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***619 HOMELAND SECURITY versus ENVIRONMENTAL CONSERVATION: SEARCHING FOR BALANCE ALONG THE ARIZONA-MEXICO BORDER**

***620 Introduction**

In Southern Arizona, national security and environmental conservation are inextricably intertwined. The Arizona borderlands are home to thousands of acres of federally protected lands and fragile ecosystems. There are also more flora and fauna listed under the Endangered Species Act within these lands than any other region of the continental United States.¹

Aside from the ecological significance of the southwest borderlands, Southern Arizona is also a major drug trafficking and illegal immigration corridor from Mexico.² These illegal crossers leave behind thousands of pounds of trash, trample vegetation and occasionally start accidental wildfires.³ The Border Patrol combats this illegal activity by erecting walls and camera towers, cutting new access roads, burying detection equipment beneath the ground, and driving vehicles off-road. The unintended consequences of border security operations upon the environment are of no small significance either. Border fencing severs wildlife migration patterns, new patrol roads disrupt desert hydrology, and off-road driving creates dustbowl conditions.⁴

In March 2015, Senator John McCain introduced the Arizona Borderlands Protection and Preservation Act.⁵ McCain argues that Border Patrol agents must get permission to enter some federal lands, which hampers border security.⁶ McCain's bill would grant Border Patrol agents unfettered access to most federal lands in Southwestern Arizona along the international border, including National Parks and wildlife refuges.⁷ Even without McCain's proposed legislation, the Secretary of the *621 Department of Homeland Security (DHS) has already waived thirty-seven environmental protection laws--ranging from the Endangered Species Act to the Wilderness Act--to strengthen security along the border.⁸ Meanwhile, environmentalists contend that this security-driven waiver authority undermines more than forty years of work to build important conservation laws and leaves citizens with no effective means to protest.⁹

Herein lies the dilemma: How can policy makers balance the preservation of our nation's natural treasures with the need to secure our southern border?¹⁰ Even though security and conservation are not mutually exclusive, politicians often frame border security in all-or nothing terms, demanding nothing less than a completely sealed border.¹¹ But framing the issue in this manner is unhelpful because border security will always be imperfect.

As a former Border Patrol agent and park ranger, the author argues there is no such thing as a completely secure border--only a well-managed one. Destroying fragile federal lands in the name of sealing the border is self-defeating. Likewise, demands for an end to all environmental damage along a chaotic border are unrealistic. What we can aim for is a relatively stable and low-risk border while mitigating harm done to the environment. Even though border security and land-management agencies

appear to generally agree with this philosophy, many of the nation's decision-makers with the power to transform the border do not frame the issue with the nuance it deserves.

PART 1: NATURAL RESOURCES AND NATIONAL SECURITY ALONG THE ARIZONA BORDER

In 1916, President Woodrow Wilson signed the Organic Act creating the National Park Service (NPS).¹² The mission of NPS is to preserve the natural and cultural resources found within parklands for the enjoyment of the American public and to leave those resources unimpaired for future generations.¹³ Novelist and historian Wallace Stegner called the National Parks “the best idea we ever had. *622 Absolutely American, absolutely democratic, they reflect us at our best rather than our worst.”¹⁴ Unfortunately, in Southern Arizona, America's “best idea” is directly threatened by America's struggle with border security.

Threatened Wildlife and the Laws that Protect Them

Organ Pipe National Monument (Organ Pipe) is an excellent example of the unique biodiversity of the border region that reflects the National Park Service's spirit of preservation. Organ Pipe is a 516 square mile monument that extends thirty-one miles along the Arizona-Mexico border.¹⁵ The monument was created in 1937 to preserve a precious and fragile sample of the Sonoran Desert ecosystem.¹⁶ Congress further protected Organ Pipe against roads and development by designating ninety-four percent of the monument as wilderness in 1978.¹⁷ Organ Pipe is home to some rare and unusual wildlife including the endangered desert pupfish.¹⁸ Pupfish live in isolated desert pools and are sometimes called “living fossils.”¹⁹ Some of these pools contain the only specimens of particular species of pupfish in the world.²⁰ For example, the Quitobaquito pupfish lives in two places on the planet: the Sonoita River and Quitobaquito Springs, which are one mile apart and separated by the international border.²¹ Other animals found within Organ Pipe that are candidates for listing under the Endangered Species Act include the Sonoran Desert Tortoise and the Acuna Cactus.²²

Approximately eighty percent of the Arizona border region is comprised of federal and tribal lands.²³ The National Park Service is just one of a handful of federal land management agencies supervising this massive area. Organ Pipe and the Cabeza Prieta National Wildlife Refuge together contain a million acres of federally protected wilderness land.²⁴ The Cabeza Prieta National Wildlife Refuge in Southwestern *623 Arizona is the largest refuge in the lower 48 states.²⁵ In Southeastern Arizona, the riparian habitat of the San Pedro River contains about half of all bird species in North America.²⁶ The Nature Conservancy even listed the river basin as one of the “Last Great Places” in the Western Hemisphere.²⁷ From the Sonoran pronghorn to the pigmy owl, Arizona's deserts are home to some of the most threatened animal species in the country.²⁸

A series of federal laws operate to protect these animals and their habitats. In 1964, Congress passed the Wilderness Act to protect specified federal lands.²⁹ The Act includes in its definition of wilderness:

Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation³⁰

The Act prohibits the construction of roads and the use of motorized vehicles in wilderness areas unless necessary for administering the land, such as responding to emergency situations.³¹

In 1969 Congress enacted the National Environmental Policy Act (NEPA), considered to be one of the first laws to provide for broad environmental protections.³² “NEPA's basic policy is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.”³³ Under NEPA, environmental assessments and impacts statements are required when federal activities are proposed.

Shortly thereafter, Congress passed the Endangered Species Act (ESA) in 1973 to protect plants and animals in danger of extinction.³⁴ The law prohibits federal agencies from taking actions that “jeopardize the continued existence of any listed *624 species or result in the destruction or adverse modification of designated critical habitat of such species.”³⁵

Despite these expansive conservation-oriented statutes, drug trafficking and illegal immigration continue to adversely impact

federally protected borderlands. In response, Border Patrol agents, park rangers, Fish and Wildlife officers and other land management law enforcement agencies resort to closing federal lands to the public, providing armed escorts for personnel, and working together to combat the illegal incursions.

Drug Trafficking and Illegal Immigration Through Federally Protected Lands

Eight years after the creation of the National Park Service, Congress established the Border Patrol in 1924 through the Labor Appropriation Act.³⁶ Following the September 11th terrorist attacks, the Border Patrol became a division of Customs and Border Protection (CBP) and subsumed within DHS.³⁷ The U.S.-Mexico border is patrolled by a variety of national security divisions within DHS, including Field Operations Officers, Air and Marine Operations Officers and Border Patrol agents.

The mission of the Border Patrol is to prevent the illegal trafficking of people and contraband across the border.³⁸ The Border Patrol also works to prevent the entry of terrorists and terrorist weapons into the country.³⁹ In 1994 the Border Patrol offered its first official National Strategic Plan (NSP), which promulgated an approach to enforcement known as “prevention through deterrence.”⁴⁰ This strategy has since been revised by the Border Patrol’s new “risk-based strategy” discussed in Part III below.

“Prevention through deterrence” functioned by front-loading agents directly on the borderline itself--as opposed to layering security resources away from the border--in order to deter prospective crossers from attempting to cross in the first place.⁴¹ Ideally, arrests would go down, not up, because fewer people would even try *625 to cross.⁴² Due to limited resources, the Border Patrol concentrated its agents in urban areas along the border where border jumpers could cross the fence and immediately melt into the city. The Border Patrol first tested this strategy on the El Paso-Ciudad Juarez section of the border in what was known as “Operation Hold the Line.”⁴³ The success in El Paso led to “Operation Gatekeeper” on the San Diego-Tijuana section of the border, which reduced illegal entries through San Diego by more than seventy-five percent over the next few years.⁴⁴

“Prevention through deterrence” succeeded in greatly reducing illegal border crossings in urban areas.⁴⁵ In response, drug trafficking and illegal migration patterns moved away from the cities and into remote and rugged desert lands.⁴⁶ Agents then had more time and space to detect and apprehend the illegal border crossers.⁴⁷ However, this new setting for illegal activity also happened to include more than a million acres of federally protected lands along the Arizona border alone--lands full of threatened and endangered wildlife.⁴⁸ The unintended consequence of the Border Patrol’s “prevention through deterrence” resulted in the degradation of these fragile areas that continues to this day.⁴⁹

Once again, Organ Pipe proves illustrative of the magnitude of the problem. Aside from the unique and endangered biodiversity of Organ Pipe, the monument is also a dangerous drug trafficking corridor.⁵⁰ As drug runners pass through the monument, they have to avoid detection by law enforcement officers as well as confrontations with other criminals looking to rob them.⁵¹ By the early 2000s, Organ Pipe developed a reputation as “America’s most dangerous park.”⁵² In 2002, cartel hit-men fleeing into the United States after committing several murders in Mexico shot and killed Park Ranger Kris Eggle in Organ Pipe.⁵³ Following Mr. Eggle’s death, the National Park Service closed two-thirds of Organ Pipe to the public and did not fully reopen the monument again until 2014.⁵⁴ By October of 2013, DHS replaced the barbed wire cattle fence that separated Organ Pipe from Mexico with thirty-five miles of pedestrian fencing and vehicle barriers.⁵⁵ Organ Pipe also tripled the number of law *626 enforcement rangers patrolling the monument, leading to an average seizure of six tons of marijuana a year.⁵⁶

Other federally protected lands along the border have also been partially closed or transformed by the illegal activity within the park. When five undocumented immigrants were murdered in Arizona’s Buenos Aires Wildlife Refuge in 2005, land managers closed 3,500 acres of the park to the public.⁵⁷ According to a 2010 Government Accountability Office report, since 2007, volunteers and staff at the Cabeza Prieta National Wildlife Refuge were required keep a law enforcement escort for protection while working near the border.⁵⁸

To combat these persistent drug and immigration issues in Southern Arizona, the Border Patrol frequently collaborates in task force operations with other federal land management agencies to pool resources. In one such collaborative effort called “Operation Trident,” the Border Patrol engaged in joint enforcement operations with agents from the U.S. Fish and Wildlife Service, the National Park Service, the U.S. Forest Service, and the Bureau of Land Management.⁵⁹

Is borderland wildlife more threatened by a lack of security or by the overwhelming footprint of security itself? The following section explores how law enforcement officers, drug smugglers and undocumented immigrants impact Arizona's desert ecosystems.

The Relationship Between Border Insecurity and the Environment

The Arizona border region consists of a series of isolated mountain ranges, which run north to south and are surrounded by inhospitable desert.⁶⁰ A variety of animals, such as the Yellow-billed Cuckoo, use these border zones as a migration corridor.⁶¹ Unfortunately, so do illegal drug and human smugglers from Mexico.⁶² The environmental impacts can be broadly categorized into damages resulting from (a) foot and vehicle traffic through federal lands, and (b) border security infrastructure such as fences, roads and camera towers. Most illegal incursions from Mexico are on foot because border fencing has greatly reduced the amount of illegal vehicle traffic that can pass through from Mexico.⁶³ Undocumented immigrants also leave thousands of ***627** pounds of trash behind, cause soil erosion by trampling vegetation, and start fires to stay warm--which sometimes get out of control.⁶⁴

The environmental impact of any one person is compounded by the enormous volumes of people passing through the desert from Mexico. Some experts estimate as many as 1.2 million people illegally pass through the U.S.-Mexico border each year.⁶⁵ Consider for example, the Buenos Aires Wildlife Refuge, which protects endangered species such as the Peregrine Falcon and the Southwest Willow Flycatcher.⁶⁶ On just one trail passing through this refuge, law enforcement officers counted 1,000 undocumented immigrants in a 24-hour period.⁶⁷ In the mid-2000s, the Department of the Interior (the parent agency of the National Park Service) reported that endangered species and their habitats in the borderlands were on the verge of suffering irreversible harm from illegal cross-border traffic.⁶⁸ In 2002, the U.S. population of Sonoran pronghorn (the fastest land animal in the United States) totaled only twenty-one.⁶⁹

Illegal hiking is also cause for substantial concern, but pales in comparison to the impact of off-road vehicles. The Wildlife Society estimates that illegal border crossers have created 8,000 miles of off-road tracks in the Cabeza Prieta Wildlife Refuge alone.⁷⁰ Meanwhile, by responding to this illegal activity with 4x4 vehicles and ATVs, the Border Patrol has created 12,000 more miles of off-road tracks in the same wilderness area.⁷¹ These vehicle tires scar the land and break ancient soil crusts, which have been formed over millions of years.⁷² The tire tracks of just one truck have the impact of more than 50 hikers, turning the soil into talc and creating dustbowl conditions.⁷³ The tires also cut new features in the land, diverting water flow from its natural course into wheel ruts rather than the larger natural pools.⁷⁴ This in turn leads to faster evaporation, which means less vegetation and a decrease in wildlife that can survive the harsh summers.⁷⁵ *High Country News* magazine called these "renegade roads" "probably the worst violation ever of the spirit of the 50-year-old Wilderness Act."⁷⁶ The image below illustrates the extent of "renegade roads" throughout Organ ***628** Pipe National Monument and the Cabeza Prieta National Wildlife Refuge of Southern Arizona.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

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The damage caused by Border Patrol vehicles is compounded by the hundreds of miles of border fencing that block the movement and migration of wildlife, exacerbate flooding, and fragment the Sonoran desert habitat.⁷⁸ There are now 652 ***629** miles of barriers built along the 2,000-mile long U.S.-Mexico border.⁷⁹ Some of the fencing is steel bollard pedestrian fencing and some is "Normandy-style" fencing intended to impede vehicle traffic.⁸⁰ When the rains come, the fences collect debris passing through the washes, blocking the flow of water and creating a dam.⁸¹

The border fence may slow down illegal immigration, but it does not stop it. As of May 2009, the GAO recorded 3,363 breaches in the fence, costing an average of \$1,300 per breach to repair.⁸² At the same time, border fencing inhibits the movement of wildlife.⁸³ U.S. border security infrastructure impedes and sometimes severs the movement of wildlife, including everything from the Mexican gray wolf to prairie dogs, ocelots, big horn sheep and kit foxes.⁸⁴ The handful of jaguars on the U.S. side of the border fence are now effectively cut off from the rest of their small population in Mexico.⁸⁵ In one incident caught on camera by a Border Patrol agent in the Buenos Aires National Wildlife Refuge, a mountain lion cub slipped through the bars of the border fence. The cub's mother, unable to pass through the fence, frantically ran along the

fence “snarling and screaming.”⁸⁶ Connectivity is key to facilitating the gene flow of a species.⁸⁷ The fencing along the Arizona border isolates wildlife and obstructs their connectivity to new mates and habitat.⁸⁸ “A kind of border war is underway--with wildlife caught in the middle--as drug smugglers and undocumented immigrants dodge the all-terrain vehicles of the Border Patrol ...”⁸⁹ This theater of chaos continues to unfold within a fragile border ecosystem which contains more plants and animals listed under the Endangered Species Act than any other region of the continental United States.⁹⁰

To make the picture even more complicated, some Southern Arizona landowners admit there are certain environmental advantages to the border fence.⁹¹ The vehicle barriers prevent illegal motorized incursions from Mexico into American *630 ranchlands.⁹² Some landowners also report less trash or other forms of damage to their land since the border fence was installed.⁹³

So is the Border Patrol protecting the wilderness areas along the border from the impacts of illegal cross-border activity, or is the environmental impact of their response making the situation worse? The answer appears to be both. Roger DiRosa, refuge manager of Arizona’s Cabeza Prieta National Wildlife refuge, articulates the complexities of the border enforcement conundrum:

It is a Catch-22 situation. While Border Patrol operations can substantially impact wilderness resources their presence is essential to its protection. The budgets and staffs of the border natural resource agencies are too inadequate to address the border problems. Further, their operational missions are very different from that of the Border Patrol. While allowing increasingly damaging activities to occur may ultimately save some wilderness resources, it is equally possible that they may not ... A lot of what has been done on the border would not be acceptable in other wilderness areas, but the Arizona border is embattled like no other area in the nation. It is a highly unique and problematic situation requiring difficult and unique solutions.⁹⁴

PART 2: WAIVER OF ENVIRONMENTAL PROTECTION LAWS

In 2007, the Sierra Club and Defenders of Wildlife sought a temporary restraining order to enjoin DHS from building roads and fences in Southern Arizona’s San Pedro Riparian National Conservation Area.⁹⁵ A federal district judge sided with the environmentalists and concluded that the relevant federal agencies failed to carry out environmental assessments required by NEPA.⁹⁶ The judge issued a temporary restraining order, halting construction within the conservation area.⁹⁷ Sixteen days later, the Secretary of Homeland Security published a notice in the *Federal Register* declaring that any federal and state laws impeding the expeditious construction of roads and fences along the border were thereby waived and unenforced.⁹⁸

The Birth of Environmental Waiver Authority

*631 At least thirty-seven environmental laws, including the Wilderness Act, NEPA, and the ESA, have been occasionally disregarded in the name of border security.⁹⁹ These waivers began in 1996 when President Bill Clinton and Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁰⁰ Among other things, the IIRIRA authorized fourteen miles of triple-layered fence construction along the San Diego border.¹⁰¹ The IIRIRA attempted to crack down on weaknesses in border security and allowed the Attorney General to waive provisions of ESA and NEPA as necessary to ensure the expeditious construction of roads and barriers.¹⁰² Initially, this legislation applied only to the San Diego border area, while other environmental protection statutes apart from ESA and NEPA remained in effect.¹⁰³ However, in 2004, eight years after Congress authorized fence construction under the IIRIRA, the mandated fencing in San Diego was still incomplete (only nine miles had been completed) because of environmental concerns beyond ESA and NEPA.¹⁰⁴ Congress reacted and in 2005 the passage of the REAL ID Act expanded the IIRIRA waiver authority to allow the Secretary of DHS to waive “all legal requirements” necessary to achieve expeditious road and fence construction.¹⁰⁵

From 2005 to 2011, several hundred miles of new border fencing went up as a result of increased funding combined with environmental waiver authority under the IIRIRA and the REAL ID Act.¹⁰⁶ The waiver authority has been used in Arizona to build steel barriers in the San Pedro Riparian National Conservation Area and to accelerate construction of a thirty-five mile wall adjacent to the Cabeza Prieta National Wildlife Refuge.¹⁰⁷ The Border Patrol also installed surveillance, detection and communication devices.¹⁰⁸

Between September 2005 and April 2008, Michael Chertoff, former Secretary of Homeland Security, waived more than thirty federal laws including the Wilderness Act, the ESA, and NEPA.¹⁰⁹ The waivers are in effect once published in the *Federal Register*.¹¹⁰ To date, the Secretary of Homeland Security has published notice on five different occasions in the *Federal Register*, thereby invoking authority to waive environmental protection laws.¹¹¹ The Congressional Research Service (CRS) went so far as to call the environmental waiver authority of the REAL ID Act of 2005 “the most sweeping suspension of laws in U.S. history.”¹¹²

Those opposing this unprecedented waiver authority argue that circumventing environmental protection laws leave security agencies with no incentive to stop and consider the long-term environmental consequences of their actions.¹¹³ Environmental conservation organizations have filed numerous unsuccessful lawsuits, alleging constitutional violations.¹¹⁴ Federal district courts have exclusive jurisdiction to hear these claims and the rulings can only be reviewed by the Supreme Court.¹¹⁵ In two cases parties sought review, but the Supreme Court declined to grant certiorari both times.¹¹⁶ Despite the unprecedented scope of the waiver authority under the REAL ID Act, the Supreme Court consistently upholds congressional delegations of authority as long as an intelligible principle is provided for delegating.¹¹⁷

Limits on Waiver Authority and Continued Obstacles to Enforcement

Even though Congress has bestowed the Secretary of Homeland Security with the authority to waive certain environmental protection laws, this waiver freedom is not unlimited. Section 102(a) of the IIRIRA states that the Secretary of Homeland Security “shall take such actions as may be necessary to install additional physical barriers and roads ... in the *vicinity* of the United States border to deter illegal crossings in areas of high illegal entry into the United States.”¹¹⁸ The term “vicinity” is not defined in the IIRIRA or any later federal statutes.¹¹⁹ The only clues as to what vicinity means are DHS regulations unrelated to the border fence as well as non-binding dicta from a Supreme Court opinion, both of which describe “vicinity” as up to twenty-five miles north of the border itself.¹²⁰

The authority to waive laws is also put in check by the Consolidated Appropriations Act of 2008 (CAA). CAA amended section 102(a) of the IIRIRA to require the Secretary of Homeland Security to consult with federal, local and private stakeholders along the border “to minimize the impact on the environment, culture, commerce, and quality of life” in areas impacted by border fencing.¹²¹ Sometimes the Border Patrol coordinates inter-agency agreements to gain access to federal lands.¹²² *633 Other times the Border Patrol receives a permit or permission from the land managers to create access roads or to install surveillance equipment.¹²³ When the Border Patrol intends to conduct an activity that may impact a threatened or endangered species, the agency must consult with the Fish and Wildlife Service.¹²⁴ The Fish and Wildlife Service then issues a biological opinion indicating whether the Border Patrol must take certain mitigating measures.¹²⁵

These environmental hurdles occasionally cause issues for the timing of Border Patrol operations. For instance, an October 2010 GAO report found that many Border Patrol stations still suffered long waits for environmental assessments before they could take enforcement actions.¹²⁶ In one example, an Arizona Border Patrol station reported having to wait four months to get permission to relocate a mobile surveillance system.¹²⁷ By the time permission was granted, the illegal traffic patterns had already changed to another area.¹²⁸ That same GAO report found that seventeen of twenty-six Border Patrol stations along the southwest border reported the inability to access certain areas in a timely manner because of compliance restrictions under NEPA and the National Historic Preservation Act.¹²⁹ Three stations reported issues with building roads and erecting camera towers because of restrictions under the Wilderness Act.¹³⁰ Five stations reported impacts from the ESA by having to change the timing of their patrol operations due to the presence of endangered species in the area.¹³¹

Even though Border Patrol agents can eventually obtain permission to access almost any federally protected area, procedural hurdles for environmental protection continue to occasionally obstruct enforcement operations. Despite these concerns, twenty-two of twenty-six Agents-in-Charge (the highest level agent in any particular Border Patrol station) concluded that border security in their respective area of responsibility was not hampered by having to operate in federally protected lands.¹³² So while environmental protection laws may occasionally operate to obstruct security operations, most Border Patrol agents do not consider these to be serious impediments to their jobs.¹³³ Rather, the biggest issue impeding security is the remoteness and poor accessibility to the patrol areas.¹³⁴

*634 Nevertheless, in response to the perceived obstacles that still impede the effectiveness of Border Patrol operations, U.S. Senator John McCain (R-AZ) proposed the Arizona Borderlands Protection and Preservation Act (SB 750) in 2015.¹³⁵ Among

other things, SB 750 grants Border Patrol agents immediate access to federal lands in Arizona within 100 miles of the border.¹³⁶ This would significantly expand the reach of waiver authority beyond the current twenty-five mile vicinity of the border. McCain justifies the bill on the contention that agents do not have unfettered access to federal lands along the border.¹³⁷ Specifically, agents must ask permission to access some lands and must patrol other lands on foot.¹³⁸ Meanwhile, smugglers, undocumented immigrants, and drugs pass through these same federal lands at will and obey no rules.¹³⁹

Senators opposing McCain's legislation argued that the bill would empower DHS with limitless discretion to waive environmental protection laws, presumably over the opposition of the other federal land management agencies along the border.¹⁴⁰ Environmental activists contend that the Border Patrol itself never asked for and does not require more extensive access to federally protected lands.¹⁴¹ The Border Patrol seems divided on the matter, with a majority of senior Border Patrol officials concluding that any security hurdles imposed by environmental laws are not high on the list of concerns.¹⁴²

Mitigating the Environmental Impacts of Border Security Operations

Some mitigation projects along the border target the damage done by illegal crossers. Other projects target the impacts of the Border Patrol's massive environmental footprint when constructing roads and fences and driving off-road. The Border Patrol's use of helicopters and horses helps to reduce their vehicular impact on fragile desert environments.¹⁴³ Border Patrol horses are even provided with special feed to avoid the introduction of non-native vegetation into the desert ecosystem.¹⁴⁴ However, motorized vehicles still remain a primary tool for patrolling the border. Failure to train and sensitize agents leads to shortfalls in accurately and consistently reporting environmental damage when it occurs during security operations. Border Patrol agents are supposed to file "incursion reports" when they drive off-road in *635 federal wilderness areas.¹⁴⁵ However, the former Superintendent of Organ Pipe National Park stated that incursion reports are filed in fewer than forty percent of the cases.¹⁴⁶ Many environmentalists, including the Sierra Club Borderlands' Program Coordinator Dan Millis, understand that the Border Patrol has a vital job to do, but still believe that the environmental training that Border Patrol agents receive needs to be much better.¹⁴⁷

The impacts of off-road motorized vehicles represent only one of the actions taken by the Border Patrol that require mitigation strategies. While building security infrastructure such as roads, fences and camera towers, the Border Patrol sometimes damages wildlife habitat or exacerbates erosion and sedimentation of the land.¹⁴⁸ In situations where the Secretary of Homeland Security has invoked the authority to waive environmental protection laws in order to complete these border security projects, DHS voluntarily prepares environmental stewardship plans.¹⁴⁹ These stewardship plans provide strategies to minimize the environmental impacts of constructing border security infrastructure. For instance, in 2009, DHS committed \$50 million to the Department of the Interior (DOI) to identify and benefit endangered and threatened species and their habitats.¹⁵⁰ The DOI identified a host of endangered and threatened species in Arizona as well as projects to mitigate harm done by border enforcement operations.¹⁵¹ These projects included more than \$3,100,000 for jaguar conservation and monitoring in Arizona and New Mexico; \$440,000 for Mexican Spotted Owl habitat protection; \$221,800 for Cabeza Prieta Sonoran Pronghorn and bat restoration; and \$687,500 for closure and restoration of unauthorized roads.¹⁵² However, much of that money was rescinded before ever being dispersed.¹⁵³

Aside from mitigating the damage caused by the Border Patrol, federal land managers conduct massive desert cleanup projects. In 2003, the Bureau of Land Management (BLM) began coordinating with federal, local, and tribal government partners to clean up and restore the desert in what became known as the Southern Arizona Project.¹⁵⁴ In fiscal year 2009 alone, the Southern Arizona Project partners removed "468,000 pounds of trash, 62 vehicles, and 404 bicycles and restored 650 acres of land that were damaged by illegal traffic ..."¹⁵⁵ Meanwhile, the land managers of Organ Pipe and the Cabeza Prieta National Wildlife Refuge conduct semiannual or annual inventories of the damage to the park by walking five different east-west *636 transects that cut across known smuggling routes.¹⁵⁶ Land management staff record and map impacts on the environment including new trails, new roads, damaged vegetation, trash levels, and fire scars.¹⁵⁷ This information is sometimes translated into environmental awareness training for Border Patrol agents by illuminating the detrimental impacts of their operational activities.¹⁵⁸

The various environmental mitigation projects in Southern Arizona are valuable and effective. Equally important is the need for comprehensive studies of environmental impacts along the border, as opposed spotty anecdotal information, in order to understand the extent of the crisis.¹⁵⁹ Finally, the cross-border co-operation of Mexican authorities is also a vital element of any fully comprehensive sustainability plan for the environment. According to the Wilson Center's State of the Border

Report, “[t]he glaring weakness in the U.S.-Mexico environmental cooperation framework has been the absence of a comprehensive natural resource management and conservation program.”¹⁶⁰ In a 2009 survey of residents as well as federal, state and local stakeholders of the ten US and Mexican border states, there was a common vision of sustainability on several particular issues.¹⁶¹ One of the principles agreed upon was the need for comprehensive cross-border management of the ecosystem.¹⁶²

This article now turns to proposals for what can be done to change the tone of the current public conversation over border enforcement in order to set realistic goals for the future of both security and the environment.

PART 3: REALISTIC SECURITY GOALS AND THE FUTURE OF ENVIRONMENTAL CONSERVATION

Politicians often demand a completely sealed border and promise to fix the border security problem.¹⁶³ However, these demands and promises do more harm than good by misleading the public as to what is possible. In the words of Michael Fisher, former Chief of the Border Patrol: “Even the heaviest concentration of fencing, all-weather roads, 24-hour lighting, surveillance systems and Border Patrol agents cannot *637 seal the border completely”¹⁶⁴ The Border Patrol’s inability to apprehend or deter all illegal border crossers is not a sign of failure--it is reality.¹⁶⁵ The border will never be completely sealed and perfect security should not be the benchmark of success at the expense of the natural environment.

The Difficulties of Measuring Security

The Border Patrol has struggled for decades to find an accurate and consistent means of measuring its own performance. In 2005, the Border Patrol adopted a sliding scale of security classifications, ranging from “controlled” to “low-level monitored.”¹⁶⁶ The agency classified a segment of the border as “controlled” when there was a “high probability of immediate apprehension at the border.”¹⁶⁷ An area was “low-level monitored” when both the ability to detect and apprehend illegal border crossers were limited by lack of resources and infrastructure.¹⁶⁸ The Border Patrol proclaimed an area under “operational control” if the agency had “the ability to detect, respond to, and interdict border penetrations in areas deemed as high priority for threat potential or other national security objectives.”¹⁶⁹

Five years later, the Border Patrol dropped the “operational control” metric and in 2013 the agency introduced an “effectiveness rate” of measurement.¹⁷⁰ Effectiveness rates are measured as the number of illegal crossers who are either apprehended or turned back to Mexico divided by the number of total illegal entries.¹⁷¹ The accuracy of this metric is debated, partly because the Border Patrol can only count those individuals they were able to detect in the first place.

In 2013, the Border Patrol reported effectiveness rates of eighty-seven percent in the Tucson Sector, which comprises much of the Arizona border.¹⁷² The effectiveness rates were reported as high as ninety-one percent in San Diego sector and as low as seven percent in lower Texas.¹⁷³ The Chief of the Border Patrol testified *638 before Congress in 2013 that the Border Patrol’s goal was a ninety percent effectiveness rate along the southwest border’s high traffic areas.¹⁷⁴ Two years later, a Border Patrol agent testified before Congress that any field agent would confess that they apprehend at most thirty-five to forty percent of the undocumented immigrants and an even smaller percentage of the drug smugglers.¹⁷⁵

Even though there is a wealth of research and data on border insecurity, the Border Patrol has done a poor job of implementing consistent, reliable measures of their security progress and failures.¹⁷⁶ Instead of settling on a framework for measuring progress, the Border Patrol has demonstrated a pattern of adopting new performance metrics, only to drop them again a few years later.¹⁷⁷ The agency is currently in the process of once again transitioning to a new measurement and performance system.¹⁷⁸ As a result, there is no consensus as to the state of border enforcement because there are no universally accepted accountability measures.¹⁷⁹

Political Promises to Fix an Unfixable Problem

In the race for the 2016 presidential election, the momentum for increased enforcement continues to grow as candidates on both sides of the aisle compete to sound tough on border security. Unfortunately, the language used to discuss border enforcement all too often lacks nuance and frames the problem in terms of all-or-nothing security. Senator Ted Cruz stated, “we will build a wall that works, we will secure the border ...”¹⁸⁰ Current Republican front-runner Donald Trump has

proposed a new border wall along the southern border: “We will have a wall. The wall will be built. The wall will be successful.”¹⁸¹ Democratic presidential candidate Hillary Clinton stated: “We need to secure our borders. I’m for it, I voted for it, I believe in it ...”¹⁸² There is nothing inherently unreasonable with political calls to control our borders, but what does a “wall that works” or a “secure border” mean exactly? We can easily enough paint an image in our mind of what a sealed border looks like, and perhaps that is the seductive power of simple answers, but every Border Patrol Agent this author has ever discussed these issues with knows that such a border does not exist. In the words of border scholar Edward Alden:

***639** Even the Cold War border between the two Germanies--the most heavily fortified in modern history--was successfully breached a thousand or so times each year. There is simply no way for a large, open, and democratic country like the United States to construct and maintain perfect border defenses. It is hard to think of another issue where the public debate is so utterly at odds with what the government can realistically achieve.¹⁸³

This is not to say that security is futile. In fact, with the massive border buildup beginning in 2006, apprehensions decreased by half by 2012 along with a reduction in the number of attempted entries.¹⁸⁴ From October 2014 to November 2015, CBP agents (which includes Border Patrol agents) apprehended 70,074 people in Arizona.¹⁸⁵ This is down from 93,174 apprehensions in the previous fiscal year.¹⁸⁶ These numbers are in line with a national decade long trend of decline in apprehensions.¹⁸⁷ Understanding just how much of the recent decline in illegal immigration is attributed to a flailing U.S. economy as opposed to more effective law enforcement is difficult.¹⁸⁸ However, the data “strongly suggest that enforcement has played a significant role in discouraging illegal entry across the southern border.”¹⁸⁹

Political demands for an escalation of border enforcement to secure the border are nothing new. Over the last several decades, politicians have consistently targeted the border as an out-of-control area in need of fixing.¹⁹⁰ The Border Patrol itself is partially responsible for perpetuating this loss-of-control narrative, which “can be used to provoke alarm and mobilize support for further escalation.”¹⁹¹ Sensationalizing the crisis conveniently masks the fact that the border has never been completely controlled at any point in time.¹⁹²

Failures in border security are not due to a lack of resources or willpower. In fact, decades of sustained bipartisan support for strengthening border security resulted ***640** in a “well-resourced, operationally robust, modernized enforcement system.”¹⁹³ From 2003 to 2013, the Border Patrol quintupled in size.¹⁹⁴ By the end of 2012, 18,516 Border Patrol agents patrolled the southern U.S. border.¹⁹⁵ Border security continues to improve, but will always be far from perfect. The real failure lies in the inability of DHS and our politicians to convey a coherent message of what successful security means.

In order to foster a constructive public debate over how much money, resources and manpower we wish to continue to throw at border security, we need a realistic idea of potential returns on our investment. The American public cannot make an informed decision without DHS and our political leaders conveying an articulate and consistent narrative of what is possible and what it will take to get there. Whether politicians are demanding bigger fences, more agents or some other means of beefing up enforcement, what is distinctly lacking is an attainable end-goal. Our decision-makers are right to see the border as an issue that deserves attention, but promises do more harm than good if we fail to articulate security targets that are reachable and grounded in reality. Impossible goals fuel mindless escalation of enforcement, thereby relegating the environment to an unfortunate afterthought.

Rethinking Approaches to Security and Conservation

Is there a point of diminishing returns in the perpetual escalation of border security? Or will future technology transform border security into something more efficient and less environmentally destructive? In 2012, the Border Patrol published a new National Strategic Plan that marked a transition from the buildup of resources to the targeted application of those resources at high-risk areas along the border.¹⁹⁶ Even before the official publication of this strategy, former Secretary of Homeland Security, Janet Napolitano, stated that the task of DHS is to manage, not seal, the border.¹⁹⁷ Clearly, DHS understands the limitations of border security and rejects the unattainable goal of preventing all illegal entries.¹⁹⁸ The question is what to do with the massive resources that are already at the Border Patrol’s disposal. Some creative proposals for the future of border enforcement may one day gain traction in a political ***641** environment that does not reduce the immense complexities of security into easy answers. Some of these proposals include realigning security resources, emphasizing low-impact surveillance, and restoring wildlife habitat along the border.

One strategic proposal to mitigate the environmental degradation of border security calls for realigning and concentrating all of the Border Patrol's resources within the first mile of the border, leaving everything north of that alone.¹⁹⁹ This strategy would saturate and sacrifice the borderline itself in the name of security, while leaving the rest of the borderlands untrammelled.²⁰⁰ At least one high-level Border Patrol agent agrees that this approach would help mitigate damage to the environment.²⁰¹ The Border Patrol's Agent-in-Charge of the Arizona borderlands passing through the Cabeza Prieta National Wildlife refuge stated that better road access near the border would lead to more arrests near the border itself.²⁰² This in turn would mean that fewer of her agents would have to chase illegal traffic further north into the refuge.²⁰³ The Cabeza Prieta refuge manager agreed with this logic.²⁰⁴

Another approach, proposed by Arizona Congressman Raul Grijalva through several unsuccessful bills, encourages a de-escalation of the border security buildup.²⁰⁵ Congressman Grijalva is a ranking member of the Subcommittee on Public Lands and Environmental Regulations.²⁰⁶ Grijalva's 2007 Borderlands Conservation and Security Act called for a de-emphasis on border fencing and for more effectively integrating environmental preservation with security along the border.²⁰⁷ The bill was unsuccessful, but if passed, would have struck the requirement for DHS to build two layers of fencing.²⁰⁸ Instead, the Secretary of Homeland Security would have been allowed to make border-fencing decisions in consultation with other federal land management agencies.²⁰⁹ The bill prioritized the use of low-impact enforcement techniques, such as the increased use of remote cameras, ground sensors, and unmanned aerial vehicles as opposed to more high-impact security mechanisms--including the border fence itself.²¹⁰ The bill also called for the establishment of a borderland conservation fund to improve wildlife habitat and mitigate environmental harm along the border.²¹¹

***642** Several years later, Congressman Grijalva attempted, unsuccessfully, to pass another similar bill called the Border Security and Responsibility Act of 2013.²¹² This bill called for a comprehensive analysis of what it would cost to mitigate the adverse effects of border enforcement.²¹³ The bill also called for natural resource protection training for Border Patrol agents and for the restoration of wildlife migration corridors.²¹⁴ Finally, the bill would have allowed the Secretary of Homeland Security to transfer DHS funds to other federal agencies, such as the National Park Service, in the pursuit of conservation efforts to fulfill the mitigation plan.²¹⁵

Meanwhile, there has been a strong backlash by security hawks to the potential appropriations of federal national security money for environmental conservation. In one particular situation where \$50 million was appropriated for such border conservation efforts, Senator McCain responded in a letter to Janet Napolitano:

U.S. Customs and Border Patrol (CBP) is charged with enhancing border security, not with financing environmental projects at the behest of the Department of the Interior. Several of the projects you identified, like \$925,000 to search bat caves or \$411,000 to install special barriers to keep Mexican fish from crossing the border, have no bearing on the life-threatening national security crisis facing my constituents in the State of Arizona.²¹⁶

McCain's comments reflect the sentiment of many Americans that conservation is and must remain a distant second to national security. Perhaps this will never change. Perhaps in the immediate future it should not change. But any comprehensive, long-term strategy for the future needs to acknowledge the importance of the fragile natural environment as well as the inherent limitations of border security. Ignoring one value in favor of the other is both short-sighted and self-defeating.

Conclusion

All nations proclaim the right to protect and control their borders.²¹⁷ The United States is no different. In the pursuit of that daunting and legitimate task, the ***643** Border Patrol drives trucks, ATVs and dirt-bikes, and builds roads, fences, camera towers, and other infrastructure that negatively impact the ecosystem. This is compounded by the enormous amounts of trash and other damage caused by undocumented immigrants and drug smugglers passing through America's southern deserts. Some damage to the border environment is inescapable if there is to be a border at all. Conversely, border security flaws and weaknesses will always be there. When the endangered Sonoran pronghorn and desert pupfish go, they will be gone for good.

Poor communication and unrealistic security objectives are the biggest threat to the natural environment along the border. In

particular, DHS continues to fail to effectively convey the possibilities and limitations of border security to the general public. Meanwhile, in this vacuum of uncertainty, politicians latch on to the border as an easy target and promise the electorate unattainable security results. Border scholar Edward Alden argues that “[t]he current debate remains infantile in the literal sense that it imagines that the United States can exist inside a perfect cocoon of border security.”²¹⁸ As long as the border security debate remains mismanaged and divorced from reality, many Americans will continue to see the border as a catastrophic failure in need of perpetual fixing. What is more self-defeating than putting off needed reforms and back-seating environmental concerns while we impatiently wait for results that cannot be reached?

The border should be treated as a zone to manage and steward--not seal. A well-managed, low-risk environment on the border is a realistic and respectable objective. More importantly, that goal leaves room for another American value that defines this country--the stewardship and preservation of our nation’s most precious natural treasures.

Footnotes

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