

May 25,2020

*We, the undersigned, request both state and federal investigations of alleged illegal sales of saguaro cactus parts taken from the Roosevelt Reservation lands in/adjacent to Organ Pipe Cactus National Monument t in October of 2019.*

As professionals in the botanical garden, horticultural and conservation communities of Arizona, we wish to express our concern regarding attempted sales of saguaros in Ajo, Arizona, apparently done without tags or permits authorized by the Arizona Department of Agriculture. If verified, these alleged efforts to sell saguaros from border wall construction sites offer a tangible example of the failure of the Pentagon, Customs and Border Protection Agency (DHS/CBP) and Army Corps of Engineers (ACE) to keep their contractors within the law.

Many of those signing this letter are from institutions that require their employees to study, educate others, and uphold the Arizona State Native Plant Law as revised in 2005. Recent actions by wall construction contractors potentially risk undermining the most effective and best-enforced state law of any in our nation, one that Arizona can be proud to have administered since 1939. It is a law that all botanical gardens, museums, educational institutions and federal agencies working in our state adhere to and support.

We understand that the Department of Homeland Security has taken the authorization to waive federal laws under the Real ID Act of 2005; this is not the issue. Nevertheless, we have seen no evidence made public to date that DHS explicitly waived the State of Arizona Native Plant Law before this attempted saguaro sales in October, 2019.

What is of potential concern is whether contractors or subcontractors for the Pentagon, DHS/CBP and ACE assume they are free of requirements for state permits and tags to transport saguaro cacti away from the Roosevelt Reservation, and were free to sell them in any market they wish to. Contractors for our institutions, state agencies and other federal agencies are obliged to adhere to every statute in the native plant law.

*In the spirit of the Arizona Public Records Law, we request to see a one page summary listing of Arizona Department of Agriculture permit and tag numbers given to DHS/CBP and ACE, or to its private contractors, subcontractors of those contractors, or to employees of those subcontractors, from September 2019 to the present.*

Here are the facts as we know them: In September 2019, less than six months after being awarded a contract from the Pentagon through the Army Corps of Engineers, Southwest Valley Constructors (SVC) began clearing vegetation, including saguaros. This was done for wall construction and associated groundwater pumping along the border. To do so, SVC and its subcontractors (including Southwest Cactus LLC) began uprooting, transplanting and hauling away saguaro cacti and other native plants. They began this in the 60 foot wide Roosevelt Reservation along the border in Organ Pipe Cactus National Monument. Such work is scheduled to extend through the Roosevelt Reservation stretch on the edge of Cabeza Prieta Wildlife Refuge and elsewhere along the border.

Since then, Southwest Valley Constructors has been bulldozing down hundreds if not thousands of cacti that it claimed it could not transplant. They have mutilated far more than the publicized 2000 that were transplanted over the first 50 days of work in Organ Pipe. After widespread public outcry

following a National Public Radio report on October 11, 2019, a larger percentage of saguaros began to be transplanted with National Park Service guidance, for which we are grateful. However, significant numbers of saguaros were still removed, mutilated and placed in truck trailers and transported away on State Highway 85 toward Ajo.

What is of legal concern is whether subcontractors had *any* state tags and permits to transport these uprooted or damaged saguaros on public highways as required by law, and whether they had authorization to sell or donate these saguaros as they attempted on October 17<sup>th</sup> in front of three witnesses. *If they did not have tags and permits, the law needs to be enforced.*

*Specifically, we request confirmation that Southwest Valley Constructors or its subcontractor Southwest Cactus LLC obtained any permits and tags required by the Arizona Department of Agriculture prior to October 17, 2019. Such state tags are required to accompany every truck-load of state-protected saguaro cactus on any state or federal highway, regardless of their origin.*

*We also request documentation of any live cacti – specifically those from the stretches of the Roosevelt Reservation in Organ Pipe and Cabeza Prieta--- that were transported to be sold or donated beyond the National Monument and the National Wildlife Refuge. This request is in line with the intent of the U.S. Freedom of Information Act and Arizona Public Records Act.*

*We request summary information regarding how many truckloads of damaged or dead saguaros were transported away from the project area on State Highway 85, and whether any state and federal agencies were aware of or authorized sales or donations of saguaros, or their parts.*

Recorded video testimonies, Facebook posts from mid-October and later interviews with witnesses document the following: less than a month after Southwest Valley Constructors and Southwest Cactus LLC received contracts, they began their work by toppling, destroying, or transporting saguaros away from the Roosevelt Reservation. On October 17, 2019, three workers from Southwest Cactus arrived at Three Nations Market in Ajo, Arizona in the company's truck.

These workers gave out Southwest Cactus business cards and attempted to sell saguaro parts from the Roosevelt Reservation to customers present in the market for as much as \$200 per cactus part. According to Facebook posts and recorded interviews, the market manager and at least two other Ajo area residents were approached by Southwest Cactus employees, who gave them their sales pitch for obtaining "as many cacti as they want" of those salvaged and transported in the Southwest Cactus truck rigged for moving cacti. We have photos of the business cards they gave out to witnesses, as well as witness names, means of contact, etc.

The incident suggests a failure by DHS/CBP and ACE to provide adequate vetting or training of contractors to ensure their knowledge of legal protocols, quality control standards, and capacity to work with endangered native species.

We suspect these attempted sales are legal violations of Arizona laws because the waivers DHS were granted do not necessarily apply to sales by its contractors, subcontractors or their employees *acting irresponsibly on their own accord.*

The Arizona State Native Plant Law was first passed in 1929, and its current Arizona Revised Statute §3-906 spells out rules regarding the collection and salvage of protected plants; procedures, permits, tags and seals; duration; and means to request exceptions that have been in place since 2005. There is no excuse for private companies gaining federal contracts to claim ignorance of or to fail to heed these statutes when are working within our state on sizeable budgets at taxpayer expense.

1. ARS §3-906(C) states that highly-safeguarded plants (including saguaros) require special permits, and cannot be taken from the growing site without possessing a valid permit and associated tags on the plants in the vehicle.
2. As Richard A. Countryman, former Assistant Director of Arizona Commission of Agriculture and Horticulture confirmed to the editors of *Desert Plants* magazine, **“The native plant law of Arizona applies equally to private land, federal land and state land. This makes it a tough law to get around. Arizona has probably the most effective and best enforced native plant law in the United States.... It is illegal to knock protected plants over with a vehicle (including a bulldozer), to chop them with an axe or hatchet or to mutilate them by rifle, pistol, archery target practice, or to drive over them or flatten or destroy them.... If a corporation is involved [involved in multiple violations], it could receive up to a \$20,000 fine under Class 1.”**
3. ARS §3-932 states that a “knowing violation” of this chapter involving either the misuse of permits, tags, seals, or receipts, or the collection, salvage, harvest, transportation or possession of protected plants without any required permits, tags, seals or receipts is a Class 1 misdemeanor. A subsequent conviction for a violation of this subsection is a Class 6 felony.
4. We requested a preliminary opinion from a current Arizona Department of Agriculture employee Scott Schade, Office of Special Investigations at (520- 628-6317) on the legality of the attempted sales of saguaros. Mr. Schade was of the opinion that the attempted sales of saguaros in Ajo in October 2019 would be considered to be unlawful. He advised that any truck transporting saguaros – from public lands or otherwise—typically requires state permits and accompanying tags. His initial response – prior to any formal investigation – was that contractors or subcontractors to any federal agency would still be obligated to display state permits and tags for plants in transit. That should apply even if the agency employing them had a special waiver to destroy or dispose of saguaros. Mr. Shade recommended that we check whether tags and permits were authorized in this case.
5. The destruction of thousands of saguaros protected by Arizona State Law has caused international public outcry. It is made more egregious by the fact that in 1937, President Roosevelt granted the Tohono O’odham unrestricted rights to harvest saguaros for sustenance and for their spiritual ceremonies through the Presidential Proclamation establishing Organ Pipe Cactus National Monument. DHS officials have no authority to waive the constitutional rights to religious liberties for the O’odham that extend to ceremonial plants required for their traditional, place-based spiritual practices. As Hia c-ed O’odham elder Lorraine Eiler explains, “saguaros are our family ancestors,” having sacred as well as ceremonial roles in O’odham spirituality.
6. In a January 30, 1952 report written by Border Patrolman Paul Ezell, he confirmed that “O’odham in Quitobaquito have been harvesting fruits of saguaros and organ pipe cactus for their own use” within walking distance of the springs, a sacred site of the tribe. This harvest almost certainly extended to cactus fruit in the Roosevelt Reservation and even at, or across the border. As Ezell documented in the same report, “no action was taken to follow up [on such informal crossings by

the O’odham] as the policy of the Immigration Service was not to molest Indians crossing the border.” In other words, the U.S. Immigration Service of that era had *granted the O’odham implied easements and usufruct rights to the saguaro in the Roosevelt Reservation.*

We question the legality of Southwest Cactus employees selling cactus parts from lands where the O’odham have had usufruct and easement rights in the Roosevelt Reservation that date back (at very least) to the time of the 1937 Proclamation by President Franklin Roosevelt.

As Tohono O’odham Chairman Ned Norris, Jr. testified in Congress before the Committee on Homeland Security’s Subcommittee on Border Security on February 27th of this year,

*“Although the focus of this hearing is on sacred sites, I must underscore as well the environmental damage that ongoing wall construction is wreaking on wildlife and trees, cacti, and 7 other plants of documented significance to the Nation...There still exist sites within the monument which are sacred to the O’odham, including Quitobaquito Spring...Even to the present day, the O’odham continue to visit the monument to collect sacred water from the Springs, to gather medicinal plants, and to harvest the fruit of the organ pipe and saguaro cactus.”*

Without implying we know for certain all the details of the events in Ajo, these initial observations move us to request a full investigation of the legality of actions by Southwest Valley Constructors and Southwest Cactus LLC; to fully enforce the Arizona Native Plant Law; and to determine whether the Pentagon and DHS/CBP had any role in or prior knowledge of these irregularities.

### List of signers (all Arizona state residents and professionals)

Name	Title	Institution	Email
Dinah Bear	Co-founder	Border Coalition	<a href="mailto:bear6@verizon.net">bear6@verizon.net</a>
Kevin Dahl	Arizona Senior Program Manager	National Parks and Conservation Association	<a href="mailto:kdahl@npca.org">kdahl@npca.org</a>
Tom Fleischner, PhD.	Executive Director	Natural History Institute	<a href="mailto:tom@naturalhistoryinstitute.org">tom@naturalhistoryinstitute.org</a>
Craig Ivanyi	Executive Director	Arizona-Sonora Desert Museum	<a href="mailto:civanyi@desertmuseum.org">civanyi@desertmuseum.org</a>
Laiken Jordahl	Borderlands Campaigner	Center for Biological Diversity	<a href="mailto:LJordahl@biologicaldiversity.org">LJordahl@biologicaldiversity.org</a>
Kimberlie McCue, PhD.	Senior Director, Desert Horticulture and Conservation	Desert Botanical Garden	<a href="mailto:kmccue@dbg.org">kmccue@dbg.org</a>
Gary Paul Nabhan, PhD.	Former Board of Governors for:	Society for Conservation Biology, National Parks System Commission	<a href="mailto:brcoyote6@gmail.com">brcoyote6@gmail.com</a>
Jeffrey M. Petrie	Co-Editor, Desert Plants magazine	Boyce-Thompson Arboretum	<a href="mailto:jmcp2001@hotmail.com">jmcp2001@hotmail.com</a>
Roger Pfeuffer	Co-Chair. Mission Gardens	Friends of Tucson’s Birthplace	<a href="mailto:rogerpfeuffer@me.com">rogerpfeuffer@me.com</a>
Cyndi Tuell,	Attorney, Board Member of...	Wilderness Watch	<a href="mailto:cyndi@tuellconsulting.com">cyndi@tuellconsulting.com</a>
Kurt Vaughn. PhD.	Executive Director	Borderlands Restoration Network	<a href="mailto:kvaughn@borderlandsrestoration.org">kvaughn@borderlandsrestoration.org</a>
Benjamin Wilder, PhD.	Desert Botanist	Tucson native	Email withheld