

Calendar No. 243

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-150

ARIZONA BORDERLANDS PROTECTION AND
PRESERVATION ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
WITH ADDITIONAL VIEWS

TO ACCOMPANY

S. 750

TO ACHIEVE BORDER SECURITY ON CERTAIN FEDERAL LANDS
ALONG THE SOUTHERN BORDER



OCTOBER 1, 2015.—Ordered to be printed

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OCTOBER 1, 2015.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 750]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 750) to achieve border security on certain Federal lands along the Southern border, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 750, the Arizona Borderlands Protection and Preservation Act, is to enhance border security on certain Federal lands along the southwest border. This bill seeks to provide U.S. Customs and Border Protection (CBP) personnel with faster access

to Federal lands in the Tucson and Yuma Border Patrol sectors for border security activities, including routine motorized patrols and the deployment of communications, surveillance, and detection equipment. The bill also requires the Government Accountability Office (GAO) to conduct a review and complete a report considering how this access has affected border security activities and the natural, cultural, and historic resources of Federal and Indian lands, as well as a sector-by-sector analysis of the probable impact if such access was expanded to other sectors.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Various Federal land agencies have different missions, guidelines, and management plans regarding CBP access to Federal land under their respective jurisdictions, which has historically slowed or impeded some efforts by CBP—or its predecessor agency—to conduct border security operations on such land.¹ Border Patrol agents can generally enter Federal lands in “hot pursuit” of suspected illegal entrants, but typically need permission for activities such as routine patrols, road building or to install surveillance equipment.²

In 2006, in an attempt to resolve ongoing conflicts between Federal land managers and CBP over access to Federal lands, the U.S. Department of Homeland Security (DHS), the U.S. Department of the Interior (DOI), and the U.S. Department of Agriculture (USDA) entered into a Memorandum of Understanding (MOU) concerning border security operations on Federal lands.³ However, as discussed further below, some Border Patrol agents-in-charge believe the MOU continues to allow for undue delays and impediments for routine access that threaten the security of our border.⁴ This bill seeks to provide Border Patrol with prompt access to Federal lands in the Tucson and Yuma Border Patrol sectors for a range of activities. The bill would remove or limit the authority of Federal land managers at USDA and DOI to conduct certain reviews or set conditions related to CBP access to Federal lands. While CBP would remain subject to the mandates of the National Environmental Policy Act (NEPA), the Wilderness Act, the Endangered Species Act, and any other environmental or cultural protection law, CBP personnel will now have immediate access to Federal lands for border security activities.

A. APPLICATION TO THE WILDERNESS ACT

Section 4(c) of the Wilderness Act prohibits the construction of temporary roads or the use of motorized vehicles or equipment within a congressionally-designated “Wilderness Area,” except in

¹ E.g., GOV’T ACCOUNTABILITY OFFICE, GAO-11-38, SOUTHWEST BORDER: MORE TIMELY BORDER PATROL ACCESS AND TRAINING COULD IMPROVE SECURITY OPERATIONS AND NATURAL RESOURCE PROTECTION ON FEDERAL LANDS 22 (2010) [hereinafter 2010 GAO REPORT], available at <http://www.gao.gov/new.items/d1138.pdf> (“Patrol agents-in-charge of 17 of 26 stations along the southwestern border reported that they have experienced delays and restrictions in patrolling and monitoring portions of federal lands because of various land management laws.”).

² See Memorandum of Understanding Among U.S. Department of Homeland Security and U.S. Department of the Interior and U.S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Border 6 (2006) [hereinafter 2006 Memorandum of Understanding].

³ *Id.*

⁴ 2010 GAO REPORT, *supra* note 1, at 22–33.

emergency situations involving health and safety.⁵ The 2006 MOU makes clear that CBP can use vehicles inside a Wilderness Area routinely, but such access is limited to pre-approved administrative roads.⁶ The MOU permits off-road access inside a Wilderness Area only in emergency circumstances or after a written request and agreement with the relevant land manager, subject to terms and conditions that the land manager may require.⁷ If a dispute persists, the MOU outlines a process for line officers to elevate the matter to regional and national managers for resolution, if necessary.⁸

In 2010, the GAO reviewed this issue and found that even with the 2006 MOU in place, the patrol agents-in-charge at three key CBP stations reported that the Wilderness Act continues to hamper their agents' abilities to access portions of Federal land.⁹ GAO also found examples of the U.S. Forest Service requiring, as a condition for access, that CBP fund a portion of its road maintenance needs.¹⁰

In 2014, CBP, in its Fiscal Year 2014 Arizona Corridor Campaign Plan, cited vehicular access as an impediment to securing the border, stating:

[T]he vast and remote area of the Cabeza Prieta National Wildlife Refuge and Organ Pipe National Monument aids criminals in their efforts to avoid law enforcement personnel. The National Park Service has restricted vehicular traffic in these areas, citing wildlife preservation and environmental reasons. Agents are forced to take long detours, severely impacting response times, as well as crippling effectiveness. Ajo Station uses the Horse Patrol Unit to work in these restricted areas. The generally flat terrain facilitates rapid travel for illicit activities.¹¹

S. 750 will ensure that DOI and USDA cannot delay or specify the terms and conditions under which CBP can conduct border security operations inside Wilderness Areas within the specified portions of the Tucson and Yuma Border Patrol sectors.

B. APPLICATION TO ENVIRONMENTAL AND HISTORIC PRESERVATION ACTS

Before land managers can grant permission for temporary road construction or installing surveillance equipment, they must complete environmental and historic property assessments, as required by the National Environment Policy Act (NEPA)¹² and the National Historic Preservation Act (NHPA).¹³ Reliance on Federal land managers to complete these assessments can create delays that compromise border security.

A 2011 GAO Report entitled *Southwest Border: Border Patrol Operations on Federal Lands* (the 2011 GAO Report) found that 14

⁵ 16 U.S.C. §§ 1131–1136(4)(c) (2014).

⁶ 2006 Memorandum of Understanding, *supra* note 2, at 4–5.

⁷ *Id.* at 5.

⁸ *Id.* at 3.

⁹ 2010 GAO REPORT, *supra* note 1, at 28.

¹⁰ *Id.* at 20.

¹¹ U.S. CUSTOMS AND BORDER PROTECTION, FISCAL YEAR 2014 ARIZONA CORRIDOR CAMPAIGN PLAN, JOINT FIELD COMMAND 83–84 (2013).

¹² 42 U.S.C. § 4321 *et seq.* (Pub. L. No. 91–190).

¹³ 16 U.S.C. § 470 (Pub. L. No. 89–665).

of the 26 Border Patrol stations along the southwest border report interruptions in operations because of the time it took land managers to complete NEPA and NHPA assessments.¹⁴

GAO provided one example where CBP waited four months for land managers to approve the relocation of a mobile surveillance system to a different location.¹⁵ By the time the land manager completed the NEPA and NHPA assessments, the illegal traffic had shifted to another area.¹⁶ Moreover, during this delay, CBP had limited ability to detect undocumented aliens within a seven-mile range that could have been covered by the mobile surveillance system.¹⁷ GAO concluded that the particular Federal land management unit had limited staff and resources which delayed the CBP request.¹⁸

Under NEPA, a Federal agency is required to consider and publicly disclose significant environmental impacts of a proposed agency action and evaluate alternatives.¹⁹ In some cases, it is determined that an Environmental Impact Statement (EIS) is required, meaning the agency believes there will be a significant environmental impact that warrants greater study.²⁰ An EIS can take years, many work hours, and millions of dollars depending on the level of analysis and the potential for, or realized litigation by, environmental groups.²¹

In addition, when a Federal project involves multiple Federal agencies, a secondary agency may be elevated in the NEPA process to one of the following statuses: (1) joint lead agency, where the second Federal agency shares the lead agency's responsibility for management of the NEPA process, including public involvement and drafting documents; or (2) cooperating agency, in which the second Federal agency has jurisdiction by law or special expertise, and wants a decision-making role in the NEPA process.²²

Under S. 750, DOI and USDA could no longer assert itself as the lead, joint, or cooperating agency in a NEPA analysis related to border security activities. Instead, CBP would perform environmental and other clearances, but would not be precluded from setting its own terms and conditions for inviting DOI and USDA to serve as a cooperating or joint lead agency.

C. APPLICATION TO THE ENDANGERED SPECIES ACT

Under Section 7 of the Endangered Species Act (ESA), CBP must consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that border security operations do not jeopardize endangered species.²³ This process is commonly referred to as "Section 7 consulta-

¹⁴ Gov't Accountability Office, GAO-11-573T, *SOUTHWEST BORDER: BORDER PATROL OPERATIONS ON FEDERAL LANDS 10* (2011), available at <http://www.gao.gov/assets/130/126072.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 10-11.

¹⁹ U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, H-1790-1, *NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK 2* (2008) [Hereinafter NEPA HANDBOOK].

²⁰ *Id.*

²¹ See Gov't Accountability Office, GAO-14-369, *NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES* (2014), available at <http://www.gao.gov/assets/670/662546.pdf>.

²² NEPA Handbook, *supra* note 19, at 111-12.

²³ 16 U.S.C. § 1536 (Pub. L. No. 93-205).

tion.”²⁴ Adding land managers to the consultation process can impair border security activities.

The 2011 GAO Report found that five Border Patrol stations reported that prolonged Section 7 consultation has changed the timing and location of ground and air patrols due to the presence of sensitive endangered species.²⁵ GAO cited one example of a land manager padlocking gates to roads located inside San Bernardino National Wildlife Refuge because the road crosses a portion of an endangered species habitat.²⁶ The gates are only opened on a case-by-case basis at the discretion of the land manager.²⁷ By contrast, the Bureau of Land Management grants the CBP routine access, provided that CBP directly engages in Section 7 consultation with USFWS.²⁸

Under S. 750, the CBP must still comply with the ESA and participate in recovery plans. Informal and formal Section 7 consultation would occur directly between CBP and USFWS but would not involve the land manager.

D. APPLICATION TO USE PERMITS AND AUTHORIZATIONS

In general, CBP must obtain permission or a permit from Federal land management agencies before building temporary roads or installing surveillance equipment on Federal lands. In 2010, GAO found that “patrol agents-in-charge for 14 of the 17 stations reported that they have been unable to obtain a permit or permission to access certain areas in a timely manner because of how long it takes for land managers to conduct required environmental and historic property assessments.”²⁹

GAO noted that while the 2006 MOU helped to advance cooperation between the agencies in some cases, “such cooperation has not always occurred.”³⁰ For example, GAO cited a case where CBP needed to improve a road to allow a truck to move an underground sensor, but the Federal land agency took eight months performing a historic property assessment.³¹

Under S. 750, DOI and USDA could not require the CBP to obtain a Special Use Permit for border security activities that require access to Federal land.

E. APPLICATION TO TRIBAL CONSULTATION AND NATIVE AMERICAN LANDS

Issues concerning tribal government consultation and access to Indian lands were not directly reviewed in the 2010 or 2011 GAO Reports. In general, CBP is required to consult with Indian tribes on border security operations on Indian lands under Section 106 of the NHPA³² and Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments).³³

²⁴ U.S. FISH AND WILDLIFE SERVICE, SECTION 7 CONSULTATION, available at <http://www.fws.gov/Midwest/Endangered/section7/section7.html>.

²⁵ 2010 GAO REPORT, *supra* note 1, at 31.

²⁶ *Id.* at 32–33.

²⁷ *Id.*

²⁸ *Id.* at 38 n.31.

²⁹ *Id.* at 22.

³⁰ *Id.* at 23.

³¹ *Id.* at 24.

³²

³³

Under S. 750, CBP must still comply with existing tribal consultation policies under NHPA and Executive Order 13175.

III. LEGISLATIVE HISTORY

Senators John McCain and Jeff Flake introduced S. 750 on March 17, 2015, and the bill was referred to the Committee on Homeland Security and Governmental Affairs on March 17, 2015. The Committee considered S. 750 at a business meeting on May 6, 2015.

During the business meeting, Senator McCain offered a substitute amendment that clarified that S. 750 applied to CBP activities in the Tucson and Yuma sectors within 100-miles from the border with Mexico, included a provision that the Secretary of Homeland Security shall make efforts to protect the natural and cultural resources on Federal lands, and made a technical correction. The McCain Substitute Amendment was adopted by unanimous consent with Senators Johnson, McCain, Portman, Lankford, Ayotte, Ernst, Sasse, Carper, Tester, Baldwin, Heitkamp, and Peters present.

Senators Heidi Heitkamp and Tom Carper also offered an amendment during the business meeting. The proposed Heitkamp-Carper amendment would: sunset the increased access to Federal lands in four years; require GAO to complete a comprehensive report that would describe the impact of the increased access, make recommendations on how best to improve the existing MOUs between DHS, DOI, and USDA, and analyze the need for increased access across the entire U.S. land border; and strike the bill's definition of "border security."

After significant debate on the amendment by the Members, particularly with regard to the definition of "border security," Senators Heitkamp and Carper agreed to modify their amendment. The modified amendment retained the four-year sunset originally proposed, but modified the required GAO report and amended, rather than deleted, the definition of "border security." The Committee adopted the Heitkamp-Carper amendment as modified by voice vote, with Senators Johnson, McCain, Portman, Lankford, Ernst, Sasse, Carper, Tester, Baldwin, Heitkamp, and Peters present. Senator Tester was recorded as voting "no." The Committee ordered the bill reported favorably, as amended by the McCain Substitute Amendment and the Heitkamp-Carper Amendment as modified, by voice vote, with Senators Johnson, McCain, Portman, Lankford, Ernst, Sasse, Carper, Tester, Baldwin, Heitkamp, and Peters present.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section provides the bill's short title, the "Arizona Borderlands Protection and Preservation Act."

Section 2. Definitions

This section defines "border security" as "the functioning and operational capability to conduct continuous and integrated manned or unmanned monitoring, sensing, or surveillance of 100 percent of Southern border mileage within the Tucson and Yuma sectors or the immediate vicinity of the Southern border within the

Tucson and Yuma Sectors; and the apprehension or turn back of illegal entries across the Southern border in the Tucson and Yuma sectors.”

This section also defines “Federal lands” to be those lands within 100 miles of the international border between the United States and Mexico that are within the Tucson and Yuma sectors.

Section 3. Support for border security needs

Subsection (a) requires the Secretaries of Agriculture and the Interior to provide CBP personnel with immediate access to Federal lands for border security activities including routine motorized patrols and the deployment of communications, surveillance, and detection equipment. The Secretary of the Interior and/or Secretary of Agriculture may provide CBP personnel training on the natural and cultural resources on Federal lands. Outside of border security activities, CBP must continue to comply with existing laws with respect to environmental reviews or other requirements.

In conducting these border security activities, CBP personnel must also take steps, the maximum extent practicable, to protect natural and cultural resources.

This subsection does not apply to any private or state-owned land and will sunset four years after the date of enactment.

Section 4. Report

Not later than 90 days before the four-year sunset, GAO shall submit a report to the appropriate congressional committees that includes: an analysis of the effectiveness and impact of such access on border security activities and the natural and cultural resources on impacted Federal lands; an assessment of the 2006 MOU; and a sector-by-sector analysis of the expected impact of applying the requirements of the bill to the entire land border of the United States, as well as the impact of illegal traffic on wildlife and natural, cultural, and historic resources on Federal lands.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 15, 2015.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 750, the Arizona Borderlands Protection and Preservation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Jeff LaFave and Mark Grabowicz.

Sincerely,

KEITH HALL.

Enclosure.

S. 750—Arizona Borderlands Protection and Preservation Act

Based on information provided by the affected agencies, CBO estimates that implementing S. 750 would cost \$1 million over the 2016–2019 period, assuming the availability of appropriated funds. Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

The bill would require the Secretaries of Agriculture and the Interior to grant Customs and Border Protection (CBP) personnel immediate access to federal lands in Arizona within 100 miles of the United States-Mexico border. That requirement would end four years after enactment of the legislation. The bill also would authorize the Secretaries to provide education and training to CBP personnel related to natural and cultural resources in the affected areas. Finally, the bill would require the Government Accountability Office (GAO) to study the effectiveness of actions taken under the bill and the effects of illegal human traffic on natural, cultural, and historic resources on federal lands.

An existing memorandum of understanding between the affected agencies allows CBP personnel access to the affected federal lands and provides for certain training activities involving those agencies. Thus, CBO estimates that carrying out activities required under the bill that directly relate to border enforcement would have a minimal effect on the operations of the affected agencies and would not affect the federal budget.

Based on information regarding the cost of similar activities and assuming the availability of appropriated funds, CBO estimates that GAO would spend \$1 million over the 2016–2019 period to conduct the study required under the bill. Those amounts would be used to cover personnel and travel costs associated with the study.

S. 750 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contacts for this estimate are Jeff LaFave and Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.

VIII. ADDITIONAL VIEWS

ADDITIONAL VIEWS ON S. 750 FILED BY SEN. HEITKAMP

The Federal government has a unique trust responsibility, treaty obligations, and other requirements it must uphold when interacting with our nation's Indian tribes—in particular, as it concerns Federal laws or regulations that could or will impact Indian lands. These obligations and responsibilities do not cease or change from state-to-state. They guide any federal interaction with tribes or proposed actions that could impact Indian tribes or Indian lands—regardless of location. It is imperative the Federal government's fiduciary responsibility to tribes, which is built on the government-to-government relationship and respect for tribal sovereignty, is not only maintained and protected, but strengthened through mechanisms such as ongoing, timely and meaningful tribal consultation. As such, the Senate must always carefully consider anything that could diminish the federal responsibility or impinge upon a tribe's sovereign rights.

The committee report accompanying S. 750 is misleading in its discussion of how S. 750 does or could impact U.S. Customs and Border Protection (CBP) access to Indian lands—and does not adequately address meaningful consultation requirements in relation to access to Indian lands. Section 3 of S. 750—the portion of the bill addressing CBP access to Federal lands—does not apply to Indian lands. As such, Section II(E) of the Committee Report is not applicable to CBP access to Indian lands, and thus, shall extend no additional rights to any agency of the Federal government that would look to gain access to Indian lands under S. 750 and should not be misconstrued as reflecting the understanding of all Committee members who considered this bill.

Section 2 of S. 750 is the definitions section of the bill and defines several terms in the underlying bill—including “Federal lands.” It defines “Federal lands” as “all land under the control of the Secretary concerned . . .” with the “Secretary concerned” defined to include both the Secretaries of Agriculture and Interior. A cursory search of legislation would show that if legislation is intended to include Indian lands, then the term “Indian lands” will be explicitly referenced in the plain language of the legislation—and oftentimes further defined in a definitions section. The term “Indian lands” is not defined in Section 2 of S. 750, nor is it explicitly used anywhere in Section 3 of the bill when discussing lands to which this Section will apply. If Section 3 was meant to include access to Indian lands, the term would have been explicitly used and/or defined in the appropriate sections. I therefore find that no reasonable reading of Section 3 of S. 750 would find that Indian

lands were meant—or are—to be included in lands for which Section 3 is applicable.

Section 4 of S. 750 offers additional clarity in this matter. In the requirement to do a sector-by-sector analysis of the impact of increased access for CBP border security activities, there is a clear statement that GAO should analyze how these activities would impact natural, cultural and historic resources on Federal and Indian lands. Section 4 clearly demonstrates that the drafters of this bill understand the need to explicitly identify Indian lands as unique and distinct when delineating which lands this Section is applicable, demonstrating a clear distinction between Federal and Indian lands. This plain reading of the legislative language suggests that no reasonable reading of this bill could be seen to include Indian lands within the definition of “Federal lands” in Section 2 or that Section 3 would be applicable to Indian lands. As a further note, the “Purpose and Summary” section of the committee report also references only Federal lands—thereby also failing to illustrate an explicit intent for Indian lands to be a necessary focus of the underlying bill.

I would not support S. 750 if Section 3 of the bill—providing CBP immediate and increased access to Federal lands—was construed to include Indian lands. This would be an affront to tribal sovereignty and the ability of the Federal Government to uphold its trust responsibility to Indian tribes. This bill does not provide such access to Indian lands as currently written. As such, it was necessary I clarify and emphasize that point.

HEIDI HEITKAMP.

ADDITIONAL VIEWS ON S. 750 FILED BY SENATOR TESTER

In order to ensure the security or trade and migration into the United States, interagency cooperation is a key component. In order to better facilitate a cooperative environment that allows law enforcement agencies along the United States border, a 2006 memorandum of understanding (MOU)¹ was reached between the Secretaries of Homeland Security, the Interior, and Agriculture, in order to provide uniform principles that guide their respective agencies' activities on Federal lands. While not perfect, this guidance has provided a useful means by which U.S. Border Patrol is enabled access to public lands for law enforcement purposes—by-and-large without delay.

The committee report for S. 750 uses Government Accountability Office (GAO) reports to provide justification for the bill. For example, on pages 4 and 5 of the committee report, the Endangered Species Act (ESA) is cited as impeding timely access for Border Patrol agents by stating that: “The 2011 GAO Report² found that five Border Patrol stations reported that prolonged Section 7 consultation has changed the timing and location of ground and air patrols due to the presence of sensitive endangered species.” Yet, a GAO report upon which this report (testimony) is based, later states that “although some delays and restrictions have occurred, Border Patrol agents were generally able to adjust their patrols with little loss of effectiveness in their patrol operations.”³ Further, the committee report omits mention of the 2010 GAO findings that: “Although 4 agents-in-charge reported that delays and restrictions have affected their ability to achieve or maintain operational control, they either have not requested resources for increased or timelier access or have had their requests denied by senior Border Patrol officials, who said that other needs were more important.”⁴

Moreover, the committee report cites the example from the same GAO report of a land manager padlocking gates to roads located inside San Bernardino National Wildlife Refuge because the road crosses a portion of an endangered species habitat. The GAO report, however, says, “The patrol agent-in-charge told us that Bor-

¹Memorandum of Understanding Among U.S. Department of Homeland Security and U.S. Department of the Interior and U.S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States' Border 6 (2006).

²This is a misattribution. This is in fact, testimony of Anu Mittal, Director of Natural Resources and Environment, GOVERNMENT ACCOUNTABILITY OFFICE BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS, AND PUBLIC LANDS, COMMITTEE ON NATURAL RESOURCES, AND THE SUBCOMMITTEE ON NATIONAL SECURITY, HOMELAND DEFENSE, AND FOREIGN OPERATIONS, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, APRIL 15, 2011. TEXT IS AVAILABLE AT <http://www.gao.gov/assets/130/126072.pdf>.

³GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-38, SOUTHWEST BORDER: MORE TIMELY BORDER PATROL ACCESS AND TRAINING COULD IMPROVE SECURITY OPERATIONS AND NATURAL RESOURCE PROTECTION ON FEDERAL LANDS 22 (2010), available at <http://www.gao.gov/new.items/d1138.pdf>.

⁴Ibid Ppg. 34.

der Patrol and the refuge manager agreed to place Border Patrol locks on refuge gates and to allow second-level Border Patrol supervisors, on a case-by-case basis, to determine whether vehicle access to the refuge is critical. If such a determination is made, a Border Patrol supervisor unlocks the gate and contacts refuge staff to inform them that access was granted through a specific gate. The patrol agent-in-charge told us that operational control has not been affected by these conditions for vehicle access.”⁵

Additionally, the report language confuses the application of current law. The report states that the bill would:

- “Remove or limit the authority of United States Department of Agriculture (USDA) and Department of the Interior (DOI) land managers to conduct certain reviews or set conditions;
- U.S. Customs and Border Protection (CBP) would remain subject to the mandates of the National Environmental Policy Act (NEPA), the ESA, the Wilderness Act and all other environmental or cultural protection laws but would have immediate access to federal lands;
- Ensure that DOI and USDA cannot delay or specify the terms and conditions under which CBP can operate inside wilderness areas;
- Prohibit DOI and USDA from asserting itself as a lead, joint lead or cooperating agency under NEPA;
- Require CBP to still comply with the ESA and participate in recovery plans and participate in informal and formal Section 7 consultation but without the participation of the land manager;
- Would prohibit DOI and USDA from requiring CBP to obtain a special use permit for infrastructure.”

It is difficult to infer the drafters’ intent of this language, but it appears to exclude DOI and USDA agencies from compliance with NEPA, ESA, etc., but purportedly to require CBP to comply with each of these statutes. If that is an accurate interpretation of intent, the bill does not reconstruct environmental law in a way to shift responsibilities from land managers to CBP. Instead, the bill states, “notwithstanding any other provision of law,” in which the Secretary concerned, such as DOI or USDA, shall provide immediate access to Border Patrol. Such language is ambiguous and confusing. According to a 2014 Congressional Research Service report: “courts take into account this expressed intent to override the provisions specified in a “notwithstanding” clause, but when the clause purports to override ‘any other provision of law,’ its preclusive scope is often unclear.”⁶ There has, in fact, not been any litigation about Border Patrol activities in Arizona under the environmental laws, whereas it is difficult to predict how a court would interpret the language currently included in the bill.

It is for these reasons that I oppose S. 750. While certain modifications or updates to the 2006 MOU may be in order, there is no evidence that a stringent statutory requirement is necessary to enable U.S. Border Patrol increased access to public lands. The GAO

⁵ Ibid Ppg. 32–33.

⁶ Eig, Larry M., “Statutory Interpretation: General Principles and Recent Trends”. Congressional Research Service Report (97–589). September 24, 2014.

findings cited in the committee report for S. 750 instead provide evidence that most agents reported that land management laws have had no effect on Border Patrol's overall measure of border security and that border security status has instead been most affected by stark terrain features. Moreover, should this bill come into effect, it may make U.S. Customs and Border Protection vulnerable to potential lawsuits based on perceived violations of environmental laws. Such lawsuits would potentially cost valuable taxpayer money that could instead be used to enhance CBP's border security capabilities where it deems them most important.

JON TESTER.

