

1 **MARK BRNOVICH**
2 **ATTORNEY GENERAL**
3 (Firm State Bar No. 14000)
4 Joseph A. Kanefield (No. 15838)
5 Brunn (Beau) W. Roysden III (No. 28698)
6 Drew C. Ensign (No. 25463)
7 Robert J. Makar (No. 33579)
8 2005 N. Central Ave
9 Phoenix, AZ 85004-1592
10 Phone: (602) 542-8958
11 Joe.Kanefield@azag.gov
12 Beau.Roysden@azag.gov
13 Drew.Ensign@azag.gov
14 Robert.Makar@azag.gov
15 *Attorneys for Plaintiff State of Arizona*

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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

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16 State of Arizona,

17 Plaintiff,

18 v.

19 Alejandro Mayorkas in his official
20 capacity as Secretary of Homeland
21 Security; United States Department of
22 Homeland Security; Troy Miller in his
23 official capacity as serves as Senior
24 Official Performing the Duties of the
25 Commissioner of U.S. Customs and
26 Border Protection; Tae Johnson in his
27 official capacity as Senior Official
28 Performing the Duties of Director of U.S.
Immigration and Customs Enforcement;
United States Department of Defense;
Lloyd Austin in his official capacity as
Secretary of Defense.

Defendants.

No. 2:21-cv-00617-DWL

**Notice of Additional Factual and
Legal Developments**

NOTICE

1
2 Arizona brought this lawsuit against the federal government asserting several claims
3 under the National Environmental Policy Act (“NEPA”) and the Administrative
4 Procedures Act (“APA”), including challenging, among other things Defendants’ halting
5 of construction of border barriers (“Border Wall”) and cancellation of contracts regarding
6 the same without conducting any environmental analysis of that decision.

7 On December 20, 2021, Defendant DHS issued an update on their plans for border
8 wall construction.¹ That press release, titled “DHS to Address Life, Safety, Environmental,
9 and Remediation Requirements for Border Barrier Projects Previously Undertaken by
10 DoD” makes clear that DHS intends to move forward with a variety of “activities necessary
11 to address life, safety, environmental, and remediation requirements for border barrier
12 projects previously undertaken by the Department of Defense (DoD) and located within
13 the Border Patrol’s San Diego, El Centro, Yuma, Tucson, El Paso, and Del Rio Sectors.”²

14 Unlike in any of their previous statements, the December 20 statement stated that
15 DHS would, as part of their “remediation,” “clos[e] small gaps that remain open from prior
16 construction activities and remediating incomplete gates.”³ What this means is uncertain;
17 neither the government’s statements nor media reports states how much additional border
18 wall will be built as a result of Defendants’ effort, but it makes clear this construction will
19 be in the Tucson Sector in Arizona.⁴ Significantly, this statement suggests that the

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22 ¹ See DHS, *DHS to Address Life, Safety, Environmental, and Remediation Requirements*
23 *for Border Barrier Projects Previously Undertaken by DoD* (Dec. 20, 2021) available at
24 [https://www.dhs.gov/news/2021/12/20/dhs-address-life-safety-environmental-and-](https://www.dhs.gov/news/2021/12/20/dhs-address-life-safety-environmental-and-remediation-requirements-border-barrier)
[remediation-requirements-border-barrier](https://www.dhs.gov/news/2021/12/20/dhs-address-life-safety-environmental-and-remediation-requirements-border-barrier)

25 ² *Id.*

26 ³ *Id.*

27 ⁴ See, e.g., Clara Migoya, *Feds OK work to close border wall ‘gaps’ in Arizona as*
28 *environmentalists raise concerns*, Arizona Republic (Dec. 30, 2021),
[https://www.azcentral.com/story/news/politics/border-issues/2021/12/30/feds-ok-closing-](https://www.azcentral.com/story/news/politics/border-issues/2021/12/30/feds-ok-closing-arizona-border-wall-gaps-upgrading-flood-prevention/8988357002/)
[arizona-border-wall-gaps-upgrading-flood-prevention/8988357002/](https://www.azcentral.com/story/news/politics/border-issues/2021/12/30/feds-ok-closing-arizona-border-wall-gaps-upgrading-flood-prevention/8988357002/); Priscilla Alvarez,
DHS to close some gaps in border wall in ongoing effort to clean up Trump-era projects,
CNN (Dec. 20, 2021), <https://www.cnn.com/2021/12/20/politics/border-wall/index.html>

1 Defendants may be engaging in additional wall construction in a way which could quite
2 possibly affect this litigation and/or the Court’s jurisdiction.

3 The State has no reason to believe that DHS will fully uphold its duty to complete
4 the remaining border wall barriers in Arizona sectors. But DHS’s activities may exacerbate
5 or ameliorate the State’s harms—especially if the wall construction is not completed. At a
6 minimum, it appears that DHS intends to alter the status quo while the State’s request for
7 a preliminary injunction to maintain that state of affairs is pending before this Court—and
8 without informing this Court or the State of the changed circumstances. Given the
9 undeniable relevance of DHS’s recently announced actions on this case, these
10 developments should have been disclosed by DHS to this Court and the State directly,
11 rather than being discovered through newspaper coverage.

12 DHS’s announcement that it intends to conduct environmental remediation
13 measures all but concedes that there are significant environmental impacts resulting from
14 its Border Wall that must be addressed under NEPA. *See* Doc. 21 at 1-2. Notably, the
15 environmental impacts from DHS’s announced activities are sufficiently severe that one
16 Arizona-based environmental group has already sent DHS a notice of its intent to file suit
17 under the Endangered Species Act (“ESA”) and NEPA.⁵ The Center for Biological
18 Diversity contends (correctly) that remediation efforts are not encompassed within
19 IIRIRA’s authority to waive NEPA, which extends only to the construction of “the barriers
20 and the roads.”⁶

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23 ⁵ *See* Center for Biological Diversity, Notice of Violations of the Endangered Species Act
24 and National Environmental Policy Act in Relation to the Rio Grande Valley of Texas
25 Levee Project (Dec. 21, 2021) *available at*
https://www.biologicaldiversity.org/campaigns/border_wall/pdfs/Border_levee_wall_RG_V_ESA_NEPA_NOI_122121.pdf

26 ⁶ *Id.* To the extent that Defendants’ construction involves *completion* of the border wall,
27 that would likely fit within the existing IIRIRA waivers. But, to the extent that DHS is
28 conducting activities necessarily predicated on *not* building border barriers, and instead
terminating construction of them, such activities necessarily fall outside the scope of
DHS’s waiver authority under IIRIRA. *See* Doc. 29 at 1-2, 5-8. Put differently, to the extent
that DHS is acting to ameliorate the environmental consequences of *its (putative) decision*
to *terminate* Border Wall construction, such activities do not fall within IIRIRA’s waiver

1 DHS's announcement leaves unclear what exactly DHS's plan is. Previously,
2 Defendants had stated unequivocally that there would be no additional wall construction
3 in Arizona. For example, in their preliminary injunction response, Defendants attached a
4 Declaration of Paul Enriquez, who stated that 18 miles of unfinished barrier construction
5 remained on the Arizona border under DoD and DHS's initial plans for that construction.
6 *See* Doc. 24-1. As Arizona has argued, much of this gap exists in the high-traffic areas
7 surrounding Nogales. *See* Reply, Doc. 28 at 14 (citing Dannels & 2d Lamb Declarations).
8 The Enriquez declaration also did not mention any additional wall construction, instead
9 stating that "[a]dditional projects aimed primarily at life, operational safety, or
10 environmental requirements may be approved and implemented going forward. Projects
11 that are intended to mitigate environmental damage caused by border barrier construction
12 also may be approved going forward." *Id.* Defendants also seemingly confirmed in their
13 response to the State's Motion that the contracts for the construction of this 18-mile
14 segment were "terminated" and that these segments had been "cancelled." *See, e.g.*, Doc.
15 24 at 13, 18, 23, 27, 32, 35, 39.

17 Defendants' public statements were plain on whether they intended to build
18 additional walls. President Biden's Inauguration Day proclamation on the border wall
19 states that "It shall be the policy of my Administration that no more American taxpayer
20 dollars be diverted to construct a border wall."⁷ Then, DHS's Border Wall Plan—
21 promulgated pursuant to that proclamation—reaffirms their commitment to that policy.
22 That Plan states that the only exception to the proclamation is the 14-mile stretch of
23 additional levee in the Rio Grande Valley in Texas, and goes on to say that DHS will use
24 the appropriated funding only to "grad[e] roads and cut[] slopes to resolve drainage and
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28 provision, and must be analyzed under NEPA and the ESA.

⁷ *Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, Proclamation 10142, 86 Fed. Reg. 7225 (Jan. 27, 2021).

1 ponding;” “address[] exposed rebar;” and “install[] canal crossings.” There is no mention
2 in the plan of closing existing gaps.

3 This raises the question of whether, and to what extent, Defendants are planning on
4 closing existing wall gaps in Arizona. Do they intend to complete the 18-mile gap Tucson
5 sector referred to in their filings? If not, what gaps will remain after their construction?
6 What is the timeframe for this construction? Do Defendants intend to comply with NEPA
7 and the ESA in conducting this additional construction activities in Arizona? These and
8 other questions are very important to this lawsuit and the State should obtain a timely
9 answer addressing these issues.

10 In addition, DHS’s December 20 announcement reiterates that “[t]he Biden-Harris
11 Administration continues to call on Congress to cancel remaining border wall funding.”
12 *Supra* note 1. It is difficult to understand this statement as anything other than an
13 acknowledgment that existing law requires construction of border barriers that the
14 Administration refuses to build, thus providing further evidence in support of the State’s
15 claim alleging violations of the Take Care Clause and the Impoundment Control Act of
16 1974 (Count VII). *See* FAC ¶¶178-85.

17 This Court accordingly may wish to order Defendants to provide an update on their
18 activities and explain the contours of their newly announced construction activities with
19 specificity. Notably, the State filed a FOIA request on August 1, 2021, seeking information
20 about construction activities that DHS had announced on July 27, 2021, along with any
21 NEPA analysis performed in connection with them (which also would include this
22 subsequent activity addressed in this notice). *See* Exhibit (attached).

23 DHS has yet to provide a single responsive document, even though FOIA’s
24 deadlines have now been blown multiple times over. *See* 5 U.S.C. §552(a)(6)(A) (requiring
25 response in 20 business days). Therefore, if this Court is to obtain information about DHS’s
26 activities directly affecting this Court’s equitable jurisdiction, it will likely need to order
27 DHS to explain its activities or permit discovery.
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1 RESPECTFULLY SUBMITTED this 10th Day of January, 2022.

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3 **MARK BRNOVICH**
4 **ATTORNEY GENERAL**

5 By s/ Drew C. Ensign

6 Joseph A. Kanefield (No. 15838)

7 Brunn W. Roysden III (No. 28698)

8 Drew C. Ensign (No. 25463)

9 Robert J. Makar (No. 33579)

Assistant Attorneys General

Attorneys for Plaintiff Arizona

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

s/ Drew C. Ensign
Attorney for the State of Arizona