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## On the Fence: Sustaining National Security and Defending Environmental Laws at the U.S.-Mexico Border

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# On the Fence: Sustaining National Security and Defending Environmental Laws at the U.S.-Mexico Border

*Vanessa Jimenez*<sup>†</sup>

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## I. INTRODUCTION

For decades, politicians, pundits, and citizens have debated the most effective and efficient way to secure the United States border from unauthorized crossings. In particular, commentators continually question the effectiveness and value of the U.S. Border Patrol’s operations along the southern United States border. Some lawmakers argue for stricter immigration laws—with proposals including banning birthright citizenship to the children of undocumented parents<sup>1</sup> or granting unbridled authority to Border Patrol. More commonly, lawmakers are

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1. James C. Ho, *HO: Ban on Birthright Citizenship Unconstitutional*, WASH. TIMES, Apr. 8, 2011, <http://www.washingtontimes.com/news/2011/apr/8/ban-on-birthright-citizenship-unconstitutional/?page=all>.

targeting restrictive endeavors at the locus of illegal immigration: the United States-Mexico border region. In reality, lawmakers are focusing far too much on drafting new legislation to expand the discretion of the Department of Homeland Security as an effort to fix the problem. The crux of the dilemma exists internally and consists of gaps in communication and organization between the agencies that interoperate in the border region.

In a desperate attempt to curb illegal immigration, the U.S. government has placed fences, walls, cameras, artillery, law enforcement, and more all along the border region.<sup>2</sup> Regardless of those genuine efforts, illegal immigration is still as prevalent as ever and is becoming increasingly dangerous for border security personnel and cross-border violators along with whatever gets in their path.<sup>3</sup> In its efforts to curb illegal immigration, the government is not only impacting potential immigrants, but it is also directly affecting the environment by waiving environmental laws and shirking international responsibility to implement border security tactics and build more infrastructure. There is a great amount of discussion on whether currently implemented state and federal laws actually hinder illegal immigration or just waste precious resources while encouraging more dangerous avenues for illegal immigrants to take when crossing the border.<sup>4</sup> Safety continues to be a mounting concern due to conflicting reports from reliable government sources pertaining to whether the border region is becoming increasingly safer, or if cross-border violence continues to escalate.<sup>5</sup> For those who are fearful about the detrimental effects of unlawful immigration, their concern is focused on the possibility of fewer jobs and economic distress due to undocumented persons working unlawfully.<sup>6</sup> But the border region takes a hit from multiple sources, not just cross-border violators.

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2. See generally, BLAS NUÑEZ-NETO & MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS: BORDER SECURITY: THE SAN DIEGO FENCE (2007), available at <http://www.fas.org/sgp/crs/homese/c/RS22026.pdf>.

3. See, e.g., *Feds Seize 32 Tons of Marijuana from Underground U.S.-Mexico Tunnel*, FOX NEWS (Nov. 30, 2011), <http://www.foxnews.com/us/2011/11/30/feds-seize-32-tons-marijuana-from-underground-us-mexico-border-tunnel/> (cross-border violators have become increasingly resourceful in their strategies to export marijuana across the border, to the extent that tunnels have been discovered that are utilized for marijuana transportation).

4. Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J.C.R. & C.L. 23, 25-27 (2009).

5. Mark Potter, *Along Mexican Border, US Ranchers Say They Live in Fear*, NBC NIGHTLY NEWS (Nov. 25, 2011, 8:13 PM), [http://www.msnbc.msn.com/id/45440385/ns/nightly\\_news/t/along-mexican-border-us-ranchers-say-they-live-fear/](http://www.msnbc.msn.com/id/45440385/ns/nightly_news/t/along-mexican-border-us-ranchers-say-they-live-fear/).

6. *Effects of Illegal Border Activities on the Federal Land Management Agencies: Hearing Before the Subcomm. on Interior, Environment and Related Agencies of the H. Comm. on Appropriations*, 109th Cong. (2006) (Statement of Tina J. Terrel, Forest Supervisor, Cleveland

These laws do more than affect persons crossing the border: they affect law enforcement officers tasked with guarding and defending the border; they affect the persons living within the border region; and they affect plants, wildlife, and even the air we breathe.<sup>7</sup> People living near the border region have heightened concerns.<sup>8</sup> When people risk their lives to cross the border, they can leave a path of destruction in their wake, affecting both the environment and the border region inhabitants. The border fence erected in the last five years has halved the inhabitable areas of many large animals indigenous to the border region.<sup>9</sup>

Some nations have created binational agreements in an attempt to remedy surfacing issues and respect alliances between nations. Prior to Congress's enactment of the Secure Fence Act of 2006, the ten-year operation adopted by the United States and Mexico in 2002 provided guidance and support to curb a variety of adverse impacts from the fence and illegal immigration. In 2005, Congress passed the Real ID Act, granting the Secretary of Homeland Security unrestricted authority to waive any laws standing in the way of border protection.<sup>10</sup> Since Congress enacted the law, the Secretary has issued five waivers, never fully explaining how the waiver of many environmental laws would further the development of border security and protect those along the border.

There must be a better solution for border protection that actually secures the border, complies with environmental laws, and minimizes destruction from improvised footpaths. In the process of protecting the border, Customs and Border Protection's efforts have been granted nearly limitless authority, including the power to supersede a number of environmental laws in the name of national security.<sup>11</sup> Fortunately, while some border security efforts appear to be detrimental to environmentally protected lands, they may benefit the greater land area in the long run by

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National Forest), *available at*

<http://www.fs.fed.us/congress/109/house/oversight/terrell/061506.html>.

7. See, e.g., Scott Shalaway, *Wildlife: Border Fences More Effective Against Wildlife than Illegal Immigrants*, PITTSBURGH POST-GAZETTE, Jan. 1, 2012, <http://old.post-gazette.com/pg/12001/1200330-140.stm>.

8. See, e.g. Potter, *supra* note 5 (reporting that Americans residing near the border are fearful of the Mexican traffickers smuggling drugs and immigrants across the border).

9. Jennifer Echemendia, *Waiving Environmental Concerns Along the Border: Fence Construction and the Waiver Authority of the REAL ID Act*, 3 PITTSBURGH. J. ENVTL. PUB. HEALTH L. 81, 82 (2009).

10. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

11. See, e.g., Chertoff: *Laws to be Waived for Border Fence*, CNN POLITICS (Apr. 1, 2008), [http://articles.cnn.com/2008-04-01/politics/border.fence\\_1\\_land-management-laws-border-fence-hidalgo-county?\\_s=PM:POLITICS](http://articles.cnn.com/2008-04-01/politics/border.fence_1_land-management-laws-border-fence-hidalgo-county?_s=PM:POLITICS) (article regarding Homeland Security Secretary Chertoff's most recent waiver of environmental laws in order to construct the border fence).

restricting movement and maintaining operational control over the region. Still, all border solutions that have taken place in the past one hundred years have one thing in common: they are not foolproof.<sup>12</sup> In each government effort to stop cross-border violations, something goes awry, and the border is left less protected than promised. Frequently the decrease in protection comes from cross-border violators finding new footpaths,<sup>13</sup> but it also comes from a lack of communication between the Department of Justice, the source authority for Customs and Border Protection, and other Departments in charge of federally protected land along the border.<sup>14</sup>

At present, the House is reviewing a bill, already referred by the House Committee on National Resources, that will broaden the waiver authority given to the Secretary of Homeland Security: H.R. 1505—National Security and Federal Lands Protection Act.<sup>15</sup> The bill is designed to prevent the U.S. Department of Agriculture and the Secretary of the Interior from enacting environmental regulations that may hinder the operations of Customs and Border Protection on public lands within one hundred miles of the entire U.S. border, including the coasts and the border regions along our neighboring countries. Land that has been set aside to protect the degradation of plants and wildlife will be available to the Department of Homeland Security for unrestricted use to meet whatever objective it deems necessary for border protection.

This article explores the origins of the border security relationship between the United States and Mexico, and the drastic steps that the United States has taken to secure its borders. The focus will be on the damage caused by the unprecedented waiver authority unleashed by the Department of Homeland Security and how the departments operating

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12. See, e.g., Marty Graham, *Drug Tunnel Stands Out In Sophistication*, REUTERS.COM, <http://www.reuters.com/article/2011/12/01/us-usa-mexico-tunnel-idUSTRE7B004H20111201> (last visited Apr. 9, 2012) (drug tunnel discovered that is surprisingly sophisticated, shows that the border fence does not hinder the drug cartels as much as hoped); *U.S. Border Patrol-Protecting Our Sovereign Borders*, U.S. CUSTOMS AND BORDER PROT., [http://www.cbp.gov/xp/cgov/about/history/legacy/bp\\_historcut.xml](http://www.cbp.gov/xp/cgov/about/history/legacy/bp_historcut.xml) (last visited Jan. 7, 2013) (while border security tightened the reins on air traffic from U.S. to Mexico, Mexican smugglers became increasingly dangerous by hijacking aircrafts).

13. See, e.g., *Immigrants Pick New Border Route*, CBS NEWS (Feb. 11, 2009, 6:10 PM), [http://www.cbsnews.com/2100-201\\_162-1868264.html](http://www.cbsnews.com/2100-201_162-1868264.html) (cross-border violators are becoming increasingly resourceful in their efforts to cross the border and are capable of finding new routes quickly).

14. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-12-39, INFORMATION SHARING AMONGST FOREIGN NATIONALS: BORDER SECURITY (2012), available at [http://kpbs.media.clients.ellingtoncms.com/news/documents/2012/03/09/OIGr\\_12-39\\_Feb12.pdf](http://kpbs.media.clients.ellingtoncms.com/news/documents/2012/03/09/OIGr_12-39_Feb12.pdf) (information sharing amongst U.S. departments along the border has created holes in border security infrastructure).

15. National Security and Federal Lands Protection Act, H.R. 1505, 112th Cong. (2011).

along the border can work together to create a mutually beneficial relationship, avoid tarnishing international relationships, prevent environmental degradation, and improve interdepartmental respect and integrity.

## II. HISTORY OF U.S.-MEXICO BORDER LEGISLATION

Border security issues arise from the history of U.S. border legislation and U.S.-Mexico agreements. Maintaining national security while remaining friendly and open to our neighbors has always been a delicate balance for the United States to attain. Border security along the U.S.-Mexico border has evolved immensely throughout the past century. In 1848, following the Mexican-American War, the two nations signed the Treaty of Peace, Friendship, Limits and Settlement between the United States and the Mexican Republic, beginning the two nations' agreements on delineating the border.<sup>16</sup> Following the Gadsden Purchase in 1853, the two nations finally settled their land appropriations and established the border.<sup>17</sup>

It was not until the early twentieth century that the United States began to introduce efforts in protecting the border region from persons emigrating from Mexico and Canada. During this time, the United States mostly sought to enforce its Chinese Exclusion Act and prevent Chinese immigrants from entering the country.<sup>18</sup> Around 1904, the U.S. government first stationed mounted watchmen of the U.S. Immigration Service, but the watchmen were only used when necessary (the U.S. government was more interested in training their men for the military rather than for securing the borders).<sup>19</sup> In the 1920s it became apparent that inspection stations alone were not enough to adequately secure the borders, so the United States officially established the U.S. Border Patrol with the mission of securing the borders between inspection stations.<sup>20</sup> Prohibition ignited a dangerous influx of cross-border violators, from both the Canadian and Mexican borders.<sup>21</sup> In the 1930s, when a mass influx of migrant workers began moving northward from Mexico, the

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16. Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922.

17. Gadsden Purchase Treaty, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031.

18. Erika Lee, *Enforcing the Borders: Chinese Exclusion along the U.S. Borders with Canada and Mexico, 1882-1924*, 89 J. AM. HIST. 54, 56 (2002).

19. *Border Patrol History*, U.S. CUSTOMS AND BORDER PROT., [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_ohs/history.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml) (last visited Jan. 28, 2012).

20. *Id.*

21. *Did You Know...During the Prohibition Era There Were 3 Federal Border Patrols*, U.S. CUSTOMS AND BORDER PROT., [http://www.cbp.gov/xp/cgov/about/history/did\\_you\\_know/prohibition\\_era.xml](http://www.cbp.gov/xp/cgov/about/history/did_you_know/prohibition_era.xml) (last visited September 15, 2012).

United States shifted its border security policy from predominantly protecting the Canadian border to protecting the Mexican border.<sup>22</sup>

In the 1980s and 1990s, a surge of persons emigrated from Mexico to the United States, prompting the United States to implement new measures to stop illegal immigration. In an effort to drive potential immigrants away from the United States, the U.S. government started adopting more aggressive tactics.<sup>23</sup> This effort has continued to present day, with minimal effectiveness.

In 1992, the United States, Mexico, and Canada signed the North American Free Trade Agreement (NAFTA) in an effort to increase economic solvency within the individual regions.<sup>24</sup> But NAFTA failed to strengthen Mexico's economy and industry by only protecting corporations and failing to ensure protection for the average working wage and conditions. This failure, in turn, led to increased illegal immigration from Mexico to the United States.<sup>25</sup> The flow of goods anticipated from the agreement steadily transitioned into an increased flow of persons instead. Mexico's economy continues to suffer more and more every year.<sup>26</sup> These dire economic circumstances and high crime rates continue to be the main driving forces behind the illegal immigration.

To combat the increasing immigration problem, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996.<sup>27</sup> In an effort to grant greater authority to the Department of Justice in securing the border region near San Diego,<sup>28</sup> Congress drafted IIRIRA to allow the Attorney General to install additional physical barriers and roads along the border, using any necessary means to deter illegal crossings in areas of high entry into the United States.<sup>29</sup> Specifically, IIRIRA authorizes the Attorney General to waive the Endangered Species Act of 1973<sup>30</sup> and the National

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22. *Border Patrol – THE EARLY YEARS, RACE AND THE POLITICS OF MIGRATION CONTROL, RACIALIZATION AND LEGITIMIZATION*, ONLINE ENCYCLOPEDIA, <http://encyclopedia.jrank.org/articles/pages/6019/Border-Patrol.html> (last visited September 15, 2012).

23. *Id.*

24. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

25. Alejandro Portes, *NAFTA and Mexican Immigration*, BORDER BATTLES: THE U.S. IMMIGRATION DEBATES (Jul. 31, 2006), <http://borderbattles.ssrc.org/Portes/>.

26. *Id.*

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, available at <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>.

28. *Id.*

29. See generally NUÑEZ-NETO & GARCIA, *supra* note 2.

30. 42 U.S.C. §§ 4321-4370(f) (2000).

Environmental Policy Act of 1969, which set forth substantive and procedural environmental requirements for new construction projects.<sup>31</sup>

The goal of IIRIRA was to give the Department of Justice the necessary authority to construct a fourteen-mile, triple-layered fence along the U.S.-Mexico border near San Diego (the Triple Fence).<sup>32</sup> The authority later shifted to the Department of Homeland Security in 2002, after the tragedies of September 11, 2001. The explicit authority was vested in the Secretary of Homeland Security who now monitors border security.<sup>33</sup> A joint venture between the Environmental Protection Agency (EPA) and Mexico's equivalent of the United States' EPA, Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT) created the Border 2012 program to facilitate clean energy, minimize waste, and maximize community and local awareness of the difficulties and dangers the border region faces.

Despite the Secretary's newfound authority to bypass two important environmental protection laws, by 2004 only nine miles of the intended fourteen-mile Triple Fence had been completed and construction was halted due to environmental concerns.<sup>34</sup> When Congress passed the REAL ID Act in 2005, it included provisions to facilitate completion of the fence.<sup>35</sup> The REAL ID Act of 2005 decisively enhanced the Secretary of Homeland Security's discretion by granting limitless waiver authority to continue and complete the project, essentially allowing the Secretary to waive any and all laws that stood in the way.<sup>36</sup> The waiver authority was initially limited to the San Diego area fence project.

As explained in Section IV of this article, in 2005 the Secretary exercised his authority to waive a number of laws, most of which were environmental and conservation laws. In the waiver notices, the Secretary did not provide any explanation or rationale as to why the waiver was necessary. Additionally, there was no indication of whether the Secretary was fully aware of the potential repercussions from a waiver of this magnitude.

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31. 16 U.S.C. §§ 1531-1544 (2000).

32. NUÑEZ-NETO & GARCIA, *supra* note 2. The Triple Fence is designed to create a freeway-wide block from any cross-border violations, the first layer is made of surplus military landing mats welded together, the second of steel mesh, and the third of chain-link fencing with concertina wire. *California Border Wall: The Beginning of a Failed Strategy*, NO BORDER WALL, <http://www.no-border-wall.com/california.php> (last visited Apr. 1, 2012).

33. Andrea C. Sancho, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security under the REAL ID Act of 2005*, 16 SOUTHEASTERN ENVTL. L.J. 421 (2008).

34. NUÑEZ-NETO & GARCIA, *supra* note 2, at 1.

35. *Id.*; Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005).

36. §102(c)(1), 119 Stat. at 306.



With the fence construction underway, Congress then expanded the available territory in which the Secretary could utilize his waiver authority. The Secure Fence Act of 2006 removed the specific IIRIRA provisions limiting the fence to the San Diego area and added provisions authorizing five stretches of two-layered reinforced fencing along the southwest border.<sup>37</sup> The Secure Fence Act not only expanded legal waiver authority, but also provided the Secretary with increased equipment and manpower. The law authorized the Department of Homeland Security to provide more vehicle barriers, checkpoints, and lighting, while vamping up their technological equipment like cameras, satellites, and unmanned aerial vehicles.<sup>38</sup> In addition to these advancements, Congress increased funding, allowing the Department of Homeland Security to double the amount of Border Patrol agents along the U.S.-Mexico border.<sup>39</sup>

The bill's supporters believed that increased fencing, both virtual<sup>40</sup> and actual, alongside increased manpower, would effectively deter vehicles from crossing the border illegally and encourage fleeing persons to seek alternative, legal methods of U.S. citizenship.<sup>41</sup> They also believed that by preventing vehicles from unlawfully crossing the border, the Department of Homeland Security could decrease the number of man-made roads and discourage people from abandoning vehicles after crossing the border, leading to benefits for both the environment and the border area inhabitants.<sup>42</sup>

Members of Congress who opposed the bill doubted that the strategies would curb illegal immigration because of the resourceful means that cross-border violators might take when trying to cross the border. Their concerns stemmed from the knowledge that cross-border violators have been known to resort to other, more dangerous measures, such as tunneling. Tunnels, however, are more closely linked to criminal

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37. NUÑEZ-NETO & GARCIA, *supra* note 2.

38. *Fact Sheet: The Secure Fence Act of 2006*, WHITE HOUSE ARCHIVES, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html> (last visited Feb. 28, 2012).

39. *Id.*

40. To create a virtual fence, a series of high-tech security would need to be built along the border. The virtual fence was eventually halted by the Obama administration, but not before spending \$1 billion on fifty-three miles of sensors, cameras, radar and two towers in Arizona. Stewart Powell, *\$1B Fence Went From Optimism to Doom*, HOUS. CHRON., Jan. 24, 2011, <http://www.chron.com/news/houston-texas/article/1B-virtual-border-fence-went-from-optimism-to-1688076.php>.

41. 152 CONG. REC. S9863-02 (daily ed. Sep. 21, 2006) (statement of Rep. Conrad).

42. *Id.*

organizations, rather than the ordinary cross-border violator.<sup>43</sup> Some criminal organizations have begun resorting to tunnels because of the high likelihood of being exposed to Border Patrol above ground and the harsh penalties traffickers face if caught and convicted.<sup>44</sup>

Apart from members of Congress, other bill opponents were concerned that the message attributed to erecting a border fence would hurt U.S.-Mexico border relations.<sup>45</sup> More importantly, they were concerned about the physical damage that would result from erecting a fence of this magnitude and the possible environmental hazards that could result from disturbing migratory patterns.<sup>46</sup> Considering the amount proposed to finance the fence, the United States could have hired more personnel and installed greater technological surveillance equipment for a fraction of the cost.<sup>47</sup>

Despite enormous pushback, the Secure Fence Act of 2006 was approved and is being implemented along the border region.<sup>48</sup> Originally, Congress appropriated \$1.2 billion for the project.<sup>49</sup> Unsurprisingly, it has cost the government more money, time, and resources to construct the fence than originally anticipated.<sup>50</sup> Many amended deadlines have come and gone.<sup>51</sup>

By April 2009, the Department of Homeland Security had erected about 613 miles of new pedestrian fencing and vehicle barriers along the southwest border from California to Texas—just shy of the intended 700 miles. Thus, the project is presently unfinished. Some members of Congress have tried creating bills to enable greater funding for the fence, but they have been largely unsuccessful. At present, apart from the

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43. *Authorities Find Another Tunnel Under U.S.-Mexico Border*, FOX NEWS LATINO (Nov. 23, 2011), <http://latino.foxnews.com/latino/news/2011/11/23/authorities-find-another-tunnel-under-us-mexico-border/>.

44. *Id.*

45. Jorge Castañeda, *Immigration: Do Bad Fences Make Bad Neighbors?*, BIG THINK (Feb. 16, 2010), <http://bigthink.com/ideas/18673>.

46. *See, e.g.*, Randol C. Archibald, *Border Fence Work Raises Environmental Concerns*, N.Y. TIMES, Nov. 21, 2007, <http://www.nytimes.com/2007/11/21/us/21fence.html>.

47. *See, e.g.*, Laura Tillman, *Officials Present 'No Fence' Alternatives*, BROWNSVILLE HERALD, Mar. 6, 2009, <http://borderwallinthenews.blogspot.com/2009/03/officials-present-no-fence-alternatives.html>.

48. Secure Fence Act of 2006, Pub. L. No. 109-397, 120 Stat. 2638.

49. Julia Gelatt, *President Signs DHS Appropriations and Secure Fence Act, New Detainee Bill Has Repercussions for Noncitizens*, MIGRATION INFO. SOURCE (Nov. 1, 2006), <http://www.migrationinformation.org/USFocus/print.cfm?ID=491>.

50. *See, e.g.*, Tyche Hendricks, *Study: Price For Border Fence Up to \$49 Billion*, SAN FRANCISCO CHRON., Jan. 8, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/08/BA6RNEJG1.DTL&ao=all> (projected costs of fence inaccurate).

51. *See, e.g.*, Elizabeth Montalbano, *DHS Scales Back Mexico Border Fence Plans*, INFORMATION WEEK (Dec. 12, 2011, 3:09 PM), <http://www.informationweek.com/news/government/security/232300377>.

waivers discussed in Part IV, immigration law at the border has been largely anticlimactic. The fence remains incomplete, and certain political groups and politicians remain focused on implementing a fence along the entirety of the border and increasing Border Patrol's control over the region. While the incomplete fence may offer some barriers to illegal immigration, more sustainable practices near the border area have been encouraged by other groups that can keep the border free from dangerous tread.

### III. BORDER 2012: AN ATTEMPT TO BEAUTIFY AND REMEDY AN INHOSPITABLE BORDER REGION

In an effort to increase accountability of the border region from both border nations, Border 2012 was created in 2002 to address a number of mutually beneficial goals. These goals were meant to create unity and cooperation between both nations at the U.S.-Mexico border, but both nations continue to struggle to attain them. Unfortunately, prioritizing barriers over relations has undermined completion of the program.

Border 2012 was a program implemented by Mexico and the United States to specifically address some immediate problems along the border region between the two countries, which extends from the Gulf of Mexico to the Pacific Ocean. The program was designed to effectuate the terms and ideals created by the 1983 La Paz Treaty between the United States and Mexico, entitled Cooperation for the Protection and Improvement of the Environment in the Border Area.<sup>52</sup> The "border area" extends 100 kilometers north and 100 kilometers south of the border.<sup>53</sup> This program is essential to border security because both countries need to work collaboratively in maintaining and securing the border region from unwanted deterioration and abuse.

The border region is wrought with degradation, pollution, and violence due to cross-border violators, U.S. border security response, and increased industry. Residents along the border suffer disproportionately from many environmental health problems, including water-borne diseases and respiratory problems.<sup>54</sup> Consistent with the principles of sustainable development, Border 2012 was created to address certain environmental hazards, particularly those that create public health

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52. Gelatt, *supra* note 49.

53. U.S.-Mexico Border 2012, *What is Border 2012?, Background*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/border2012/framework/background.html> (last visited Jan. 11, 2013).

54. *Id.*; U.S. ENVTL. PROT. AGENCY, EPA-832-R-00-007, STATUS REPORT ON THE WATER AND WASTEWATER INFRASTRUCTURE PROGRAM FOR THE U.S.-MEXICO BORDERLANDS 3 (2000) (those living along the U.S.-Mexico border have been found to be more susceptible to water-borne diseases due to inadequately treated sewage).

challenges.<sup>55</sup> Accountability and the responsibilities of each nation's agency to secure compliance with Border 2012 have been carefully delineated in a memorandum between the nations.<sup>56</sup>

The Border 2012 program empowered federal environmental authorities in the United States and Mexico to undertake cooperative initiatives and was implemented through multi-year binational programs.<sup>57</sup> EPA and SEMARNAT were the National Coordinators for their respective nations, and they are required by the program to conduct monitoring and issue reports of their monitoring efforts.<sup>58</sup> The program also delineated limits on emission levels that can be generated from corporations that reside along the border region,<sup>59</sup> and ensured continued use of atmospheric monitoring facilities.<sup>60</sup>

The Border 2012 framework, developed in 2002, encompassed six goals to be implemented along the border region, focusing mostly on preserving environmental integrity along the border. The first of those goals was to reduce water contamination by identifying sources of contamination, increasing potable water in homes, furthering sanitization processes of wastewater, and evaluating the water quality standards of shared water sources.<sup>61</sup> The second goal focused on reducing air pollution by improving and reaching air quality standards, promoting emissions reductions, and determining alternatives to reduce air pollution.<sup>62</sup> After the U.S. and Mexican governments monitor and examine output emissions, they determine how to implement an effective strategy to reduce emissions.<sup>63</sup>

The third goal of Border 2012 was to reduce land contamination around the border region resulting from illegal immigrant movement.<sup>64</sup> Border personnel was tasked with improving infrastructure along the border for waste management and pollution prevention, first by creating

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55. U.S.-Mexico Border 2012, *What is Border 2012?, Background*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/border2012/framework/background.html> (last visited Jan. 11, 2013) (defines "sustainable development" as conservation-oriented social and economic development that emphasizes the protection and sustainable use of resources, while addressing both current and future needs and present and future impacts of human actions).

56. U.S. ENVTL. PROT. AGENCY, OPERATIONAL GUIDANCE FOR BORDER 2012 COORDINATING BODIES AND TASK FORCES (2009).

57. *Id.* at 2.

58. *Id.*

59. Annex IV to the Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., art. I, Aug. 22, 1990, T.I.A.S. No. 11269.

60. *Id.* at art. III.

61. U.S. ENVTL. PROT. AGENCY, *supra* note 53.

62. *Id.*

63. *Id.*

64. *Id.*

a well-researched action plan and then implementing a binational policy of clean-up and restoration policies, culminating with a cleanup of three of the largest sites that contain abandoned waste in the U.S.-Mexico border region.<sup>65</sup> Involving border personnel in the process of Border 2012 keeps everyone accountable to the region and encourages positive change to inhabitants and those along the border.

The fourth goal was to improve environmental health by building the capacity for health care personnel in the region to conduct research, deliver preventative services, and enhance public awareness of environmental exposure.<sup>66</sup> Border 2012 initially started an effort to train health care providers to specialize in efforts to ensure water purity, but also included an innovative effort to promote distance learning in the subject of environmental health in conjunction with the Pan American Health Organization.<sup>67</sup> The fifth goal of Border 2012 was to create a chemical emergency advisory/notification mechanism between Mexico and the United States in order to identify chemical risks on either side of the border.<sup>68</sup> Its most central purpose was to create a bond among the sister cities of the border region to identify and combat chemical risks.<sup>69</sup>

The sixth goal of Border 2012 was to promote environmental stewardship among the border region by identifying the border region's heavy pollutant industries and creating a baseline standard and emissions assessment test to administer to those industries.<sup>70</sup> Border 2012's success was centered around community involvement and input; if successful it will create a sense of awareness to inspire accountability.

Presidents Obama and Calderon have expanded Border 2012.<sup>71</sup> In congruence with Border 2012, President Obama announced the Bilateral Framework on Clean Energy and Climate Change,<sup>72</sup> and has also proposed two new projects, one of which is aimed at reducing emissions from idling vehicles waiting to cross at the border stations.

As explored below, the use of waiver authority by the Department of Homeland Security undermines the foundation and goals of Border 2012 and sends a message to neighboring countries that the United States

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Press Release, The White House, U.S.-Mexico Announce Bilateral Framework on Clean Energy and Climate Change (Apr. 16, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/US-Mexico-Announce-Bilateral-Framework-on-Clean-Energy-and-Climate-Change](http://www.whitehouse.gov/the_press_office/US-Mexico-Announce-Bilateral-Framework-on-Clean-Energy-and-Climate-Change).

72. *Id.*

does not value treaties that may come in direct conflict with policy it selfishly desires to implement.<sup>73</sup>

#### IV. DEPARTMENT OF HOMELAND SECURITY WAIVER USE

In an effort to curb the negative effects of illegal immigration, the federal government granted the Secretary of Homeland Security, Michael Chertoff, unrestricted waiver authority in order to allow the Department of Homeland Security immediate access to federal lands along the border to complete the fence and any other necessary border security projects.<sup>74</sup> Section 102(a) of the IIRIRA states that the Secretary “shall take such actions as necessary to install additional physical barriers and roads” in the border region.<sup>75</sup> Section 102(c) grants the waiver authority, stating that the provisions of certain environmental laws are waived to the extent deemed necessary by the Secretary to construct the barriers and roads.<sup>76</sup>

Since Congress enacted the REAL ID Act in 2005, the Secretary of the Department of Homeland Security has exercised his waiver authority on five separate occasions.<sup>77</sup> Many people and organizations have scrutinized Secretary Chertoff’s lack of transparency, as he is not required and did not explain his reasoning for invoking his waiver authority on those five occasions.<sup>78</sup> The most damaging part of this exercise of waiver authority is the failure to justify its use and the

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73. Border 2012 has been subsequently followed by Border 2020 in an effort to keep the continued binational efforts in motion. Border 2020’s goals remain similar, but have been built upon to recognize inherent problems and areas for improvement. Border 2020 also seems to be more comprehensive and transparent than Border 2012 in their endeavor to revitalize the border region. U.S. ENVTL. PROT. AGENCY, EPA-160-R-12-001, BORDER 2020: U.S.-MEXICO ENVIRONMENTAL PROGRAM (2013), <http://www.epa.gov/border2020/pdf/border2020summary.pdf>.

74. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 102, 110 Stat. 3009, *available at* <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>.

75. *Id.* at § 102(a).

76. *Id.* at § 102(c).

77. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 18,293 (Apr. 3, 2008); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 18,294 (Apr. 3, 2008); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60,870 (Oct. 26, 2007); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535 (Jan. 19, 2007); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005, 70 Fed. Reg. 55,622 (Sept. 22, 2005).

78. *See, e.g., Chertoff’s Border Wall Waiver is an Assault on the Rule of Law*, NO BORDER WALL (Apr. 1, 2008, 11:48 PM), <http://notexasborderwall.blogspot.com/2008/04/chertoffs-border-wall-waiver-is-assault.html>.

inability to employ an alternative means of maintaining border protection. Critics may be less vocal in their opposition to waiver authority if the Secretary divulged the need for the waiver authority and explained why, as a last resort, the waiver was vital to border security.

Threats to the environment and protected species have increased due to the use of waivers. As fences and barriers along the border increase, environmental interests decrease. Since designating this mandate, Secretary Chertoff has used his waiver power on five separate occasions. Most of the waiver authority uses have been challenged on the grounds of unconstitutional delegation of authority—primarily by the Defenders of Wildlife and Sierra Club.<sup>79</sup>

On September 22, 2005, Secretary Michael Chertoff first asserted his waiver authority under the REAL ID Act.<sup>80</sup> The notice of waiver stated, “Congress granted me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads under Section 102 of IIRIRA.”<sup>81</sup> The notice further explained:

In order to ensure the expeditious construction of the barriers and roads that Congress prescribed ... [in] an area of high illegal entry into the United States ... I have determined that it is necessary that I exercise the authority ... I hereby waive in their entirety, with respect to the construction of the barriers and roads ... all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of [eight federal laws cited in Note 70].<sup>82</sup>

Secretary Chertoff provided no explanation or rationale for the questionable need to immediately waive any of these individual laws.<sup>83</sup> Chertoff only vaguely discussed “the expeditious construction of barriers

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79. Press Release, Defenders of Wildlife, U.S. Supreme Court Asked to Answer: Is Chertoff Above the Law? (Mar. 17, 2008), available at <http://www.defenders.org/press-release/us-supreme-court-asked-answer-chertoff-above-law>.

80. On September 22, 2005, Secretary Chertoff waived eight statutes, as amended: Administrative Procedure Act, 5 U.S.C. §§ 551-596 (2000); National Historic Preservation Act, 16 U.S.C. §§470-470x-6 (2000); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (2000); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (2000); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) (2000); and the Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2000). Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005, 70 Fed. Reg. at 55,623.

81. *Id.*

82. *Id.*

83. *Id.*

and roads.”<sup>84</sup> The Department of Homeland Security later asserted that the waiver was necessary to build a fourteen mile stretch of fencing—as part of the Border Infrastructure System—near San Diego, California.<sup>85</sup> The Department of Homeland Security has yet to explain why the standard practice of obtaining approval from the necessary land use and environmental agencies was overly burdensome.

The Sierra Club challenged this waiver in *Sierra Club v. Ashcroft*.<sup>86</sup> The plaintiffs argued that Section 102(c) represented “an unconstitutional delegation of legislative authority,” and that Section 102(c) “is unconstitutional because it permits the DHS Secretary to abolish federal statutory jurisdiction that ordinarily would have governed [the] dispute.”<sup>87</sup> Also, the plaintiffs alleged that the waiver legislation exercised by Secretary Chertoff was impermissibly retroactive because Section 102(b) of the IIRIRA had limited construction to the San Diego border region.<sup>88</sup> But the court construed the waiver authority to extend to whichever region has areas of “high illegal entry.”<sup>89</sup> However, the court did not give any definition of what constitutes an area of “high illegal entry.”<sup>90</sup>

The Federal District Court for the Southern District of California upheld the Secretary’s use of his waiver authority and further stated that in the REAL ID amendment to the IIRIRA Section 102(c), “Congress simply broadened the scope of the waiver authority of the pre-existing delegation to ‘all laws,’ but again only for the narrow purpose of expeditious completion of the Triple Fence<sup>91</sup> authorized by the IIRIRA.”<sup>92</sup> The court reasoned that Congress extended the scope of the waiver, and that the waiver still only applied to the fourteen-mile corridor specified in Section 102(b) of IIRIRA.<sup>93</sup> Thus, the time of the *Sierra Club* decision, Section 102(b) of the IIRIRA limited construction to “[fourteen] miles of international land border” near San Diego; hence,

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84. *Id.*

85. Press Release, Department of Homeland Security, DHS Exercises Waiver Authority to Expedite Advancements in Border Security (Apr. 1, 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/waivers-DHS-PR-Regarding-Exercise-of-Waiver-Authority.pdf>.

86. *Sierra Club v. Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).

87. *Id.* at \*15.

88. *Id.*

89. *Id.* at \*20-\*21.

90. *Id.* at \*20.

91. The fence, as stipulated by the IIRIRA, is actually three fences, creating more of a wall than a fence. NUÑEZ-NETO & GARCIA, *supra* note 2.

92. *Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at \*19-20.

93. *Id.*



the “narrow purpose” that the court referred to was bounded by the application of the law to the relevant geography.

On January 19, 2007, Secretary Chertoff exercised his waiver authority a second time at the Barry Goldwater Range, Yuma Barrier in southern Arizona—a region that Chertoff deemed a hotspot for high illegal entry.<sup>94</sup> In this instance, Chertoff waived nine federal statutes<sup>95</sup> with a brief account of “a need to construct fixed and mobile barriers (such as fencing, vehicle barriers, towers, sensors, cameras, and other surveillance, communication, and detection equipment) and roads in the vicinity of the border of the United States within and in the vicinity of the [Barry Goldwater Range].”<sup>96</sup> Chertoff did not provide any further explanation regarding the waiver of the nine laws, the necessity for the immediate exercise of the waiver, or the duration of the waiver.

Save Our Heritage foundation challenged this waiver in *Save Our Heritage v. Chertoff*.<sup>97</sup> The plaintiff argued, as the Sierra Club argued previously, that the waiver authority was an improper delegation of power to the executive.<sup>98</sup> The U.S. District Court for the District of Columbia, in a similar fashion as the District Court for the Southern District of California, upheld Chertoff’s waiver authority, granting the defendants’ motion to dismiss for failure to state a claim.<sup>99</sup> Ultimately, the plaintiffs’ claim failed because they did not file it within the sixty-day statute of limitations.<sup>100</sup> However, the court further stated that the delegation of power was proper because there was “an intelligible principle that the Secretary must conform to in the exercise of his delegated power” given by Congress.<sup>101</sup> Regardless of the filing deficiency, the court still expressed their authority and decision-making power over the matter.

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94. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535 (Jan. 19, 2007).

95. Administrative Procedure Act, 5 U.S.C. §§ 551-596 (2000); National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000); National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee (2000); Sikes Act, 16 U.S.C. §§ 670-670o (2000); Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2000); and Military Lands Withdrawal Act of 1999, Pub. L. 106-65, 113 Stat. 885 (1999).

96. 72 Fed. Reg. at 2535.

97. *Save our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008).

98. *See* Complaint at 1, *Save our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) (No. 07CV00308).

99. *See Save Our Heritage*, 533 F. Supp. 2d at 64-65.

100. *Id.* at 61-62.

101. *Id.* at 64.

On October 5, 2007, Defenders of Wildlife and the Sierra Club brought suit against Secretary Chertoff in the U.S. District Court for the District of Columbia seeking a temporary restraining order enjoining DHS from building the border fence and conducting other related activities in the San Pedro Riparian National Conservation Area, within the vicinity of the U.S. border in southeastern Arizona.<sup>102</sup> On October 10, 2007, the presiding district court judge issued a temporary restraining order halting fence construction activities in the Conservation Area. The court found that the relevant federal agencies had failed to carry out an environmental assessment as legally required.<sup>103</sup> Despite this temporary restraining order, the Secretary continued to waive a number of environmental laws in order to resume construction.<sup>104</sup>

On October 26, 2007, Secretary Chertoff exercised his waiver authority for the third time.<sup>105</sup> This waiver was associated with the construction of barriers and roads along the same Conservation Area that was challenged earlier that month.<sup>106</sup> On this occasion, Secretary Chertoff increased the amount of waived laws to twenty<sup>107</sup> and again failed to explain his rationale.<sup>108</sup> Because of Chertoff's waiver, these twenty laws no longer operated "starting approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the

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102. NUÑEZ-NETO & GARCIA, *supra* note 2.

103. *Id.*

104. *Id.*

105. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the Real ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60,870 (Oct. 26, 2007).

106. *Id.*

107. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2008); Endangered Species Act of 1979, 16 U.S.C. §§ 1531-1544 (2008); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (2008); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2008); National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2008); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-713c (2008); Clean Air Act, 42 U.S.C. §§ 7401-7671q (2008); Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (2008); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300aaa-13 (2008); Noise Control Act, 42 U.S.C. §§ 4901-4918 (2008); Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2008); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2008); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785 (2008); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668ee (2008); Archeological and Historic Preservation Act, 16 U.S.C. §§ 469-470x-6 (2008); Antiquities Act, 16 U.S.C. §§ 431-460ttt-2 (2008); Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. §§ 461-470x-6 (2008); Arizona-Idaho Conservation Act of 1988, 16 U.S.C. §§ 460xx-460ttt-2 (2008); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1281-1287 (2008); Farmland Protection Policy Act, 7 U.S.C. §§ 4201-4209 (2008); and Administrative Procedure Act, 5 U.S.C. §§ 551-596 (2008).

108. *See, e.g., Rules Waived for U.S. Fence*, L.A. TIMES (Apr. 2, 2008), <http://articles.latimes.com/2008/apr/02/nation/na-fence2>.

SPRNCAs and any and all land.”<sup>109</sup> Defenders of Wildlife again challenged the constitutionality of Section 102(c), alleging a violation of separation of powers, the lack of an intelligible principle under the nondelegation doctrine, and the impermissibility of the broad scope of waiver authority granted by Section 102.<sup>110</sup>

Yet again, the U.S. District Court for the District of Columbia upheld Chertoff’s exercise of waiver authority, despite the considerable increase in the number of laws waived.<sup>111</sup> The court agreed with the government that “‘Congress may delegate in even broader terms’ than otherwise permissible in matters of immigration policy, foreign affairs, and national security because ‘the Executive Branch already maintains significant independent control’ over these areas.”<sup>112</sup> The District Court reasoned that Section 102 defined the boundaries of the Secretary’s waiver authority by only allowing discretion when necessary. Yet the court never described a situation in which the use of waiver authority would be “necessary” or, for that matter, unnecessary.

The most recent incident during which Secretary Chertoff exercised his waiver authority was on April 1, 2008.<sup>113</sup> On that occasion, he utilized his waiver authority for two separate projects, giving a vague rationale for the waivers:

Criminal activity at the border does not stop for endless debate or protracted litigation, congress and the American public have been adamant that they want and expect border security. We’re serious about delivering it, and these waivers will enable important security projects to keep moving forward. At the same time, we value the need for public input on any potential impact of our border infrastructure plans on the environment—and we will continue to solicit it.<sup>114</sup>

The Department of Homeland Security subsequently released a statement regarding the waivers, deeming them necessary to expedite security improvements and naming particular projects. Once again, following an

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109. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 123 n.4 (D.D.C. 2007) (citing 72 Fed. Reg. at 60,870).

110. See First Amended Complaint at 9, *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007) (No. 07-1801).

111. *Defenders of Wildlife*, 527 F. Supp. 2d at 129.

112. *Id.* at 123.

113. Press Release, Department of Homeland Security, DHS Exercises Waiver Authority to Expedite Advancements in Border Security (Apr. 1, 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/waivers-DHS-PR-Regarding-Exercise-of-Waiver-Authority.pdf>.

114. *Id.*

established pattern, the Department failed to divulge why the normal protocol was insufficient at present.<sup>115</sup>

One of the waivers applied to environmental and land management laws for various project areas in California, Arizona, New Mexico, and Texas, encompassing approximately 470 miles.<sup>116</sup> DHS asserted that this waiver was to facilitate the installation of towers, sensors, cameras, detection equipment, and the construction of pedestrian and vehicle fences and roads.<sup>117</sup> A separate waiver was designated for a levee-border barrier project in Hidalgo County, Texas to reinforce flood protection in the area while providing the Border Patrol with important tactical infrastructure.<sup>118</sup> This time, Chertoff waived more than thirty laws affecting Texas, Arizona, California, and New Mexico.<sup>119</sup> Defenders of Wildlife attempted to appeal the 2007 use of waiver authority decision to the Supreme Court of the United States, but in spite of impressive amicus

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. On April 1, 2008, Secretary Chertoff waived the following laws, as amended: Administrative Procedure Act, 5 U.S.C. §§ 551-596 (2000); Farmland Protection Policy Act, 7 U.S.C. §§ 4201-4209 (2000); National Park Service General Authorities Act, 16 U.S.C. §§ 1(a-1)-18(f-3) (2000); Antiquities Act, 16 U.S.C. §§ 431-433 (2000); Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. §§ 461-467(b) (2000); Archaeological and Historic Preservation Act, 16 U.S.C. §§ 469-469(c) (2000); National Historic Preservation Act, 16 U.S.C. §§ 470-470(x-6) (2000); Archeological Resources Protection Act, 16 U.S.C. §§ 470(aa)-470(mm) (2000); Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (2000); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (2000); Eagle Protection Act, 16 U.S.C. §§ 668-668(d) (2000); National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668 (dd)-668(ee) (2000); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (2000); Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(a)-754(d) (2000); Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (2000); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (2000); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000); National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1687 (2000); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000); Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000); Safe Drinking Water Act, 42 U.S.C. §§ 300(f)-300(j-26) (2000); Religious Freedom Restoration Act, 42 U.S.C. § 2000(bb) (2000); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) (2000); Noise Control Act, 42 U.S.C. §§ 4901-4918 (2000); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992(k) (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2000); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785 (2000); National Parks and Recreation Act of 1978, Pub. L. No. 95-625, §§ 401(7), 403, 404, 92 Stat. 3467 (1978) (codified in scattered sections of 16 U.S.C.); National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1, 2, 3, 4 (2000)); Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145, 113 Stat. 1711 (1999); California Desert Protection Act, Pub. L. No. 103-433, §§ 102(29), 103, 108 Stat. 4471 (1994); Arizona Desert Wilderness Act, Pub. L. No. 101-628, §§ 301(a)-(f), 104 Stat. 4469 (1990). Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 18,293 (Apr. 3, 2008).

briefs, the petition was denied.<sup>120</sup> The County of El Paso also sought review by the Supreme Court in light of Chertoff's actions.<sup>121</sup> Despite the pushback from multiple environmental agencies and local governments affected by the fence, Secretary Chertoff still executed the waiver authority, undermining many environmental laws to construct the border fence.

#### V. EXPANDING THE SECRETARY OF HOMELAND SECURITY'S WAIVER AUTHORITY

While many believe that the waiver authority was already overkill, some politicians and organizations want to increase the scope of the Secretary's waiver authority into other protected lands for general border security purposes, beyond the goal of fence construction. On July 8, 2011, Representative Rob Bishop from Utah proposed a bill to the House Committee on Natural Resources, National Parks, Forests, and Public Lands.<sup>122</sup> Bishop proposed the bill to prohibit the Secretaries of the Interior and Agriculture from taking action on public lands, which impede border security on such lands, among other purposes.<sup>123</sup>

The bill authorizes the Secretary of Homeland Security to have immediate access to any public land managed by the Federal Government for purposes of conducting activities that assist in securing the border (including access to maintain and construct roads, construct a fence, use vehicles to patrol, and set up monitoring equipment).<sup>124</sup> This bill will expand the waiver authority that has been given to the Secretary of Homeland Security in accordance with IIRIRA, and will increasingly extend that authority to reach one hundred miles of the international land and maritime borders of the United States.<sup>125</sup> The Natural Resources Committee of the House of Representatives ties the deficiency in security on federal lands along the northern and southern U.S. borders to the fact that internal documents have shown that Department of the Interior land managers are using environmental regulations to hinder U.S. Border

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120. Petition for Writ of Certiorari, *Defenders of Wildlife v. Chertoff*, 554 U.S. 918 (2008) (No. 07-1180).

121. *Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008) (Concluding that the Waiver Legislation clearly satisfies the intelligible principle standard, and also concluding that the Waiver Legislation does not violate the Presentment Clause nor the Tenth Amendment).

122. Press Release, U.S. House of Representatives Natural Res. Comm., Groups Call for Passage of Republican Legislation to Enhance Border Security on Federal Lands (July 8, 2011), available at <http://naturalresources.house.gov/uploadedfiles/07.08.11-borderhearingrecap.pdf>.

123. National Security and Federal Lands Protection Act, H.R. 1505, 112th Cong. (2011).

124. *Id.* at § 2.

125. *Id.*

Patrol security efforts.<sup>126</sup> The passage of this bill will grant Border Patrol the capacity to impede upon those laws that stand in the way of national security.

The bill passed through the subcommittee and is making its way for approval in the House. The bill will effectively allow the Secretary of Homeland Security to waive any environmental law governed by the Secretary of the Interior or the Secretary of Agriculture for any activity deemed necessary for border security, most importantly the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act.<sup>127</sup> Republican Representative Doc Hastings, the chairman of the House Natural Resources Committee, has said that “Border Patrol has become encumbered with layers of environmental regulations making it difficult to deal with drug smugglers, human traffickers, and other criminals who are targeting public lands along the U. S. borders.”<sup>128</sup> “Jan Danowitz, the Pew Environment Group’s Director of Public Lands, called the plan a sweeping waiver of environmental laws that would allow a single federal agency to destroy wildlife habitat and wetlands and hurt water quality.”<sup>129</sup>

Despite the bill’s strong position to assist Border Patrol in their mission to protect the border, Customs and Border Protection has taken steps to show its opposition to the bill by sending officials to testify against Bishop’s bill in Congress.<sup>130</sup> Their opposition is centered around the contention that, from their experience, “[m]ost agents reported that land management laws have had no effect on Border Patrol’s overall measure of border security.”<sup>131</sup> Additionally, the Obama Administration has openly opposed the legislation, deeming it unnecessary.<sup>132</sup> While this piece of legislation brings to light the difficulties that Border Patrol has been facing in order to maintain operational control at the border, namely the length of time it takes to be granted exposure to protected lands, it is not the best action to take to remedy the problem as it exists.

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126. *Securing our Border on Federal Lands*, U.S. HOUSE OF REPRESENTATIVES NATURAL RES. COMM., <http://naturalresources.house.gov/border/> (last visited Sept. 16, 2012).

127. Rob Hotakainen, *GOP Bill Would Let Border Patrol Ignore Environmental Laws*, SEATTLE TIMES, Oct. 25, 2011, [http://seattletimes.nwsources.com/html/localnews/2016606506\\_envir onment26m.html](http://seattletimes.nwsources.com/html/localnews/2016606506_envir onment26m.html).

128. *Id.*

129. *Id.*

130. Scott Nicol, *Environmental Assault Disguised as Border Security*, PEOPLES WORLD (Nov. 4, 2011), <http://www.peoplesworld.org/environmental-assault-disguised-as-border-security/>.

131. *Id.*

132. Tim Woody, Op-Ed., *Homeland Security Will Not Protect Lands*, ANCHORAGE DAILY NEWS, Mar. 8, 2012, <http://www.adn.com/2012/03/08/2360122/homeland-security-will-not-protect.html>.

Similar to the limitless waiver authority, allowing Border Patrol access to one hundred miles of borderlands will only increase the gap in communication amongst interrelated departments and lead to environmental degradation. Taking away any and all power that the Department of the Interior and the Department of Agriculture have over their federally protected lands near the border removes their say in preserving vital lands, species, and air quality. Now that this deficiency in border security's ability to maintain full operational control along the border has been brought to the federal government's attention, the departments can work together towards transparency and efficiency to better enable Customs and Border Protection's ability to obtain land grants.

#### VI. BORDER PROTECTION INTERAGENCY PROTOCOL AT PRESENT

The Secretary's use of waiver authority is an unnecessary mechanism that disintegrates the communication protocol that the agencies created and agreed upon. The Department of Homeland Security, the Department of the Interior, and the Department of Agriculture created a communication system between agencies to facilitate exchange and encourage two common goals: basic human safety and ecological conservation.<sup>133</sup> When the Department of Homeland Security exercises waivers, it bypasses all accepted forms of communication between the agencies and supersedes the norms of the relationship. Rather than designating a waiver authority that circumvents protocol, the agencies should work together to remedy whatever deficiencies are in place in their communication mechanism.

In 2006, the Department of Homeland Security, Department of the Interior, and Department of Agriculture signed a memorandum of understanding regarding cooperative national security and counterterrorism efforts on Federal lands along U.S. borders.<sup>134</sup> While memorandums of understanding are not legally binding documents, the departments created this particular memorandum of understanding in a cooperative effort to coordinate communication between the three departments.<sup>135</sup> The three departments recognized the importance of communication among them to preserve national security and ensure

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133. Memorandum of Understanding Among U.S. Department of Homeland Security and U.S. Department of the Interior and U.S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Effects on Federal Lands along the United States' Borders (2006), available at <http://www.cis.org/articles/2010/mou.pdf> [hereinafter MOU Regarding Cooperative National Security and Counterterrorism Effects].

134. *Id.*

135. *Id.*

counterterrorism efforts by preventing illegal entry into the United States by cross-border violators, most notably to hinder drug and human smugglers, smuggling organizations, foreign nationals, and terrorists and terrorist organizations.<sup>136</sup> Increasing communication and transparency among the departments enables the departments to work together cohesively to prevent illegal entry into the United States, protect Federal Lands and natural and cultural resources, and prevent adverse impacts associated with illegal entry by cross-border violators.

In particular, the agencies recognized the aftermath that results from the monitoring and capturing of cross-border violators as they damage federally protected lands and natural and cultural resources.<sup>137</sup> It is important to note that while the memorandum carefully delineates a practical procedure and mechanism to address the concern of all agencies involved, it is carefully written to give DHS the authority to opt out of its correct and proper procedure if and when necessary. In the memorandum, the words “where possible” preface the agencies’ commitment to “prevent adverse impacts associated with illegal entry,” signifying that there are more pressing issues at hand that may overshadow the need to protect land and its resources.<sup>138</sup>

While the memorandum of understanding describes the goals and principles between the departments, its most important component is the guidance it asserts in facilitating communication among departments by creating a system of protocols necessary to link the appropriate departments to ensure a more expeditious way to receive permission to use the land while being respectful of the resource. It also states the need to share information among departments, and creates interagency liaisons.<sup>139</sup> In addition to the liaison positions, a borderlands management task force provides an intergovernmental forum in the field for officials—including those from Border Patrol, the land management agencies, and other state and local governmental entities—to regularly meet and discuss challenges and opportunities for greater transparency between agencies.<sup>140</sup>

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136. *Id.*

137. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-144, FEDERAL LANDS: ADOPTING A FORMAL, RISK-BASED APPROACH COULD HELP LAND MANAGEMENT AGENCIES BETTER MANAGE THEIR LAW ENFORCEMENT RESOURCES (2010), available at <http://www.gao.gov/assets/320/314200.html>.

138. MOU Regarding Cooperative National Security and Counterterrorism Effects, *supra* note 133.

139. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-573T, SOUTHWEST BORDER: BORDER PATROL OPERATIONS ON FEDERAL LANDS 8 (2011), available at <http://www.gao.gov/new.items/d11573t.pdf>.

140. *Id.* at 9.



It is apparent from the memorandum that the utilization of federally protected lands is necessary to protect the lands and capture cross-border violators.<sup>141</sup> The federal laws enforced by the relevant agencies contain provisions to allow Border Patrol immediate access to federally protected lands through permits, specific permission, or general permissions.<sup>142</sup>

The memorandum details what communication processes should be used, as well as the responsibilities and expectations of each department for certain projects. The memorandum explains that communication should begin at the lowest field operational level possible in order to both resolve conflict and delegate resolution authority.<sup>143</sup> If a resolution cannot be reached, the request for land use can be elevated up the levels of seniority for each department.<sup>144</sup> Because the Department of the Interior and the Department of Agriculture have administrative jurisdiction over the use of federally protected lands, Border Patrol must receive authorization before entering and using protected lands.<sup>145</sup> The most significant part of the memorandum is the outline of responsibilities, including expectations of each department and how Customs and Border Protection can obtain authorization.<sup>146</sup> The memorandum also specifies what manpower and vehicles (if any) can be used for Border Patrol projects.<sup>147</sup> This explicit guidance has created a uniform request process among the agencies, streamlining communication, authority, and transparency so that each agency knows what to expect.

The memorandum goes as far as proposing timelines for submitting land usage requests so that the requesting agency will be aware of the approval time and be able to notify land owners of their duty to complete the requests within that timeframe.<sup>148</sup> The requesting agency must request, in writing, that the land management agency grant additional access to federal lands only for such purposes as routine patrols, non-emergency operational access, and establishment of temporary camps or other operational activities.<sup>149</sup> The requesting agency must also specify the lands, routes, and means of access desired.<sup>150</sup> From there, the land

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141. See MOU Regarding Cooperative National Security and Counterterrorism Effects, *supra* note 133.

142. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139, at 5-7.

143. MOU Regarding Cooperative National Security and Counterterrorism Effects, *supra* note 133.

144. *Id.*

145. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139, at 9.

146. See *id.* at 7-9.

147. *Id.*

148. *Id.* at 20.

149. *Id.* at 5.

150. *Id.*

management agency will discuss and negotiate the terms of the request with the requesting agency.<sup>151</sup> For areas designated or managed as wilderness, the extent of land invasion, if allowable, will be determined by a situational analysis of the minimum level of invasion contemplated.<sup>152</sup> If all goes accordingly, the requesting agency should receive approval or denial within ninety days of the request.<sup>153</sup>

While the memorandum delineates a very cautionary and formulated system for the requesting agency to use, it prefaces each segment with the notice that if Border Patrol finds itself in a compromising situation and must access federal lands without permission, they may do so and subsequently submit a brief report to the land management agency.<sup>154</sup> The subsequent report must include articulated facts of why there was a specific exigency or emergency involving human life, health, safety of persons within the area, or potential threat to national security.<sup>155</sup> It must also include a description of how obtaining use of the land would reasonably result in the apprehension of cross-border violators.<sup>156</sup>

Since the memorandum of understanding delineated protocol for most situations that could occur for Border Patrol personnel for both non-emergency and emergency situations, it is curious why the Department of Homeland Security found it necessary to use a limitless waiver authority. A 2011 Government Accountability Office (GAO) study reported that seventeen of twenty-six patrol agents-in-charge in the Southwest Region still had difficulty accessing some federal lands, despite knowing the tools to obtain permission and the wide range of accessibility.<sup>157</sup> Some agents-in-charge pointed to the fact that obtaining a permit or permission took far longer than expected due to environmental and historic property assessments.<sup>158</sup> Time is of the essence when it comes to border security, and this delay in obtaining permission renders the requests obsolete.<sup>159</sup> Knowledge of the difficulties

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151. *Id.*

152. *Id.* at 5-7.

153. MOU Regarding Cooperative National Security and Counterterrorism Effects, *supra* note 133.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 16.

158. *Id.*

159. See, e.g., Hugh Holub, *GAO Confirms Federal Environmental Laws and Federal Land Managers Hinder Securing Our Border*, TUCSON CITIZEN, Apr. 20, 2011, <http://tucsoncitizen.com/view-from-baja-arizona/2011/04/20/gao-confirms-federal-environmental-laws-and-federal-land-managers-hinder-securing-our-border/>.

in obtaining permission and permits to use land likely deters Border Patrol stations from requesting permission altogether.<sup>160</sup>

While the GAO study did not make any new recommendations, it clarified that the recommendations it made in previous studies still stand.<sup>161</sup> In October 2010, it recommended that Border Patrol enter into interagency agreements that provide for Customs and Border Protection to use their own resources to conduct the required environmental and historic property assessments; also, it recommended that the agencies prepare programmatic National Environmental Policy Act documents for Border Patrol activities in areas where additional access may be needed.<sup>162</sup> In addition, the report recommended increased training to build awareness of the environmentally and culturally sensitive nature of the lands where protecting national security is critical.<sup>163</sup> In November 2010, the GAO further recommended a number of cooperative actions that would further national security while also protecting the interests of preserving land by increasing communication techniques and strategies amongst agencies.<sup>164</sup>

It is apparent from the text of the GAO reports that some regions flourish while others remain vulnerable. Of the Southwestern region, the Tucson sector continues to have the most difficulty maintaining operational control of the region.<sup>165</sup> While the Tucson region carries the highest number of apprehensions, it also maintains the most difficulty in deterring persons at the border initially with other types of less invasive

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160. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139.

161. *Id.*

162. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-38, SOUTHWEST BORDER: MORE TIMELY BORDER PATROL ACCESS AND TRAINING COULD IMPROVE SECURITY OPERATIONS AND NATURAL RESOURCE PROTECTION ON FEDERAL LANDS 51-52 (2010), *available at* <http://www.gao.gov/new.items/d1138.pdf>.

163. *Id.*

164. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-177, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO BETTER ENSURE A COORDINATED FEDERAL RESPONSE TO ILLEGAL ACTIVITY ON FEDERAL LANDS 38-39 (2010), *available at* <http://www.gao.gov/new.items/d11177.pdf>. (Specifically recommended to coordinate provisions that related to threat information for federal lands that is timely and actionable; future plans for upgrades of compatible radio communications used for daily law enforcement operations on federal lands; efforts to determine agencies' information needs for intelligence, including coordination of Border Patrol annual assessments of the threat environment and vulnerabilities affecting border security on federal lands; Border Patrol budget requests for personnel, infrastructure, and technology that affect federal lands; deployment plans for personnel, infrastructure, and technology on federal lands before such deployment is initiated; and access to information resulting from deployment of technology on federal lands).

165. Operational Control of an area is both "managed" and "controlled" in the sense that the Border Patrol "claims the capability to consistently detect entries when they occur; identify what the entry is and classify its level of threat (such as who is entering, what the entrants are doing, and how many entrants there are); effectively and efficiently respond to the entry; and bring the situation to an appropriate law enforcement resolution (such as an arrest)." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139, at 3.

surveillance that other regions are capable of.<sup>166</sup> Border Patrol measures its effectiveness at detecting and apprehending undocumented aliens through a daily assessment process and security level labeling system.<sup>167</sup>

While the memorandum included a proposed timeline for requests to be handled, the reality is that the departments do not carry the resources necessary to effectuate these requests on the proposed schedule. The agencies working together by communicating and sharing information would better prepare the Border Patrol agents to preserve border security and maintain environmental integrity. Because the enumerated protocol is not working there needs to be some changes implemented.<sup>168</sup>

At the local level, many agencies have developed plans to work effectively together and create a level of transparency that benefits all parties involved. The agencies that have taken the initiative to coordinate those plans have maintained a higher level of control over their regions.<sup>169</sup> Granted, when assessing regional operations, not all regions share the same deterrents, making the obtainment of operational control a very difficult prospect. For example, some regions have rough terrain that makes it nearly impossible to detect and arrest cross-border violators at a preemptive level.<sup>170</sup>

Rather than create a limitless waiver authority that goes against the very core of the relationship among the departments, the best way to remedy this problem is to develop and strengthen the communication among the departments by identifying the deficiencies and filling the holes where necessary. Enhanced coordination will promote a number of areas that are currently vulnerable, such as officer safety and efficient law enforcement responses to illegal activity along the border. The crux of the deficiency in obtaining permits seems to be with completing the requirements necessary for the National Environmental Policy and National Historic Preservation Acts.<sup>171</sup> The environmental and historic property assessments require specialized knowledge of different individuals, and difficulty in scheduling a time for these individuals to coordinate the review has resulted in severe time delays.<sup>172</sup>

These delays could be remedied by some changes to their structure and by implementing a strategy for obtaining permits that includes amending the National Environmental Policy and National Historic

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166. *Id.*

167. *Id.*

168. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 162, at 51-52.

169. *Id.*

170. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139, at 1.

171. *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 162, at 51-52.

172. GOV'T ACCOUNTABILITY OFFICE, *supra* note 139, at 10.

Preservations Acts to ensure resources are immediately available to assist Border Patrol within thirty days. While the interagency liaisons are incredibly useful to encourage and facilitate communication between the agencies, the addition of personnel dedicated solely to facilitating the assessment processes is necessary. These additional personnel, entitled Survey Managers, would be capable of preparing and executing the historic property assessments. The creation of a Survey Manager position will decrease scheduling delays and streamline the permission requests to use federally protected lands. Additionally, instead of only assessing the lands on request, these personnel could preemptively assess neighboring lands that are likely to need surveillance or use in the future. Since all agencies involved will benefit from a more effective and efficient process, both Border Patrol and the applicable land management agencies could collectively finance the new Survey Manager positions. Supplementing their time between assessment requests with anticipatory assessments could streamline the process as a whole. If survey specialists and other resources are on-hand to perform assessments at a moment's notice then the agencies could better meet the timeline goals that are described in the 2011 memorandum and better promote national security. Most importantly, this can be accomplished while ensuring the preservation of the land in the border region.

## VII. CONCLUSION

From the history of border security and the evolution of U.S. legislation addressing border security, it is evident that the United States may continue to employ drastic measures in an effort to protect our borders. While immigration issues did not serve the forefront of legislation in the last four years, one of the first pieces of legislation that President Barack Obama has chosen to tackle is comprehensive immigration reform. This proposed immigration reform is aimed at streamlining the citizenship process, without taking any additional national security efforts at the border—which could be the source of greatest contention to some.<sup>173</sup> The National Security and Federal Lands Protection Act may gain steam as a tool for the Republicans to strengthen their platform of unwavering commitment to border security, regardless of monetary and physical costs. Instead of wiping out the entire permit system, it would be in the best interest of all interested agencies to

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173. The Senate had previously outlined an immigration reform plan that was prefaced on the federal government certifying that the U.S.-Mexico border was secure. The President's plan does not include this condition. Cindy Carcamo, *Arizonans Torn on Obama's Immigration Reform Proposal*, L.A. TIMES, Jan. 30, 2013, <http://www.latimes.com/news/nation/nationnow/la-na-nn-ff-arizona-obama-immigration-20130130,0,3527234.story>.

continue working on their internal communication and delegation structure to safely and efficiently secure our nation's borders. Waiver authority will only continue to isolate DHS from working collaboratively with other related agencies. By engaging all agencies involved, the interests of each competing agency are promoted and accountability is simultaneously encouraged.

The United States could apply a variety of approaches—apart from limitless waiver authority—either separately or conjunctively in an effort to combat cross-border violations; it could revamp the admissions process, enable higher technology to create a more viable virtual fence, or it could reinforce its interdepartmental infrastructure to support increased communication between agencies. To respect the preservation of environmental laws, DHS should refrain from using its waiver authority and should instead let the departments process and implement requests on their own. Once the departments create a system of communication that processes and implements requests in a timely fashion, DHS will not be viewed as skirting around environmental laws in the name of border security. Instead of throwing money at a fence that has proven to be obsolete, Congress should reappropriate the funds to go towards increased personnel and intelligence at the border.