October 19, 2022

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Dear Governor Ducey, and Messrs. Clark and Roemer,

RE: Sixty-Day Notice of Intent to Sue the Governor of Arizona, the Arizona Department of Emergency and Military Affairs and the Arizona Department of Homeland Security for Endangered Species Act Section 9 Violations to stop the obstruction of one of the last established endangered jaguars and ocelot movement corridors between Mexico and the United States by the inappropriate and unnecessary placement of shipping containers along the Border in the San Rafael Valley west of the Huachuca Mountains in Southeast Arizona.

With this Notice of Intent Sue, the Center for Biological Diversity (“Center”) informs you of your violations of the Endangered Species Act, 16 U.S.C. § 1531, et seq. (“ESA”). arising from your obstructing endangered wildlife corridors and interfering with endangered species recovery, and to request that you take immediate action to remedy these violations.
This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision. 16 U.S.C. § 1540(g)(2). The activities described in this notice violate the take provisions of the ESA and, if they are not curtailed, the Center intends to commence a civil action against you and other responsible state employees, acting in their official capacity, for violations of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

On August 12, 2022, as Governor of the State of Arizona, you issued an Executive Order, inaccurately called "Securing Arizona's Southern Border," that "[i]the Department of Emergency management shall immediately initiate operation to close the gaps in Arizona's southern border wall, regardless of location…"

Your placement of shipping containers to "close the gaps" in the border wall is nothing more than a contemptuous, failing publicity stunt. Media coverage of the failure of your publicity stunt has been extensive.¹

On October 13, 2022, the U.S. Department of the Interior Bureau of Reclamation wrote to your Directors of the Emergency Management Department and of the Arizona Department of Homeland Security Director stating that "unauthorized placement of those containers constitutes a violation of federal law and is a trespass against the United States (43 C.F.R. Part 423; 43 C.F.R. Part 429). That trespass is harming federal lands and resources and impeding Reclamation's ability to perform its mission."

In the San Rafael Valley on the west side of the Huachuca Mountains, we have now documented initiation of you plans to block wildlife corridors with your shipping container stunt. You have already illegally moved your shipping containers onto the Coronado National Forest west of the Huachuca Mountains immediately to the west of the Huachuca Mountains for deployment along the Border.

The Border area that you are in the process of deploying your shipping containers is an established and critical movement corridor for federally listed and protected jaguars and ocelots. Both jaguars and ocelots have been sighted and documented in the area.²

Further deployment of your shipping containers along the Border will obstruct the movement of and will prevent the recovery of endangered jaguar and ocelot. The shipping containers are reasonably certain to cause unlawful take of jaguar and ocelot.


The shipping containers are reasonably certain to cause unlawful take of jaguar and ocelot by harassment via the obstruction of a major movement corridor.

The shipping containers are reasonably certain to cause unlawful take of jaguar and ocelot by harm through adverse modification and degradation of habitat that significantly impairs essential behavior patterns, namely the ability to utilize a major movement corridor. Preventing essential movement for survival and recovery is an obvious injury to jaguar and ocelot. Babbitt v. Sweet Home Chapt. Comms. For Ore. (94-859), 515 U.S. 687 (1995).

The border area targeted by your action is within designated Critical Habitat. Critical Habitat is the "[s]pecific areas within the geographical area occupied by the species at the time of listing that contain physical or biological features essential to conservation of the species..."3 A map of Designated Critical Habitat for jaguar follows with the area targeted by your current action follows:

3 [https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat](https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat)
An annotated map of the jaguar movement corridor from U.S. Fish and Wildlife Service's July 2018, *Jaguar Recovery Plan* follows:

**Figure 4.** Map of habitat connectivity and roadways of interest in the Borderlands Secondary Area as modeled by Stoner et al. (2015) (some road segments in densely populated areas omitted). A visual examination of this connectivity model, which extends across the entirety of the Northwestern Recovery Unit, reveals three corridors that extend across the U.S.-Mexico border. These corridors are intersected by Mexico Federal Highways 2 and 15. U.S. State Routes 82 and 83 also intersect with "source" habitat patches (used for modeling purposes), which may impact jaguar habitat connectivity. These areas are good candidates for further assessment to determine the potential for road crossing mitigation structures.
Your shipping container stunt ignores the fact that the Border Patrol already has "approximately 3,700 agents working the nine stations in Tucson Sector." And, specifically with respect to the area of our concern here, the area west of the Huachuca Mountains, at the Sonoita Station, the Border Patrol "utilizes a multi-tiered, deterrence-based operational strategy in which agents are deployed in highly visible and strategic locations. These agents are supported and backed by a network of agents, acting as a tier, in order to provide in-depth coverage…"
The following images document your illegal trespass on the Coronado National Forest and the initiation of the violations addressed in this Notice letter:

Shipping containers stacked next to border road. The image is looking to the east and the scar created by past construction activity in the Huachuca Mountains' Coronado National Memorial. October 16, 2022.
Shipping containers and cleared area on the Coronado National Forest. The image is looking to the east and the scar created by past construction activity in the Huachuca Mountains' Coronado National Memorial. October 16, 2022.
Normandy barriers, border road and shipping containers staging area. The image is looking to the west. October 16, 2022.
Normandy barriers and shipping containers staging area. The image is looking to the west. October 16, 2022.
Shipping container staging area with border Normandy barriers in the background. The image is looking to the southwest. October 16, 2022.
The Center is the noticing party in this Notice of Intent to Sue. The Center is a non-profit, public interest, conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places and to the fulfillment of the continuing educational goals of our membership and the general public in the process. Our address is: P.O. Box 710, Tucson, Arizona 85702-0710.

Section 9 of the ESA specifically prohibits the “take” of an endangered species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term “harm” is further defined to include “significant habitat modification or degradation where it … injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3 “Harass” includes any “act or omission which creates the likelihood of injury to wildlife by annoying it to such and extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.” Id. The ESA’s legislative history supports “the broadest possible” reading of “take.” Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. Id. at 704; see also National Wildlife
Federation v. Burlington Northern Railroad, 23 F.3d 1508, 1512 (9th Cir. 1994). The ESA’s prohibition on take applies equally to threatened species, unless a species-specific rule promulgated by the FWS pursuant to ESA section 4(d) provides otherwise. 50 C.F.R. § 17.31(a).

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including state agencies, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person, including state agencies, to “cause to be committed” the take of a species. 16 U.S.C. § 1538(g). Violations of Section 9 are enforceable under the ESA’s citizen-suit provision. 16 U.S.C. § 1540(g).

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. See Strahan v. Coxe, 127 F.3d 155, 158, 163-64 (1st Cir. 1997), cert. denied, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]”); Defenders of Wildlife v. Administrator, Envtl. Protection Agency, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takes of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); Loggerhead Turtle v. City Council of Volusia County, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including … any … governmental instrumentality or agency … who is alleged to be in violation of any provision of [the ESA]. U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute and ongoing take and future activities that are reasonably likely to result in take. See Burlington Northern Railroad, 23 F.3d 1508 at 1511.

The jaguar (Panthera onca) is the largest existing cat native to North America and the third largest cat globally. At the time of the European colonization of North America, jaguars ranged from California to the Carolinas. Primarily as a result of hunting, trapping, and poisoning by humans, jaguars have been almost entirely extirpated from the United States. In the last decade, however, there have been multiple observations of an estimated four to six individual jaguars in Arizona and New Mexico. These individuals are believed to be part of a larger population of jaguars that ranges from Sonora, Mexico into the southwestern United States.

The jaguar has been formally recognized as an endangered species since 1969. However, prior to 1997, the jaguar was protected under the ESA only in Mexico and Central and South America and not in the United States. In 1979, the U.S. Fish and Wildlife Service (“FWS”) published a notice stating that it had inadvertently excluded jaguars within the United States from the ESA listing and intended to correct the error as quickly as possible. After numerous delays, FWS listed the jaguar as an endangered species within the United States in July 1997. 62 Fed. Reg. 39147.

Your activities authorized are reasonably likely to result in prohibited take of jaguars and ocelots and may be enjoined under the ESA. See United States v. Town of Plymouth, 6 F.Supp.2d 81, 91 (D.Mass. 1998) (preliminary injunction issued against township which authorized off-road vehicles on a beach that was habitat for threatened piping plovers); Defenders of Wildlife v. Administrator, Envtl. Protection Agency, 668 F.Supp. at 1356-1357, aff’d 882 F.3d 1294 (enjoining the EPA from continuing its registration of strychnine until it could do so without illegally taking protected species of wildlife).
Further deployment of your shipping containers along the Border will obstruct the movement of and will prevent the recovery of endangered jaguar and ocelot. The shipping containers are reasonably certain to cause unlawful take of jaguar and ocelot within the meaning of the ESA and its implementing regulations.

The shipping containers are reasonably certain to cause unlawful take of jaguar and ocelot by harassment via the obstruction of a major movement corridor that is essential to the jaguar’s normal behavioral patterns. *See* 50 CFR 17.3 (defining prohibited “harassment” as activities that “significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted”).

The shipping containers are also reasonably certain to cause unlawful take of jaguar and ocelot by “harm” through adverse modification and degradation of habitat that significantly impairs essential behavioral patterns, namely the ability to utilize a major movement corridor that, in turn, enables. Preventing movement essential for survival and recovery is an obvious injury to jaguar and ocelot. *See* 50 CFR 17.3 (defining prohibited “harm” to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering”; *see also* Babbitt v. Sweet Home Chapt. Comms. For Ore., 515 U.S. 687 (1995) (sustaining the validity of the “harm” definition’s inclusion of adverse habitat modification).

Accordingly, you are violating and you continue to violate section 9 of the ESA. Pursuant to the citizen suit provision of the ESA, 16 U.S.C. sections 1540(g)(1)(A) and (2)(A), the Center is providing you with sixty days’ notice of our intention to commence a civil action to challenge the foregoing violations of law and any violations that may occur after service of this notice letter, and to seek their remediation in a court of law.

We are hopeful that your will take all necessary measures to avoid the unauthorized future taking of jaguars and ocelots, and that your representatives will contact us shortly to discuss any questions prior to the commencement of legal action to discuss your obligations under the ESA.

If you have any questions about the issues raised in this notice letter, please feel free to contact Robin Silver, M.D., Center for Biological Diversity, P.O. Box 1178, Flagstaff, AZ 86002, by mail; by phone: (602) 799-3275, or by Email: rsilver@biologicaldiversity.org.

Sincerely,

Robin Silver, M.D.
Co-Founder and Board Member
Center for Biological Diversity