protection.</p> <p>Constructs a small craft ready fuel storage tank and necessary infrastructure required to support functions and operations at each facility.</p> <p>This project will provide Anti-Terrorism/Force Protection (AT/FP) features and comply with AT/FP regulations, and physical security mitigation in accordance with DoD Minimum Anti-Terrorism Standards for Buildings.</p> <p>Special costs include Post Construction Contract Award Services (PCAS). In addition, this item includes the costs for environmental mitigation PCAS and building control systems. Costs include Washington State gross sales receipt tax.</p> <p>Operations and maintenance support information (OMSI) is included in this project.</p> <p>Department of Defense and Department of the Navy principles for high performance and sustainable building requirements will be included in the design and construction of the project in accordance with federal laws and Executive Orders. Low Impact Development (LID) will be included in the design and construction of this project as appropriate.</p>				

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<p>Special construction features include a wave attenuation system mounted to the underside of the trestle and pier deck, port security barrier mooring points and a cathodic protection system.</p> <p>Site preparation includes clearing, grubbing, and logging, site grading, excavation, and selective demolition.</p> <p>Mechanical utilities include potable water lines, sanitary sewer lines, fire protection systems, storm water lines, and an industrial waste collection system.</p> <p>Environmental mitigation in compliance with state and local law includes sound mitigation to protect mammal, fish and water fowl, permits and monitoring, biological and archeological monitoring, protection of tribal trust resources and assets, environmental restoration, habitat conservation, in-lieu fee program, shoreline protection and restoration, and deck features and lighting for fish habitat concerns.</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>				
<p>11. Requirement: Adequate: Substandard:</p> <p>PROJECT:</p> <p>Constructs a general purpose berthing pier and trestle with controlled access, vessel maintenance facility with parking, fuel distribution and storage system.</p> <p>(New Mission)</p> <p>REQUIREMENT:</p> <p>Facilities are required to support the Maritime Force Protection Unit (MFPU) Bangor's operational mission to provide security escort for submarines through protection by presence and defense by force during transit between homeport and the surface/dive points in the Strait of Juan de Fuca and test range. This mission supports the stand-up of the Nuclear Weapons Security (NWS) Program mission as mandated by National Security Presidential Directive and Instructions.</p> <p>CURRENT SITUATION:</p>				

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<p>Mission requirements have outpaced the ability to provide adequate facilities to support the TPS mission at Bangor. As a result, extensive berth shifts and unnecessary days spent away from homeport occur when no pier space is available. Bangor berthing is required approximately 253 days per year.</p> <p>The BVs moor at the Marginal North Pier in the waterfront restricted area, if space is available, under naval ordnance safety and security activity waiver conditions. The explosives safety quantity-distance arc from explosives handling wharf and the increase in operational tempo multiplies the frequency of encumbrance at this berth.</p> <p>Small craft maintenance function is currently being executed in three facilities and seven temporary storage structures near the head of service pier.</p> <p>Diesel fuel is provided using a converted Ship Waste Oily Barge (SWOB). The authorization to continue to operate the SWOB in this capacity is under an interim authority to operate (IATO) for one year. The IATO is renewable annually and contingent on implementation of good custodianship measures and approximately \$800K is spent on eight to fourteen week dry-docking overhaul and tank preservation inspection, survey, and repair operations.</p> <p>The SWOB is currently being moored inboard on the interim floats added to K/B Dock adjacent to the TPS vessel berths to ensure crew endurance limits can be maintained. It occupies moorings originally intended for two vessels. Resupply operations require it to be towed from its moored location to Defense Logistics Agency Manchester and back, a 12 hour evolution. The feasibility of continued use of the SWOB as a fuel container due to environmental concerns is evaluated annually.</p> <p>This project is not sited in a 100-year flood plain.</p> <p>IMPACT IF NOT PROVIDED:</p> <p>Full operational capability of the TPS mission cannot be executed. NWS posture will continue to fall short of DoD directives and requirements. The 250-foot BVs will remain in a nomadic state with continued berth shifts and days spent away from homeport, due to lack of adequate, dedicated pier space.</p> <p>Maintenance will continue to be performed in multiple facilities that are approximately 47 percent of the required space. Inadequately sized facilities will continue to negatively impact maintenance schedules, which</p>				

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jeopardizes the readiness conditions of escort vessels, create operational inefficiencies, and compound shortfalls.				
MFPFU will continue fueling operations using a converted fuel system that was designed for temporary use.				
12. Supplemental Data:				
A. Estimated Design Data:				
1. Status:				
(A) Date design or Parametric Cost Estimate started	10/2016			
(B) Date 35% Design or Parametric Cost Estimate complete	07/2017			
(C) Date design completed	10/2018			
(D) Percent completed as of September 2017	15%			
(E) Percent completed as of January 2018	35%			
(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	N/A			
3. Total Cost (C) = (A) + (B) = (D) + (E):				
(A) Production of plans and specifications	\$5,338			
(B) All other design costs	\$2,669			
(C) Total	\$8,007			
(D) Contract	\$6,450			
(E) In-house	\$1,557			
4. Contract award:	03/2019			
5. Construction start:	04/2019			
6. Construction complete:	02/2021			
B. Equipment associated with this project which will be provided from other appropriations:				
<u>Equipment</u>	<u>Procuring</u>	<u>FY Approp</u>		
<u>Nomenclature</u>	<u>Approp</u>	<u>or Requested</u>	<u>Cost (\$000)</u>	
Collateral Equipment	OMN	2020	74	
Com/Data	OMN	2020	200	
IDS	OMN	2020	50	
Pier Modular Firing Positions	OMN	2020	180	
Port Security Barrier NEW	OMN	2020	150	
Port Security Barrier Relocation	OMN	2020	953	
Smart Grid Equipment	OMN	2020	500	
JOINT USE CERTIFICATION:				
The Regional Commander certifies that this project has been considered for				

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<p>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 are benefited by this project.</p> <p>Activity POC: Project Development Lead Phone No: 360 396-0074</p>				

Appendix B

Exhibit B

NAVAL BASE KITSAP

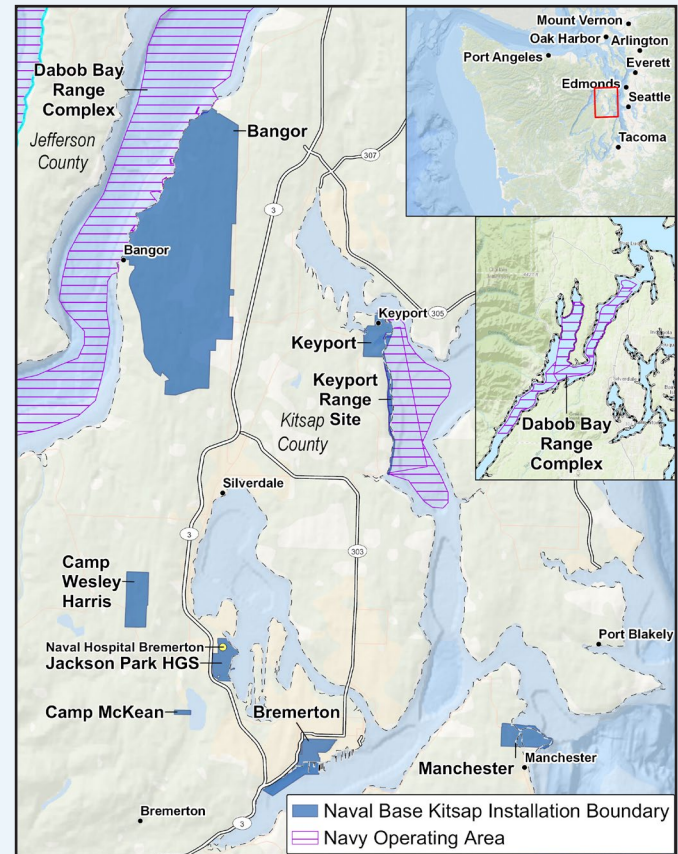
OPERATIONS AND ECONOMIC CONTRIBUTIONS



OPERATIONAL OVERVIEW

Naval Base Kitsap (NBK) is the third largest installation in the U.S. Navy and arguably the most complex. NBK is home to multiple high-value, strategic missions including all types of submarines, two aircraft carriers, the Puget Sound Naval Shipyard (PSNS), and the largest fuel depot in the Continental U.S. These facilities provide critical support to the National Defense Strategy. NBK is also the home of several Research, Development, Testing, and Evaluation (RDT&E) Commands who work to maintain the U.S. Navy's technological advantage.

NBK's primary areas of operation include Bangor, home to Submarine Group 9, Bremerton, homeport to Carrier Strike Group 3 and PSNS, Keyport, home to Naval Undersea Warfare Center, and Manchester Fuel Depot. NBK also manages outlying areas in Washington and Alaska. Our operating areas also include the Dabob Bay Range Complex in Hood Canal, which is vital to the mission of many of our supported commands.



ECONOMIC HIGHLIGHTS

NBK's contribution* to the regional economy in FY 2017 totaled \$4.0 billion and included:

- **\$1.9 billion in industry output** - \$1.1 billion from payroll; \$792 million from operations and contracts; and \$14 million from visitor spending.
- **\$2.1 billion million in direct military and civilian payroll** expenditures to personnel residing in the Region of Influence (ROI).^{**}
- **45,532 jobs** - including **31,585** military/civilian personnel residing in ROI and an estimated **13,947** jobs stimulated from base operations and maintenance, personal spending, and visitor spending.
- **\$129 million*** in state and local tax revenues** - \$89.2 million from payroll; \$38.5 million from operations and maintenance; and \$1.6 million from visitor spending.



Source: NBK/NAVMAG II Economic Impact Assessment, December 2018 (using financial data from FY 2017).

*EIA results are rounded as appropriate for presentation purposes.

**The ROI for the NBK EIA includes: Kitsap, Jefferson, and Mason counties.

***Provided for informational purposes, not included in the Total Economic Impact.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

NO. 2:19-cv-1502

DECLARATION OF KATHY L.
OLINE IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I, KATHY OLINE, declare and affirm:

1. I am the Assistant Director of Research and Fiscal Analysis for the Washington State Department of Revenue. I have been an employee of the Department of Revenue for 31 years. I have personal knowledge of the matters stated herein, and if called as a witness, I would testify competently to this information.

2. In my position, I am responsible for making revenue projections based on changes to tax laws, or otherwise to project the increases or decreases in state tax revenue as a result of various events or circumstances.

3. Through the Department of Defense (DoD) Fact Sheet on Section 2808 Funding Pool, attached hereto as Exhibit A, and the Department of the Navy's FY 2019 Budget Estimates,

1 attached hereto as Exhibit B, I have learned the following background facts. I have then made
2 projections about the loss of tax revenue to Washington State as a result.

3 4. I understand that Congress appropriated \$88.96 million for a Pier and
4 Maintenance Facility at Bangor Base in Kitsap County, Washington. The Bangor base is the
5 home of the U.S. Pacific Fleet of Trident Ballistic Missile submarines. It is the sole Trident
6 submarine base on the west coast.

7 5. These funds were allocated to construct a pier for two 250-foot blocking vessels,
8 a boat shop, and a small-craft fueling station and storage tank. According to DoD, these
9 "Facilities are required to support the Maritime Force Protection Unit (MFPU) Bangor's
10 operational mission to provide security escort for submarines through protection by presence
11 and defense by force during transit between homeport and the surface/dive points in the Strait of
12 Juan de Fuca and test range. This mission supports the stand-up of the Nuclear Weapons Security
13 (NWS) Program mission as mandated by National Security Presidential Directive and
14 Instructions." Currently, "mission requirements have outpaced the ability to provide adequate
15 facilities to support the [transit protection] mission at Bangor." When no pier space is available,
16 sailors are subject to "extensive berth shifts and unnecessary days spent away from homeport."
17 The DoD advises that if the pier is not provided, "full operational capability of the [transit
18 protection] mission cannot be executed. NWS posture will continue to fall short of DoD
19 directives and requirements. The 250-foot [blocking vessels] will remain in a nomadic state with
20 continued berth shifts and days spent away from homeport, due to lack of adequate, dedicated
21 pier space."

22 6. The Trump Administration has announced it is reprogramming the \$88.96 million
23 appropriated by Congress for the pier and maintenance facility at the Bangor Base described
24 above to construct portions of a wall at the southern border of the United States.

25 7. I have analyzed the tax implications of the reprogramming of these funds to
26 Washington State's general fund revenues.

1 8. Washington State imposes a retail sales tax or use tax on federal government
2 contracting projects such as the planned project at the Bangor Base. Sales and use tax is the
3 single largest source of State tax revenue. Both the sales tax and use tax are imposed at the same
4 rate of 6.5% for the State, plus an additional amount for local governments.

5 9. In government contracting projects, the sales or use tax is owed by the contractor.
6 Washington calculates its sales or use tax based on the value of the materials either purchased in
7 this State or used in the construction. Whether the sales or use tax applies depends on whether
8 the materials were purchased in this State, but the two taxes are imposed at the same rate.

9 10. In addition, Washington imposes a business and occupation (B&O) tax on those
10 doing business in this State. This includes government contracting projects like the one that was
11 scheduled for Bangor. B&O tax is based on a business's gross receipts. For government
12 contracting projects, the rate of B&O tax is .484% of gross receipts.

13 11. To calculate the loss of tax revenue to Washington resulting from the
14 Administration's reprogramming of \$88.96 million designated for a construction project in this
15 State, I needed to estimate the amount of the money that was for materials, and the amount of
16 money for labor, because the sales or use tax only applies to materials.

17 12. Based on our general understanding of government contracting projects, I
18 estimated that approximately 35% of the total construction cost is for materials.

19 13. Using this proportion of material versus labor cost, I used the estimate of \$31.136
20 million for material costs, and \$57.824 million for labor costs. I also estimated that half of the
21 work would occur in Fiscal Year 2020, and half of the work in Fiscal Year 2021.

22 14. I then took the \$31.136 million for material costs, and multiplied it by .065, or
23 the 6.5% rate for sales or use tax. This results in approximately \$2.02 million in sales or use tax
24 received by Washington over the life of the project. That amount is then divided in half for the
25 two fiscal years, resulting in approximately \$1.01 million in sales or use tax per fiscal year.
26

1 15. To calculate B&O tax, I used the full \$88.96 million price of the contract. I
2 assumed this amount would be paid by the United States to a general contractor, who would then
3 purchase materials and perform the labor for the contract. I then multiplied this amount by
4 .00484, or .484%, the B&O tax rate for government contracting. This resulted in approximately
5 \$430,000 in tax. I also assumed that this work was spread evenly between Fiscal Year 2020 and
6 Fiscal Year 2021. This resulted in approximately \$215,000 in tax for each of these fiscal years.

7 16. In addition, I assumed that the general contractor in the paragraph above
8 purchased the materials in Washington from another business. This separate business would then
9 also owe B&O tax based on the purchase price of these materials. The B&O tax rate for retailing
10 is .00471, or .471%. I used the \$33.136 million material cost described above, for a resulting
11 B&O tax liability on this retailing business of about \$146,000 in additional B&O tax. I also
12 assumed that these purchases were spread evenly between Fiscal Year 2020 and Fiscal Year
13 2021. This resulted in approximately \$73,000 in tax for each of these fiscal years.

14 17. These amounts, with some rounding, are reflected in the following chart:

15

Fund - Source	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
GF-State - Retail Sales Tax	(1,010,000)	(1,010,000)	0	0	0	0
GF-State - Business and Occupation Tax	(289,000)	(289,000)	0	0	0	0
Performance Audit - Retail Sales Tax ¹	(2,000)	(2,000)	0	0	0	0
Fiscal Year Total	(1,301,000)	(1,301,000)	0	0	0	0
Biennial Total		(2,602,000)		0		0

20

21 18. In making these estimates, I assumed that the Bangor project will not go forward
22 without federal funding.

23 19. Based on the above methodology, I estimate that the total tax loss to Washington
24 State resulting from loss of the Bangor construction project will be approximately \$2.6 million.

25
26 ¹ Per RCW 82.08.020(5) and RCW 82.12.0201, 0.16 percent (0.0016) of the state sales and use taxes collected are deposited into Fund 553 - Performance Audits of Government Account.

21. This estimate includes only state tax revenue lost as a direct result of reprogramming of federal funds for the Bangor project, and does not include other economic losses to Washington State.

22. In addition to impacts to the State general fund, local governments in Washington will also suffer a loss in tax revenue. Using a similar methodology to that described above, but applying approximate rates of sales or use tax for local governments, I determined that there would be an estimated loss of \$880,000 to local governments as a result of losing the Bangor project, with half of that loss occurring in Fiscal Year 2020 and half in Fiscal Year 2021. This means the combined estimated tax loss to Washington State and local governments as a result of the reprogramming of funds described above is \$3.48 million.

I declare under penalty of perjury of the laws of Washington that the foregoing is true and correct.

DATED this 24th day of October, 2019.

DATED this 24th day of October, 2019.

Kathy L Oline
KATHY L. OLIVE
Assistant Director
Research & Fiscal Analysis
Washington State Department of Revenue

KATHY L. OLIVE
Assistant Director
Research & Fiscal Analysis
Washington State Department of Revenue