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WAIVER AUTHORITY VS. FEDERAL PRESERVATION LAWS: A CASE STUDY ON THE U.S.-MEXICAN BORDER WALL

Abstract

Because of federal law waivers, former President Donald J. Trump Administration's border wall and border infrastructure project threatened the existence of the American Southwest's natural, archaeological, and historical resources—including Native American cultural patrimony. Legislation such as the National Historic Preservation Act and the National Environmental Policy Act require lead federal agencies to consider the potential adverse impacts their project may have on cultural and environmental resources prior to project commencement. However, when waiver authority is declared by the Secretary of the Department of Homeland Security federal agencies are no longer obligated to comply with existing federal preservation laws. The U.S. Customs and Border Patrol voluntarily performs environmental reviews called Environmental Stewardship Plans and Environmental Stewardship Summary Reports when waiver authority is declared. Yet, these reviews are not as comprehensive as the existing federal environmental procedures. Through this thesis, I analyze existing surveys of the areas, federal preservation legislation, and interviews with federal and state professionals to understand the implications waiver authority has on the cultural landscapes of the border wall region. In the end, I make general recommendations to avoid, minimize, or mitigate adverse impacts on cultural landscapes when emergencies justifying waiver authority are declared.

Keywords

alternatives, cultural landscapes, consultations, public input, transparency

Disciplines

Historic Preservation and Conservation

WAIVER AUTHORITY VS. FEDERAL PRESERVATION LAWS: A CASE STUDY ON
THE U.S. –MEXICAN BORDER WALL

Jennifer Lynne Boggs

A THESIS

in

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Advisor
Anne E. Nelson
Senior Associate General Counsel, National Trust
Lecturer in Historic Preservation

Program Chair
Frank G. Matero
Professor

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Abbreviations

ACHP: Advisory Council on Historic Preservation

AG: Attorney General

APE: Area of Potential Effect

BLM: Bureau of Land Management

BMP: Best Management Practice

CATEX: Categorical Exclusion

Border Patrol: U.S. Customs and Border Patrol

CEQ: Council on Environmental Quality

CFR: Code of Federal Regulations

DHS Secretary: Secretary of the Department of Homeland Security

DOI: Department of the Interior

EA: Environmental Assessment

EIS: Environmental Impact Statement

EPA: Environmental Protection Agency

ESA: Endangered Species Act

ESP: Environmental Stewardship Plan

ESSR: Environmental Stewardship Summary Report

FONSI: Finding of No Significant Impact

IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act

MOU: Memorandum of Understanding

NAGPRA: Native American Graves and Repatriation Act

NEPA: National Environmental Policy Act

NHPA: National Historic Preservation Act

NOA: Notice of Availability

NPS: National Park Service

ORPI: Organ Pipe Cactus National Monument

P.L.: Public Law

PA: Programmatic Agreement

SHPO: State Historic Preservation Office

THPO: Tribal Historic Preservation Office

U.S.C.: United States Code

UNESCO: United Nations Educational, Scientific and Cultural Organization

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“Preserving landscapes presents some unique difficulties. Landscapes may be meaningful and valuable aspects of the built environment that we are charged with designing, planning, preserving, and managing, but one has to understand what they are and how they change before asking questions about preservation” – Randall Mason, University of Pennsylvania¹

Introduction

Tools, food waste, and ceramics lay scattered across the surface.² Material evidence reveals that the first humans occupied the American Southwest as early as 10,000 years ago.³ Several Native American tribes, such as the Tohono O'odham Nation, have called this region home for centuries even before a border wall segregated the land. Where written documents are absent, material evidence reveals the evolution of civilization in the American Southwest. What history lies beneath the surface has yet to be revealed.

Because of federal law waivers, former President Donald J. Trump Administration's (Trump Administration) border wall and border infrastructure project threatened the existence of the American Southwests' natural, archaeological, and historical resources—including Native American cultural patrimony (e.g., sites and artifacts). Legislation such as the National Historic Preservation Act (NHPA)⁴ and the National Environmental Policy Act (NEPA)⁵ require lead federal agencies to consider the

¹ Randall Mason, “Cultural Landscapes,” Spring 2020, Weitzman School of Design, University of Pennsylvania.

² Andrew S. Veech, “Archaeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S. Mexico International Border, Organ Pipe Cactus National Monument, Pima County, Arizona” (National Park Service, July 2019).

³ Andrew S. Veech, “Archaeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S. Mexico International Border, Organ Pipe Cactus National Monument, Pima County, Arizona” (National Park Service, July 2019).

⁴ *National Historic Preservation Act*, U.S.C. 54 (1966), §§ 300101 *et seq.*

⁵ *National Environmental Policy Act*, U.S.C. 42 (1969), §§ 4321 *et seq.*

potential adverse impacts their project may have on cultural and environmental resources prior to project commencement. This consideration often leads to mitigating, minimizing, or avoiding significant damage to the project region’s most important resources.

When waiver authority is declared by the Secretary of the Department of Homeland Security (DHS Secretary), federal agencies are no longer obligated to comply with existing federal laws like NHPA and NEPA. Waiver authority gives the DHS Secretary sole discretion through Section 102(a) of the Real ID Act of 2005⁶ “to waive *all* legal requirements...[the DHS Secretary] determines necessary to ensure expeditious construction of certain barriers and roads at the U.S. border.”⁷ The U.S. Customs and Border Patrol (Border Patrol)—the federal law enforcement agency tasked with overseeing the border walls—voluntarily performs environmental reviews called Environmental Stewardship Plans (ESPs) and Environmental Stewardship Summary Reports (ESSRs) when waiver authority is declared. Yet, these reviews are not as comprehensive as the existing federal environmental procedures.⁸ Furthermore, the Real ID Act⁹ precludes judicial review of the DHS Secretary’s decision to use waiver authority. The lack of judicial review makes it nearly impossible to challenge the necessity of waiving all federal laws. Because of the waiver authority, as outlined in the

⁶ *Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes, P.L. 109-13, U.S. Statutes at Large* 231(2005): 119.

⁷ Emphasis added to all. *P.L. 109-13 (2005): § 102(c)(1)*.

⁸ “Environmental Stewardship Plans (ESPs) and Environmental Stewardship Summary Reports (ESSRs),” U.S. Customs and Border Protection, accessed December 17, 2020, <https://www.BorderPatrol.gov/about/environmental-management-sustainability/documents/esp-essr>.

⁹ *P.L. 109-13 (2005): § 102(c)(1)*.

Real ID Act, the history of the American Southwest fate is in the hands of a single person.

Through this thesis, I analyze the implications waiver authority has on cultural landscapes (including cultural and environmental resources) using the U.S.-Mexican border wall construction (including infrastructure) during the Trump Administration as a case study. This study is not a critique on whether or not a border wall between the United States and Mexico (Map 1) is needed. This thesis does, however, question the necessity of circumventing federal environmental review processes to expedite the construction of a new border wall. The primary resources for this assessment are NEPA and NHPA legislation, existing surveys of the area, and interviews with federal and state preservation professionals. In the end, I make general recommendations to avoid, minimize, or mitigate adverse impacts to cultural landscapes when emergencies justifying waiver authority are declared. These recommendations may be turned over to preservation, environmental, and conservation advocacy groups for promotion and used to challenge the exemption of the border wall from future federal environmental review processes.

Methodology

This thesis focuses on assessing waiver authority's use and its potential impacts on cultural landscapes through a case study on the Trump Administration's border wall project. The analysis of effects informs the development of recommendations that will increase the likelihood of environmental and cultural resource protection when waiver authority is used.

I was unable to visit the border wall region during this research project. Resultingly, I rely on the Federal Register waiver documents to determine the locations in which waivers have been applied (Map 2).¹⁰ I also utilize existing surveys of the region in order to analyze different levels of environmental review processes to assess whether the Border Patrol ESPs are sufficient replacements for NEPA and NHPA reviews.

The qualitative data relies on legislation and interviews with stakeholders. Specific legislation includes NHPA, NEPA, the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) and the Real ID Act. Interviews rely on the perspectives of state, private, and tribal professions who have a considerable stake in the border wall construction.¹¹ The qualitative data is essential to understand how to apply and comply with federal preservation laws. An analysis of stakeholder perspectives and federal preservation legislation is, therefore, crucial to provide recommendations to improve environmental reviews if the DHS Secretary implements waiver authority again.

¹⁰ I used the U.S.G.S. Map “Federal and Indian Lands Within 100 Miles of the U.S. Mexican - Border Wall, as featured in Fugate, to get a sense of how much federal, private, and tribal lands are actually affected by the border wall construction. It appears that the land in Texas is primarily private land although the state has the largest area of contact with the U.S. Mexican border. California, Arizona, and New Mexico, possibly collectively, represent the area in which Texas connects with the border. The majority of the land in these three states appears to be held by the Bureau of Land Management (BLM), the Forest Service, the Department of Defense, and tribal lands. It is important to note that this graph does not reflect the lands across the border wall in Mexico. It is also important to note the scale in which the graph was created. While the amount of National Park Service land represented on this graph is almost invisible, Organ Pipe Cactus National Monument, for example, is over 500 square miles, which is not an insignificant area of land to consider.

¹¹ Because of the migrant crisis at the border wall, the Border Patrol was unable to respond to the questions I posed to them in a timely manner.

Background Information

Emergence of the U.S. Mexican Border Wall

Officially ending the war between the United States and Mexico in 1848, the Treaty of Guadalupe-Hidalgo formally drew the boundary between the U.S. and Mexico. The National Archives summarizes the handwritten agreement: “Mexico ceded 55 percent of its territory, including parts of present-day Arizona, California, New Mexico, Texas, Colorado, Nevada, and Utah, to the United States. Mexico relinquished all claims to Texas and recognized the Rio Grande as the southern boundary with the United States.”¹² The U.S. paid Mexico for the boundary extension¹³ and agreed to “police the boundaries.”¹⁴

As tensions over the Mexican-American War continued to fester, the two countries struck a new deal in 1854.¹⁵ Mexico received \$10 million in exchange for 29,670 square miles of land, which would become part of Arizona and New Mexico—an agreement called the Gadsden Purchase. The purchase not only gave the U.S. the ability to create a southern transcontinental railroad route on U.S. territory, but it was also “the last major territorial acquisition in the contiguous United States.”¹⁶ Despite the 1854 deal, people continued to dispute the boundary lines between the countries for more than a century. The result of the continued dispute was the Treaty to Resolve Pending Boundary

¹² “Treaty Of Guadalupe Hidalgo,” opened for signature February 2, 1848, Treaty Series no. 207: 791-806; National Archives. “The Treaty of Guadalupe Hidalgo,” National Archives, August 15, 2016, <https://www.archives.gov/education/lessons/guadalupe-hidalgo>.

¹³ 9 Stat 922 Article XII; “Treaty of Guadalupe Hidalgo.”

¹⁴ 9 Stat 922 Article XI; “Treaty of Guadalupe Hidalgo.”

¹⁵ Tensions between the U.S. and Mexico continued after the signing of the Treaty because Mexico wanted financial compensation from the U.S. because of Native American attacks. The U.S., although it agreed in the Treaty to protect Mexico, did not believe it was financially responsible for the attacks. “Milestones

¹⁶ “Gadsden Purchase Treaty (December 1853),” National Archives, August 15, 2016.

Differences and Maintain the Rio Grande and Colorado River as the International Boundary in 1970 which officially drew the line between the U.S. and Mexico.¹⁷

The demarcation of the boundary between the U.S. and Mexico did not begin with walls. Boundary markers or “ground landmarks” were the first markers that lined the countries' geographic border.¹⁸ Over 250 boundary monuments stretched the political boundary.¹⁹ The federal government and private citizens erected the first fences made of barbed wire to prevent the international travel of cattle.²⁰ Later in 1918, the cities of Nogales, Mexico and Nogales, Arizona erected a wired fence between the two cities in order to monitor the border crossing following the deadly events of the Battle of Ambos Nogales.²¹ The Nogales fence “became what was most likely the first permanent barrier to control the movement of people across the U.S.-Mexico border.”²² By the 1920s,

¹⁷ “Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary,” entered into force April 18, 1972, *United States Treaty Series* 23, no. 7313; Dinah Bear, “Border Wall: Broadest Waiver of Law in American History” (Washington, DC: Center for International Environmental Law, February 2009).

¹⁸ Mexico and the U.S. agreed to mark the boundary between the countries with markers in the 1848 Gadsden Purchase Agreement. Bear, 1; “Monuments, Manifest Destiny, and Mexico,” National Archives, August 15, 2016, <https://www.archives.gov/publications/prologue/2005/summer/mexico-1.html>.

¹⁹ These markers still exist and are listed in the National Register of Historic Places. The white marble obelisk called, “Initial Point of Boundary Between U.S. and Mexico” establishes the western-most boundary between the U.S. and Mexico. It is Monument number 258. This obelisk became U.S. National Register site in 1974 because of its political significance. For more information about this Monument see, Morris H. F., “National Register of Historic Places Inventory/Nomination: Initial Boundary Between the U.S. & Mexico,” National Park Service, September 6, 1974; Monument 1 is located near El Paso, Texas. For more information see, “International Boundary Marker,” American Society of Civil Engineers, 2020, and Morris H. Raney, “National Register of Historic Places Inventory/Nomination: International Boundary Marker No. 1, U.S. and Mexico / Western Land Boundary Marker No. 1, U.S. and Mexico,” National Park Service, 1974; “Did You Know... Century-Old Obelisks Mark U.S.-Mexico Boundary Line?” U.S. Customs and Border Protection, accessed March 21, 2021.

²⁰ Bear, “Border Wall: Broadest Waiver of Law in American History,” 1.

²¹ For more information about the Battle of Ambos Nogales see, Rachel St John, “The Raging Controversy at the Border Began With This Incident 100 Years Ago,” *Smithsonian Magazine*, August 2018.

²² Rachel St John, “The Raging Controversy at the Border Began with This Incident 100 Years Ago,” *Smithsonian Magazine*, August 2018, <https://www.smithsonianmag.com/history/raging-controversy-border-began-100-years-ago-180969343/>.

“fences were a fixture in most border towns.”²³ The first stations along the border between Mexico and the U.S. were implemented in 1894. The Border Patrol did not exist until 1904, and its official duties to secure the border were not established until 1924 with the enactment of the Labor Appropriation Act.²⁴

In the 1940s, efforts to deter illegal immigrants intensified with an increase in Border Patrol employees.²⁵ The U.S. government called for the erection of chain link fences along the international boundary. Barriers were placed strategically, meaning that barriers were established in locations that forced illegal aliens to climb hazardous terrain to navigate around the wall.²⁶

Efforts to deter illegal crossing and drug smuggling continued into the 1990s as construction of 14 miles of a 10-foot tall “primary fence” began in San Diego—a measure of “Prevention Through Deterrence.”²⁷ San Diego lacked the natural barriers that would typically discourage entry; however, “the primary fence, by itself, did not

²³ Rachel St John, “The Raging Controversy at the Border Began with This Incident 100 Years Ago.”

²⁴ Early efforts of the Border Patrol focused on the apprehension of Chinese immigrants and the prevention of bootlegging as opposed to preventing illegal immigration. For more information on the Chinese Exclusion Act of 1882 see, “An Act To Execute Certain Treaty Stipulations Relating To The Chinese,” May 6, 1882; *Enrolled Acts and Resolutions of Congress, 1789-1996; General Records of the United States Government; Record Group 11; National Archives*. “Border Patrol History,” U.S. Customs and Border Protection, July 21, 2020, <https://www.Border.Patrol.gov/border-security/along-us-borders/history>; Bear, “Border Wall: Broadest Waiver of Law in American History,” 1.

²⁵ “Border Patrol History;” St John, “The Raging Controversy at the Border Began with this Incident 100 Years Ago.”

²⁶ Of course, as St John notes, the placement of these chain link fences and the later placement of fences and walls creates a humanitarian crisis that puts lives on the line in order to cross the border. St John, “The Raging Controversy at the Border Began with This Incident 100 Years Ago.”

²⁷ “Border Patrol Strategic Plan 1994 and Beyond: National Strategy,” U.S. Border Patrol, July 1994, <https://www.hsdl.org/?view&did=721845>; Blas Nuñez-Neto and Michael John Garcia, “Border Security: The San Diego Fence,” *CRS Report for Congress*, May 23, 2007, 3.

have a discernible impact on the influx of unauthorized aliens coming across the border in San Diego.”²⁸ The primary fence failed to deter illegal immigration.

“[I]t soon became apparent to immigration officials and lawmakers that the Border Patrol needed, among other things, a ‘rigid’ enforcement system that could integrate infrastructure (i.e., a multi-tiered fence and roads), manpower, and new technologies to control the border region further.”²⁹ Additionally, the Border Patrol was troubled with the fact that their pursuits of illegal immigrants traversed through “environmentally sensitive areas,” resulting in damage to vegetation, erosion of the land, trash, and even wildfires.³⁰ Operation Gatekeeper of 1994 called for a three-tiered fence to stop the influx of illegal immigrants into the U.S.—as in two additional barriers would run parallel to the original 14-mile fence.³¹ Operation Gatekeeper promised increased staffing and new, as well. The Border Patrol believed that multiple fences, increased staffing, and new technology would deter individuals from trekking through environmentally sensitive areas and prevent illegal immigrants from entering the U.S. illegally.

Emergence of Waiver Authority

Waiver authority emerged out of a need to expeditiously reinforce the border between the U.S. and Mexico near San Diego. As concerns for national security rose following the September 11, 2001, terrorist attacks on the U.S., waiver authority

²⁸ Nuñez-Neto and Garcia, 3.

²⁹ Nuñez-Neto and Garcia, 4.

³⁰ Blas Nuñez-Neto, *Border Security Barriers along the U.S. International Border* (New York: Nova Science Publishers, 2009).

³¹ “Operation Gatekeeper,” U.S. Department of Justice Office of the Inspector General, 1994, <https://oig.justice.gov/sites/default/files/archive/special/9807/gkp01.htm>.

expanded to ensure continued reinforcement of the entire international border. Those federal laws that were believed to hinder the construction of the border were waived, meaning the federal obligations to consider the project's effects on cultural, historical, and natural resources were eradicated for large areas of the border wall.

Waivers published in the Federal Register outline the federal legislation that enables the implementation of waiver authority. A Federal Register waiver states, “Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out DHS's border security mission.”³² This authority lies with Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,³³ the Real ID Act,³⁴ the Secure Fence Act of 2006,³⁵ and the Department of Homeland Security Appropriations Act 2008.³⁶ It is this order I aim to follow and explain briefly the legislation and amendments that authorize the DHS Secretary to waive federal laws enacted to identify and protect our nation’s resources.

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (1996)

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to regulate and discourage illegal immigration.³⁷ This thesis is most concerned with Section 102 of the IIRIRA, titled “Improved Enforcement at the

³² Underlines added for emphasis. Office of the Secretary, Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” *Federal Register* 84, no. 169 (August 30, 2019): 45787.

³³ *Omnibus Consolidated Appropriations Act, P.L. 104-208, U.S. Statutes at Large* 3009 (1996): 110. This omnibus act included the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

³⁴ *P.L. 109-13* (2005).

³⁵ *Secure Fence Act, P.L. 109-367, U.S. Statutes at Large* 2638 (2005): 120.

³⁶ *Consolidated Appropriations Act, P.L. 110-161, U.S. Statutes at Large* 1844 (2008): 121.

³⁷ *P.L. 104-208*, (1996).

Border.”³⁸ Section 102 grants the United States Attorney General the ability to construct additional barriers and roads “in the vicinity of the United States border” to restrict illegal immigration into the country.³⁹ More specifically, the additional construction concerns the 14 miles of boundary wall located in San Diego, as described above.⁴⁰ To ensure the “expeditious construction” of the wall, the Attorney General is granted permission through the IIRIRA to waive provisions of National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) as deemed necessary, but no other federal laws.⁴¹

Although President Clinton ultimately signed IIRIRA into law, the Clinton Administration did not use waiver authority. The Secretary of the Department of the Interior (DOI) stated, “full compliance with the ESA would not impede the timely and effective construction of border infrastructure contemplated by this provision.”⁴² The Clinton Administration believed that the San Diego border wall project could still be completed in a timely manner even if ESA and NEPA reviews were conducted.

Real ID Act (2005)

The San Diego project did not occur with expedience. Considerable delays — delays caused by objections to the construction⁴³ —over nine years virtually halted the construction of the secondary and tertiary fences planned. The Real ID Act of 2005 was meant to kickstart the San Diego border fencing project.⁴⁴ Most relevant to this thesis, the

³⁸ *P.L.* 104-208, (1996): § 102.

³⁹ *P.L.* 104-208, (1996): § 102(a).

⁴⁰ *P.L.* 104-208, (1996): § 102(b)(1).

⁴¹ *P.L.* 104-208, (1996): § 102(c).

⁴² Bear, “Border Wall: Broadest Waiver of Law in American History,” 2.

⁴³ For more information about the objections see, Bear, 3.

⁴⁴ *P.L.* 109-13, (2005).

Real ID Act increased funding for border security and amended Section 102(c) of the IIRIRA.⁴⁵

Amendments to Section 102(c) of the IIRIRA grant the DHS Secretary—instead of the Attorney General—the ability to waive “all legal requirements” necessary to ensure “expeditious construction” of the border wall and infrastructure projects.⁴⁶ The Real ID Act additionally waives the right to judicial review.⁴⁷ In other words, only those cases that claim waivers are a violation of the United States Constitution can be heard by federal courts.⁴⁸ All of the DHS Secretary’s decisions to use waiver authority become effective once published in the Federal Register.⁴⁹

The first waiver was used in September of 2005 by the George W. Bush Administration to speed up the San Diego three-tiered wall construction. A total of six laws—including NEPA, ESA, and the NHPA—were identified as barriers for the San Diego border wall project.⁵⁰ Subsequently, this area of the border wall was revisited in

⁴⁵ P.L. 109-13, (2005): § 102.

⁴⁶ The amended provision states, “Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.” P.L. 109-13, (2005): § 102(c)(1); Also, it is important to note that the November 5, 2002: The Homeland Security Act gave the Department of Homeland Security control over border Security. The power was transferred from the Department of Justice, where the AG role resides. Bear, “Border Wall: Broadest Waiver of Law in American History,” 3.

⁴⁷ P.L. 109-13, (2005): § 102(c)(2).

⁴⁸ Nuñez-Neto and Garcia, “Border Security: The San Diego Fence,” CRS-6.

⁴⁹ P.L. 109-13, (2005): § 102(c)(1).

⁵⁰ Office of the Secretary, Department of Homeland Security, “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,” *Federal Register* 70, no. 183 (September 22, 2005): 55622.

2017 and 2019 as the wall was considered outdated.⁵¹ The DHS Secretary waived thirty-two federal laws between 2017 and 2019 laws to construct the San Diego wall (Map 6).

Secure Fence Act (2006)

In October 2006, Congress passed the Secure Fence Act.⁵² This act further amended Section 102(c) of the IIRIRA and Section 102 of the Real ID Act. Waiver authority was no longer limited to the border wall and infrastructure projects in the San Diego area. The Secure Fence Act made it possible for the Bush Administration to create 850 miles of a two-layered fence to divide the U.S. from Mexico.⁵³ Where the topography exceeded a grade of ten percent, other options such as surveillance cameras, were chosen instead of a physical border wall.⁵⁴ As a result, the entire international boundary between the U.S. and Mexico is subject to waiver authority deemed necessary by the DHS Secretary.

Moreover, President Bush evoked waiver authority four other times following the 2005 waiver. The Bush Administration's most extensive stretch of waivers totaled 559 miles (about the distance between Philadelphia and Maine)—and impacted all the border wall states (California, Arizona, New Mexico, Texas).⁵⁵ A total of thirty-seven federal

⁵¹ Office of the Secretary, Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” *Federal Register* 82, no. 147 (August 2, 2017): 35984.

⁵² *P.L. 109-367*, (2005).

⁵³ Nuñez-Neto and Garcia, “Border Security: The San Diego Fence,” CRS-6; Bear, “Border Wall: Broadest Waiver of Law in American History,” 5.

⁵⁴ *P.L. 109-367*, (2005): § 3(1)(C).

⁵⁵ Office of the Secretary, Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” *Federal Register* 73, no. 68 (April 8, 2008): 19078.

laws concerned with environmental and cultural resource protection were waived to complete this vast expanse of land.⁵⁶

Despite initial opposition to waive environmental reviews, Clinton signed waiver authority into law. Waiver authority began out of necessity to expedite border construction by waiving NEPA and ESA requirements; it has since transformed into an unregulated, sweeping power that invalidates federal preservation laws and puts the fate of the nation's resources into the hands of a single person—the DHS Secretary.

Trump Border Wall

What began as a campaign promise turned into a reality in 2017, when President Donald J. Trump signed Executive Order 13767.⁵⁷ Executive Order 13767 calls for the executive branch to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”⁵⁸ The Executive Order does not mention the use of waivers for this project. However, the DHS Secretary invoked waiver authority twenty-seven times— totaling over one thousand miles (about the distance between Philadelphia, Pennsylvania and Tampa, Florida). The length of the geographic boundary between the U.S. and Mexico is about two thousand miles. In other words, the Trump Administration waivers apply to half of the U.S.-Mexican border.

⁵⁶ Kenneth D. Madsen, “DHS Waivers,” Ohio State University, March 25, 2021, <https://u.osu.edu/madsen.34/dhs-waivers/>.

⁵⁷ “Executive Order 13767: Border Security and Immigration Enforcement Improvements” (White House, January 25, 2017).

⁵⁸ “Executive Order 13767: Border Security and Immigration Enforcement Improvements,” § 2(a).

Former President Trump's 2019 Declaration of a National Emergency further justified the perceived urgent need to construct a new border wall.⁵⁹ As discussed, the DHS Secretary evoked waiver authority during the Trump Administration before this Declaration of a National Emergency; yet, the proclamation suggests that the wall construction needed to occur with haste because national security was at risk.⁶⁰ The language of the proclamation mirrors that of the Real ID Act to suggest the proposed threat of an unsecured border and the need for the country to do everything in its power—including suggesting that the DOI transfer jurisdiction of their lands over to the Border Patrol if needed—to secure the border region.⁶¹

During national emergencies, it is understandable that some projects may need to occur at warp speed, but speed has consequences—consequences such as significant impacts on natural and cultural resources. Executive Order 13767 requested the executive branch to “produce a comprehensive study of the security of the southern border, to be completed within 180 days of [the Executive Order]” because of anticipated environmental effects from the construction. If such a survey was requested, then why is there a lack of time to complete the requirements of NEPA and the NHPA?⁶²

What began as a means to dissuade wandering cattle, turned into a measure to promote national security. NEPA and NHPA have the ability to preserve the history of

⁵⁹ Donald J. Trump, Proclamation, “Declaring a National Emergency Concerning the Southern Border of the United States,” *Federal Register* 84, no. 34 (February 20, 2019): 4949.

⁶⁰ 84 FR 4949.

⁶¹ “Executive Order 13767: Border Security and Immigration Enforcement Improvements.”

⁶² “Executive Order 13767: Border Security and Immigration Enforcement Improvements,” § 4(d).

the American Southwest development; however, waiver authority eliminates the potential for cultural heritage and landscape preservation.

Major Legislation

The primary legislation addressed in this thesis is the NHPA and NEPA. These laws were chosen because of the review processes they require prior to projects—projects or undertakings defined by the particular legislation. This is not to say that there are no other laws that regulate cultural and natural resources, though. In the case of the Trump Administration border wall construction, the DHS Secretary waived as many as twenty federal laws. Two of the most common laws waived are NHPA and NEPA.

National Historic Preservation Act (NHPA) (1996)

The National Historic Preservation Act of 1966 (“NHPA”) is the primary federal law established to preserve the United States’ heritage.⁶³ NHPA recognizes that heritage is “irreplaceable.”⁶⁴ As a result, heritage needs to be preserved and protected for future generations. It establishes the National Register and creates the Advisory Council on Historic Preservation (ACHP)—a federal agency devoted to safeguarding the nation's heritage by taking on an advisory role for the President and Congress.⁶⁵ NHPA additionally creates both State Historic Preservation Offices (SHPOs) and Tribal Historic Preservation Offices (THPOs).⁶⁶

⁶³ 54 *U.S.C.* §§ 300101 *et seq.*

⁶⁴ 54 *U.S.C.* § 300101.

⁶⁵ “About the ACHP,” Advisory Council on Historic Preservation, accessed February 10, 2021, <https://www.achp.gov/about>.

⁶⁶ 54 *U.S.C.* § 300101.

A significant section within the NHPA is Section 110.⁶⁷ The legislation states, “Each Federal agency shall establish (unless exempted under Section 214), in consultation with the [Secretary of Interior Standards], a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties.”⁶⁸ Section 110 reviews are essential documents because they allow federal agencies to understand what resources are under their care and what the resource conditions are. From these inventory documents, plans for resource care can be developed alongside mitigation measures in the event these resources are threatened. Also, in the event that Native American cultural patrimony is threatened, Section 110 requires federal agencies to comply with the Native American Graves and Repatriation Act (NAGPRA)⁶⁹ and consult with other federal, state, and local agencies to plan for repatriation.⁷⁰ Section 110 reviews are, therefore, important components of cultural heritage management.

Another critical component of cultural heritage management as outlined by the NHPA is the Section 106 review process (Flowchart 1).⁷¹ Section 106 is a procedural

⁶⁷ 54 *U.S.C.* § 306102.

⁶⁸ 54 *U.S.C.* § 306102.

⁶⁹ In the event that Native American cultural items are found on federal lands, agencies must consult with local tribes to identify the lineal descendants of the items. Items must be returned to tribes, if requested. *Native American Graves and Repatriation Act*, *U.S.C.* 25 (1990) § 3002(c); 54 *U.S.C.* § 306102(E)(iii).

⁷⁰ 54 *U.S.C.* § 306102(D).

⁷¹ “The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.” 54 *U.S.C.* § 306108.

process triggered by a federal undertaking on state, local, tribal,⁷² federal, and private land. As defined by the implementing regulations, an “‘Undertaking’ means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency...”⁷³ Thus, a Section 106 review is triggered by federal involvement—whether it be through federal funding or a permit— such as the border wall and infrastructure project.⁷⁴

If an undertaking exists, the federal agency must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included or *eligible* for inclusion in the National Register.”⁷⁵ Effects on historic properties are determined through comprehensive reviews of existing documentation, environmental and historic property testing (i.e., archaeological surveys), and consultations with interested parties.

Consultations include “appropriate Federal agencies,” interested THPOs, SHPOs, consulting parties, representatives of the local government, applicants for the project, and members of the general public with a “legal or economic interest” in the outcome of the project.⁷⁶ According to the ACHP, consultations are meant to provide the federal agency with guidance on the historic property within an area of potential effect (APE) prior to surveying the APE.⁷⁷ Through an “*active* exchange of ideas and information,” members

⁷² Tribal land as defined by Section 106 of NHPA are “all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.” “Protection of Historic Properties (incorporating amendments effective August 5, 2004),” *Code of Federal Regulations*, title 36, Part 800 (2004): 85-110.

⁷³ 36 C.F.R. § 800.16(y).

⁷⁴ 54 *U.S.C.* § 306108.

⁷⁵ Emphasis added to eligible. 54 *U.S.C.* § 300308.

⁷⁶ 36 C.F.R. § 800.2(c).

⁷⁷ “Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The

of the above organizations and agencies provide information regarding the project area's perceived value of resources, alternatives, and ways to avoid, minimize, and mitigate adverse impacts to historic resources. Consultations can potentially “inform federal agencies about appropriate and culturally sensitive methods to use during any testing and excavation,” such as may be the case when working on Tribal or Native Hawaiian Organization’s (NHO) land.⁷⁸ Consultations continue throughout the entire Section 106 process. Yet, the ACHP notes that “there is no hard and fast rule about how much consultation is enough.”⁷⁹ The amount of consultation is dependent on the project.⁸⁰ The NHPA, however, grants SHPOs, THPOs, consulting parties (i.e., preservation organizations), and the ACHP the ability to comment on various findings and determinations made during consultations.⁸¹ The Section 106 process, as a result, has a checks and balance system that ensures that consideration is given to all resources in a proposed project area and that consultations truly involved an active exchange of information.

The balance between historic preservation and the necessity to expedite projects can be achieved through the development of NHPA alternative procedures.⁸² NHPA

area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 C.F.R. § 800.16(f); Advisory Council on Historic Preservation, “Section 106 Consultation about Archaeology,” Advisory Council on Historic Preservation, accessed March 10, 2021, <https://www.achp.gov/node/9869>.

⁷⁸ Advisory Council on Historic Preservation. The ACHP provides numerous reference documents on how to effectively consult with THPOs and NHO. For a list of this information see: Advisory Council on Historic Preservation, “Training and Guidance for Indian Tribes and Native Hawaiian Organizations,” Advisory Council on Historic Preservation, accessed March 10, 2021, <https://www.achp.gov/indian-tribes-and-native-hawaiians/training-guidance>.

⁷⁹ Advisory Council on Historic Preservation, “Section 106 Consultation about Archaeology.”

⁸⁰ 36 CFR § 800.2(a)(4); 36 CFR § 800.3(c)(3); “Section 106 Consultation about Archaeology.”

⁸¹ 54 *U.S.C.* § 306107.

⁸² 36 CFR § 800.14.

includes five acceptable alternatives, each of which include consultations and ACHP comments on proposed actions.⁸³ One method to expedite and adapt federal reviews is to sign a Programmatic Agreement (PA).⁸⁴ PAs are legally binding agreements between lead federal agencies and interested parties such as SHPOS and THPOs. According to the ACHP, “Programmatic agreements are the most commonly used program alternative.”⁸⁵ applied to “multiple or complex federal undertakings,” including routine maintenance projects. PAs are also beneficial to federal agencies in circumstances where they cannot “fully determine how a particular undertaking may affect historic properties or the location of historic properties and their significance and character prior to approving a project.” Drafting an agreement outlining how to manage unexpected effects prior to an undertaking will save ample time following the project.

The federal legislation regarding PAs also features guidance for developing agreements in the event of a national emergency.⁸⁶ While no one can predict an emergency effectively, there is the ability to predict continued maintenance and upkeep of the border wall for national security matters.⁸⁷ Through the negotiations with all affected parties, including Native American tribes, methods to mitigate or lessen cultural

⁸³ 36 CFR § 800.14.

⁸⁴ 36 CFR § 800.14.

⁸⁵ 36 CFR § 800.14(b); Advisory Council on Historic Preservation, “Programmatic Agreements,” Advisory Council on Historic Preservation, accessed April 20, 2021, https://www.achp.gov/program_alternatives/pa.

⁸⁶ 36 CFR § 800.12.

⁸⁷ In the July 2015 New Mexico EA, the Border Patrol notes that they were in the process of developing a PA with “appropriate parties” for actions that mimicked those covered in the EA. Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico” (Department of Homeland Security, July 2015), 7.

resources' impacts can be developed. PAs are, therefore, federally accepted agreements that can be applied to border wall and border infrastructure projects.

Furthermore, federal agencies may want to consider requesting program comments from the ACHP as an alternative procedure to the Section 106 process.⁸⁸ Program comments (Flowchart 3) are beneficial alternatives because they allow the ACHP to comment on a group of undertakings as opposed to comments on a singular project.⁸⁹ The ACHP additionally notes that program comments give the federal agency the ability “to achieve a much broader perspective of classes of historic properties than an agency’s field office typically possesses.”⁹⁰ Federal agencies will have a more complete understanding of their resources as a result of program comment procedures.

While alternative procedures for NHPA exists, Section 110 of the NHPA further states, “[t]he [DHS] Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.”⁹¹ As a result, the procedures outlined above requiring historic resource identification, consultations, alternative analyses, and agreements are no longer required when the DHS Secretary waives the NHPA.

National Environmental Policy Act (NEPA) (1970)

Signed into law in 1970, the National Environmental Policy Act⁹² requires federal agencies to “foster and promote the general welfare, to create and maintain conditions

⁸⁸ 36 CFR § 800.14(e).

⁸⁹ 36 CFR § 800.14(e); Advisory Council on Historic Preservation, “Program Comment Questions and Answers,” Advisory Council on Historic Preservation, accessed April 23, 2021, https://www.achp.gov/program_comment_questions_and_answers.

⁹⁰ Advisory Council on Historic Preservation.

⁹¹ 54 U.S.C. § 306112.

⁹² 42 U.S.C. §§ 4321 *et seq.*

under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”⁹³ The legislation created the Council on Environmental Quality (CEQ), which oversees NEPA reviews, provides guidance much like the ACHP, and helps foster NEPA agreements that may result from emergencies.⁹⁴ Unlike NHPA, NEPA reviews apply to “historic, cultural, and natural aspects of our national heritage” and are triggered by major federal actions—actions agencies take that have the potential to “significantly affecting the quality of the human environment.”⁹⁵ Major federal actions consist of those activities involving federal funding and coordination.⁹⁶ Effects or impacts as defined by §1508.1(g) include changes that are “reasonably foreseeable and have a reasonably close causal relationship to the Proposed Action or alternatives...”⁹⁷ drawing a close parallel with the NHPA; however, like the term cultural resources suggests, the effects of the major federal action can occur beyond a single property. Significant impacts or effects can be on the environment, the community, or even on public interests.⁹⁸

NEPA reviews can take three forms: 1) Categorical Exclusion (CATEX), 2) Environmental Assessments, 3) Environmental Impact Statement. A CATEX means that

⁹³ 42 U.S.C. § 4331(a); U.S. EPA, “What Is the National Environmental Policy Act?,” Overviews and Factsheets, US EPA, July 31, 2013, <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

⁹⁴ Council on Environmental Quality, “NEPA: National Environmental Policy Act,” NEPA.Gov, accessed March 10, 2021, <https://ceq.doe.gov/>.

⁹⁵ 42 U.S.C. § 4332 *et seq*; “National Environmental Policy Act Implementing Regulations,” *Code of Federal Regulations*, title 40, Part 1500 (2011): 833-837.

⁹⁶ “Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 CFR § 1508.18. “Integrating NEPA and Section 106” (Advisory Council on Historic Preservation, March 2013).

⁹⁷ 40 CFR § 1508.1(g).

⁹⁸ “Integrating NEPA and Section 106.”

there are no foreseeable effects on the human environment. In other words, actions are excluded from reviewing their project and do not have to consider potential effects of their project because there are none.⁹⁹ Environmental Assessments (EA)¹⁰⁰ must be conducted prior to an action to identify if a project has the potential to affect historic, cultural, and natural resources. The EA includes: 1) a summary of why the major federal action is occurring, 2) alternatives to the proposed plan including a no-action alternative,¹⁰¹ 3) the potential environmental and cultural impacts for each plan, and 4) a list of people who should be consulted on the project (Flowchart 2).¹⁰² If the project is determined to have no impact on the identified resources, then a Finding of No Significant Impact (FONSI) is issued, and the review process is completed. The issuing of a FONSI does require a report on the “reasons why the agency has concluded that there are no significant environmental impacts projected to occur upon implementation of the action.”¹⁰³ If an action is determined to affect resources or public health significantly, an EIS must be prepared. Like NHPA, NEPA is procedural. Projects can proceed once the review process is completed, even if significant impacts will result from the project. Agencies must only consider the impacts and explain the reason behind their decision through the EA and EIS reports.

Furthermore, because NEPA and NHPA both apply to historic properties, the review process can be intertwined for expedience. The NHPA states,

⁹⁹ 40 CFR § 1508.1(d); U.S. EPA, “National Environmental Policy Act Review Process,” Overviews and Factsheets, US EPA, July 31, 2013, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

¹⁰⁰ As defined by 40 CFR §1508.1(h).

¹⁰¹ 40 CFR § 1502.14(c).

¹⁰² U.S. EPA, “National Environmental Policy Act Review Process.”

¹⁰³ U.S. EPA, “National Environmental Policy Act Review Process.”

Nothing in this Act shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969, and nothing in this Act shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.¹⁰⁴

Federal agencies are required to comply with both NEPA and NHPA if the situation permits.¹⁰⁵

Through reviews, consultations, and surveys required by NHPA and NEPA prior to a federal undertaking, historic properties and natural resources are afforded protection from federal actions. Resources are comprehensively identified, values are discussed, and alternative plans are mapped through research and the consultation process.

Documentation and consultations are components of the NHPA and NEPA. Waiver authority, however, requires neither documentation nor the consideration of project effects on resources. Resultingly, cultural and environmental resources have the potential to be obliterated before they are even identified.

Literature Review on the Border Wall

Scholars approach the subject of the U.S.-Mexican border wall from a variety of angles. Border wall discussions appear to begin with a focus on U.S. immigration reform, which is understandable as the first use of waiver authority was employed in the

¹⁰⁴ 54 U.S.C. § 306111.

¹⁰⁵ For more information regarding substitution of NEPA procedures for Section 106, see: 36 CFR § 800.8(c); “Integrating NEPA and Section 106.” The CEQ and the ACHP created a handbook with a recommended timeline as well online courses to help federal agencies navigate the integration of the reviews. Council On Environmental Quality Executive Office Of The President and Advisory Council on Historic Preservation, *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (Council On Environmental Quality Executive Office Of The President & The Advisory Council on Historic Preservation, 2013).

1990s.¹⁰⁶ Of course, literature changes with the political climate and the context of the construction. Today, media and scholarly articles are divided unequally among border wall topics such as: 1) national/ border security, 2) environmental injustice, and 3) indigenous rights.

National security and the control of illegal immigration was the catalyst for the Trump Administration border wall construction. In 2017, President Trump stated in Executive Order 13767, “Continued illegal immigration presents a clear and present danger to the interests of the United States.”¹⁰⁷ It is, therefore, necessary to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border.”¹⁰⁸ The fear and the apprehension to admit foreigners into this country drove continued support for the border wall. I am not suggesting that a wall is not needed. Instead, I argue that the literature supporting the construction puts national security at the forefront. In other words, scholarly literature should view the whole picture of the border wall: national security plus its implications. There has to be a scholarly, middle ground.

On either side of the middle ground are waiver authority proponents David J. Barron and Todd D. Rakoff in “In Defense of Big Waiver”¹⁰⁹ and the opponent Dinah Bear in “Border Wall: Broadest Waiver of Law in American History.”¹¹⁰ Rackoff and

¹⁰⁶ For more information on the 1990s U.S. immigration policies, see “Historical Overview of Immigration Policy,” Center for Immigration Studies, accessed April 25, 2021, <https://cis.org/Historical-Overview-Immigration-Policy>.

¹⁰⁷ “Executive Order 13767: Border Security and Immigration Enforcement Improvements.”

¹⁰⁸ “Executive Order 13767: Border Security and Immigration Enforcement Improvements.”

¹⁰⁹ David J. Barron and Todd D. Rakoff, “In Defense of Big Waiver,” *Columbia Law Review*, 113, no. 2 (March 2013): 265–345.

¹¹⁰ Bear, “Border Wall: Broadest Waiver of Law in American History.”

Barron divide waiver authority into two classes: 1) little waivers and 2) big waivers. They suggest that the little waivers are those provisions within the Endangered Species Act, for example, that includes provisions allowing the law to be waived by the Secretary of Defense for national authority reasons.¹¹¹ The authors argue that this “tinkering” or slight modification to the law is a “little waiver.” Waiving all provisions that may interfere with the border wall's construction, such as the waiver authority granted to the DHS Secretary in the Real ID Act is “sweeping” legislation that “facilitates” Congress’ lawmaking abilities. Resultingly, the sweeping use of power is called a big waiver.¹¹² No matter how large or small the waiver authority is, Barron and Rackoff support the power for its ability to “overcome gridlock” and “for freeing the exercise of new delegations of authority from prior constraints and updating legislative frameworks that have grown stale.”¹¹³ In summary, Rackoff and Barron argue that big waiver authority is necessary for keeping the “ball rolling in Congress.”¹¹⁴ The authors do not address the environmental consequences that this authority may have. In the case of the border wall, waiver authority has a one-track mind like the authors, get the job done no matter the costs.

Bear counters Barron and Rackoff’s argument supporting waiver authority. Bear begins with a comprehensive history that led to the creation of waiver power. She ends with a brief analysis of the environmental, cultural, and social impacts that the construction will have if the waiver authority goes unchecked for the entire length of the

¹¹¹ Barron and Rakoff, “In Defense of Big Waiver,” 277.

¹¹² Barron and Rakoff, 271, 277, 290.

¹¹³ Barron and Rakoff, 265.

¹¹⁴ Barron and Rakoff, “In Defense of Big Waiver.”

border. She argues that “[w]aiving all laws for hundreds of miles of construction is fundamentally contrary to the principles of the United States, a country that prides itself as a country that was founded on and adhered to the “rule of law.”¹¹⁵ The waiver authority legislation's onset began with a justification for national security and was supported by a lack of concern for environmental impacts. In the end, Bear’s article suggests that shortcuts to avoid environmental reviews are not a new thing but have been implemented since the 1990s.

In a 2018 Masters thesis, Bryce Garrett Fugate analyses the use of waiver authority since the 1990s.¹¹⁶ Through field surveys of five identified regions—all federally-owned and managed by the Department of the Interior—Fugate illustrates the range of effects the Trump Administration border wall construction can have from “preventing natural wildlife movement to infringing upon Indigenous sovereignty to fragmenting lands protected to be enjoyed by the public.”¹¹⁷ In the end, he makes general recommendations to prevent large-scale social and environmental consequences. These recommendations include repealing or amending Section 102 of the Real ID Act, implementing wildlife crossing points at the border wall, and creating “International Peace Parks.”¹¹⁸ Fugate’s thesis helps draw the necessary attention to the region for the construction's total impact to be considered by the enabling legislatures.

¹¹⁵ Bear, “Border Wall: Broadest Waiver of Law in American History,” 12.

¹¹⁶ Bryce Garret Fugate, “Walls and Wilderness: Analyzing the Impacts of Border Barriers on U.S. Government Lands of the United States - Mexico Border” (Thesis, El Paso, Texas, The University of Texas, 2018).

¹¹⁷ Fugate, 59.

¹¹⁸ Fugate, 54.

Fugate’s biophilia hypothesis analysis directly ties into cultural landscape theory, although he does not use this specific terminology. He references Edward Wilson’s¹¹⁹ work to suggest that people have an inherent connection with nature—that despite the draw away from it for a variety of reasons (i.e., COVID-19), people “have a psychological tendency to reconnect with nature.”¹²⁰ UNESCO defines cultural landscapes as “combined works of nature and humankind, [that] express a long and intimate relationship between peoples and their natural environment.”¹²¹ So, while Wilson, and as a result Fugate, discuss this inherent draw to nature, cultural landscapes are the result of the interaction between people and nature. One cannot exist without the other. Fugate focuses his study on the present-day landscape of tourism and occupation, but he excludes a historical glance at the border wall region's landscape. As stated in the introduction, the border wall region has been occupied for over ten thousand years. People have been interacting with the environment in this area for millennia. This history of interaction should not be neglected or ignored.

What has not drawn the same degree of awareness as environmental injustices is the complex relationship between indigenous heritage and the border wall construction. This is not to say that indigenous heritage is at less of a risk of destruction than the environmental resources within the border wall region. In February 2020, Congress held

¹¹⁹ According to Encyclopedia Britannica, Edward Wilson is an “American biologist recognized as the world’s leading authority on ants. He was also the foremost proponent of sociobiology, the study of the genetic basis of the social behavior of all animals, including humans.” “Edward O. Wilson: Biography,” Encyclopedia Britannica, accessed April 16, 2021, <https://www.britannica.com/biography/Edward-O-Wilson>.

¹²⁰ Fugate, “Walls and Wilderness: Analyzing the Impacts of Border Barriers on U.S. Government Lands of the United States - Mexico Border,” 14.

¹²¹ UNESCO World Heritage Centre, “Cultural Landscapes,” UNESCO World Heritage Centre, accessed February 18, 2021, <https://whc.unesco.org/en/culturallandscape/>.

a Subcommittee meeting on Destroying Sacred Sites and Erasing Tribal Culture.”¹²²

Emphasized repeatedly throughout the session was the need for formal, effective consultations as many tribal sites were subject to dynamite and bulldozers.¹²³

Communication between the DHS and tribes occurred for the Trump Administration border wall project, but the Border Patrol largely ignored recommendations to minimize impacts to both cultural sites, plants, and animals that are significant to the nation (i.e., medicine plants, endangered species).¹²⁴ Waiver authority erases the NHPA consultation requirement and the NEPA public input process. Waivers also do not apply to tribal lands when the nation is recognized as sovereign.¹²⁵ Yet, just because sites, plants, and animals fall outside of the federally recognized boundary does not mean that there will not be affects to tribal resources. Consultations and public input are essential to understand the distribution and potential to affect tribal patrimony.

Zia Akhtar, an indigenous rights advocate, analyzes indigenous rights, specifically of the Lipan Apache Tribe of Texas, pertaining to the border wall construction.¹²⁶ Federal laws and case law heavily support Akhtar’s argument. He argues that waiver authority impedes a tribe’s rights, whether they be the constitutional rights for judicial review, or to

¹²² U.S. Congress, “Destroying Sacred Sites and Erasing Tribal Culture : The Trump Administration’s Construction of the Border Wall : Oversight Hearing before the Subcommittee for Indigenous Peoples of the United States of the Committee on Natural Resources. U.S. House of Representatives,,” February 26, 2020.

¹²³ U.S. Congress, "Destroying Sacred Sites and Erasing Tribal Culture."

¹²⁴ Peter Steere (THPO, Cultural Resource Manager for the Tohono O'odham Nation), Interview by Author, February 9, 2021.

¹²⁵ Steere.

¹²⁶ Zia Akhtar, “The Limits and Potential of Judicial Review and Truth Commissions in Safeguarding the Rights of Indigenous Peoples: An Examination of the Implications of the US-Mexico Border Security Wall on the Lipan Apache,” *Law, Social Justice and Global Development Journal*, December 2013, Gale OneFile: LegalTrac.

freely practice their religion and culture and occupy the land granted to them in 1848 through the Treaty of Guadeloupe Hidalgo.¹²⁷ In particular, the author emphasizes the legislation that supports consultation. Akhtar’s legislative analysis, as well as his conclusions on indigenous rights violations, form the foundation of my understanding of tribal and federal government relations during the current border wall construction project.

Literature on the border wall construction takes several paths, whether it focuses on security, the protection of the environment, or less so on indigenous rights. Much of the cultural landscape is occupied and has been occupied by Native Americans for millennia. The landscape of the U.S.- Mexican border region is still alive with this culture. Resultingly, there should be ample discussions about the history and cultural landscapes of the American Southwest—history and landscapes that are threatened by emergency construction of a replacement border wall.

Surveys / Reviews & Consultations

“[T]he damage is avoidable but is a predictable consequence of the Administration's sweeping waivers of Federal laws which deprive the Federal agencies, the tribes, and the American public of the information necessary to decide whether the benefits of the wall outweigh its human and environmental costs.” –Sarah Krakoff, University of Colorado¹²⁸

The surveys, reviews, and consultations required by major federal preservation laws are essential components of environmental and cultural resource protection. Without these reviews, there would be little understanding of what resources are present in the

¹²⁷ Akhtar, "The Limits and Potential of Judicial Review," 3.

¹²⁸ U.S. Congress, “Destroying Sacred Sites and Erasing Tribal Culture : The Trump Administration’s Construction of the Border Wall : Oversight Hearing before the Subcommittee for Indigenous Peoples of the United States of the Committee on Natural Resources. U.S. House of Representatives.,” February 26, 2020.

project areas and the potential impact of the project on these resources. Documentation accompanied by physical surveys is crucial to understanding what history and resources exist on *and beneath* the surface. Also, it is equally as important to include stakeholders in this documentation process. It is one thing to note the existence; it is another to understand the values attached to these resources. As a result, the major federal laws protecting cultural and natural resources, as previously discussed, were enacted to ensure that sufficient consideration is granted to the American Southwest's natural resources and cultural heritage.

To illustrate the resources that may or have been affected by the border wall construction and illustrate the insufficiencies of ESPs, I analyzed several environmental and cultural review documents. These surveys include: 1) the July 2019 Section 110 baseline survey of Organ Pipe Cactus National Monument (ORPI) to illustrate the concept of potential to yield information;¹²⁹ 2) a Border Patrol EA for the tactical infrastructure along the border wall in New Mexico from July 2015 as a comparison to the ESP;¹³⁰ and 3) the June 2019 ESP for the San Diego secondary fence replacement illustrating the similarities between EAs and ESPs.¹³¹

¹²⁹ Veech, "Archaeological Survey, ORPI."

¹³⁰ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, "Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico" (Department of Homeland Security, July 2015).

¹³¹ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, "Environmental Stewardship Plan: San Diego Secondary Fence Replacement," June 2019.

The U.S. Congress designated ORPI a National Monument in 1937 – a designation made possible by the Antiquities Act of 1906 (Map 3).¹³³ ORPI is located in southern Arizona along a thirty-mile stretch of the U.S.-Mexican border. The monument is about 500 squares miles in size and is the only place in the U.S. where the organ pipe cactus grows. In 1978, Congress declared 95% of the monument a “wilderness” area under the Wilderness Act of 1964.¹³⁴ While there is no human settlement in this area, at some point in history, people occupied this land alongside the native species such as the organ pipe cactus. Traces of this history are still scattered across the landscape, largely undisturbed by humans—undisturbed until the border wall construction.¹³⁵

In anticipation of the Trump Administration border wall and infrastructure project, ORPI personnel, the Intermountain Region Archaeology Program (IMRAP), and the Southern Arizona Support Office collaborated to begin planning for an archaeological resource recovery mission for this ecological and culturally significant landscape. Before the salvage efforts could commence, however, sites of importance needed to be identified within the area of impact—an area encompassing more than 100 acres of land along the

¹³² Veech, “Archaeological Survey, ORPI.”

¹³³ *Antiquities Act*, U.S.C. 54 (1906), §§ 3203 et seq.

¹³⁴ *Wilderness Act*, U.S.C. 16 (1964), §§ 1131 et seq; Wilderness is defined as, “an area of undeveloped 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...” 16 U.S.C. § 2(c). The Wilderness Act restricts the use of motorized vehicles and equipment. The Wilderness Act prevents the construction of permanent and temporary roads. The act also prohibits the construction of structures or installations within the area of designation. Construction of the border wall and infrastructure projects like roads are technically prohibited under the Wilderness Act provisions. 16 U.S.C. § 4(c).

¹³⁵ UNESCO recognized the importance of this area in the Sonoran Desert in 1976 by declaring it a Biosphere Reserve – “learning places for sustainable development.” In other words, they are areas that promote the conservation of biodiversity and cultural diversity. UNESCO, “What Are Biosphere Reserves?,” October 9, 2019, <https://en.unesco.org/biosphere/about>.

border, including the Roosevelt Reservation. The identification of these sites occurred by performing a walking (or pedestrian) survey with no ground disturbance. The inventory created satisfies a “baseline” NHPA Section 110 requirement for ORPI.¹³⁶

ORPI is covered by the waiver published in the Federal Register volume 84 page 21798 (Map 4) from May 2019.¹³⁷ The 2019 waiver consists of over 68 miles of border in Cochise County and Pima County, Arizona. It waives 42 laws, including NHPA, NEPA, NAGPRA, the Antiquities Act, and the Wilderness Act.¹³⁸ Given that the length of the wall is 68 miles, and the area of potential effect away from the wall is about 60 feet, there is the chance that about 500 acres of land will be affected by the construction under this individual waiver.¹³⁹ This calculation does not consider the depth at which the wall foundation needs to rest—about 8 to 10 feet down, to be more precise.¹⁴⁰

The 2019 ORPI Section 110 report begins by establishing the monument’s context. The report evaluates the environmental setting, including the native and endangered flora and fauna species, and summarizes the region's history from c. 15,000 BCE. The report also outlines the archaeological work that has been conducted in the monument since 1951, including the nature of the resources collected and identified. In each of these surveys, significant resources relating to the national significance of the monument are identified. These resources include O’odoham trail networks from the salt

¹³⁶ Veech, “Archaeological Survey, ORPI,” 40.

¹³⁷ Office of the Secretary, Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” *Federal Register* 84, no. 94 (May 15, 2019): 21798.

¹³⁸ 84 CFR 21798.

¹³⁹ 68 miles = 359,040 feet * 60 feet = 21,542,400 feet = 494.5 acres.

¹⁴⁰ Veech, “Archaeological Survey, ORPI,” 1.

pilgrimages to California, “dense concentrations of precontact Native American petroglyphs,” and pre-contact Native American archaeological sites.¹⁴¹

Despite the number, and expanse, of the previous surveys conducted within ORPI’s boundaries, there were still over 11 miles of the border region that had not been surveyed; this is the area in which the 2019 team focused their efforts.¹⁴² The most recent survey identified five new archaeological sites, 35 isolated occurrences, and 20 isolated features.¹⁴³ The isolated occurrences consisted of stray pottery, lithic, and marine shells.¹⁴⁴ Features included arrangement so stones, wooden stakes, and concentration of artifacts.¹⁴⁵ Of the five sites found, all appeared to be pre-contact Native American sites, potentially covered under NAGPRA. Two of the sites were determined to be eligible for the National Register of Historic Places under Criterion D: “as [they possess] both integrity and the ability to yield information about precontact occupation and utilization of the western Papagueria through time and about precontact trade patterns between the Gulf of California and the Gila Basin.”¹⁴⁶

It is important to emphasize—and the report makes it very clear—that all of the ORPI surveys were pedestrian or aerial surveys. In other words, there was no excavation or ground disturbance involved to investigate the sites and features further. According to the inventory report, “[i]t is probable that significant, presently unrecorded surface-level

¹⁴¹ Veech, “Archaeological Survey, ORPI,” 15.

¹⁴² The report does note that the team did not achieve 100% survey of this area in the allotted time frame. Each surveyor was spaced five meters apart and walked parallel to the international boundary. The archaeologists placed pins on the surface to identify artifacts or items of interest. They only strayed away from their survey sector if a cluster of interest was found and needed to be viewed further. Veech, 40.

¹⁴³ Veech, “Archaeological Survey, ORPI,” 40–42.

¹⁴⁴ Veech, “Archaeological Survey, ORPI,” Appendix D.

¹⁴⁵ Veech, “Archaeological Survey, ORPI,” Appendix E & F.

¹⁴⁶ Veech, “Archaeological Survey, ORPI,” 58.

and buried archaeological deposits persist across the project APE, and we must assume that all such unrecorded deposits will be destroyed over the course of ensuing border wall construction.”¹⁴⁷ In other words, these National Register eligible sites have the potential to yield more information. In addition, there are likely other National Register sites in the area. These areas should be investigated further, which the IMRAP planned to do, but more as a recovery effort than investigation. A report on the findings has yet to be published from this salvage activity.

Even though recovery efforts were to occur, this is not the same for other locations along the border wall. Vast areas of the region have not been investigated by archaeologists. Resultingly, there may be significant history still buried beneath the border wall region.

*EA Addressing Proposed Tactical Infrastructure for New Mexico: July 2015*¹⁴⁸

In normal circumstances, when federal funding or permits are used, Border Patrol projects must comply with all federal laws. The 2015 EA for the U.S.-Mexican border in New Mexico addressed the need for maintenance and repair of existing tactical infrastructure such as fences, roads, lighting, communications, and surveillance systems, as well as drainage structures and gates (Map 5). The work was to take place between ten to fifty-two miles along the U.S. Mexican border.¹⁴⁹ According to the EA, “[t]he need for the Proposed Action is to ensure that the increased level of border security provided by

¹⁴⁷ Veech, “Archaeological Survey, ORPI,” 16.

¹⁴⁸ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico.”

¹⁴⁹ “Final Environmental Assessment New Mexico,” 1–1.

existing tactical infrastructure is not compromised by impacts occurring through acts of sabotage, acts of nature, or a concession in integrity due to a lack of maintenance and repair.”¹⁵⁰ Without the maintenance proposed, the Border Patrol would be unable to perform their ultimate task: securing the U.S.-Mexican border.

The 2015 EA begins with a summary of the Border Patrol goals, the purpose and need of the project, and the framework for analyzing the report results. This report's framework complies with the two essential NEPA requirements: 1) evaluate the consequences of the Proposed Action, and 2) develop alternatives to the Proposed Action to avoid, minimize, or mitigate impacts to resources.¹⁵¹

The introduction additionally documents the public involvement process required by NEPA. According to the Border Patrol, federal, state, and local agencies in the border region were contacted to solicit comments regarding environmental concerns for the Proposed Action. The Border Patrol also “coordinated” with agencies such as the Bureau of Land Management (BLM) New Mexico office, the New Mexico Environment Department, and Federally-Recognized Native American Tribes and Nations.¹⁵² The Border Patrol published a Notice of Availability (NOA)—as in the documents are available to be reviewed in the Federal Register—for the EA. The Finding of No Significant Impact (FONSI) was published in several newspapers over two consecutive days.

¹⁵⁰ “Final Environmental Assessment New Mexico,” 1–4.

¹⁵¹ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico.”

¹⁵² “Final Environmental Assessment New Mexico,” 1–5, 1–6.

The Border Patrol notes in the EA that they only received three letters during this thirty-day comment period.¹⁵³ The three letters were from the White Mountain Apache Tribe, the New Mexico Environmental Department, and International Boundary and Water Commission.¹⁵⁴ The White Mountain Apache Tribe stated that they believed the project would not impact their historic, traditional, and cultural properties; however, they asked that in the event something was discovered, respect should be given to the remains until they are repatriated. The New Mexico Environmental Department's comments focus on the air, ground water, and surface water, and recognize the potential for harm but suggests that if care is taken, then long-term impacts can be avoided. The final letter from the International Boundary and Water Commission requested "...that the proposed works and related facilities not affect the permanence (disturb the foundations) of existing boundary monuments not impeded access for their maintenance."¹⁵⁵ In addition, the comment letter requested that the Proposed Action avoid the Roosevelt Reservation – a strip of land measuring 60 feet wide that runs parallel to the international boundary through the states of New Mexico, Arizona, and California. This land was set aside in 1907 by President Theodore Roosevelt to be “kept free from obstruction as a protection against the smuggling of goods between the United States and said Republic” for the public welfare.¹⁵⁶ The Border Patrol disregarded the request to avoid the Roosevelt

¹⁵³ Copies of the two reports were also placed in several libraries. The public was invited to submit comments and concerns to the Border Patrol regarding the project through multiple measures: by fax, through email, through the website, and by mail. “Final Environmental Assessment New Mexico,” 1–6, 1–7.

¹⁵⁴ “Final Environmental Assessment New Mexico,” Appendix B.

¹⁵⁵ “Final Environmental Assessment New Mexico,” B-8.

¹⁵⁶ Theodore Roosevelt, “Proclamation 758: Setting Apart As Public Lands A Strip Of Land On The Mexican Frontier” (1907), Wikisource.

Reservation. The EA notes that a Memorandum of Understanding signed in 2006 among the DHS, the DOI, Department of Agriculture “regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States Borders” allows “operation and construction within the 60-foot Roosevelt Reservation” as the purpose of this construction is consistent with the goal of Proclamation 758.¹⁵⁷ In the end, the published letters indicated a concern for the impact on cultural and natural resources, and requests to avoid the resources or contact the appropriate parties are offered.

The following EA section addresses the alternatives to the Proposed Action. The section begins with the criteria used to screen the alternatives. The criteria should support the Border Patrol's mission to deter illegal border crossing and allow the Border Patrol to maintain their equipment to ensure such mission continues. Meanwhile, the Border Patrol wished to minimize its impact on the environment, including cultural and natural resources. Impacts are classified on a scale from no effect, temporary, short-term, to long term.¹⁵⁸ Effects are also considered to be no effect, negligible, minor, to major.¹⁵⁹ Table 2 summarizes the findings.

¹⁵⁷ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico,” 3–4; Theodore Roosevelt, “Proclamation 758: Setting Apart As Public Lands A Strip Of Land On The Mexican Frontier.”

¹⁵⁸ “In general, short-term effects are those that would occur only with respect to a particular activity or for a finite period or only during the time required for maintenance and repair activities. Long-term effects are those that are more likely to be persistent and chronic.” Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico,” 3–1.

¹⁵⁹ “These relative terms are used to characterize the magnitude or intensity of an impact. Negligible effects are generally those that might be perceptible but are at the lower level of detection. A minor effect is slight, but detectable. A moderate effect is readily apparent. A major effect is one that is severely adverse or exceptionally beneficial.” “Final Environmental Assessment New Mexico,” 3–1.

The subsequent sections of the EA defines the affected environment, elaborates on known resources within this area, and considers each alternatives' impacts on the region's resources. For cultural resources, the EA notes that over 320 miles of the New Mexican border were surveyed in 2010 as a part of the Joint Task Force Six program. According to the EA, "these surveys identified 202 cultural resources, 10 of which are border monuments. Data recovery or extensive subsurface testing was conducted at 12 sites."¹⁶⁰

The Border Patrol expected long-term, minor adverse impacts on archaeological sites in the areas that road grading will occur as part of the Proposed Action plan. If the tactical infrastructure is maintained on an as-needed basis under the No Action Alternative, there will be negligible or no potential impacts unless there is an unanticipated find—an unexpected find would have the same impact rating Proposed Action plan. Also, the EA notes that maintenance under the No Action Alternative would still be subject to a separate Section 106 review if the undertaking has the potential to impact the resource.

After defining each plan's potential impacts (Proposed vs. No Action), the Border Patrol concluded that the best approach to take was the Proposed Action because there was a FONSI overall. The EA states, "The No Action Alternative would continue to meet minimum Border Patrol mission needs, but the lack of a centralized planning effort,

¹⁶⁰ "Typically, cultural resources are subdivided into archaeological sites (prehistoric or historic sites containing physical evidence of human activity but no standing structures); architectural sites (buildings or other structures or groups of structures, or designed landscapes that are of historic or aesthetic significance); and sites of traditional, religious, or cultural significance to Native American tribes." "Final Environmental Assessment," 3–61.

established performance specifications, and a preventative maintenance plan would make it far more difficult for Border Patrol to prevent the gradual degradation of tactical infrastructure.”¹⁶¹ Other alternatives were considered but were “eliminated from further detailed analysis” as they did not meet the criteria set forth by the Border Patrol.¹⁶²

The EA tackles issues such as contacting and communicating with federal, state, and local agencies about environmental concerns if the Proposed Action commences. There is also an understanding of the potential impacts on the ecological and cultural resources within the affected area. The chosen action did not eliminate impacts, but it considered them in conjunction with mitigation measures.

Furthermore, if the public disagreed with the findings—such as with *Defenders of Wildlife v. Chertoff* (2008)¹⁶³ and *National Parks Conservation Association v. Semonite et. al.* (2017)—¹⁶⁴ the public had the right to challenge the decisions. In both cases, the federal agencies concluded, after preparing EAs, that there would be no significant impacts to the historic resources within the project area. Neither federal agency was required to prepare an EIS, as a result. *Defenders of Wildlife and National Parks Conservation Association* argued that the impacts are obvious. Each federal agency needed to take a “hard look” at the impacts by preparing a detailed EIS as required by NEPA.¹⁶⁵ The *National Parks Conservation Association* won their case in the appellate

¹⁶¹ “Final Environmental Assessment New Mexico,” 2-11.

¹⁶² “Final Environmental Assessment New Mexico,” Section 2.5.

¹⁶³ 527 F. Supp. 2d 119 (D.D.C. 2007).

¹⁶⁴ 925 F. 3d 500 (D.C. Cir. 2019).

¹⁶⁵ “However, the Corps failed to take a ‘hard look’ at these impacts in the manner required by NEPA because the significance of an impact does not turn on whether there is some level of subjectivity but whether, in fact, the introduction of a massive industrial project is a significant intrusion that negatively impacts the physical environment and the consequent visitor experience in enjoying the primitive

court; the Army Corps was required to prepare further documentation regarding the potential impact of their project. Unfortunately, Defenders of Wildlife lost their case against DHS Secretary Chertoff because waiver authority was implemented for the project, meaning the federal government no longer had an obligation to prepare an EA or an EIS. The U.S District court, further, ruled that waiver authority does not violate the Constitution; the border wall construction could continue without further consideration of environmental impacts.¹⁶⁶

ESP for the San Diego Secondary Fence: June 2019

ESPs, prepared by the Border Patrol, identify natural and cultural resources in the pathway of a project operating under waiver authority. These reports aim to assess the potential impacts of a project on the identified resources.¹⁶⁷ ESPs are meant to mimic the normal environmental and cultural review processes by reportedly implementing the same “standards and approaches.”¹⁶⁸ In other words, ESPs are planning documents for proposed actions.

The final portion of the Border Patrol’s work is to create an Environmental Stewardship Summary Reports (ESSRs), which incorporates all the alterations to the initial plan, the proposed impacts of the changes, and a summary of the monitoring

landscapes that have been maintained and conserved for decades through conscious and deliberate efforts by Congress, federal agencies, and state agencies.” 925 F. 3d 500 (D.C. Cir. 2019).

¹⁶⁶ “In sum, given the Supreme Court’s ready acceptance of the ‘necessity’ standard as an adequate “intelligible principle” to guide a delegation of legislative authority to the Executive Branch, as well as the Executive’s independent constitutional authority in the areas of foreign affairs and immigration control, the Court is constrained to reject plaintiffs’ claim that the waiver provision of the REAL ID Act is an unconstitutional delegation.” 527 F. Supp. 2d 119 (D.D.C. 2007).

¹⁶⁷ “Environmental Stewardship Plans (ESPs) and Environmental Stewardship Summary Reports (ESSRs).”

¹⁶⁸ “What Are Environmental Stewardship Plans (ESPs)?” U.S. Customs and Border Protection, accessed April 6, 2021, <https://www.Border Patrol.gov/faqs/what-are-environmental-stewardship-plans-esp>.

program. All ESPs and ESSRs are published on the Border Patrol’s website for public review.¹⁶⁹

The ESP reviewed for this thesis addresses the Secondary Fence project in San Diego, California (Map 6). The proposed action required contractors to “remove and replace approximately 12.5 miles of the existing secondary border wall, construct approximately 1.5 miles of a new secondary border wall (14 total miles), install fiber-optic cable, and construct an all-weather road” (Fig. 1).¹⁷⁰ The region of influence stretches fifty feet on either side of the wall, although portions of the project stretch beyond 50 feet. For the 12.4-mile fence replacement fence, a total of 75 acres were affected by the new construction.¹⁷¹ According to the Border Patrol, a replacement wall will prevent illegal aliens from entering the U.S. illegally. The current wall does not fulfill this mission.¹⁷² This area of construction is covered by waiver authority as published in Federal Register volume 84, page 2897 (Map 7) from February 19, 2019;¹⁷³ however, to be good stewards of the environment, the Border Patrol “completed environmental resource surveys, consulted with various stakeholders, and prepared this Environmental Stewardship Plan (ESP)” for this project area.¹⁷⁴

¹⁶⁹ “Environmental Stewardship Plans (ESPs) and Environmental Stewardship Summary Reports (ESSRs).”

¹⁷⁰ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” 2–1.

¹⁷¹ 12.4 miles = 65,472 feet. 65,472*50 feet on the U.S. side = 3,273,600 feet. 3,273,600 feet = 75.15 acres. “Environmental Stewardship Plan: San Diego,” 2–4.

¹⁷² “Environmental Stewardship Plan: San Diego,” 2–1.

¹⁷³ Office of the Secretary, Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” *Federal Register* 84, no. 27 (February 8, 2019): 2897.

¹⁷⁴ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” 1–1.

ESPs, like NEPA reviews include a public input process. For the San Diego project, the Border Patrol notified the appropriate federal, state, local, Native American, and other interested parties such as the California Office of Historic Preservation and the Sierra Club of San Diego about the project plans.¹⁷⁵ A thirty-day comment period was created to seek “input on potential project impacts to the environment, culture, and commerce, including potential socioeconomic impacts, and quality of life.”¹⁷⁶ The call for comments was posted in English and Spanish. The ESP notes that the comments were incorporated into the document; however, these comments cannot be found for this specific project.

If the comment page is anything like the one created for the fence replacement in Pima and Cochise Counties, Arizona, in September 2020, the comments received would be counted and categorized based on the topic discussed (environment, culture, economic, and quality of life). The Stakeholder Feedback Report—a report prepared in conjunction with the ESP to document the overarching comments received during the public input process—summarizes the input received.¹⁷⁷ Such comments force the contractors and the federal agency to think beyond their project scope—to consider their project's total impact on cultural landscapes. Yet, because federal laws were waived for the San Diego fence replacement, the Border Patrol does not need to formally consider the public’s concerns. Furthermore, contracts for the San Diego project were awarded

¹⁷⁵ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, 11–12.

¹⁷⁶ Department of Homeland Security and U.S. Customs and Border Protection, “Pima and Cochise Counties Border Infrastructure Projects Stakeholder Feedback Report,” 2019, 3.

¹⁷⁷ Department of Homeland Security and U.S. Customs and Border Protection, “Environmental Stewardship Plan: Fence Replacement Projects in Cochise and Pima Counties Tucson Sector, Arizona.”

prior to the public comment period which emphasizes that regardless of comments and concerns, the project will continue forward unaltered.

After the public input process and prior to project commencement, the Border Patrol requires that Best Management Practices (BMP) be created to guide the construction. The BMP are meant to “reduce or eliminate potential adverse impacts” in the region of influence.¹⁷⁸ The ESP BMPs are similar to those created for the New Mexico infrastructure project.¹⁷⁹ Additionally, environmental monitors oversee construction practices to ensure contractors implement BMP and to note if there are deviations from these practices.¹⁸⁰ More general practices include “4. Early identification and protection of sensitive resource areas to be avoided” and “5. Collection and storage of native plant material for reuse in restoration.”¹⁸¹ There are more specific practices depending on the resource category. For instance, prior to construction, a qualified biologist was to meet with the construction workers on-site to discuss “the need to avoid impacts outside of the approved construction area and to protect sensitive flora and fauna.”¹⁸² The biologist will also prepare a report following construction detailing the project impacts.¹⁸³

¹⁷⁸ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” 1–5.

¹⁷⁹ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico,” Appendix E.

¹⁸⁰ U.S. Customs and Border Protection, “What Are Environmental Stewardship Plans (ESPs)?”

¹⁸¹ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” 1–4.

¹⁸² “Environmental Stewardship Plan: San Diego,” 1–7.

¹⁸³ “Environmental Stewardship Plan: San Diego,” 1–8.

The ESP's cultural resource impact section summarizes the region's history and the survey methodology. As for methods, an archaeologist used the California Historical Resources Information System (CRIS), the National Register, and the California Register of Historic Places to identify sites and resources that may be impacted by the Border Patrol fence replacement in San Diego. The ESP states, "[a] total of 147 past investigations have included portions of the current APE, and archaeologists recorded a total of 84 resources within one-quarter mile of the APE. Of the 84 resources, 67 are prehistoric sites, seven are isolated prehistoric artifacts, seven are historic sites, two resources have both prehistoric and historic components (multi-component), and one site has an unknown time period."¹⁸⁴ Only 24 of these cultural resources are within the APE.

Within the APE, there are two National Register-listed properties: Border Monument 258, also known as the Initial Point of Boundary between the U.S. and Mexico¹⁸⁵ (Fig. 2), and the U.S. Inspection Station/U.S. Custom House (Fig. 3).¹⁸⁶ The Border Patrol state, "[b]ecause of the proximity of these two structures to the Study Area and the potential of the project to alter the visual landscape, a viewshed analysis was conducted to address potential impacts to these two historic properties."¹⁸⁷ The determination was that since there are already two walls impacting the view of Monument 258, then a replacement fence will "not result in an adverse effect to the setting aspect of integrity."¹⁸⁸ In the case of the Custom House, the landscape had already

¹⁸⁴ "Environmental Stewardship Plan: San Diego," 3–46.

¹⁸⁵ Morris H. Raney, "National Register of Historic Places Inventory/Nomination: Initial Boundary Between the U.S. & Mexico" (National Park Service, 1974).

¹⁸⁶ Clayton B. Fraser, "National Register of Historic Places Inventory/Nomination: Inspection Station/U.S. Custom House" (National Park Service, January 13, 1983).

¹⁸⁷ "Environmental Stewardship Plan: San Diego," 3–48.

¹⁸⁸ "Environmental Stewardship Plan: San Diego," 3–49.

been altered significantly by modern development, and a secondary border wall already existed within 100 feet of the Custom House. As a result, the Border Patrol determined that the replacement of the border wall would again result in no new adverse impacts on nationally significant resources.¹⁸⁹ The Border Patrol notes that funding would be set aside “to the extent funding is available” for mitigation practices in the event of unavoidable impacts from the construction.¹⁹⁰

The digital survey findings informed the need for a pedestrian survey of the APE (183.37 acres).¹⁹¹ The Border Patrol notes that there were two primary goals of the pedestrian survey: 1) to identify unrecorded cultural resources, and 2) to update the conditions of those resources found in previous surveys. Archaeologists discovered six cultural resources during the survey, three of which are eligible for the National Register. Sites that are eligible for inclusion on the National Register are ordinarily subject to Section 106 reviews to assess the project's impacts on the resources. The Border Patrol relocated three previously identified eligible sites within the Study Area to avoid impacting them. To avoid impacting six newly discovered sites, the Border Patrol recommended that a professional archaeologist be on the ground during construction. Having a professional on hand enables in-place preservation—preserving site integrity—and, ideally, complete avoidance of the nationally significant sites.¹⁹²

The final section of the ESP defines related projects and cumulative impacts on sites such as those identified in the digital and pedestrian surveys. According to the ESP,

¹⁸⁹ Environmental Stewardship Plan: San Diego," 3-49.

¹⁹⁰ “Environmental Stewardship Plan: San Diego," 1-13.

¹⁹¹ “Environmental Stewardship Plan: San Diego," 3-48.

¹⁹² “Environmental Stewardship Plan: San Diego," 3-49, 3-50.

“This cumulative impact analysis summarizes expected environmental effects from the combined impacts of past, present, and reasonably foreseeable future projects.”¹⁹³ Past impacts contributed to the existing conditions of the sites. Present impacts include the revegetation efforts to restore habitats along the border and the infrastructure system's maintenance and repair. Future actions include possible additional border wall construction. These future and reasonably foreseeable actions will, according to the Border Patrol, have “negligible cumulative impacts on cultural resources,” if monitoring and avoidance measures continue to be put into place.¹⁹⁴

In the end, the ESP follows similar procedures to the EA and EIS required by NEPA and the review process required by Section 106 of the NHPA. The ESP features a public input section, cultural resource surveys (both digital and on foot), and an analysis of the potential impacts of the construction on environmental and cultural resources. Best Management Practices are also put into place to guide the construction just as they are with NEPA reviews. The question is: if the Border Patrol completes ESP and ESSRs—reports that follow the standards of NEPA and Section 106, then what is preventing the Border Patrol from following the federal preservation laws already established? Despite the declaration of a national emergency,¹⁹⁵ the Border Patrol was able to prepare ESPs in a timely manner according to NEPA standards. In other words, if there was time for an ESP review, then there should be substantial time to prepare an EA for the same project.

¹⁹³ “Environmental Stewardship Plan: San Diego,” 4-1.

¹⁹⁴ “Environmental Stewardship Plan: San Diego,” 4-6.

¹⁹⁵ 84 FR 4949.

There is little reason to invest time and energy reinventing review processes that already exist, especially if the procedures and standards mirror one another.

Recommendations

“ . . . I believe we would be wise to reconsider the effectiveness and cost of a wall along our southern border, which has adversely affected the fragile environment and vibrant cross border culture of an entire region. Such a wall stands as a symbol of fear and intolerance. This is not what America is about, and we can do better.” – Senator Patrick Leahy, Chairman of the Senate Judiciary Committee¹⁹⁶

The Trump Administration border wall project jeopardized what makes this country environmentally and culturally unique. Federal laws intended to protect these resources were waived for a perceived national emergency. By performing surveys and assessments in the footsteps of the major federal laws such as NEPA and NHPA, the Border Patrol attempted to be good stewards of the human and natural environment. Yet, there is little reason to perform ESPs and ESSRs when federal review alternatives already exist with the same goal in mind: reduce the time necessary to complete the reviews while also being good stewards to the environment. If ESPs and ESSRs continue to exist, improvements are absolutely necessary.

Below, I offer several recommendations regarding how to improve environmental reviews in the event of a national emergency justifying waiver authority is declared. Each recommendation was informed by conversations with preservation and environmental professionals who live and work within the border wall region. With elaboration and modifications, as needed, these recommendations may be turned over to preservation,

¹⁹⁶ Dinah Bear, “Border Wall: Broadest Waiver of Law in American History” (Washington, DC: Center for International Environmental Law, February 2009), 12.

environmental, and conservation advocacy groups for promotion and used to challenge the exemption of the border wall from future federal environmental review processes.

Review Alternatives / Streamlined Current Reviews

Waiver authority and ESPs are unjustified actions to hasten the construction of the border wall project because environmental review alternatives exist. As the ACHP states, “Federal agencies sometimes need a more flexible approach to ensure the requirements of Section 106 review are achieved and historic preservation concerns are balanced with other federal mission requirements and needs.”¹⁹⁷ Balance between federal missions and historic preservation goals can be achieved by integrating NEPA and NHPA (Flowchart 4) or by completing Section 106 review alternatives such as PAs and program comments.¹⁹⁸

NEPA and NHPA integration does not preclude the necessity for either review. Instead, as the ACHP states, “Federal agencies’ statutory obligations under NEPA and NHPA are independent, but integrating the processes creates efficiencies, promotes transparency and accountability, and supports a broad discussion of effects to the human environment.” The public consultation components can be integrated, and timelines can be coordinated to hasten review time. In other words, Section 106 reviews and NEPA reviews can inform each other, reducing the necessity of performing reviews for the same project again.

¹⁹⁷ Advisory Council on Historic Preservation, “Program Alternatives,” Advisory Council on Historic Preservation, accessed April 23, 2021, https://www.achp.gov/program_alternatives.

¹⁹⁸ 40 CFR § 1508.18.

Moreover, NHPA includes five alternative procedures to the standard Section 106 reviews (Table 1).¹⁹⁹ Consultations and ACHP approval are required for each alternative. Section 106 program alternatives make it possible for federal agencies to streamline the Section 106 process and ensure that federal agencies still comply with federal preservation laws because total consideration for project effects and mitigation measures are outlined in these agreements. There is even a checks and balance system with the integration of SHPOs, THPOs, the ACHP, and CEQ in the development of alternative procedures. The most effective method to avoid, minimize, or mitigate harm to cultural landscapes is to comply with existing federal laws. Compliancy is possible.

Comprehensive Consultations & Coordination

Stakeholder communication and engagement must be conducted to anticipate the tangible and intangible impacts a project may have on a resource and surrounding communities. The consultation components of Section 106 and NEPA are also essential to maintain project transparency. Waiver authority waives any obligation to communicate with interested parties. The Border Patrol's ESPs include a public input process; yet, as explored above, this process is a simple documentation of concerns. As a result, if ESPs continue to exist, improvements to the public input process are necessary.

Improving ESPs requires the Border Patrol to be transparent about the project with all interested parties.²⁰⁰ The Border Patrol should require contractors to provide their

¹⁹⁹ 36 CFR § 800.14.

²⁰⁰ A 2019 Masters thesis called "Waiving NEPA to Build A Border Wall: From Conflict to Collaboration between 1990 and 2017" tackles the issue of transparency between the Border Patrol, other federal organizations, and the public. The author notes that Border Patrol provided funding to the Fish and Wildlife Service to build a much-needed barrier, but the public was not aware of the collaboration that occurred. The author concludes "that in forgoing the public engagement process, [C]BP lost the ability to inform the

schedules, plans, and initial findings to federal, state, and tribal agencies within the project area. Providing such documentation will enable parks and monuments, for example, to promptly surveys their resources. These surveys have the ability to add substantial information to ESP impact considerations. Mitigation measures can even be taken prior to construction²⁰¹ and effectively planned for following construction.²⁰² With transparency comes an understanding of extent resources and proper planning to effectively mitigate project effects.

Furthermore, consultations between the Border Patrol and the interested parties should continue throughout the construction process. The one-time, ask for input request does not provide the Border Patrol with sufficient information to plan for and avoid all sensitive areas. The time frame within which comments were due may not have been long enough for the interested party to provide sufficient evidence of possible effects of the proposed action. To be good stewards of the environment, the Border Patrol should consult the experts in the project areas in order to avoid under valuing and misrepresenting the possible project effects on cultural and environmental resources.²⁰³

public of activities that could have given [C]BP a better image and contributed to better relations on the ground...the question persists: to what extent did the lack of NEPA hinder BP's public outreach in other locations?" Mariana Sofia Rodriguez-McGoffin, "Waiving NEPA to Build A Border Wall: From Conflict to Collaboration on the Arizona-Mexico Border between 1990 And 2017" (Masters Thesis, Tuscon, Arizona, The University of Arizona, 2019), 31.

²⁰¹ For example, in ORPI, Organ Pipe cacti were relocated from the APE prior to the Trump Administration construction (Fig. 4). Rijk Morawe (Chief of Resources at Organ Pipe Cactus National Monument), Interview by Author, February 2, 2021.

²⁰² The THPO for the Tohono O'odham Nation reports that conversations about remediation and mitigation measures occur at least twice a month since the construction started. Peter Steere (THPO, Cultural Resource Manager for the Tohono O'odham Nation), Interview by Author, February 9, 2021.

²⁰³ The need for more effective tribal consultation was made the primary concern of the U.S. Congress Subcommittee meeting entitled, "Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall" that occurred in February of 2020. Raúl M. Grijalva, a Congress Representative from Arizona, stated that despite speaking to tribes about the significance of sites like Monument Hill and Quitobaquito pond (Fig. 5), plans for the construction continued anyway—plans

Moreover, the Border Patrol should collaborate with tribes to develop plans for when Native American cultural patrimony is discovered during construction, as NAGPRA can also be waived for the border wall project.²⁰⁴ The current process is very unclear. For example, the San Diego ESP states, “Cultural resource and tribal monitoring will be implemented for the three affected historic properties to avoid adverse effects should features be identified during construction.”²⁰⁵ Because of the lack of transparency, there is little reason tribes and nations should trust the ESP process as it currently stands.²⁰⁶

Waiver authority waives the obligation to engage with stakeholders, including SHPOS, environmental agencies, and Native American tribes. ESPs attempt to gauge the effects of the project based on a single public comment period. The ESP public input process is not effective because it lacks the necessary transparency, communication, and coordination with stakeholders throughout the project. The public input process’ goals should help the Border Patrol make informed decisions, allow them to make alternative plans, and ultimately help them create effective mitigation measures.

that involved explosives and bulldozers. The Border Patrol tribal liaisons made an effort to contact the Tohono O’odham Nation for information regarding the values of the sites, but there is no effort to avoid sensitive areas. U.S. Congress, “Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration’s Construction of the Border Wall : Oversight Hearing before the Subcommittee for Indigenous Peoples of the United States of the Committee on Natural Resources. U.S. House of Representatives.,” February 26, 2020,

²⁰⁴ Kathryn Leonard (Arizona State Historic Preservation Office, State Historic Preservation Officer), Interview by Author, February 11, 2021.

²⁰⁵ Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol, “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” 1–11.

²⁰⁶ Interviews for this thesis revealed that although construction supported by waiver authority is occurring near Monument Hill—a sacred Native American burial ground—NPS personnel were able to initiate a NAGPRA-like process in coordination with the DHS, Army Corp, and approval by the DOI to return fragments of human remains to lineal descendants. Rijk Morawe (Chief of Resources at Organ Pipe Cactus National Monument), Interview by Author, February 2, 2021.

Maintain Up-to-Date Statewide Databases

Maintaining an up-to-date, inter-agency, statewide databases will expedite the ability of the state to respond to emergencies because agencies will know what exists and the current resource conditions. Historic and environmental agencies should have an obligation to maintain an up-to-date database featuring their state’s resources. This does not mean that the Department of Transportation, the SHPO, a city or town, and the National Park Service (NPS) should have individual documentation methods within a single state. An inter-agency database is necessary for proper coordination and planning at the state level during emergencies. As the AZSITE Consortium—the Arizona cultural resource database—notes, “[The database] is designed to reduce the amount of research time for preservation professionals and academic researchers conducting regulatory reviews, research, and historic preservation planning.”²⁰⁷ A collective state database is essential to compile data quickly, especially if emergencies occur.

Resources to include in such a database are those that feature extra protections. Endangered species should be included as well as their known habitat locations. Local and state historic register properties, objects, and districts should also be featured in the database. National Historic Register properties and districts require inclusion as well. All resources should include the geospatial coordinates for ease of identification. It may also be beneficial to include metadata indicating the special protections for each resource and the type of review or documentation that should occur if a project was to occur near the identified resource.

²⁰⁷ Arizona State Parks, “Arizona’s Cultural Resource Inventory: AZSITE,” Arizona State Parks and Trails, 2021, <https://azstateparks.com//trails/arizona-premier-trail-system>.

Furthermore, what does not appear to be included in any of the border wall state databases²⁰⁸ is the identification of areas with the potential to yield information. States may have gaps in their survey information meaning all possible historic and environmental resources have yet to be documented. Identifying areas that lack survey information and comparing these areas to known resources and historic documents may reveal the need for further investigation. Identifying sites with a potential to yield information before emergencies are declared provides states with ample time for funding acquisition, survey work, and a thorough documentation of newly identified resources.

If an emergency does occur, regardless of whether the emergency occurs at the border wall, documentation on the resources should be promptly handed over to lead agencies for consideration. At the termination of a project, lead agencies should be prepared to hand over their findings for inclusion into the statewide databases as well. Documentation is the only way to truly consider all the potential effects of a project on natural and cultural resources.

Additional Section 110 Standards

Proactively surveying and documenting the extent conditions of the resources on a set schedule supports the ability to provide comprehensive documentation with expedience to lead federal agencies prior to project commencement. As discussed, Section 110 of the NHPA requires federal agencies to develop a preservation and

²⁰⁸ New Mexico Historic Preservation Division, “Archaeological Records Management Section,” New Mexico Department of Cultural Affairs, 2019, <http://www.nmhistoricpreservation.org/arms.html>; Arizona State Parks, “Arizona’s Cultural Resource Inventory”; Texas Historical Commission, “Atlas,” Atlas: Texas Historic Sites, 2020, <https://atlas.the.state.tx.us/>; California Office of Historic Preservation, “California Historical Resources Information System,” CA State Parks, 2021, <https://www.parks.ca.gov/>.

conservation plan for their historic resources. Yet, one of the many issues with the border wall construction is the lack of knowledge about what cultural and biological material lies within the area. Setting standards within the NHPA to require federal agencies to survey their resources on a set schedule should be greatly considered.

Currently, it appears that surveys occur on a project-to-project basis, leaving little time for sufficient documentation. If set schedules for Section 110 reviews are established, the federal agency will be prepared to hand over sufficient documentation to lead project agencies regarding the nature of the resources within the area of potential effect. Such surveys should also be highly suggested following projects to determine if impacts occurred. Having comprehensive record of photos and documentation on resources on a set schedule and after projects is will not only help analyze the effects of projects in the present, but also aid in the consideration of effects for similar, future projects. As a result of such documentation, mitigation measures or alternative plans can be developed for future projects to avoid previously documented impacts.

Amend or Repeal Real ID Act Section 102(c)

Waiver authority must be repealed or amended considerably to ensure the continued existence of environmental and cultural resources within its path. For amendments, I propose allowing judicial review, expanding the discretion to use waiver authority to include other heads of federal agencies, and setting criteria defining when the authority is considered “necessary.” The best and safest course of action for cultural and environmental resources, however, is to repeal Section 102(c) of the Real ID Act entirely.

Interested parties should have the right to object to a project if serious consequences are foreseen, but plans have not been considered to avoid or minimize these consequences. Waiver authority currently prevents a judicial review of the DHS Secretary's decision to use the authority.²⁰⁹ Expanding the ability to challenge the DHS Secretary's decision in the lower court system will ensure further consideration of potential project effects. Allowing other courts, other than the federal court system, to hear waiver authority cases will also provide further scrutiny over the necessity to waive all federal laws. If expedience is the goal, delays associated with court decisions can be expedited through more intensive public review processes and the creation of alternative plans for the proposed action, components included in existing federal preservation laws.

In addition to allowing judicial review, criteria defining "necessary" needs to be established.²¹⁰ Criteria may read, for example, "waiver authority can be utilized when there is a direct and imminent threat to human lives (i.e., wall collapse)."²¹¹ Defining necessity will clarify when the authority can be utilized and will provide a limit to waiver authority's sweeping powers.

²⁰⁹ *P.L. 109-13* § 102(c) states, "(2) No judicial review.--Notwithstanding any other provision of law (statutory or nonstatutory), no court, administrative agency, or other entity shall have jurisdiction--"(A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or "(B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision." 527 F. Supp. 2d 119 (D.D.C. 2007); 447 F. Supp. 3d 965 (D. Ariz. 2020).

²¹⁰ In 2019, the Center of Biological Diversity (CBD) challenged the use of waiver authority instituted by the DHS Secretary during the Trump Administration. One of the issues brought forth to the AZ district court is that Section 102(c) of the Real ID Act "...sets forth no standards or criteria to apply in determining whether such waiver is necessary for expeditious border-wall construction..." 447 F. Supp. 3d 965 (D. Ariz. 2020); "Center for Biological Diversity v. Wolf," *SCOTUSblog* (blog), accessed April 22, 2021, <https://www.scotusblog.com/case-files/cases/center-for-biological-diversity-v-wolf/>.

²¹¹ Author's opinion and own words.

The broad powers of waiver authority extend beyond the lack of limiting criteria. The DHS Secretary holds all the power regarding the use of waivers. To limit the power of the DHS Secretary, I propose that the ability to use waiver authority should not rest in the hands of a single person. Instead, authority should be expanded to include the heads of other federal agencies such as the DOI and DOA.²¹² Experts in the fields of cultural relations, archaeology, and environmental protection should have the ability to comment on projects that will affect the land and resources they manage. This recommendation may not eradicate the need for waivers. It may, however, reduce the sweeping use of waiver authority, and resultingly, the harm to the cultural landscapes of the border wall region.

Furthermore, if amendments to Section 102(c) are not possible, waiver authority should be entirely repealed. The authority granted to the DHS Secretary is too broad and has no limits. On February 14, 2019, Rep. Kathleen Rice of New York introduced H.R. 1232 to the House: Rescinding DHS' Waiver Authority for Border Wall Act—²¹³ a bill meant to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, eliminating Section 102(c) and waiver authority in its entirety.²¹⁴ H.R. 116-45, an accompanying report to H.R. 1232, states, “By rescinding this extraordinary waiver authority—that prioritizes the building of a border wall and border infrastructure between

²¹² “There is no requirement that the Secretary consult anyone, even on issues or laws that are not under the Department of Homeland Security’s purview or on which the Secretary has no expertise, before the Secretary exercises this discretion.” U.S. Congress, House of Representatives, *Rescinding DHS' Waiver Authority For Border Wall Act (to Accompany H.R. 1232)*, May 2, 2019, 116th Cong., 1st sess., 2019, H. Rep. 116-45.

²¹³ U.S. Congress, House of Representatives. House of Representatives. *Rescinding DHS' Waiver Authority For Border Wall Act*. February 14, 2019. 116th Cong., 1st sess., 2019, H. Rep. 1232.

²¹⁴ H.R. 1232.

ports of entry above all other Federal infrastructure and at the expense of the environment, economy, and culture of border communities.” the DHS Secretary has the obligation to abide by existing federal laws.²¹⁵ This bill proposing to repeal Section 102 (c) currently awaits further consideration from the U.S. government.²¹⁶ This bill should be reheard by the U.S. government and implemented in order to balance the need between federal missions and historic preservation obligations.

Conclusion

“The solution is fairly simple: do not waive dozens of Federal laws when engaging in massive and expensive construction projects on Federal public lands. Follow existing laws requiring meaningful tribal consultation; environmental impact assessment; archeological, historic, and cultural site review; and protection of endangered and threatened species.” – Krakoff, Indian Subcommittee²¹⁷

Since the 2016 campaign promise to construct a new wall along the U.S.-Mexican border, many cultural and environmental specialists have been trembling about the potential impacts the Trump Administration border wall project would have on the U.S.’s

²¹⁵ H. Rep. 116-45.

²¹⁶ The legislation is on Union Calendar 23. U.S. Congress, House of Representatives. House of Representatives. H.R. 1232. To express the need urgency to pass the bill proposed by H.R. 1232, on April 13, 2011, the House introduced the National Security and Federal Lands Protection Act. This act would waive the ability of the DOI and Department of Agriculture to “impede, prohibit, or restrict activities of U.S. Customs and Border Protection” on “all land under the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture within 100 miles of the international land borders of the United States for the activities of U.S. Customs and Border Protection.” If the law passes, the Border Patrol would build and maintain roads, use planes, and even construct and maintain additional fences. While these tasks appear necessary for national security, these tasks would also not be subject to ANY federal laws as outlined in the act automatically. The provision further states: “This section shall not be construed to provide (1) authority to restrict legal uses, such as grazing, hunting, or mining, on land under the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture; or (2) any additional authority to restrict legal access to such land.” The act makes it nearly impossible to protect our nation’s resources specifically called out for these protections with the names like National Park, National Monument, etc. This proposed Act is why it is necessary to abolish the waiver authority granted to the DHS Secretary under the Real ID Act of 2005. It is, therefore, essential to express the necessity to repeal Section 102 (c) to provide the ultimate protection for our nation’s resources U.S. Congress, House of Representatives. House of Representatives, National Security and Federal Lands Protection Act, April 17, 2012, 112th Cong., 2nd sess., 2012, H. Rep 112-448: § 2(a) & (c); H.R. 112-448 § 2(c)(2); H.R. 112-448 § 2(d).

²¹⁷ U.S. Congress, “Destroying Sacred Sites and Erasing Tribal Culture.”

resources. Professionals rely on federal preservation laws—such as the NHPA and the NEPA—to anticipate the potential effects of the proposed action and consider alternatives to avoid, minimize, or mitigate harm to cultural and natural resources. Yet, when waiver authority is used to waive all federal preservation laws, then there is no consideration of the potential project effects.

Hundreds of acres of land in the American Southwest have been bladed for the border wall construction. The complete impact of the construction has yet to be seen. It is inadequate to fall to the defense of the “land has already been developed.” Development does not mean the land has nothing else to reveal—consider the African American burial ground in New York City as a comparison.²¹⁸ In other words, the border wall construction and infrastructure project is not “a little bump on the road;” it is a project that affects close to a thousand miles of some of the most environmentally and culturally sensitive land in the country. Effective communication, collaborations, and conversations are essential for understanding the complete impact of the project.

The Border Patrol performed Environmental Stewardship Plans (ESPs) in the shadow of NEPA and NHPA review procedures. The ESPs, however, did not consider all the potential effects of the project and did not include a comprehensive stakeholder engagement process that would have led to effective decision-making and alternative plan developments. With improvements, these reviews may be adequate to accompany projects of the utmost emergency. But if the Border Patrol has the ability to mimic the

²¹⁸ For more information about the NYC African burial ground, see, “African Burial Ground National Monument,” National Park Service, April 26, 2019, <https://www.nps.gov/afbg/learn/historyculture/index.htm>.

substantive procedures of NEPA and NHPA, then there is indeed time and money to comply with the existing federal preservation laws.

The most significant argument against the use of federal preservation laws is the need for national security. Preservation and environmental professionals within the border wall region have taken notice of the substantial impact illegal immigration has had on the natural and cultural resources in the area (Fig.6). A professional stated, “There is a lot of crime and drug trafficking in this region. People are afraid. There is the legitimacy for creating safer borders. [However, national security] concerns need to be balanced with cultural resource protection.”²¹⁹ Compliance with federal preservation laws does not counteract the assurance of national security; compliance with federal preservation laws does not slow the pace of the project. A balance between environmental and cultural resource protection and national security measures can be drafted if the federal government complies with existing federal preservation laws. Waiver authority is not the answer for improved national security measures.²²⁰

²¹⁹ Rijk Morawe (Chief of Resources at Organ Pipe Cactus National Monument), Interview by Author, February 2, 2021.

²²⁰ This thesis did not answer the questions regarding the impact the border wall construction had on Mexico's cultural and natural resources. Investigations and surveys should be conducted if they have not already been conducted in order to document any resulting impacts. As expressed earlier, border walls and barriers have not always existed in this region. As Laiken Jordahl, a Borderlands Campaigner for the Center for Biological Diversity, stated, “Fragmentation is what makes loss uniquely devastating.” Animals and plants do not claim a nationality and cultural resources lie where they are left. A barrier cuts off the natural ebb and flow of people and animals across this land. A complete understanding of the effect would complement the work in this thesis as well as those from the University of Texas and The University of Arizona.

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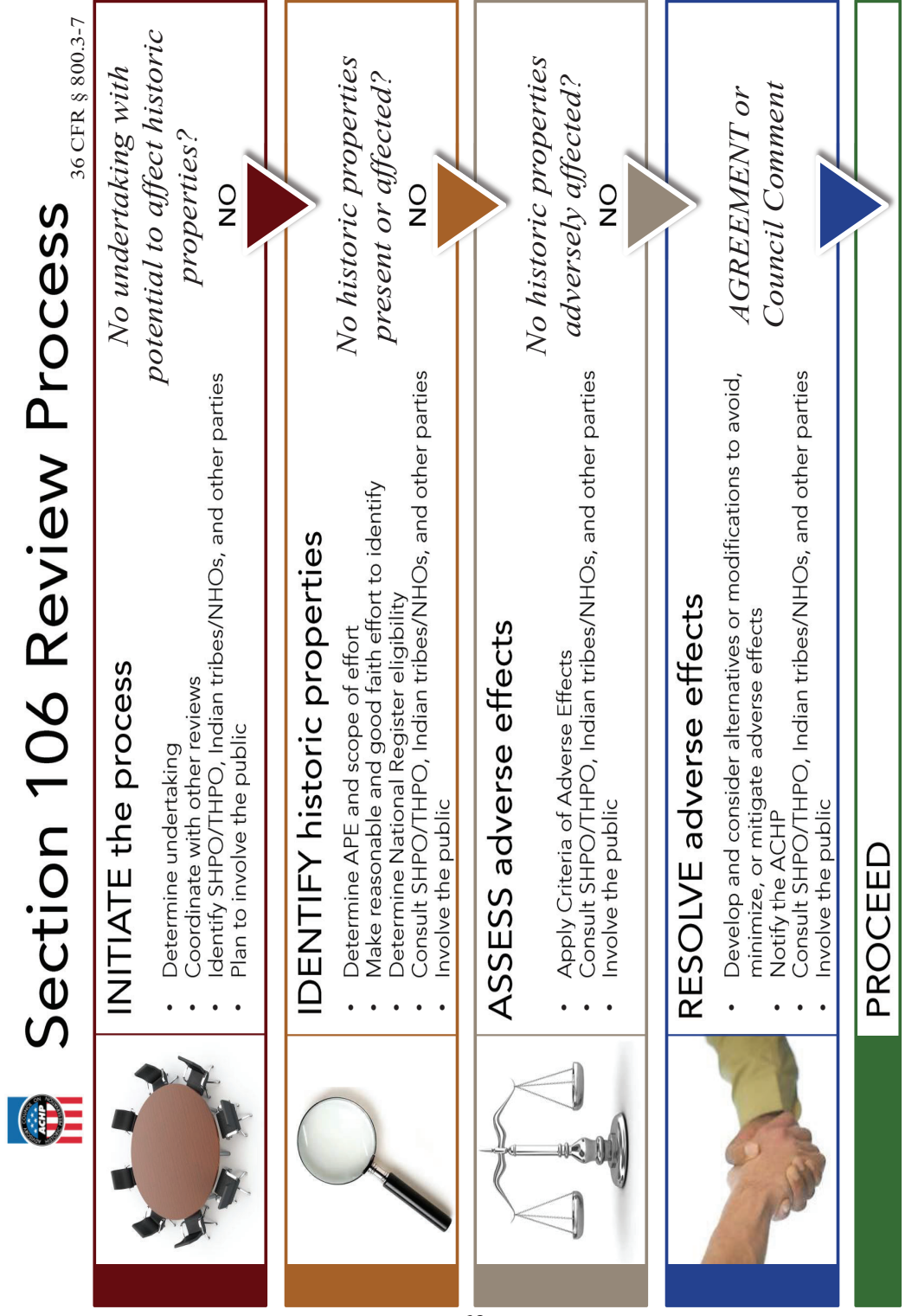
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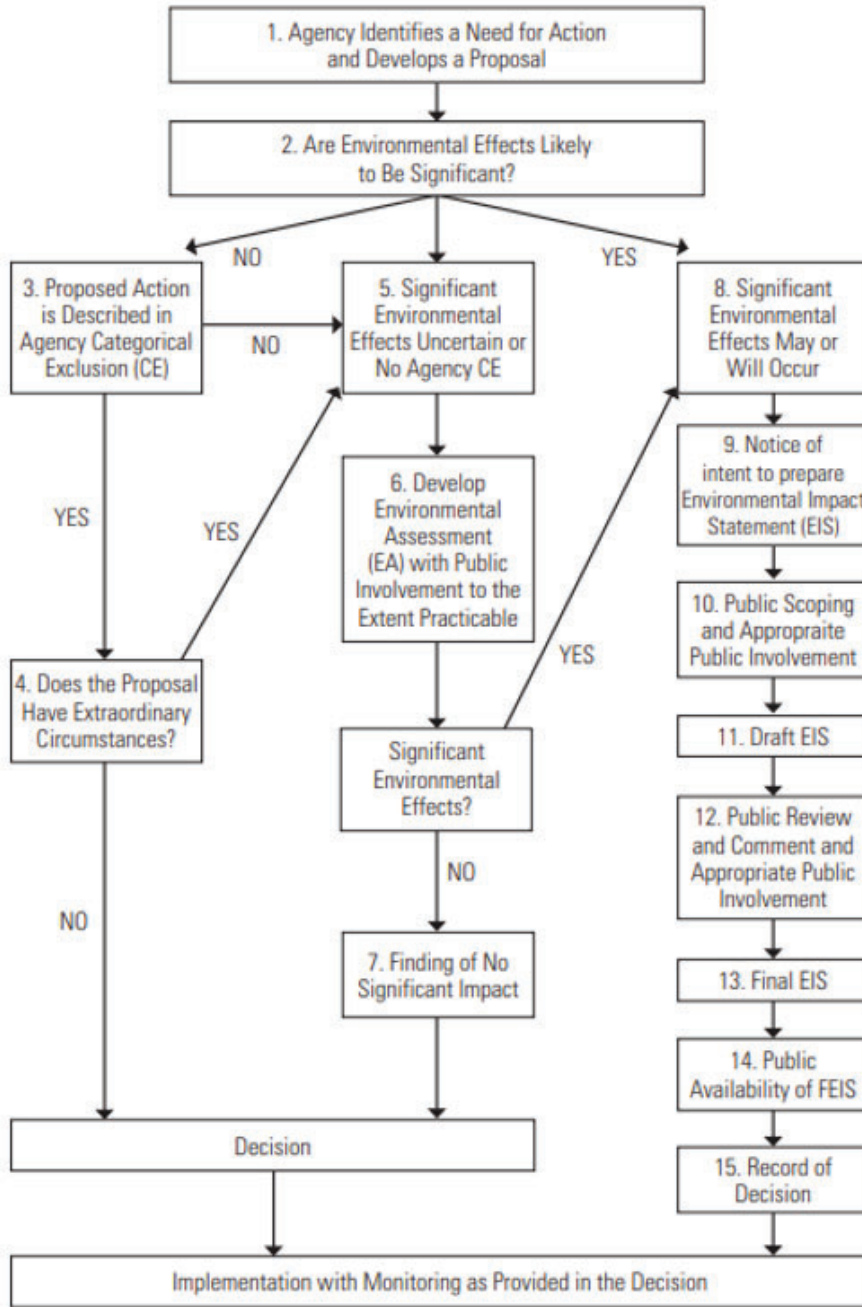
Flowcharts

C O N S U L T A T I O N



Flowchart 1: Section 106 Review Process. Image courtesy of the Advisory Council on Historic Preservation.

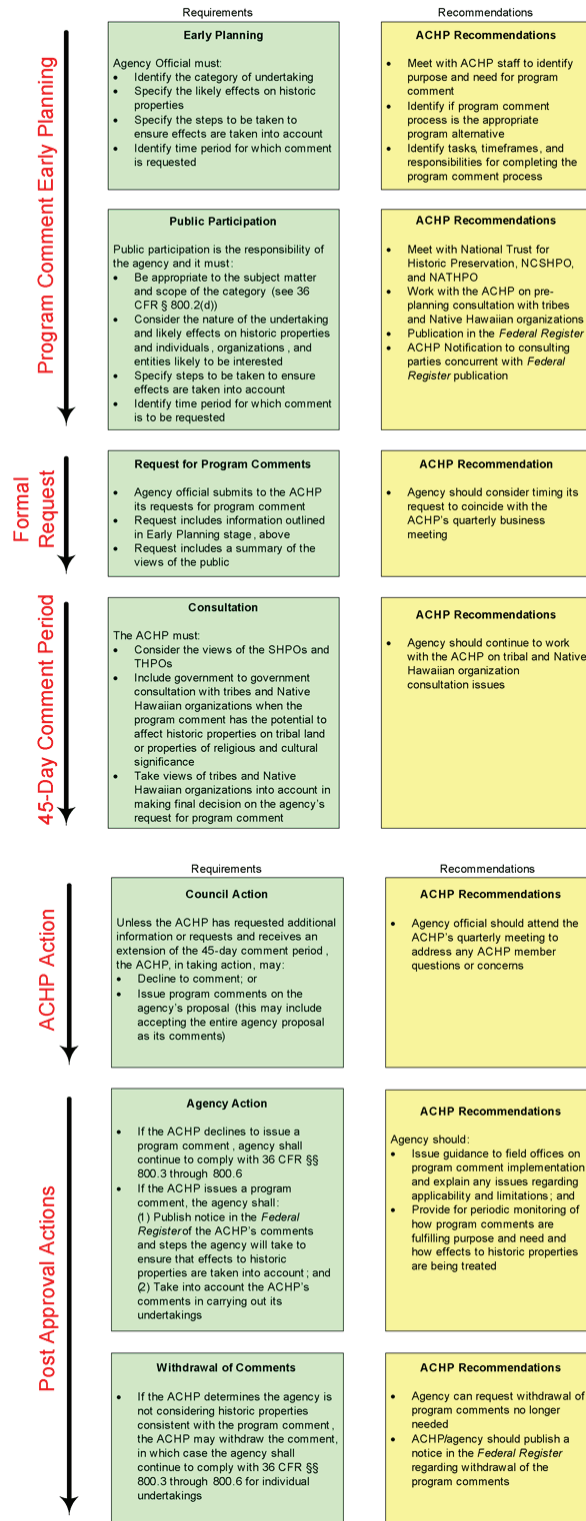
The NEPA Process (Figure 1)



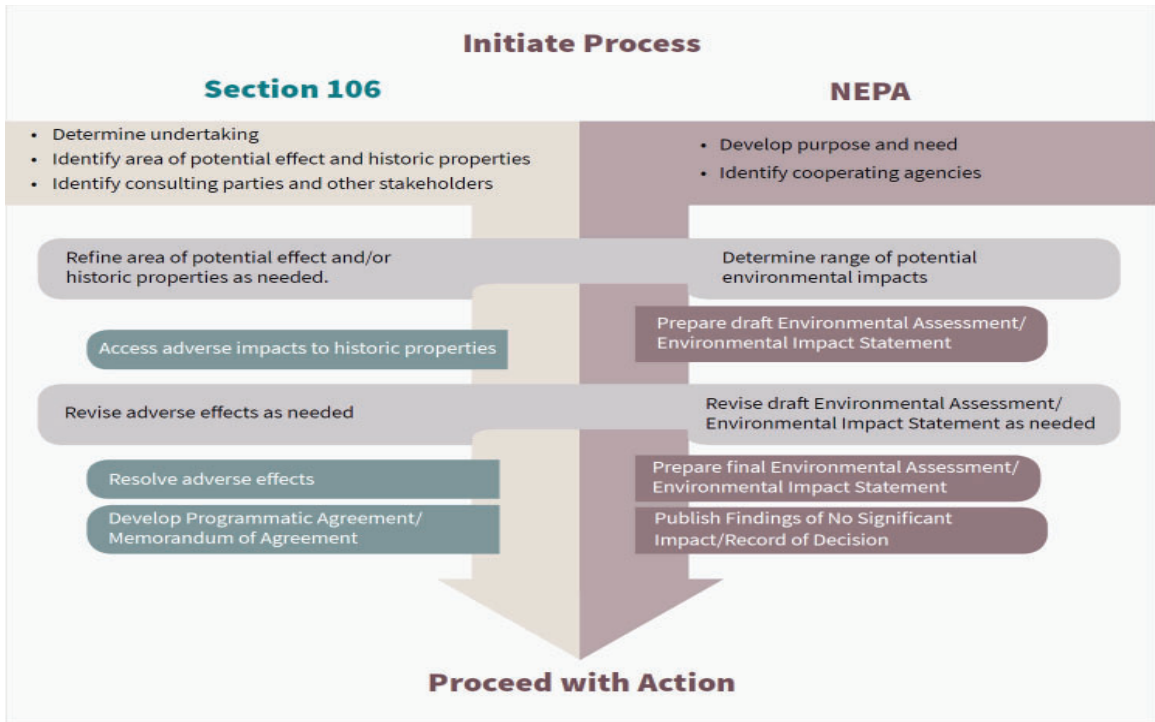
** Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS, or the Record of Decision. 40 CFR 1502.9(d).*

Flowchart 2: Flowchart summarizing the NEPA review process. From the Council On Environmental Quality. “A Citizen’s Guide to NEPA.” Executive Office Of The President, January 2021.

PROGRAM COMMENT PROCESS



Flowchart 3: Program Comment, NHPA process. Image courtesy of the Advisory Council on Historic Preservation.

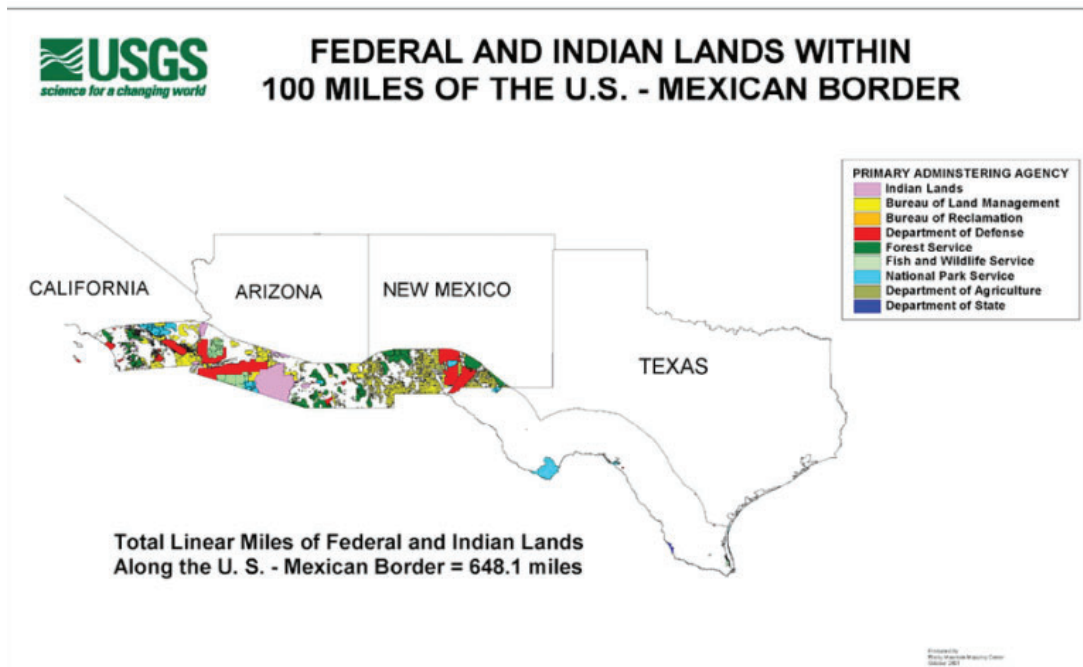


Flowchart 4: Integration of Section 106 and NEPA review processes. Courtesy of the National Capital Planning Commission.

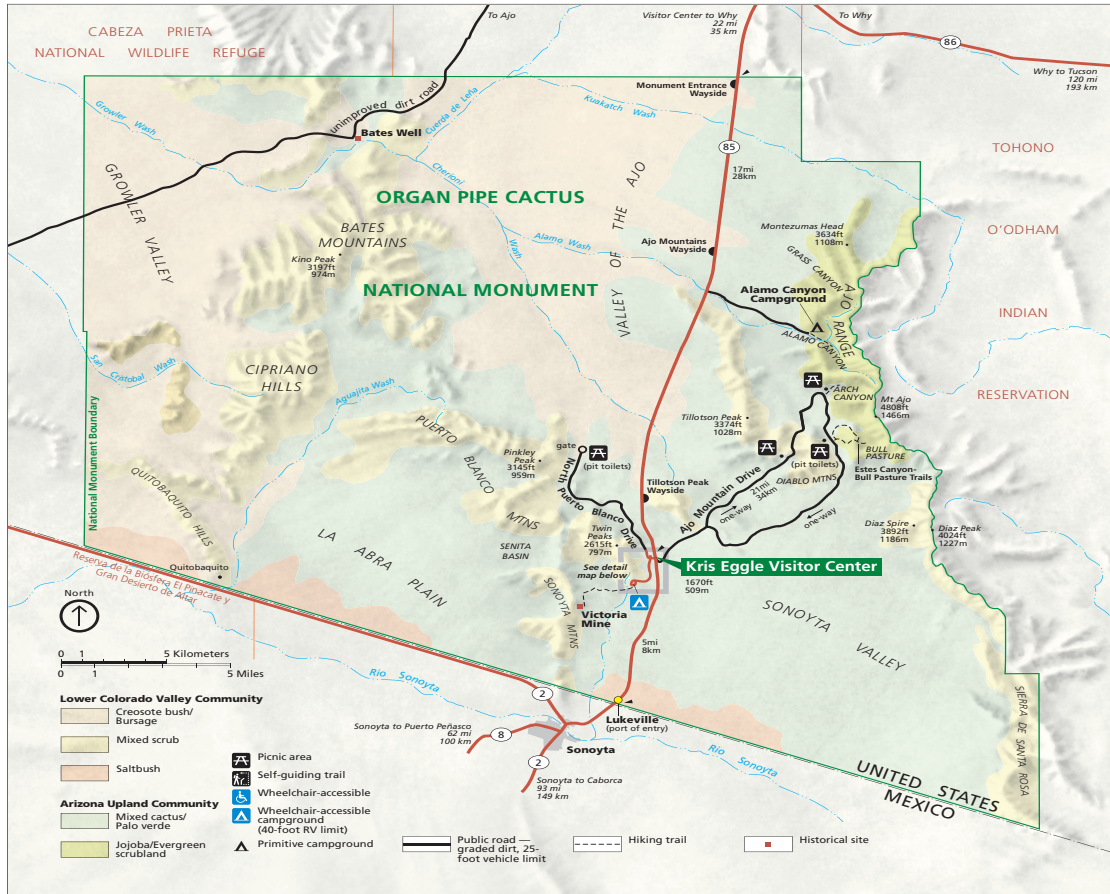
Maps



Map 1: Location of the U.S. Mexican Border with major cities for reference. Vehicle and pedestrian barriers indicated on map. From Mark, Michelle, Skye Gould, and Andy Kiersz. "As the Government Shutdown over Trump's Border Wall Rages, a Journey along the Entire 1,933-Mile US-Mexico Border Shows the Monumental Task of Securing It." Business Insider, January 13, 2019. <https://www.businessinsider.com/us-mexico-border-wall-photos-maps-2018-5>.

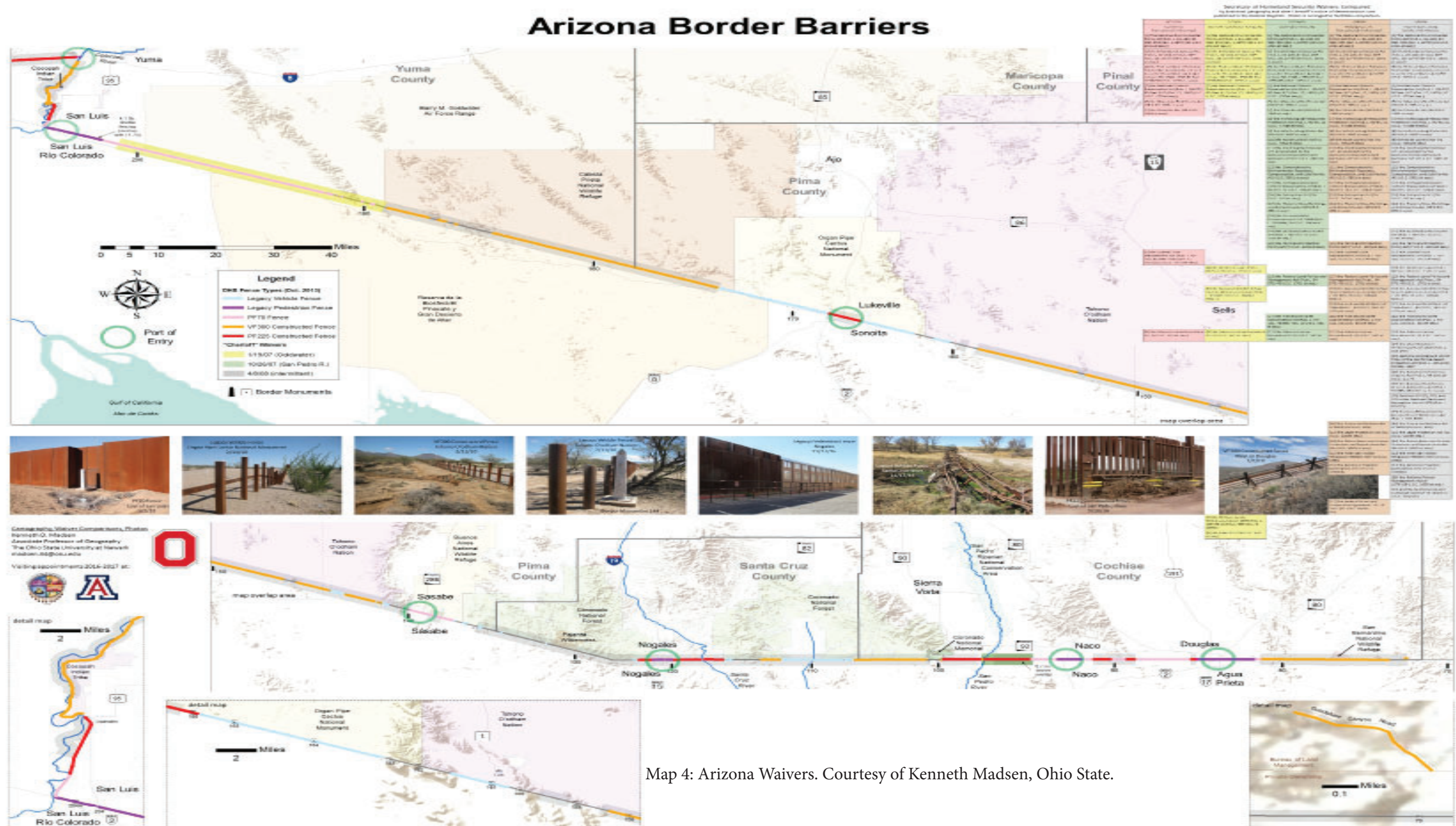


Map 2: Federal and Indian Lands within 100 miles of the U.S. Mexican Border to illustrate the reach of the CBP, the length of the U.S. - Mexican border, and the amount of federal land within the area. Image courtesy of U.S.G.S. & Fugate, Bryce Garret. "Walls and Wilderness: Analyzing the Impacts of Border Barriers on U.S. Government Lands of the United States - Mexico Border." Thesis, The University of Texas, 2018.



Map 3: Organ Pipe Cactus National Monument. Because of archaeological-site sensitivity, a map of the Section 110 archaeological survey cannot be made publicly available. This map, however, provides a clear picture of the major historic sites and the location of the Monument in comparison to the border and the Tohono O’odham Nation Reservation. Map courtesy of the National Park Service.

Arizona Border Barriers



Map 4: Arizona Waivers. Courtesy of Kenneth Madsen, Ohio State.

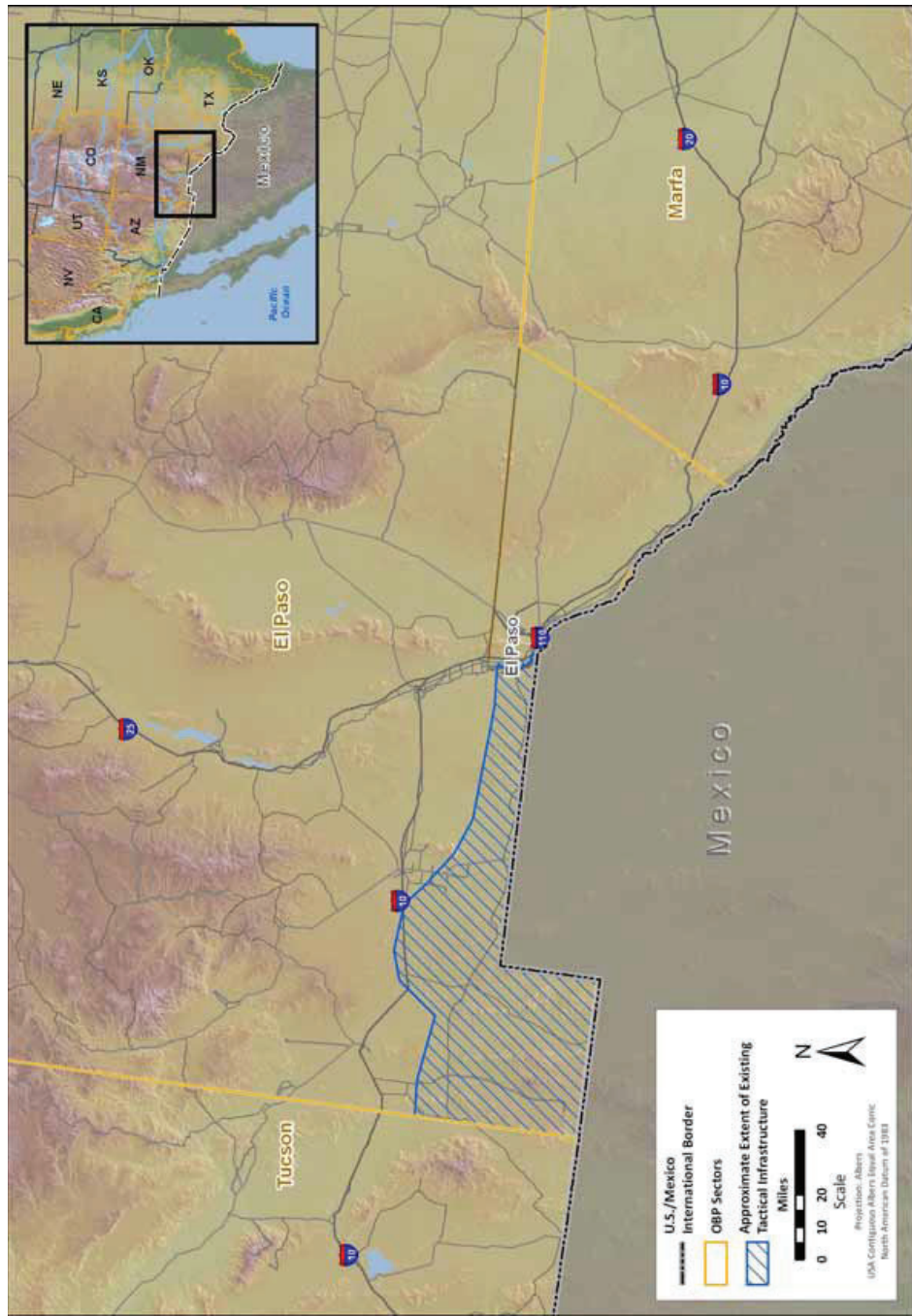
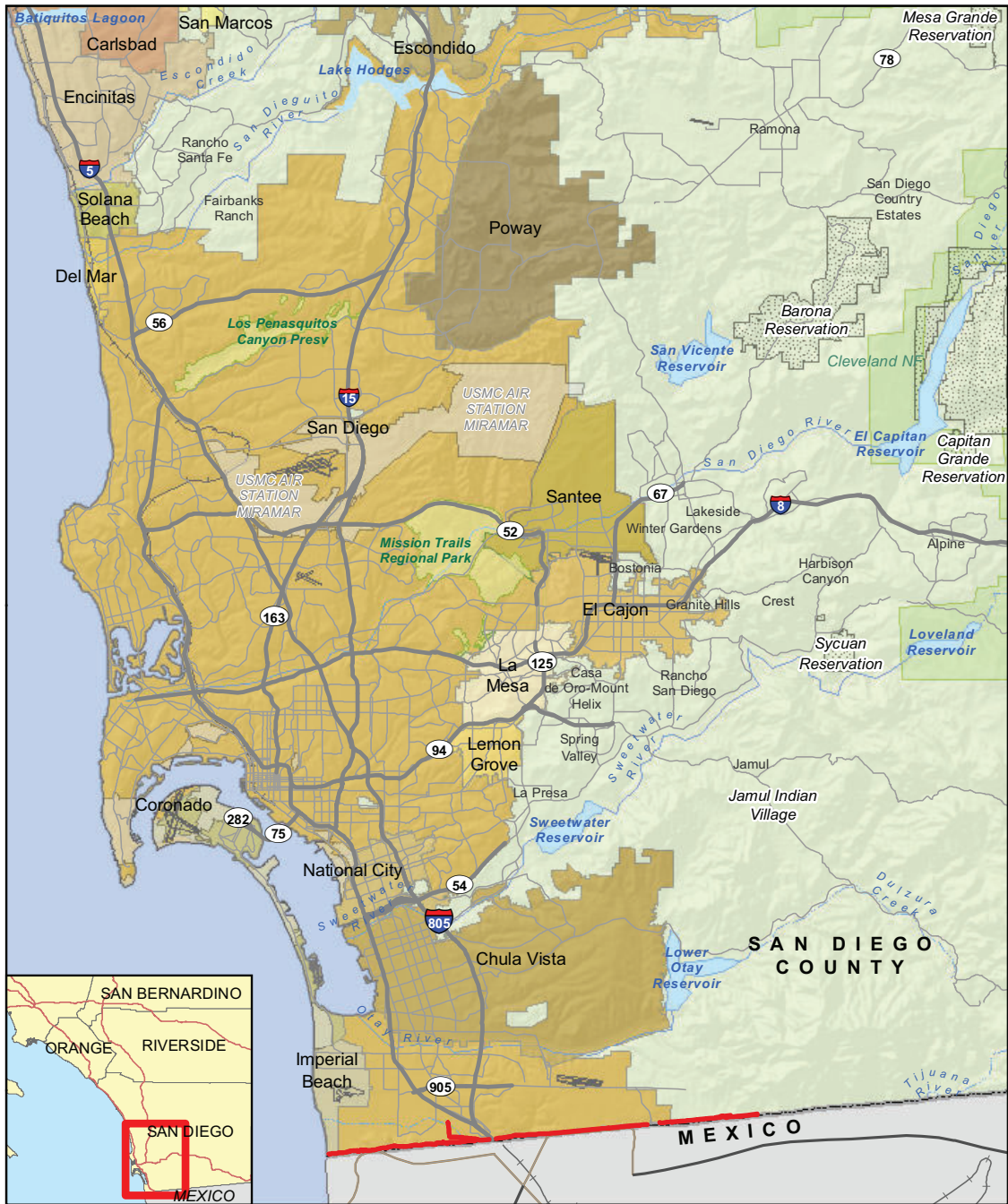


Figure 1-1. Region of Analysis for Proposed Tactical Infrastructure Maintenance and Repair Activities in New Mexico

Map 5: The New Mexico Tactical Infrastructure Project location covered by an EA. Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol. “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico.” Department of Homeland Security, July 2015.



 Project Area



FIGURE 2-1
Regional Location

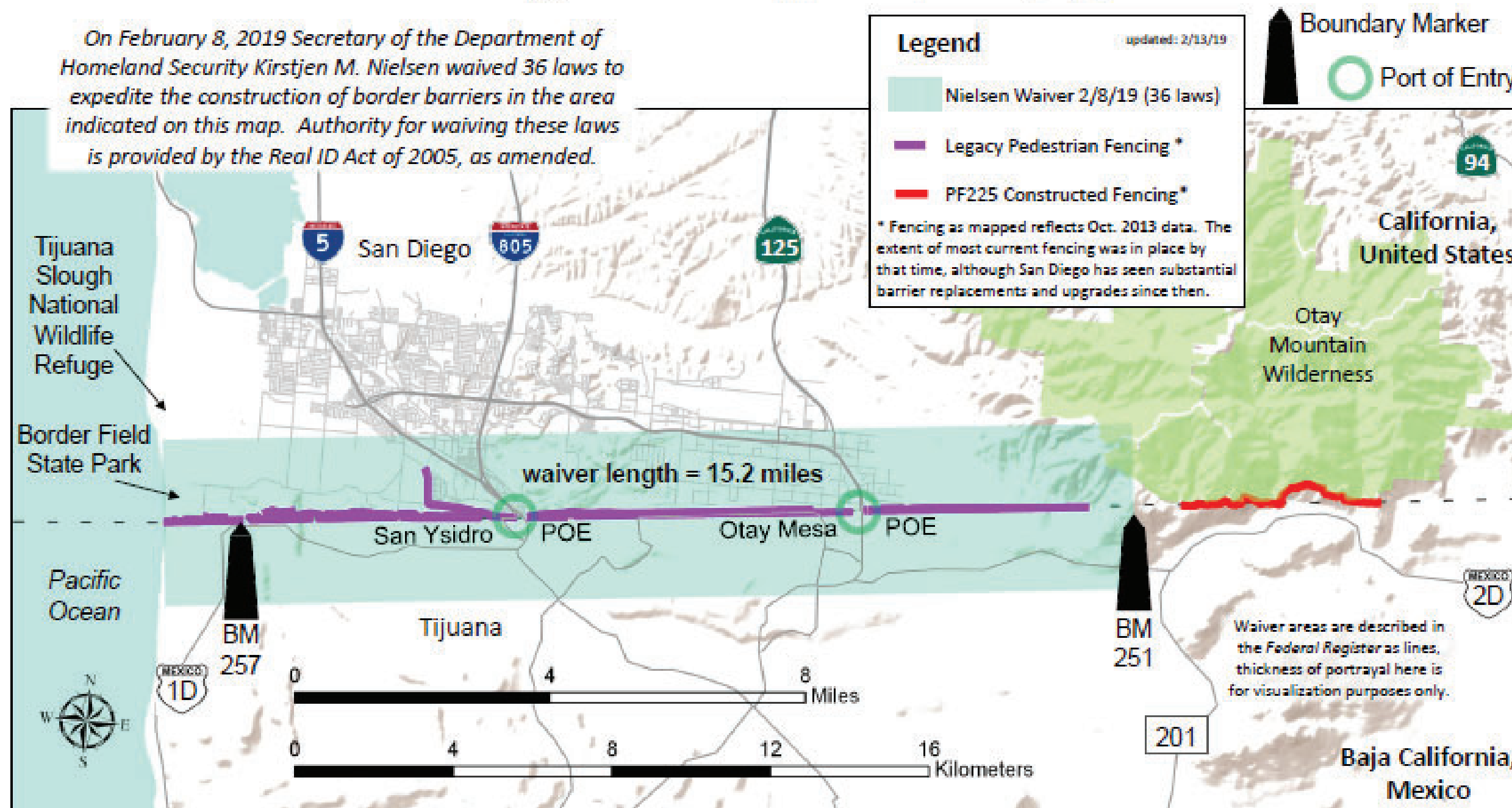
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Map 6: Map clarifying the location of the San Diego Fence Replacement project. From the “Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol. “Environmental Stewardship Plan: San Diego Secondary Fence Replacement,” June 2019.

Department of Homeland Security Waivers and Border Barriers * San Diego, CA

Kenneth D. Madsen
Associate Professor of Geography
<http://u.osu.edu/madsen.34/maps/>



Map 7: San Diego waivers. Courtesy of Kenneth Madsen, Ohio State.

Figures



Fig. 1: Bulldozer preparing the ground for border infrastructure replacement near Border Field State Park, San Diego May 31, 2018. Photo courtesy of KBPS News and U.S. Border Patrol.



Fig. 2: Border Monument 258 in close proximity to pre-Trump era border wall. 2015. Photo from South Bay Compass.



Fig. 3: U.S. Inspection Station/U.S. Custom House (San Ysidro, California) looking north at the west and south façades. 1981. Photo from National Register of Historic Places nomination.



Fig. 4: Some of the cacti transplanted in Organ Pipe Cactus National Monument by the contractor. Project funded by the CBP. Photo courtesy of Rijk Morawe, ORPI.



Fig. 5: Quitobaquito pond from the north looking south. Completed fence in the background. Photo courtesy of Rijk Morawe, ORPI.



Fig. 6: Terminus of the fence as seen in Organ Pipe Cactus National Monument. On the east side, cartels have already bladed a road to provide access for contraband and human smuggling. Photo courtesy of Rijk Morawe, ORPI.

Tables

July 1, 2020



ADVISORY COUNCIL ON HISTORIC PRESERVATION Preserving America's Heritage

Program Alternatives (36 CFR 800.14)

ALTERNATE PROCEDURES	PROGRAMMATIC AGREEMENTS	EXEMPTED CATEGORIES	STANDARD TREATMENTS	PROGRAM COMMENTS
<p>Objective</p> <p>Tailor Section 106 process to fit agency mission/programs through agency-wide restructuring of the review procedure</p>	<p>Govern implementation of a program or resolve adverse effects when: effects are repetitive or are regional or national in scope; effects cannot be fully determined prior to approval; nonfederal parties are delegated decision-making responsibilities; involve routine management at federally managed properties; other circumstances warrant a departure from standard process</p>	<p>The ACHP can exempt a program or category of undertakings from further review if potential effects are foreseeable and likely to be minimal or not adverse and exemption is consistent with purposes of NHPA</p>	<p>Establish standard methods for treatment of a category of effects, undertakings, or historic properties according to best practices; does not replace the normal Section 106 process but can expedite reviews</p>	<p>Alternate method for agency to meet Section 106 responsibilities; allows the ACHP to issue comments on a program or class of undertakings in lieu of commenting on a case-by-case basis</p>
<p>Who proposes?</p> <p>Agency official, following consultation</p>	<p>Agency official</p>	<p>Agency official or the ACHP on own initiative</p>	<p>Agency official or any other party with an interest in the application of standard treatments in the Section 106 process, including the ACHP on own initiative</p>	<p>Agency official may request; the ACHP on own initiative</p>
<p>Who consults?*</p> <p>Agency official consults with the ACHP, NCSHPO, individual SHPOs/THPOs as appropriate, Indian tribes and NHOs. The ACHP also recommends consultation with NATHPO, Indian tribes, NHOs, and other consulting parties.</p>	<p>Project-specific: federal agency consults with SHPO/THPO, Indian tribes, NHOs, other consulting parties, and the ACHP if participating. Program or nationwide: federal agency consults with the ACHP, SHPO/THPO or NCSHPO/NATHPO, Indian tribes, NHOs, and other consulting parties.</p>	<p>Proponent of exemption (the ACHP or agency) notifies and considers the views of SHPOs/THPOs and NHOs. The ACHP consults Indian tribes and NHOs. The ACHP recommends agency proponents consult Indian tribes, NHOs, and others in developing proposal prior to submitting to the ACHP.</p>	<p>The ACHP notifies and considers the views of SHPOs/THPOs and consults with Indian tribes and NHOs, where appropriate.</p>	<p>The ACHP notifies and considers the views of SHPOs/THPOs and consults with Indian tribes and NHOs, where appropriate.</p>

continued >>

Table 1 (inc. following page): Section 106 Program Alternatives. Courtesy of the Advisory Council on Historic Preservation.

ALTERNATE PROCEDURES	PROGRAMMATIC AGREEMENTS	EXEMPTED CATEGORIES	STANDARD TREATMENTS	PROGRAM COMMENTS
<p>Public participation</p> <p><i>Federal Register</i> publication is required along with other appropriate steps to seek public input during development of alternate procedures</p>	<p>Agency responsibility; should be appropriate to the subject matter and the scope of the program or undertaking</p>	<p>Proponent responsibility (the ACHP or agency); should be appropriate to the subject matter and the scope of the exemption</p>	<p>The ACHP arranges for public participation appropriate to the subject matter and the scope of the standard treatment; the ACHP may request agency official to do this if an agency requested the standard treatment</p>	<p>Agency responsibility; required before request; should be appropriate to the subject matter and scope of the category; the ACHP recommends <i>Federal Register</i> notice</p>
<p>Approval action</p> <p>The ACHP, after 60-day review period. Agency must publish notice of final alternate procedures in <i>Federal Register</i> if approved and notify parties with whom it consulted.</p>	<p>Execution by signatories</p>	<p>The ACHP must approve or reject, after 30-day review period; the ACHP notifies agency official and SHPOs/THPOs of decision</p>	<p>ACHP approval and publication in <i>Federal Register</i>; included in MOAs/PAs as mitigation measures or used to support no adverse effect findings in regular reviews</p>	<p>The ACHP must approve or decline to comment after 45-day comment period following official request</p>
<p>Time frame</p> <p>60 days for ACHP review following agency submission; development process leading to submission likely to be lengthy</p>	<p>No fixed time period</p>	<p>30 days for ACHP review unless it requests more information; development process leading to submission could be lengthy</p>	<p>No fixed time period</p>	<p>45 days for comments after request is made; total process could be as short as three months if preparation by agency before request is thorough</p>

* Federal agencies are responsible for government-to-government consultation with Indian tribes. The party responsible for consultation must consult with Indian tribes and Native Hawaiian organizations when the program alternative has the potential to affect historic properties on tribal lands or properties of religious and cultural significance to tribes or NHCs.

Acronym Glossary

- MOA — Memorandum of Agreement
- NATHPO — National Association of Tribal Historic Preservation Officers
- NCSHPO — National Conference of State Historic Preservation Officers
- NHO — Native Hawaiian organization
- NHPA — National Historic Preservation Act
- PA — Programmatic Agreement
- SHPO — State Historic Preservation Officer
- THPO — Tribal Historic Preservation Officer

Resource Area	Alternative 1: Proposed Action Alternative	Alternative 2: No Action Alternative
Land Use	No effects.	No effects.
Geology and Soils	Short- and long-term, minor, adverse effects.	Short- and long-term, minor, adverse effects.
Vegetation	Short- and long-term, negligible to moderate, adverse effects.	Short- and long-term, minor to moderate, adverse effects.
Terrestrial and Aquatic Wildlife Resources	Short- and long-term, negligible to minor, adverse effects.	Short- and long-term, minor to moderate, adverse effects.
Threatened and Endangered Species	Short- and long-term, negligible to minor, adverse effects.	Short- and long-term, minor to moderate, adverse effects.
Hydrology and Groundwater	Short- and long-term, negligible to minor, adverse effects.	Short- and long-term, minor to moderate, adverse effects.
Surface Waters and Waters of the United States	Short- and long-term, negligible to minor, adverse effects.	Short- and long-term, minor to major, adverse effects.
Floodplains	Short-term, negligible to minor, adverse effects.	Short- and long-term, minor, adverse effects.
Air Quality	Short-term, negligible to minor, adverse effects.	No effects.
Noise	Long-term, negligible to minor, adverse effects.	Long-term, negligible to minor, adverse effects.
Cultural Resources	Long-term, negligible to minor, adverse effects.	Long-term, negligible, adverse effects
Roadways and Traffic	Short-term, negligible to minor, adverse effects.	Short- and long-term, negligible to minor, adverse effects.
Hazardous Materials and Waste Management	Long-term, negligible to minor, adverse effects.	Long-term, negligible to minor, adverse effects.
Socioeconomic Resources, Environmental Justice, and Protection of Children	Short- and long-term, negligible, beneficial effects.	No effects.
BLM Realty and Minerals	Long-term, beneficial effects.	Short- and long-term, negligible to minor, adverse effects.
Sustainability and Greening	No effects.	No effects.
Aesthetics and Visual Resources	No effects.	No effects.
Climate Change	No effects.	No effects.
Human Health and Safety	No effects.	No effects.
Utilities and Infrastructure	No effects.	No effects.

Table 2: Summary of Anticipated Environmental Impacts by Alternative. From Department of Homeland Security, U.S. Customs and Border Protection, and U.S. Border Patrol. “Final Environmental Assessment Addressing Proposed Tactical Infrastructure Maintenance and Repair along the U.S. /Mexico International Border in New Mexico.” Department of Homeland Security, July 2015, 8.

Appendix

70 FR 55622

4/8/2021 Federal Register :: Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as A...

LEGAL STATUS

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LEGAL STATUS

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

A Notice by the [Homeland Security Department](#) on 09/22/2005

DOCUMENT DETAILS

Printed version:

PDF (<https://www.govinfo.gov/content/pkg/FR-2005-09-22/pdf/05-18882.pdf>)

Publication Date:

09/22/2005 (/documents/2005/09/22)

Agencies:

Department of Homeland Security (<https://www.federalregister.gov/agencies/homeland-security-department>)
Office of the Secretary

Dates:

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09/22/2005

Document Type:

Notice

Document Citation:

70 FR 55622

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55622-55623 (2 pages)

Document Number:

05-18882

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[Feedback](#)

DOCUMENT STATISTICS

<https://www.federalregister.gov/documents/2005/09/22/05-18882/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigra...> 1/4

Page views:

150

as of 04/08/2021 at 10:15 am EDT

DOCUMENT STATISTICS

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security

ACTION:

Notice of determination.

 Start Printed Page 66623

SUMMARY:

The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads along the international land border of the United States in California.

DATES:

This Notice is effective on September 22, 2005.

Determination and Waiver

In section 102(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208 (<https://api.fdsys.gov/link?collection=plaw&congress=104&lawtype=public&lawnum=208&link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note (2000) (IIRIRA)), Congress provided that the Attorney General shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. Pursuant to sections 1511 and 1517 of the Homeland Security Act of 2002, Public Law 107-296 (<https://api.fdsys.gov/link?collection=plaw&congress=107&lawtype=public&lawnum=296&link-type=html>), 116 Stat. 2135, 2309, 2311 (Nov. 25, 2002) (HSA) (6 U.S.C. 551 (<https://api.fdsys.gov/link?collection=uscode&title=6&year=mostrecent§ion=551&type=usc&link-type=html>), 557), the authorities of the Attorney General contained in section 102 of the IIRIRA were transferred to me. In section 102(c) of the IIRIRA, as amended by section 102 of the REAL ID Act of 2005, Public Law 109-13 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=13&link-type=html>), Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (REAL ID Act) § 8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), Congress granted to 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.

In section 102(b) of the IIRIRA, Congress specifically provided for the construction along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences. In

section 446 of the HSA, Congress expressed its sense that completing the 14-mile border project under section 102(b) of the IIRIRA should be a priority for the Secretary of Homeland Security. Nearly nine years after the passage of the IIRIRA, the project prescribed in section 102(b) of the IIRIRA remains incomplete.

In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in section 102(b) of the IIRIRA, regarding which Congress expressed its support in section 446 of the HSA, 116 Stat. 2195 (6 U.S.C. 256 (<https://api.fdsys.gov/link?collection=uscode&title=6&year=mostrecent§ion=256&type=usc&link-type=html>)), and which is an area of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that was transferred to me by sections 1511 and 1517 of the HSA and that is vested in me by section 102(c) of the IIRIRA as amended by section 102 of the REAL ID Act. Accordingly, I hereby waive in their entirety, with respect to the construction of the barriers and roads prescribed in section 102(b) of the IIRIRA (including, but not limited to, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, detection equipment, and lighting), all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852, (Jan. 1, 1970) (42 U.S.C. 4321 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4321&type=usc&link-type=html>) *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1531&type=usc&link-type=html>) *et seq.*)), the Coastal Zone Management Act (Pub. L. 92-583, 86 Stat. 1280 (Oct. 27, 1972) (16 U.S.C. 1451 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1451&type=usc&link-type=html>) *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (Act of June 30, 1948, c. 758, 62 Stat. 1155 (33 U.S.C. 1251 (<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=1251&type=usc&link-type=html>) *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=703&type=usc&link-type=html>) *et seq.*), the Clean Air Act (42 U.S.C. 7401 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=7401&type=usc&link-type=html>) *et seq.*), and the Administrative Procedure Act (5 U.S.C. 551 (<https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=551&type=usc&link-type=html>) *et seq.*). I reserve the authority to make further waivers from time to time under the authority granted to me by section 102(c) of the IIRIRA, as amended by section 102 of the REAL ID Act, as I may determine to be necessary to accomplish the provisions of section 102 of IIRIRA.

Dated: September 13, 2005.

Michael Chertoff,

Secretary of Homeland Security.

[FR Doc. 05-18882 (/a/05-18882) Filed 9-21-05; 8:45 am]

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LEGAL STATUS

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

A Notice by the [Homeland Security Department](#) on 04/08/2008

DOCUMENT DETAILS

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Office of the Secretary

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This Notice is effective on April 8, 2008.

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as of 04/08/2021 at 10:15 am EDT

DOCUMENT STATISTICS

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security.

ACTION:

Notice of determination; correction.

SUMMARY:

The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States. The notice of determination was published in the **Federal Register** on April 3, 2008. Due to a publication error, the description of the Project Areas was inadvertently omitted from the April 3 publication. For clarification purposes, this document is a republication of the April 3 document including the omitted description of the Project Areas.

DATES:

This Notice is effective on April 8, 2008.

Determination and Waiver

I have a mandate to achieve and maintain operational control of the borders of the United States. Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), 2, 120 Stat. 2638, 8 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1701&type=usc&link-type=html>) note. Congress has provided me with a number of authorities necessary to accomplish this mandate. One of these authorities is found at section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208 (<https://api.fdsys.gov/link?collection=plaw&congress=104&lawtype=public&lawnum=208&link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=13&link-type=html>), Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161 (<https://api.fdsys.gov/link?collection=plaw&congress=110&lawtype=public&lawnum=161&link-type=html>),

Div. E, Title V, 564, 121 Stat. 2090 (Dec. 26, 2007). In Section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In Section 102(b) of IIRIRA, Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including priority miles of fencing that must be completed by December 2008. Finally, in section 102(c) of the IIRIRA, Congress granted to 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 authorized by section 102 of IIRIRA.

I determine that the following areas in the vicinity of the United States border, located in the States of California, Arizona, New Mexico, and Texas are areas of high illegal entry (collectively "Project Areas"):

California

- Starting approximately 1.5 mile east of Border Monument (BM) 251 and ends approximately at BM 250.
- Starting approximately 1.1 miles west of BM 245 and runs east for approximately 0.8 mile.
- Starting approximately 0.2 mile west of BM 243 and runs east along the border for approximately 0.5 mile.
- Starting approximately 0.7 mile east of BM 243 and runs east along the border for approximately 0.9 mile.
- Starting approximately 1.0 mile east of BM 243 and runs east along the border for approximately 0.9 mile.
- Starting approximately 0.7 mile west of BM 242 and stops approximately 0.4 mile west of BM 242.
- Starting approximately 0.8 mile east of BM 242 and runs east along the border for approximately 1.1 miles.
- Starting approximately 0.4 mile east of BM 239 and runs east for approximately 0.4 mile along the border.
- Starting approximately 1.2 miles east of BM 239 and runs east for approximately 0.2 mile along the border.
- Starting approximately 0.5 mile west of BM 235 and runs east along the border for approximately 1.1 miles.
- Starting approximately 0.8 mile east of BM 235 and runs east along the border for approximately 0.1 mile.
- Starting approximately 0.6 mile east of BM 234 and runs east for approximately 1.7 miles along the border.
- Starting approximately 0.4 mile east of BM 233 and runs east for approximately 2.1 miles along the border.
- Starting approximately 0.05 mile west of BM 232 and runs east for approximately 0.1 mile along the border.

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- Starting approximately 0.2 mile east of BM 232 and runs east for approximately 1.5 miles along the border.
- Starting 0.6 mile east of Border Monument 229 heading east along the border for approximately 11.3 miles to BM 225.
- Starting approximately 0.1 mile east of BM 224 and runs east along the border for approximately 2.5 miles.
- Starting approximately 2.3 miles east of BM 220 and runs east along the border to BM 207.

Arizona

- Starting approximately 1.0 mile south of BM 206 and runs south along the Colorado River for approximately 13.3 miles.
- Starting approximately 0.1 mile north of County 18th Street running south along the border for approximately 3.8 miles.
- Starting at the Eastern edge of BMGR and runs east along the border to approximately 1.3 miles west of BM 174.
- Starting approximately 0.5 mile west of BM 168 and runs east along the border for approximately 5.3 miles.
- Starting approximately 1 mile east of BM 160 and runs east for approximately 1.6 miles.
- Starting approximately 1.3 miles east of BM 159 and runs east along the border to approximately 0.3 mile east of BM 140.
- Starting approximately 2.2 miles west of BM 138 and runs east along the border for approximately 2.5 miles.
- Starting approximately 0.2 miles east of BM 136 and runs east along the border to approximately 0.2 mile west of BM 102.
- Starting approximately 3 miles west of BM 99 and runs east along the border approximately 6.5 miles.
- Starting approximately at BM 97 and runs east along the border approximately 6.9 miles.
- Starting approximately at BM 91 and runs east along the border to approximately 0.7 miles east of BM 89.
- Starting approximately 1.7 miles west of BM 86 and runs east along the border to approximately 0.7 mile west of BM 86.
- Starting approximately 0.2 mile west of BM 83 and runs east along the border to approximately 0.2 mile east of BM 73.

New Mexico

- Starting approximately 0.8 mile west of BM 69 and runs east along the border to approximately 1.5 miles west of BM 65.
- Starting approximately 2.3 miles east of BM 65 and runs east along the border for approximately 6.0 miles.
- Starting approximately 0.5 mile east of BM 61 and runs east along the border until approximately 1.0 mile west of BM 59.
- Starting approximately 0.1 miles east of BM 39 and runs east along the border to approximately 0.3 mile east of BM 33.
- Starting approximately 0.25 mile east of BM 31 and runs east along the border for approximately 14.2 miles.
- Starting approximately at BM 22 and runs east along the border to approximately 1.0 mile west BM 16.
- Starting at approximately 1.0 mile west of BM 16 and runs east along the border to approximately BM 3.

Texas

- Starting approximately 0.4 miles southeast of BM 1 and runs southeast along the border for approximately 3.0 miles.
- Starting approximately 1 Mi E of the intersection of Interstate 54 and Border Highway and runs southeast approximately 57 miles in proximity to the IBWC levee to 3.7 miles east of the Ft Hancock POE.
- Starting approximately 1.6 miles west of the intersection of Esperanza and Quitman Pass Roads and runs along the IBWC levee east for approximately 4.6 miles.
- Starting at the Presidio POE and runs west along the border to approximately 3.2 miles west of the POE.
- Starting at the Presidio POE and runs east along the border to approximately 3.4 miles east of the POE.
- Starting approximately 1.8 miles west of Del Rio POE and runs east along the border for approximately 2.5 miles.

- Starting approximately 1.3 Mi north of the Eagle Pass POE and runs south approximately 0.8 miles south of the POE.
- Starting approximately 2.1 miles west of Roma POE and runs east approximately 1.8 miles east of the Roma POE.
- Starting approximately 3.5 miles west of Rio Grande City POE and runs east in proximity to the Rio Grande river for approximately 9 miles.
- Starting approximately 0.9 miles west of County Road 41 and runs east approximately 1.2 miles and then north for approximately 0.8 miles.
- Starting approximately 0.5 mile west of the end of River Dr and runs east in proximity to the IBWC levee for approximately 2.5 miles.
- Starting approximately 0.6 miles east of the intersection of Benson Rd and Cannon Rd and runs east in proximity to the IBWC levee for approximately 1 mile.
- Starting at the Los Indios POE and runs west in proximity to the IBWC levee for approximately 1.7 miles.
- Starting at the Los Indios POE and runs east in proximity to the IBWC levee for approximately 3.6 miles.
- Starting approximately 0.5 mile west of Main St and J Padilla St intersection and runs east in proximity to the IBWC levee for approximately 2.0 miles.
- Starting approximately 1.2 miles west of the Intersection of U.S. HWY 281 and Los Ranchitos Rd and runs east in proximity to the IBWC levee for approximately 2.4 miles.
- Starting approx 0.5 miles southwest of the intersection of U.S. 281 and San Pedro Rd and runs east in proximity to the IBWC levee for approximately 1.8 miles.
- Starting approximately 0.1 miles southwest of the Intersection of Villanueva St and Torres Rd and runs east in proximity to the IBWC levee for approximately 3.6 miles.
- Starting approximately south of Palm Blvd and runs east in proximity to the City of Brownsville's levee to approximately the Gateway-Brownsville POE where it continues south and then east in proximity to the IBWC levee for a total length of approximately 3.5 miles.
- Starting at the North Eastern Edge of Ft Brown Golf Course and runs east in proximity to the IBWC levee for approximately 1 mile.
- Starting approximately 0.3 miles east of Los Tomates-Brownsville POE and runs east and then north in proximity to the IBWC levee for approximately 13 miles.

In order to deter illegal crossings in the Project Areas, there is presently 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. In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in the IIRIRA in the Project Areas, which are areas of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended.

Accordingly, I hereby waive in their entirety, with respect to the construction of roads and fixed and mobile barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting) in the Project Areas, all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 (https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4321&type=usc&link-type=html) et seq.)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1531&type=usc&link-type=html) et seq.)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251

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(<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=1251&type=usc&link-type=html>) *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=703&type=usc&link-type=html>) *et seq.*), the Clean Air Act (42 U.S.C. 7401 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=7401&type=usc&link-type=html>) *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=300&type=usc&link-type=html>) *et seq.*), the Noise Control Act (42 U.S.C. 4901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4901&type=usc&link-type=html>) *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=6901&type=usc&link-type=html>) *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=9601&type=usc&link-type=html>) *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=469&type=usc&link-type=html>) *et seq.*), the Antiquities Act (16 U.S.C. 431 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=431&type=usc&link-type=html>) *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=461&type=usc&link-type=html>) *et seq.*), the Wild and Scenic Rivers Act (Pub. L. 90-542, 16 U.S.C. 1281 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1281&type=usc&link-type=html>) *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://api.fdsys.gov/link?collection=uscode&title=7&year=mostrecent§ion=4201&type=usc&link-type=html>) *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583, 16 U.S.C. 1451 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1451&type=usc&link-type=html>) *et seq.*), the Wilderness Act (Pub. L. 88-577, 16 U.S.C. 1131 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1131&type=usc&link-type=html>) *et seq.*), the Federal Land Policy and Management Act (Pub. L. 94-579, 43 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=43&year=mostrecent§ion=1701&type=usc&link-type=html>) *et seq.*), the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=668&type=usc&link-type=html>)dd-668ee), the Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=742&type=usc&link-type=html>)a, *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 16 U.S.C. 661 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=661&type=usc&link-type=html>) *et seq.*), the Administrative Procedure Act (5 U.S.C. 551 (<https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=551&type=usc&link-type=html>) *et seq.*), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145 (<https://api.fdsys.gov/link?collection=plaw&congress=106&lawtype=public&lawnum=145&link-type=html>)), Sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433), 50 Stat. 1827, the National Park Service Organic Act (Pub. L. 64-235, 16 U.S.C. 1 (<https://api.fdsys.gov/link?collection=plaw&congress=106&lawtype=public&lawnum=145&link-type=html>))

collection=uscode&title=16&year=mostrecent§ion=1&type=usc&link-type=html), 2-4), the National Park Service General Authorities Act (Pub. L. 91-383, 16 U.S.C. 1 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1&type=usc&link-type=html>)a-1 *et seq.*), Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625), Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628), the Rivers and Harbors Act of 1899 (33 U.S.C. 403 (<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=403&type=usc&link-type=html>)), the Eagle Protection Act (16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=668&type=usc&link-type=html>) *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 (<https://api.fdsys.gov/link?collection=uscode&title=25&year=mostrecent§ion=3001&type=usc&link-type=html>) *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=1996&type=usc&link-type=html>)), the Religious Freedom Restoration Act (42 U.S.C. 2000 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=2000&type=usc&link-type=html>))bb), the National Forest Management Act of 1976 (16 U.S.C. 1600 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1600&type=usc&link-type=html>) *et seq.*), and the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. 528 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=528&type=usc&link-type=html>)-531).

This waiver does not supersede, supplement, or in any way modify the previous waivers published in the **Federal Register** on September 22, 2005 (70 FR 55622 (</citation/70-FR-55622>)), January 19, 2007 (72 FR 2535 (</citation/72-FR-2535>)), and October 26, 2007 (72 FR 60870 (</citation/72-FR-60870>)).

I reserve the authority to make further waivers from time to time as I may determine to be necessary to accomplish the provisions of section 102 of the IIRIRA, as amended.

Michael Chertoff,

Secretary.

[FR Doc. E8-7451 (</a/E8-7451>) Filed 4-7-08; 8:45 am]

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LEGAL STATUS

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LEGAL STATUS

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

A Notice by the [Homeland Security Department](#) on 08/02/2017

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ENHANCED CONTENT

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security.

ACTION:

Notice of determination.

SUMMARY:

The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States near the city of San Diego in the state of California.

DATES:

This determination takes effect on August 2, 2017.

SUPPLEMENTARY INFORMATION:

The principal mission requirements of the Department of Homeland Security ("DHS") include border security and the detection and prevention of illegal entry into the United States. Border security is critical to the nation's national security. Recognizing the critical importance of border security, Congress has ordered DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1701&type=usc&link-type=html>) note). Congress defined "operational control" as the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. Secure Fence Act of 2006, Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1701&type=usc&link-type=html>) note). Consistent

with that mandate from Congress, the President's Executive Order on Border Security and Immigration Enforcement Improvements directed executive departments and agencies to deploy all lawful means to secure the southern border. Executive Order 13767, (/executive-order/13767) § 1. To achieve this end, the President directed, among other things, that I take immediate steps to prevent all unlawful entries into the United States, to include the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, (/executive-order/13767) § 4(a).

Congress has provided the Secretary of Homeland Security with a number of authorities necessary to carry out DHS's border security mission, including the border security provisions described above. One of these authorities is found at section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208 (<https://api.fdsys.gov/link?collection=plaw&congress=104&lawtype=public&lawnum=208&link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=13&link-type=html>), Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://api.fdsys.gov/link?collection=plaw&congress=109&lawtype=public&lawnum=367&link-type=html>), § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://api.fdsys.gov/link?collection=uscode&title=8&year=mostrecent§ion=1103&type=usc&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161 (<https://api.fdsys.gov/link?collection=plaw&congress=110&lawtype=public&lawnum=161&link-type=html>), Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress has called for the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

Determination and Waiver

Section 1

The United States Border Patrol's San Diego Sector is one of the busiest Sectors in the Nation. For example, in fiscal year 2016 alone, the United States Border Patrol apprehended over 31,000 illegal aliens and seized approximately 9,167 pounds of marijuana and approximately 1,317 pounds of cocaine in the San Diego Sector. To be sure, the construction of border infrastructure and other operational improvements have improved border security in the San Diego Sector; however, more work needs to be done. The San Diego Sector remains an area of high illegal entry for which there is an immediate need to construct additional border barriers and roads.

To begin to meet the need for additional border infrastructure within the San Diego Sector, DHS will immediately implement various border infrastructure projects. These projects will focus on an approximately fifteen mile segment of the border within the San Diego Sector that starts at the Pacific Ocean and extends eastward. This approximately fifteen mile segment of the border is referred to herein as the "Project Area" and is more specifically described in Section 2 below.

All of the projects that DHS will undertake within the Project Area will further Border Patrol's ability to deter and prevent illegal crossings. For example, DHS will replace existing primary fencing in the Project Area. The majority of the existing primary fence in the Project Area was built in the early 1990s using a fence design that is no longer optimal for Border Patrol operations. The new primary barrier will use an operationally effective design that is intended to meet Border Patrol's current requirements. DHS will also build prototype border wall in the Project Area near the eastern terminus of the existing secondary barrier. The construction of border wall prototypes in the Project Area and the robust physical characteristics that are to be incorporated into the border wall prototypes are intended to deter illegal crossings. In addition to deterring illegal crossings in the Project Area, DHS will use the border wall prototypes to evaluate various design features for potential inclusion in a border wall standard that will be developed by the Government and utilized as a part of border wall construction going forward. Importantly, construction of the border wall prototypes in the Project Area also means that DHS can evaluate various design features in the border environment under actual operational conditions. As such, the construction of border wall prototypes will not only deter illegal entry in the Project Area, but evaluation of the border wall prototypes is also critical to and necessary for future border wall design and construction.

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Section 2

I determine that the following area in the vicinity of the United States border, located in the state of California within the United States Border Patrol's San Diego Sector, which is referred to herein as the Project Area, is an area of high illegal entry: Starting at the Pacific Ocean and extending to approximately one mile east of Border Monument 254.

There is presently a need to construct physical barriers and roads, including the infrastructure projects described in Section 1, in the vicinity of the border of the United States to deter illegal crossings in the Project Area. In order to ensure the expeditious construction of the barriers and roads in the Project Area, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of IIRIRA as amended.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers (including, but not limited to, accessing the Project Area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features) in the Project Area, the following statutes, including all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following statutes, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4321&type=usc&link-type=html>) *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1531&type=usc&link-type=html>) *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 (<https://api.fdsys.gov/link?collection=uscode&title=33&year=mostrecent§ion=1251&type=usc&link->

type=html) et seq.), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Pub. L. 113-287 (<https://api.fdsys.gov/link?collection=plaw&congress=113&lawtype=public&lawnum=287&link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>) et seq., now codified at 54 U.S.C. 100101 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=100101&type=usc&link-type=html>) note and 54 U.S.C. 300101 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=300101&type=usc&link-type=html>) et seq.)), the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=703&type=usc&link-type=html>) et seq.), the Migratory Bird Conservation Act (16 U.S.C. 715 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=715&type=usc&link-type=html>) et seq.), the Clean Air Act (42 U.S.C. 7401 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=7401&type=usc&link-type=html>) et seq.), the Archeological Resources Protection Act (Pub. L. 96-95 (16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>)aa et seq.)), the Paleontological Resources Preservation Act (16 U.S.C. 470 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=470&type=usc&link-type=html>)aaa et seq.), the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=4301&type=usc&link-type=html>) et seq.), the National Trails System Act (16 U.S.C. 1241 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1241&type=usc&link-type=html>) et seq.), the Safe Drinking Water Act (42 U.S.C. 300 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=300&type=usc&link-type=html>)f et seq.), the Noise Control Act (42 U.S.C. 4901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=4901&type=usc&link-type=html>) et seq.), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=6901&type=usc&link-type=html>) et seq.), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent§ion=9601&type=usc&link-type=html>) et seq.), the Archaeological and Historic Preservation Act (Pub. L. 86-523, as amended, repealed, or replaced by Pub. L. 113-287 (<https://api.fdsys.gov/link?collection=plaw&congress=113&lawtype=public&lawnum=287&link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=469&type=usc&link-type=html>) et seq., now codified at 54 U.S.C. 312502 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=312502&type=usc&link-type=html>) et seq.)), the Antiquities Act (formerly codified at 16 U.S.C. 431 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=431&type=usc&link-type=html>) et seq., now codified 54 U.S.C. 320301 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=320301&type=usc&link-type=html>) et seq.), the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=461&type=usc&link-type=html>) et seq., now codified at 54 U.S.C. 3201 (<https://api.fdsys.gov/link?collection=uscode&title=54&year=mostrecent§ion=3201&type=usc&link-type=html>)-320303 & 320101-320106), the Wild and Scenic Rivers Act (Pub. L. 90-542 (16 U.S.C. 1281 (<https://api.fdsys.gov/link?>

collection=usc&title=16&year=mostrecent§ion=1281&type=usc&link-type=html) et seq.), the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://api.fdsys.gov/link?collection=usc&title=7&year=mostrecent§ion=4201&type=usc&link-type=html>) et seq.), the Coastal Zone Management Act (Pub. L. 92-583 (16 U.S.C. 1451 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=1451&type=usc&link-type=html>) et seq.)), the Wilderness Act (Pub. L. 88-577 (16 U.S.C. 1131 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=1131&type=usc&link-type=html>) et seq.)), the Federal Land Policy and Management Act (Pub. L. 94-579 (43 U.S.C. 1701 (<https://api.fdsys.gov/link?collection=usc&title=43&year=mostrecent§ion=1701&type=usc&link-type=html>) et seq.)), the National Wildlife Refuge System Administration Act (Pub. L. 89-669 (16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=668&type=usc&link-type=html>))dd-668ee)), the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105-57 (<https://api.fdsys.gov/link?collection=plaw&congress=105&lawtype=public&lawnum=57&link-type=html>))), National Fish and Wildlife Act of 1956 (Pub. L. 84-1024 (16 U.S.C. 742 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=742&type=usc&link-type=html>))a, et seq.)), the Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=661&type=usc&link-type=html>) et seq.)), the Wild Horse and Burro Act (16 U.S.C. 1331 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=1331&type=usc&link-type=html>) et seq.), an Act of Oct. 30, 2000, Pub. L. 106-398 (<https://api.fdsys.gov/link?collection=plaw&congress=106&lawtype=public&lawnum=398&link-type=html>), 1, 114 Stat. 1654 (enacting into law § 2848 of Part II of Subtitle D of Title XXVIII of Division B of H.R. 5408 (114 Stat. 1654A-426), as introduced on Oct. 6, 2000), the Administrative Procedure Act (5 U.S.C. 551 (<https://api.fdsys.gov/link?collection=usc&title=5&year=mostrecent§ion=551&type=usc&link-type=html>) et seq.), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145 (<https://api.fdsys.gov/link?collection=plaw&congress=106&lawtype=public&lawnum=145&link-type=html>))), sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433), the Rivers and Harbors Act of 1899 (33 U.S.C. 403 (<https://api.fdsys.gov/link?collection=usc&title=33&year=mostrecent§ion=403&type=usc&link-type=html>))), the Eagle Protection Act (16 U.S.C. 668 (<https://api.fdsys.gov/link?collection=usc&title=16&year=mostrecent§ion=668&type=usc&link-type=html>) et seq.), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 (<https://api.fdsys.gov/link?collection=usc&title=25&year=mostrecent§ion=3001&type=usc&link-type=html>) et seq.), the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://api.fdsys.gov/link?collection=usc&title=42&year=mostrecent§ion=1996&type=usc&link-type=html>))), and the Religious Freedom Restoration Act (42 U.S.C. 2000 (<https://api.fdsys.gov/link?collection=usc&title=42&year=mostrecent§ion=2000&type=usc&link-type=html>))bb).

This waiver does not repeal the previous waiver published in the *Federal Register* on September 22, 2005 (70 FR 55622 (/citation/70-FR-55622)).

I reserve the authority to make further waivers from time to time as I may determine to be necessary under section 102 of IIRIRA, as amended.

Dated: July 26, 2017.

John F. Kelly,

3/25/2021 Federal Register :: Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as...
Secretary of Homeland Security.

[FR Doc. 2017-16260 (/a/2017-16260) Filed 8-1-17; 8:45 am]

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PUBLISHED DOCUMENT

LEGAL STATUS

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LEGAL STATUS

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

A Notice by the [Homeland Security Department](#) on 02/08/2019

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Department of Homeland Security (<https://www.federalregister.gov/agencies/homeland-security-department>)
Office of the Secretary

Dates:

This determination takes effect on February 8, 2019.

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02/08/2019

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Page views:

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as of 03/25/2021 at 10:15 am EDT

DOCUMENT STATISTICS

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security.

ACTION:

Notice of determination.

SUMMARY:

The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations, and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border near the City of San Diego in the State of California.

DATES:

This determination takes effect on February 8, 2019.

SUPPLEMENTARY INFORMATION:

Important mission requirements of the Department of Homeland Security ("DHS") include border security and the detection and prevention of illegal entry into the United States. Border security is critical to the nation's national security. Recognizing the critical importance of border security, Congress has mandated DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), § 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/8/1701?type=usc&year=mostrecent&link-type=html>) note). Congress defined "operational control" as the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. *Id.* Consistent with that mandate from Congress, the President's Executive Order on Border Security and Immigration Enforcement Improvements directed executive departments and agencies to deploy all lawful means to secure the southern border. Executive Order 13767, ([/executive-order/13767](https://www.govinfo.gov/link/EO/13767)) § 1. In order to achieve that end, the President directed, among other things, that I take immediate steps to prevent all unlawful entries into the United States, including the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, ([/executive-order/13767](https://www.govinfo.gov/link/EO/13767)) § 4(a).

Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out DHS's border security mission. One of those authorities is found at section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("IIRIRA"). Public Law 104-208 (<https://www.govinfo.gov/link/plaw/104/public/208?link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://www.govinfo.gov/link/plaw/109/public/13?link-type=html>), Div. B, 119 Stat. 231, 302, 306

(May 11, 2005) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161 (<https://www.govinfo.gov/link/plaw/110/public/161?link-type=html>), Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress mandated the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

Determination and Waiver

Section 1

The United States Border Patrol's San Diego Sector is an area of high illegal entry. For example, in fiscal year 2018 alone, the United States Border Patrol ("Border Patrol") apprehended over 38,000 illegal aliens in the San Diego Sector. In that same year Border Patrol seized approximately 8,700 pounds of marijuana and approximately 1,800 pounds of cocaine in the San Diego Sector.

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In order to satisfy the need for additional border infrastructure in the San Diego Sector, DHS will take action to construct barriers and roads. Specifically, construction of secondary barriers and roads will occur within an approximately fourteen mile segment of the border within the San Diego Sector that starts at approximately the Pacific Ocean and extends eastward. The segment of the border within which such construction will occur is referred to herein as the "project area" and is more specifically described in Section 2 below.

Section 2

I determine that the following area in the vicinity of the United States border, located in the State of California within the United States Border Patrol's San Diego Sector, is an area of high illegal entry (the "project area"): Starting at approximately the Pacific Ocean and extending eastward to approximately Border Monument 251.

There is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project area. In order to ensure the expeditious construction of the barriers and roads in the project area, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of IIRIRA.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, safety features, lighting,

cameras, and sensors) in the project area, all of the following statutes, including all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the following statutes, as amended:

The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 (<https://www.govinfo.gov/link/uscode/42/4321?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://www.govinfo.gov/link/uscode/16/1531?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 (<https://www.govinfo.gov/link/uscode/33/1251?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Pub. L. 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified at 54 U.S.C. 100101 (<https://www.govinfo.gov/link/uscode/54/100101?type=usc&year=mostrecent&link-type=html>) note and 54 U.S.C. 300101 (<https://www.govinfo.gov/link/uscode/54/300101?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://www.govinfo.gov/link/uscode/16/703?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Migratory Bird Conservation Act (16 U.S.C. 715 (<https://www.govinfo.gov/link/uscode/16/715?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Clean Air Act (42 U.S.C. 7401 (<https://www.govinfo.gov/link/uscode/42/7401?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Archeological Resources Protection Act (Pub. L. 96-95 (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Paleontological Resources Preservation Act (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 (<https://www.govinfo.gov/link/uscode/16/4301?type=usc&year=mostrecent&link-type=html>) *et seq.*); the National Trails System Act (16 U.S.C. 1241 (<https://www.govinfo.gov/link/uscode/16/1241?type=usc&year=mostrecent&link-type=html>) *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300 (<https://www.govinfo.gov/link/uscode/42/300?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Noise Control Act (42 U.S.C. 4901 (<https://www.govinfo.gov/link/uscode/42/4901?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://www.govinfo.gov/link/uscode/42/6901?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://www.govinfo.gov/link/uscode/42/9601?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Archaeological and Historic Preservation Act (Pub. L. 86-523, as amended, repealed, or replaced by Pub. L. 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>) (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 (<https://www.govinfo.gov/link/uscode/16/469?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified at 54 U.S.C. 312502 (<https://www.govinfo.gov/link/uscode/54/312502?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Antiquities Act (formerly codified at 16 U.S.C. 431 (<https://www.govinfo.gov/link/uscode/16/431?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified 54 U.S.C. 320301 (<https://www.govinfo.gov/link/uscode/54/320301?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 (<https://www.govinfo.gov/link/uscode/16/461?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified at 54 U.S.C. 3201 (<https://www.govinfo.gov/link/uscode/54/3201?type=usc&year=mostrecent&link-type=html>)-320303 & 320101-320106); the Wild and Scenic Rivers Act (Pub. L. 90-542 (16 U.S.C. 1281

(<https://www.govinfo.gov/link/uscode/16/1281?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://www.govinfo.gov/link/uscode/7/4201?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Coastal Zone Management Act (Pub. L. 92-583 (16 U.S.C. 1451 (<https://www.govinfo.gov/link/uscode/16/1451?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Wilderness Act (Pub. L. 88-577 (16 U.S.C. 1131 (<https://www.govinfo.gov/link/uscode/16/1131?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Federal Land Policy and Management Act (Pub. L. 94-579 (43 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/43/1701?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the National Wildlife Refuge System Administration Act (Pub. L. 89-669 (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>)dd-668ee)); the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105-57 (<https://www.govinfo.gov/link/plaw/105/public/57?link-type=html>)); National Fish and Wildlife Act of 1956 (Pub. L. 84-1024 (16 U.S.C. 742 (<https://www.govinfo.gov/link/uscode/16/742?type=usc&year=mostrecent&link-type=html>)a, *et seq.*)); the Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 (<https://www.govinfo.gov/link/uscode/16/661?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Wild Horse and Burro Act (16 U.S.C. 1331 (<https://www.govinfo.gov/link/uscode/16/1331?type=usc&year=mostrecent&link-type=html>) *et seq.*); an Act of Oct. 30, 2000, Pub. L. 106-398 (<https://www.govinfo.gov/link/plaw/106/public/398?link-type=html>), 1, 114 Stat. 1654 (enacting into law § 2848 of Part II of Subtitle D of Title XXVIII of Division B of H.R. 5408 (114 Stat. 1654A-426), as introduced on Oct. 6, 2000); the Administrative Procedure Act (5 U.S.C. 551 (<https://www.govinfo.gov/link/uscode/5/551?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145 (<https://www.govinfo.gov/link/plaw/106/public/145?link-type=html>)); sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433); the Rivers and Harbors Act of 1899 (33 U.S.C. 403 (<https://www.govinfo.gov/link/uscode/33/403?type=usc&year=mostrecent&link-type=html>)); the Eagle Protection Act (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 (<https://www.govinfo.gov/link/uscode/25/3001?type=usc&year=mostrecent&link-type=html>) *et seq.*); and the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://www.govinfo.gov/link/uscode/42/1996?type=usc&year=mostrecent&link-type=html>)).

This waiver does not revoke or supersede previous waivers published in the *Federal Register* on September 22, 2005 (70 FR 55622 (/citation/70-FR-55622)), and August 2, 2017 (82 FR 35984 (/citation/82-FR-35984)), which shall remain in full force and effect in accordance with their terms. I reserve the authority to execute further waivers from time to time as I may determine to be necessary under section 102 of IIRIRA.

Kirstjen M. Nielsen,

Secretary of Homeland Security.

[FR Doc. 2019-01379 (/a/2019-01379) Filed 2-7-19; 8:45 am]

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LEGAL STATUS

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LEGAL STATUS

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

A Notice by the [Homeland Security Department](#) on 05/15/2019

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as of 11/07/2020 at 2:15 pm EST

DOCUMENT STATISTICS

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security.

ACTION:

Notice of determination.

SUMMARY:

The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations, and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border in Cochise County and Pima County, Arizona.

DATES:

This determination takes effect on May 15, 2019.

SUPPLEMENTARY INFORMATION:

Important mission requirements of the Department of Homeland Security ("DHS") include border security and the detection and prevention of illegal entry into the United States. Border security is critical to the nation's national security. Recognizing the critical importance of border security, Congress has mandated DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/8/1701?type=usc&year=mostrecent&link-type=html>) note). Congress defined "operational control" as the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. *Id.* Consistent with that mandate from Congress, the President's Executive Order on Border Security and Immigration Enforcement Improvements directed executive departments and agencies to deploy all lawful means to secure the southern border. Executive Order 13767, (</executive-order/13767>) § 1. In order to achieve that end, the President directed, among other things, that I take immediate steps to prevent all unlawful entries into the United States, including the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, (</executive-order/13767>) § 4(a).

Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out DHS's border security mission. One of those authorities is section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("IIRIRA"). Public Law 104-208 (<https://www.govinfo.gov/link/plaw/104/public/208?link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://www.govinfo.gov/link/plaw/109/public/13?link-type=html>), Div. B, 119 Stat. 231, 302, 306

(May 11, 2005) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161 (<https://www.govinfo.gov/link/plaw/110/public/161?link-type=html>), Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress mandated the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

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Determination and Waiver

Section 1

The United States Border Patrol's (Border Patrol) Tucson Sector is an area of high illegal entry. In fiscal year 2018, the Border Patrol apprehended over 52,000 illegal aliens attempting to enter the United States between border crossings in the Tucson Sector. Also in fiscal year 2018, the Border Patrol had over 1,900 separate drug-related events between border crossings in the Tucson Sector, through which it seized over 134,000 pounds of marijuana, 62 pounds of cocaine, over 91 pounds of heroin, and over 902 pounds of methamphetamine. Additionally, Cochise and Pima Counties, which are within the Tucson Sector, have been identified as High Intensity Drug Trafficking Areas by the Office of National Drug Control Policy.

During the high levels of illegal entry of people and drugs within the Tucson Sector, I must use my authority under Section 102 of IIRIRA to install additional physical barriers and roads in the Tucson Sector. Therefore, DHS will take immediate action to replace existing barriers in the Tucson Sector. Construction will occur along four separate segments of the border, which are referred to herein as the "project areas" and more specifically described in Section 2 below.

The existing barriers within the project areas include both vehicle fencing and outmoded pedestrian fencing that no longer satisfy Border Patrol's operational needs. Transnational criminal organizations known for smuggling drugs and aliens into United States from Mexico are known to operate in the area. These transnational criminal organizations have been able to use the lack of adequate infrastructure and the surrounding terrain, which provides high ground for scouts seeking to protect and warn smugglers moving through the area, to their advantage. Therefore, Border Patrol requires a more effective barrier. The existing vehicle barriers and outmoded pedestrian fencing will be replaced with an 18 to 30 foot barrier that employs a more operationally effective design. In addition, roads will be constructed or improved and lighting will be installed.

To support DHS's action under Section 102 of IIRIRA, DHS requested that the Department of Defense, pursuant to 10 U.S.C. 284 ([\(b\)\(7\)"\), assist by constructing fence, roads, and lighting within the Tucson Sector in order to block drug smuggling corridors across the international boundary between the United States and Mexico. The Acting Secretary of Defense has concluded that the support requested satisfies the statutory requirements of](https://www.govinfo.gov/link/uscode/10/284?type=usc&year=mostrecent&link-type=html)

10 U.S.C. 284 (<https://www.govinfo.gov/link/uscode/10/284?type=usc&year=mostrecent&link-type=html>) (b)(7) and that the Department of Defense will provide such support in the project areas described in Section 2 below.

Section 2

I determine that the following areas in the vicinity of the United States border, located in the State of Arizona within the United States Border Patrol's Tucson Sector, are areas of high illegal entry (the "project areas"):

- Starting approximately one-half (.5) mile west of Border Monument 178 and extending east to Border Monument 162;
- Starting at Border Monument 100 and extending east for approximately one (1) mile;
- Starting at Border Monument 98 and extending east to Border Monument 97; and
- Starting approximately one-half (.5) mile west of Border Monument 83 and extending east to Border Monument 74.

There is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project areas pursuant to sections 102(a) and 102(b) of IIRIRA. In order to ensure the expeditious construction of the barriers and roads in the project areas, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of IIRIRA.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of physical barriers and roads (including, but not limited to, accessing the project areas, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, safety features, lighting, cameras, and sensors) in the project areas, all of the following statutes, including all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the following statutes, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 (<https://www.govinfo.gov/link/uscode/42/4321?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://www.govinfo.gov/link/uscode/16/1531?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 (<https://www.govinfo.gov/link/uscode/33/1251?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Public Law 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>), 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified at 54 U.S.C. 100101 (<https://www.govinfo.gov/link/uscode/54/100101?type=usc&year=mostrecent&link-type=html>) note and 54 U.S.C. 300101 (<https://www.govinfo.gov/link/uscode/54/300101?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://www.govinfo.gov/link/uscode/16/703?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Migratory Bird Conservation Act (16 U.S.C. 715 (<https://www.govinfo.gov/link/uscode/16/715?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Clean Air Act (42 U.S.C. 7401 (<https://www.govinfo.gov/link/uscode/42/7401?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Archeological Resources Protection Act (Pub. L. 96-95, 93 Stat. 721 (Oct. 31, 1979) (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Paleontological Resources Preservation Act (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470>);

type=usc&year=mostrecent&link-type=html)aaa et seq.); the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 (<https://www.govinfo.gov/link/uscode/16/4301?type=usc&year=mostrecent&link-type=html>) et seq.); the Safe Drinking Water Act (42 U.S.C. 300 (<https://www.govinfo.gov/link/uscode/42/300?type=usc&year=mostrecent&link-type=html>)f et seq.); the Noise Control Act (42 U.S.C. 4901 (<https://www.govinfo.gov/link/uscode/42/4901?type=usc&year=mostrecent&link-type=html>) et seq.); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://www.govinfo.gov/link/uscode/42/6901?type=usc&year=mostrecent&link-type=html>) et seq.); the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://www.govinfo.gov/link/uscode/42/9601?type=usc&year=mostrecent&link-type=html>) et seq.); the Archaeological and Historic Preservation Act (Pub. L. 86-523, 74 Stat. 220 (June 27, 1960) as amended, repealed, or replaced by Public Law 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>), 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 (<https://www.govinfo.gov/link/uscode/16/469?type=usc&year=mostrecent&link-type=html>) et seq., now codified at 54 U.S.C. 312502 (<https://www.govinfo.gov/link/uscode/54/312502?type=usc&year=mostrecent&link-type=html>) et seq.); the Antiquities Act (formerly codified at 16 U.S.C. 431 (<https://www.govinfo.gov/link/uscode/16/431?type=usc&year=mostrecent&link-type=html>) et seq., now codified 54 U.S.C. 320301 (<https://www.govinfo.gov/link/uscode/54/320301?type=usc&year=mostrecent&link-type=html>) et seq.); the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 (<https://www.govinfo.gov/link/uscode/16/461?type=usc&year=mostrecent&link-type=html>) et seq., now codified at 54 U.S.C. 3201 (<https://www.govinfo.gov/link/uscode/54/3201?type=usc&year=mostrecent&link-type=html>)-320303 & 320101-320106); Wild and Scenic Rivers Act (Pub. L. 90-542, 82 Stat. 906 (Oct. 2, 1968) (16 U.S.C. 1271 (<https://www.govinfo.gov/link/uscode/16/1271?type=usc&year=mostrecent&link-type=html>) et seq.); the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://www.govinfo.gov/link/uscode/7/4201?type=usc&year=mostrecent&link-type=html>) et seq.); the Federal Land Policy and Management Act (Pub. L. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (43 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/43/1701?type=usc&year=mostrecent&link-type=html>) et seq.); the Wilderness Act (Pub. L. 88-577, 78 Stat. 890 (Sept. 3, 1964) (16 U.S.C. 1131 (<https://www.govinfo.gov/link/uscode/16/1131?type=usc&year=mostrecent&link-type=html>) et seq.); 43 U.S.C. 387 (<https://www.govinfo.gov/link/uscode/43/387?type=usc&year=mostrecent&link-type=html>); the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 80 Stat. 926 (Oct. 15, 1966) (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>)dd-668ee); National Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 70 Stat. 1119 (Aug. 8, 1956) (16 U.S.C. 742 (<https://www.govinfo.gov/link/uscode/16/742?type=usc&year=mostrecent&link-type=html>)a, et seq.); the Fish and Wildlife Coordination Act (Pub. L. 73-121, 48 Stat. 401 (March 10, 1934) (16 U.S.C. 661 (<https://www.govinfo.gov/link/uscode/16/661?type=usc&year=mostrecent&link-type=html>) et seq.); the National Trails System Act (16 U.S.C. 1241 (<https://www.govinfo.gov/link/uscode/16/1241?type=usc&year=mostrecent&link-type=html>) et seq.); the Administrative Procedure Act (5 U.S.C. 551 et seq.); the Wild Horse and Burro Act (16 U.S.C. 1331 (<https://www.govinfo.gov/link/uscode/16/1331?type=usc&year=mostrecent&link-type=html>) et seq.); the Rivers and Harbors Act of 1899 (33 U.S.C. 403 (<https://www.govinfo.gov/link/uscode/33/403?type=usc&year=mostrecent&link-type=html>)); the National Park Service Organic Act and the National Park Service General Authorities Act (Pub. L. 64-235, 39 Stat. 535 (Aug. 25, 1916) and Public Law 91-383, 84 Stat. 825 (Aug. 18, 1970) as amended, repealed, or replaced by Public Law 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>), 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 1 (<https://www.govinfo.gov/link/uscode/16/1?type=usc&year=mostrecent&link-type=html>), 2-4 and 16 U.S.C. 1 (<https://www.govinfo.gov/link/uscode/16/1?type=usc&year=mostrecent&link-type=html>)a-1 et seq., now

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codified at 54 U.S.C. 100101 (<https://www.govinfo.gov/link/uscode/54/100101?type=usc&year=mostrecent&link-type=html>)-100102, 54 U.S.C. 100301 (<https://www.govinfo.gov/link/uscode/54/100301?type=usc&year=mostrecent&link-type=html>)-100303, 54 U.S.C. 100501 (<https://www.govinfo.gov/link/uscode/54/100501?type=usc&year=mostrecent&link-type=html>)-100507, 54 U.S.C. 100701 (<https://www.govinfo.gov/link/uscode/54/100701?type=usc&year=mostrecent&link-type=html>)-100707, 54 U.S.C. 100721 (<https://www.govinfo.gov/link/uscode/54/100721?type=usc&year=mostrecent&link-type=html>)-100725, 54 U.S.C. 100751 (<https://www.govinfo.gov/link/uscode/54/100751?type=usc&year=mostrecent&link-type=html>)-100755, 54 U.S.C. 100901 (<https://www.govinfo.gov/link/uscode/54/100901?type=usc&year=mostrecent&link-type=html>)-100906, 54 U.S.C. 102101 (<https://www.govinfo.gov/link/uscode/54/102101?type=usc&year=mostrecent&link-type=html>)-102102); Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625, 92 Stat. 3467 (Nov. 10, 1978)); 50 Stat. 1827 (April 13, 1937); Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628, 104 Stat. 4469 (Nov. 28, 1990)); Arizona-Idaho Conservation Act of 1988 (Pub. L. 100-696, 102 Stat. 4571 (Nov. 18, 1988)) (16 U.S.C. 460 (<https://www.govinfo.gov/link/uscode/16/460?type=usc&year=mostrecent&link-type=html>)); 16 U.S.C. 450 (<https://www.govinfo.gov/link/uscode/16/450?type=usc&year=mostrecent&link-type=html>)y (Pub. L. 77-216, 55 Stat. 630 (Aug. 18, 1941), as amended by Public Law 82-478, 66 Stat. 510 (July 9, 1952)); 67 Stat. c18 (Nov. 5, 1952); National Forest Management Act of 1976 (16 U.S.C. 1600 (<https://www.govinfo.gov/link/uscode/16/1600?type=usc&year=mostrecent&link-type=html>) *et seq.*); Multiple-Use and Sustained-Yield Act of 1960 (16 U.S.C. 528 (<https://www.govinfo.gov/link/uscode/16/528?type=usc&year=mostrecent&link-type=html>)-531); the Eagle Protection Act (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>) *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 (<https://www.govinfo.gov/link/uscode/25/3001?type=usc&year=mostrecent&link-type=html>) *et seq.*); and the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://www.govinfo.gov/link/uscode/42/1996?type=usc&year=mostrecent&link-type=html>)).

This waiver does not revoke or supersede the previous waivers published in the **Federal Register** on October 26, 2007 (72 FR 60870 (/citation/72-FR-60870)), and April 8, 2008 (73 FR 19078 (/citation/73-FR-19078)), which shall remain in full force and effect in accordance with their terms. I reserve the authority to execute further waivers from time to time as I may determine to be necessary under section 102 of IIRIRA.

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

[FR Doc. 2019-10079 (/a/2019-10079) Filed 5-14-19; 8:45 am]

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LEGAL STATUS

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LEGAL STATUS

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

A Notice by the [Homeland Security Department](#) on 08/30/2019

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ENHANCED CONTENT



Docket Number:

DHS-2019-0048 (<https://beta.regulations.gov/docket/DHS-2019-0048>)

ENHANCED CONTENT

PUBLISHED DOCUMENT

AGENCY:

Office of the Secretary, Department of Homeland Security.

ACTION:

Notice of determination.

SUMMARY:

The Acting Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations, and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border in Hidalgo County, Texas and Starr County, Texas.

DATES:

This determination takes effect on August 30, 2019.

SUPPLEMENTARY INFORMATION:

Important missions of the Department of Homeland Security ("DHS") include border security and the detection and prevention of illegal entry into the United States. Border security is critical to the nation's national security. Recognizing the critical importance of border security, Congress has mandated DHS to achieve and maintain operational control of the international land border. Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), § 2, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/8/1701?type=usc&year=mostrecent&link-type=html>) note). Congress defined "operational control" as the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. *Id.* Consistent with that mandate from Congress, the President's Executive Order on Border Security and Immigration Enforcement Improvements directed executive departments and agencies to deploy all lawful means to secure the southern border. Executive Order 13767, ([/executive-order/13767](https://www.govinfo.gov/link/EO/13767)) § 1. In order to achieve that end, the President directed, among other

things, that I take immediate steps to prevent all unlawful entries into the United States, including the immediate construction of physical infrastructure to prevent illegal entry. Executive Order 13767, (/executive-order/13767) § 4(a).

Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out DHS's border security mission. One of those authorities is section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("IIRIRA"). Public Law 104-208 (<https://www.govinfo.gov/link/plaw/104/public/208?link-type=html>), Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. § 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13 (<https://www.govinfo.gov/link/plaw/109/public/13?link-type=html>), Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Secure Fence Act of 2006, Public Law 109-367 (<https://www.govinfo.gov/link/plaw/109/public/367?link-type=html>), § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 (<https://www.govinfo.gov/link/uscode/8/1103?type=usc&year=mostrecent&link-type=html>) note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161 (<https://www.govinfo.gov/link/plaw/110/public/161?link-type=html>), Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress mandated the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

Determination and Waiver

Section 1

The United States Border Patrol's (Border Patrol) Rio Grande Valley Sector is an area of high illegal entry. In fiscal year 2018 alone, the Border Patrol apprehended over 162,000 illegal aliens attempting to enter the United States between border crossings in the Rio Grande Valley Sector. In that same year, the Border Patrol had over 1,400 separate drug-related events between border crossings in the Rio Grande Valley Sector, through which it seized over 204,000 pounds of marijuana, over 1,850 pounds of cocaine, over 16 pounds of heroin, and over 750 pounds of methamphetamine.

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Owing to the high levels of illegal entry within the Rio Grande Valley Sector, I must use my authority under section 102 of IIRIRA to install additional physical barriers and roads in the Rio Grande Valley Sector. Therefore, DHS will take immediate action to construct barriers and roads. The areas in the vicinity of the border within which such construction will occur are more specifically described in Section 2 below. Such areas are not located within any of the areas identified in sections 231 and 232(c) of title II of division A of the Fiscal Year 2019 DHS Appropriations Act. See Public Law 116-6 (<https://www.govinfo.gov/link/plaw/116/public/6?link-type=html>), Div. A, Title II, §§ 231-232.

Section 2

I determine that the following areas in the vicinity of the United States border, located in the State of Texas within the Border Patrol's Rio Grande Valley Sector, are areas of high illegal entry (the "project areas"):

- Starting approximately one-quarter (0.25) of a mile northwest of the intersection of South Conway Street (also known as La Lomita Boulevard) and the International Boundary and Water Commission (IBWC) levee and extending southeast along the IBWC levee to the northwest boundary of the La Lomita Historical Park, which is also the intersection of East Chimney Road and the IBWC levee.
- Starting at the southeast boundary of the La Lomita Historical Park and extending southeast along the levee to the point where the levee ends at South Depot Road.
- Starting at a point that is approximately six hundred and twenty (620) feet northwest of the intersection of South Depot Road and State Highway 115, and extending south along the levee for approximately one (1) mile.
- Starting at a point on the IBWC levee that is approximately one-quarter (0.25) of a mile south and west of the point at which South 15th Street ends near Carlson Lake, and then extending east along the northern shore of Carlson Lake and continuing east along Doffin Canal Road to the western boundary of the Santa Ana National Wildlife Refuge.
- Starting at the eastern boundary of the La Coma Tract of the Lower Rio Grande Valley National Wildlife Refuge and extending west along the IBWC levee for approximately one-tenth (0.10) of a mile.
- Starting outside the city limits of Rio Grande City, Texas, at a point approximately two hundred and fifteen (215) feet southeast of the location where the international bridge at the Rio Grande City port of entry begins to cross the Rio Grande River and extending south and east along the Rio Grande River for approximately sixth-tenths (0.60) of a mile.
- Starting outside the city limits of La Grulla, Texas, at a point approximately three hundred and forty (340) feet northwest of the intersection of Mission Street and West Private Lazaro Solis Street and extending northwest for approximately one (1) mile.
- Starting outside the city limits of La Grulla, Texas, at a point approximately two-tenths (0.20) of a mile southeast of the intersection of East Private Lazaro Solis Street and El Sol Drive and extending east for approximately two and four-tenths (2.40) miles.

There is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project areas pursuant to sections 102(a) and 102(b) of IIRIRA. In order to ensure the expeditious construction of the barriers and roads in the project areas, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of IIRIRA.

Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers (including, but not limited to, accessing the project areas, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, safety features, lighting, cameras, and sensors) in the project areas, all of the following statutes, including all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the following statutes, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 (<https://www.govinfo.gov/link/uscode/42/4321?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 (<https://www.govinfo.gov/link/uscode/16/1531?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 (<https://www.govinfo.gov/link/uscode/33/1251?type=usc&year=mostrecent&link-type=html>) *et seq.*)); the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), as amended, repealed, or replaced by Public Law 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>), 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>) *et seq.*, now codified at 54 U.S.C. 100101 (<https://www.govinfo.gov/link/uscode/54/100101?type=usc&year=mostrecent&link-type=html>) note and 54 U.S.C. 300101 (<https://www.govinfo.gov/link/uscode/54/300101?type=usc&year=mostrecent&link-type=html>)).

type=html) et seq.); the Migratory Bird Treaty Act (16 U.S.C. 703 (<https://www.govinfo.gov/link/uscode/16/703?type=usc&year=mostrecent&link-type=html>) et seq.); the Migratory Bird Conservation Act (16 U.S.C. 715 (<https://www.govinfo.gov/link/uscode/16/715?type=usc&year=mostrecent&link-type=html>) et seq.); the Clean Air Act (42 U.S.C. 7401 (<https://www.govinfo.gov/link/uscode/42/7401?type=usc&year=mostrecent&link-type=html>) et seq.); the Archeological Resources Protection Act (Pub. L. 96-95, 93 Stat. 721 (Oct. 31, 1979) (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>))aa et seq.); the Paleontological Resources Preservation Act (16 U.S.C. 470 (<https://www.govinfo.gov/link/uscode/16/470?type=usc&year=mostrecent&link-type=html>))aaa et seq.); the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 (<https://www.govinfo.gov/link/uscode/16/4301?type=usc&year=mostrecent&link-type=html>) et seq.); the Safe Drinking Water Act (42 U.S.C. 300 (<https://www.govinfo.gov/link/uscode/42/300?type=usc&year=mostrecent&link-type=html>)f et seq.); the Noise Control Act (42 U.S.C. 4901 (<https://www.govinfo.gov/link/uscode/42/4901?type=usc&year=mostrecent&link-type=html>) et seq.); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 (<https://www.govinfo.gov/link/uscode/42/6901?type=usc&year=mostrecent&link-type=html>) et seq.); the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 (<https://www.govinfo.gov/link/uscode/42/9601?type=usc&year=mostrecent&link-type=html>) et seq.); the Archaeological and Historic Preservation Act (Pub. L. 86-523, 74 Stat. 220 (June 27, 1960) as amended, repealed, or replaced by Public Law 113-287 (<https://www.govinfo.gov/link/plaw/113/public/287?link-type=html>), 128 Stat. 3094 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 (<https://www.govinfo.gov/link/uscode/16/469?type=usc&year=mostrecent&link-type=html>) et seq., now codified at 54 U.S.C. 312502 (<https://www.govinfo.gov/link/uscode/54/312502?type=usc&year=mostrecent&link-type=html>) et seq.); the Antiquities Act (formerly codified at 16 U.S.C. 431 (<https://www.govinfo.gov/link/uscode/16/431?type=usc&year=mostrecent&link-type=html>) et seq., now codified 54 U.S.C. 320301 (<https://www.govinfo.gov/link/uscode/54/320301?type=usc&year=mostrecent&link-type=html>) et seq.); the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 (<https://www.govinfo.gov/link/uscode/16/461?type=usc&year=mostrecent&link-type=html>) et seq., now codified at 54 U.S.C. 3201 (<https://www.govinfo.gov/link/uscode/54/3201?type=usc&year=mostrecent&link-type=html>)-320303 & 320101-320106); the Farmland Protection Policy Act (7 U.S.C. 4201 (<https://www.govinfo.gov/link/uscode/7/4201?type=usc&year=mostrecent&link-type=html>) et seq.); the Federal Land Policy and Management Act (Pub. L. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (43 U.S.C. 1701 (<https://www.govinfo.gov/link/uscode/43/1701?type=usc&year=mostrecent&link-type=html>) et seq.); the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 80 Stat. 926 (Oct. 15, 1966) (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>))dd-668ee); National Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 70 Stat. 1119 (Aug. 8, 1956) (16 U.S.C. 742 (<https://www.govinfo.gov/link/uscode/16/742?type=usc&year=mostrecent&link-type=html>))a, et seq.); the Fish and Wildlife Coordination Act (Pub. L. 73-121, 48 Stat. 401 (March 10, 1934) (16 U.S.C. 661 (<https://www.govinfo.gov/link/uscode/16/661?type=usc&year=mostrecent&link-type=html>) et seq.); the National Trails System Act (16 U.S.C. 1241 (<https://www.govinfo.gov/link/uscode/16/1241?type=usc&year=mostrecent&link-type=html>) et seq.); the Administrative Procedure Act (5 U.S.C. 551 (<https://www.govinfo.gov/link/uscode/5/551?type=usc&year=mostrecent&link-type=html>) et seq.); the Rivers and Harbors Act of 1899 (33 U.S.C. 403 (<https://www.govinfo.gov/link/uscode/33/403?type=usc&year=mostrecent&link-type=html>)); the Eagle Protection Act (16 U.S.C. 668 (<https://www.govinfo.gov/link/uscode/16/668?type=usc&year=mostrecent&link-type=html>) et seq.); the Native American Graves Protection and

Repatriation Act (25 U.S.C. 3001 (<https://www.govinfo.gov/link/uscode/25/3001?type=usc&year=mostrecent&link-type=html>) *et seq.*); and the American Indian Religious Freedom Act (42 U.S.C. 1996 (<https://www.govinfo.gov/link/uscode/42/1996?type=usc&year=mostrecent&link-type=html>)).

This waiver does not revoke or supersede the previous waivers published in the **Federal Register** on April 8, 2008 (73 FR 19077 (/citation/73-FR-19077)) and 73 FR 19078 (/citation/73-FR-19078)), and October 11, 2018 (83 FR 51472), which shall remain in full force and effect in accordance with their respective terms. I reserve the authority to execute further waivers from time to time as I may determine to be necessary under section 102 of IIRIRA.

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Dated: August 26, 2019.

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

[FR Doc. 2019-18846 (/a/2019-18846) Filed 8-29-19; 8:45 am]

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