



TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
EXECUTIVE OFFICE

Phone: 602-542-7000
www.azag.gov

SUMMARY OF COUNTERCLAIM 2/10/11

I. Count One - Failure to Achieve and Maintain Operational Control of the Arizona/Mexico Border.

The Secure Fence Act and the Appropriations Act of 2008 required Department of Homeland Security (“DHS”) to achieve and maintain operational control for the Arizona/Mexico border. The Secure Fence Act of 2006 defines operational control as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.” The Appropriations Act of 2008 required the construction of at least 700 miles of reinforced fencing and the installation of additional “physical barriers, roads, lighting, cameras, and sensors to gain operation control of the southwest border.” The Appropriations Act of 2010 required creation of a plan “for a program to establish and maintain a security barrier along the borders of the

United States, with fencing and vehicle barriers where practical, and other forms of tactical infrastructure and technology . . .” The Secretary of DHS has not taken all necessary and appropriate actions to achieve and maintain operational control of the southwest border, as required by the Secured Fence Act and the Appropriations Act of 2008. The Secretary has not built at least 700 miles of fence along the border as required. The Secretary has targeted the construction of less than 700 miles of fence. The Secretary has failed to provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to achieve and maintain “operational control.” Count One seeks a declaration that the DHS and the secretary have failed to take all actions necessary and appropriate to achieve and maintain “operational control,” that they are in violation of the Secured Fence Act of 2006 and the Appropriations Act of 2008, and it seeks injunctive declaratory and mandamus relief that the United States, the DHS and the Secretary comply with those acts.

II. Count Two – Failure to Protect Arizona as the U.S. Constitution Requires.

The United States Constitution, Article 4, Section 4, requires the United States to protect Arizona against invasion and domestic violence. The word “invasion” does not necessarily mean invasion of one country by another, but can mean large numbers of illegal immigrants from various countries.

The constitutional obligation to protect Arizona from this type of invasion is further clarified in the congressional requirement that the federal government acquire operational control over the border, and the statutory requirement that the Secretary “shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. 8 U.S.C. §1103(A)(5). Arizona is unable to bear the staggering cost of protecting itself, and even if it could, the federal government has argued that Arizona is preempted from taking action to assist in the enforcement of federal immigration law. A similar claim was rejected 14 years ago by the Ninth Circuit. Conditions have since changed in: (1) the scope of the problem; (2) the percentage of illegal aliens with criminal records, which has more than doubled since 2005; (3) the national security aspect of the problem which has become evident since 9/11; (4) the statutory changes in the last 14 years. We are asking for a second look by the Ninth Circuit, or a first look by the U.S. Supreme Court. Count Two seeks a declaration that counter-defendants have failed to protect Arizona from invasion of illegal aliens as required by Article 4, Section 4, and failed to protect it from domestic violence arising out of the criminal activity of aliens unlawfully present in the United States, and for injunctive declaratory and mandamus relief that the federal government create and implement

priorities and enforcement policies that will meet these constitutional requirements, until the border is under “effective control.”

III. Count Three – Failure to Enforce/Follow Immigration Laws.

Paragraph 8, U.S.C. §1373 requires ICE to respond to any lawful inquiry from any state or local government regarding citizenship or immigration status. The executive branch has declared, including declarations made in this lawsuit, that it is determined to ignore the terms and conditions of its obligations under 8 U.S.C. §1373. In its efforts to prevent Arizona from making inquiries regarding an individual’s immigration status, the federal government has treated Arizona differently than it has treated other states. The refusal to enforce provisions of the federal immigration law has threatened national security and imposed a tremendous burden on the states, in particular on Arizona. Counter-defendants are not authorized to enforce only the immigration laws of which they approve, and their declarations amount to an abdication of their statutory responsibilities. Therefore, they are committing an abuse of discretion. [Count Three seeks a declaration that the Secretary and the Attorney General have abused their discretion by adopting priorities that are contrary to express statutory mandates and that they are violating the law by failure to enforce or follow immigration laws.]

IV. Count Four – Declaratory Relief Regarding Reimbursement Obligations.

Congress established the State Criminal Alien Assistance Program, 8 U.S.C. §1231(i) [SCAAP] to compensate states for the substantial economic burdens they have suffered as a result of the federal government's failure to incarcerate or deport criminal aliens. SCAAP provides that upon written request by a Governor, the Attorney General shall either enter into an arrangement to compensate the State for incarcerating undocumented and criminal aliens, or federally incarcerate them. SCAAP also states that compensation to the State "shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General." For 2009, the last reporting year, the amount allocated to Arizona was \$9.7 million, or 1/14th the amount Arizona actually spent to incarcerate qualifying illegal and criminal aliens: \$135 million. [The Department of Justice allocated \$62 million (compared to Arizona's \$9.7 million) to jurisdictions where the sanctuary policies, which violate the express terms of 8 U.S.C. §§1373 and 1644. The City of Los Angeles received 50% more than the entire State of Arizona, even though it has forbidden sanctuary policies.] Count Four seeks, among other things, an order requiring the Attorney General to compensate Arizona for the actual cost it incurs in incarcerating qualifying illegal criminal aliens.

V. Count Five – 10th Amendment.

The 10th Amendment provides that “the powers not delegated to the United States by the constitution . . . are reserved to the states respectively, or to the people.” While control of the border is a federal responsibility, illegal aliens who successfully cross the border and commit crimes in Arizona become an Arizona responsibility. By not doing its job, and using its alleged “preemption” rights to stop Arizona from performing its law enforcement obligations, the United States is violating Arizona’s 10th Amendment rights. Count Five seeks an injunction.

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