



U.S. Department of Justice

Environment and Natural Resources Division

90-1-0-16911

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December 12, 2022

The Honorable Douglas A. Ducey
Governor of Arizona
Office of the Governor
1700 W. Washington St.
Phoenix, AZ 85007
(602) 542-4331

The Honorable Mark Brnovich
Attorney General
Office of the Attorney General, Phoenix Office
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025

Re: Notice of Prospective Filing of Legal Action Regarding Unlawful Construction
and Trespass on Federal Land

Dear Governor Ducey and Attorney General Brnovich:

We are writing to inform you that the United States, on behalf of the United States Department of Agriculture and the United States Department of the Interior, intends to file legal action in relation to the State of Arizona's unlawful trespass and construction of makeshift shipping container barriers on federal lands along the United States' border with Mexico, as well as the Governor's executive order purporting to authorize the same. The State of Arizona's actions on lands held by the U.S. Forest Service and the U.S. Bureau of Reclamation violate federal law, present serious public safety risks and environmental harms, and interfere with federal agencies' ability to carry out their official duties. The State's actions have substantially curtailed federal law enforcement personnel from freely accessing the border area, and Arizona's placement of armed guards on federal land risks putting federal law enforcement officials in danger. Moreover, Arizona's actions stymie federal efforts to complete construction of border infrastructure projects in certain locations.

Since August 2022, Arizona and its agents have been installing shipping containers as barriers on the United States' properties along the international border with Mexico. The United

States owns these lands in fee and through an easement on Cocopah Tribal lands. Through its plenary power under the Property Clause of the U.S. Constitution, Congress has tasked the Forest Service and the Bureau of Reclamation with administering their occupancy and use. See 16 U.S.C. § 551 (Forest Service); 43 U.S.C. § 387 (Reclamation). The agencies do so under detailed regulations. See, e.g., 36 C.F.R. § 251.50 (Forest Service); 43 C.F.R. § 429.1 (Reclamation). Those regulations require environmental reviews and agency authorization before any entity may occupy and use the respective federal lands. The Forest Service and the Bureau of Reclamation informed you or your representatives of these requirements, of Arizona's trespasses, and of the negative environmental impacts of your actions, in multiple communications, including letters dated October 7, 2022 from the Forest Service and October 13, 2022 from the Bureau of Reclamation, and during a meeting on November 29, 2022. Nonetheless, Arizona has not ceased its activities or sought the necessary authorizations.

Arizona's unauthorized construction of shipping container barriers on federal lands frustrates Congress' Property Clause power, violates federal law, and is a trespass against the United States. The Governor's unlawful order purporting to authorize Arizona's construction conflicts with federal law and interferes with the United States' sovereign property rights and thus is void under the U.S. Constitution's Supremacy Clause. Arizona's actions also interfere with the United States' easements, including an easement on Cocopah Tribal Lands for which Arizona did not seek permission from the Tribe either. For these reasons, we intend to sue Arizona and the Governor (and their agents) for injunctive relief, ejectment, and money damages, unless Arizona immediately ceases all construction activities and—under the federal agencies' direction to minimize further harms to the United States—begins removing the unlawfully installed shipping containers. If filed, the lawsuit would include causes of action at common law and under the United States Constitution. The lawsuit may be filed in federal court in the District of Arizona under 28 U.S.C. § 1345 as early as December 14, 2022, and will include a motion seeking emergency injunctive relief.

We welcome the opportunity to have a discussion between our leadership and Arizona's leadership concerning this prospective litigation. If Arizona is interested in having such a discussion, please contact our Senior Trial Attorney Andrew Smith at 202-598-3803 or andrew.smith@usdoj.gov so that we can discuss scheduling.

Thank you for your consideration.

Sincerely,

/s/ Todd Kim

Todd Kim
Assistant Attorney General

/s/ Gary M. Restaino

Gary M. Restaino
United States Attorney
District of Arizona

cc (via email only): Anni L. Foster, General Counsel, Office of Arizona Governor Douglas A. Ducey, afoster@az.gov