



# **Wilderness In Peril: Border Security Measures Threaten Wilderness along the Northern Border with Canada**

**An Analysis Prepared by Wilderness Watch**

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## Executive Summary

Under the guise of border security, a plethora of new and proposed laws, policies, memoranda, and other governmental actions pose an unprecedented threat to Wildernesses, including in many national parks, along our nation's Northern Border. This whitepaper describes the threats and presents several recommendations for securing the protection of Wilderness and parks along the Northern Border.

**Wilderness at Risk.** The Wildernesses at risk from Northern Border security measures represent a vast array of America's wild heritage. A total of 73 Wildernesses, stretching across 12 states and totaling more than 32 million acres, could be damaged by these measures. This total represents nearly 30% of the 110-million-acre National Wilderness Preservation System, a system that the American public and Congress have painstakingly assembled since 1964.

The threatened Wildernesses within 100 miles of the Canadian border include some of America's most well-known and loved Wilderness areas: the Boundary Waters Canoe Area Wilderness in Minnesota, Montana's Bob Marshall Wilderness, Washington's Olympic Wilderness and the Stephen Mather Wilderness in North Cascades National Park, and iconic Alaskan Wildernesses like those in the Arctic National Wildlife Refuge, Wrangell-St. Elias National Park, Glacier Bay National Park, and Misty Fjords National Monument. See the appendix for the full list.

**Congressional Threats.** The legislative threats include H.R. 1505, the so-called "National Security and Federal Lands Protection Act" introduced by Rep. Rob Bishop (R-UT). This bill would waive 16 federal laws within 100 miles of the Northern Border, including the 1964 Wilderness Act, the 1916 National Park Service Act, the Endangered Species Act, and the National Environmental Policy Act, all of which protect Wildernesses and National Parks, to allow the Department of Homeland Security (DHS) to take any steps it feels necessary to secure the borders. This bill passed the full House of Representatives in June 2012 as part of H.R. 2578.

**Administrative Threats.** The administrative threats arise from the Final Northern Border Programmatic Environmental Impact Statement (PEIS) issued by DHS in July 2012, and a 2006 Memorandum of Understanding between DHS, Department of Interior, and Department of Agriculture. The Final PEIS envisions giving DHS the ability to build border walls, vehicle barriers, surveillance towers, forward operating bases, and similar infrastructure along the Canadian border as has been constructed along the border with Mexico. The 2006 MOU erroneously assumes DHS activities along the Northern Border are exempt from wilderness and national park laws and regulations.

**Law Waiver.** These threats, coupled with the existing authority of the Secretary of DHS to unilaterally waive any laws he or she chooses, combine to create very real and ongoing threats to our Wildernesses along the Northern Border.

Wilderness Watch believes that these threats must be met, and our great Wildernesses along the Northern Border must instead be protected as the "enduring resource of wilderness" that Congress intended in passing the 1964 Wilderness Act.

## **Introduction**

Since the terror attacks of September 11, 2001, the U.S. federal government has taken a long series of steps to increase national security and to secure the nation's borders. While these measures may have increased national security, some of them have brought unintended consequences that have caused severe damage to some of our Wildernesses and other public lands.

The most intense border security measures have focused on the international border with Mexico, where a significant Border Patrol presence has been established to interdict illegal migrants and drug smugglers entering from Mexico. As a result of both illegal human traffic and Border Patrol's actions to intercept them, several significant Wildernesses have suffered major long-term damage from off-road motor vehicle use and the construction of border fences, surveillance towers, roads, and other communications and operations infrastructure.

Recently, efforts to more completely replicate this border security apparatus along the Northern Border with Canada have been promoted, both through legislation in Congress as well as administrative efforts in the U.S. Department of Homeland Security (DHS). These new measures pose extraordinary threats to our nation's Wilderness areas and national parks within 100 miles of the border with Canada, including such iconic national treasures as the Boundary Waters Canoe Area Wilderness, Glacier National Park, Olympic National Park, and the Arctic National Wildlife Refuge. The full listing of these threatened Wildernesses by state is included in the Appendix. This paper seeks to explain these threats, inform citizens and public officials about the various laws and policies governing the Northern Border, and suggest ways to safeguard our Wildernesses.

## **Background**

In 1964, Congress passed the Wilderness Act "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness".<sup>1</sup> This law provided statutory protections for Wildernesses and established the National Wilderness Preservation System. Upon signing the Wilderness Act into law, President Lyndon Johnson famously remarked, "If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning." The law, among other things, prohibited roads and road-building, structures and installations, motorized and mechanized travel, and the landing of aircraft. The primary directive of the Wilderness Act is to protect the wilderness character of any area so designated.

The Wilderness Act defined Wilderness in part: "A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an

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<sup>1</sup> P.L. 88-577, 78 Stat. 890, 16 U.S.C. 1131-1136.

area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act 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....” In addition, Wilderness “generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable” and “has outstanding opportunities for solitude or a primitive and unconfined type of recreation.”<sup>2</sup>

The National Wilderness Preservation System initially included 54 areas totaling 9.1 million acres of Federal land. Only Congress can designate a federal area as Wilderness. Since 1964, Congress has designated over 700 additional Wildernesses, so that the National Wilderness Preservation System today includes 757 areas and totals 110 million acres.<sup>3</sup>

Since the September 11<sup>th</sup> attacks, Congress has also passed a plethora of new national security laws and is debating several others. The DHS has also instituted a host of inter-agency agreements, and has adopted new rules and regulations on its own. The post-9/11 actions have also added to earlier border easements and treaties. Unfortunately, Wilderness has lost out in most of these new actions, with border security measures given top priority and, in some instances, the *only* priority, since border security has had some exemptions from other federal laws. In order to fully grasp the challenges to Wilderness preservation along the Northern Border, it is necessary to know and understand the existing array of laws, policies, executive authorities, and ongoing Border Patrol practices that affect these national treasures as well as a number of emerging threats.

**A. Early 20<sup>th</sup> Century Border Easements.** Two different U.S. presidents early in the 20<sup>th</sup> century took actions to withdraw U.S. land right on the international borders with Mexico and Canada in order to facilitate the federal government’s ability to control the nation’s borders.

- ***Border with Mexico.*** In 1907, President Theodore Roosevelt withdrew a strip of land 60 feet wide along the Mexican land border with California, Arizona, and New Mexico from “entry, settlement or other form of appropriation under the public land laws and set apart as a reservation....” Roosevelt’s proclamation also withdrew the 60-foot strip “from the operation of public land laws....” This action is now referred to as the “Roosevelt Reservation.”<sup>4</sup>

- ***Border with Canada.*** Similarly, President Taft withdrew 60 feet along the Canadian border in 1912 “from entry, settlement, or other form of appropriation and disposition under the public-land laws, and set apart as a public reservation” in order that “the customs and immigration laws of the United States can be better enforced and the

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<sup>2</sup> Wilderness Act, Sec. 2(c).

<sup>3</sup> See [www.wilderness.net](http://www.wilderness.net).

<sup>4</sup> Presidential Proclamation No. 758, 27 May 1907.

public welfare thereby advanced by the retention in the Federal Government of complete control of the use and occupation of lands abutting on international boundary lines....” This action is now referred to as the “Taft Reservation.”<sup>5</sup>

The Taft Reservation differs from the Roosevelt Reservation in one very important way. The 1907 Roosevelt Reservation along the border with Mexico withdrew the 60-foot strip from public land laws, but the Taft Reservation for the Canadian border did not. Moreover, by 1912 Congress or the President had established many national forests and national parks along the Northern Border and these reservations and protections were not repealed or affected by the Taft Reservation. The Taft Reservation did *not* reduce or replace the boundaries of federal land units, but only overlaid them. Therefore the laws and rules governing these forests and parks, including the subsequent designation by Congress of some of these areas as Wilderness, apply to all activities along the Northern Border, including those activities of the Border Patrol.

In a 2006 Memorandum of Understanding (MOU), DHS, the U.S. Department of Interior, and the U.S. Department of Agriculture declared that Customs and Border Protection (CBP) (an agency within DHS) operation and construction within both 60-foot reservations “is consistent with the purpose of those reservations and that any CBP activity (including, but not limited to, operations and construction) within the sixty-foot reservations is outside the oversight or control of Federal land managers” such as the National Park Service or the U.S. Forest Service.<sup>6</sup> In this regard, the MOU is incorrect.

This MOU declaration fails to account for the difference in relationship to public land laws between the two border reservations, and it fails to acknowledge the legal obligations of the federal land management agencies to preserve the wilderness character of those Wildernesses that abut the Canadian border. CBP activities also must abide by the 1964 Wilderness Act in these instances.

**B. International Boundary Treaties with Canada.** In both 1908 and 1925, the United States signed treaties with Canada affecting the international border between the two countries.<sup>7</sup> Provisions of the treaties created a joint commission, the International Boundary Commission, funded in part by each country.<sup>8</sup>

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<sup>5</sup> Presidential Proclamation No. 1196, 3 May 1912. This proclamation modified an earlier one by Theodore Roosevelt withdrawing a 60-foot reservation along the border with Canada; see Presidential Proclamation No. 810, 15 June 1908. Neither of these proclamations along the Canadian border, however, withdrew the 60-foot strip “from the operation of public land laws” as did the 1907 Roosevelt Reservation.

<sup>6</sup> Department of Homeland Security, Department of the Interior, U.S. Department of Agriculture, *Memorandum of Understanding Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Borders*, (Washington, DC, March 2006).

<sup>7</sup> See Treaty Between the United States of America and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada from the Atlantic Ocean to the Pacific Ocean, Signed at Washington, April 11, 1908; and Treaty Between the United States of America and His Britannic Majesty, in Respect of the Dominion of Canada, to Define More Accurately at Certain Points and to Complete the International Boundary Between the United States and Canada and to Maintain the Demarcation of that Boundary, Signed at Washington, February 24, 1925.

<sup>8</sup> For more background, see <http://www.internationalboundarycommission.org/>.

One of the major functions of the International Boundary Commission today is clearing a 20-foot swath (10 feet in each nation) from trees and brush along 5,525 miles of the international boundary, and maintaining the boundary monuments. The commission's work includes both the boundary between the Lower 48 states and Canada, as well as the border between Alaska and Canada. The clearing occurs both in and outside designated Wildernesses along the international border. While such clearing may be legal under the treaty, it can nonetheless still damage the wilderness character.

**C. 2005 REAL ID Act.** The REAL ID Act granted the Secretary of Homeland Security the unprecedented authority to waive any and all laws of the United States in order to “ensure expeditious construction of barriers and roads” along the borders. The law also restricted court review of any such waiver decisions to the point where it is nearly impossible for citizens or communities to challenge the waivers.<sup>9</sup>

This unprecedented waiver authority affects all borders of the United States, including those with Mexico and Canada. One legal scholar concludes that this waiver authority is likely unconstitutional on several grounds, but because of the restricted judicial review contained in the law, the courts will not likely ever adequately review it. There is also no statutory end to this waiver authority; it will continue into the future unless or until Congress curtails it.<sup>10</sup>

In April 2008, DHS Secretary Michael Chertoff, using authority given to him by Congress,<sup>11</sup> signed a major waiver. It was a determination to “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)” along parts of the southern border with Mexico.

The 2008 Chertoff waiver covered more than 35 federal laws that form the bedrock of environmental protection in this country. The laws waived include the Wilderness Act, the Endangered Species Act, the 1906 Antiquities Act, the Wild and Scenic Rivers Act, the 1916 National Park Service Organic Act, the Administrative

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<sup>9</sup> Public Law 109-13, 119 Stat. 302, enacted May 11, 2005. See also <http://codes.lp.findlaw.com/uscode/8/12/I/1103/notes>. The REAL ID Act also mandated, among many other requirements, the construction of approximately 700 miles of border wall along the southern border with Mexico.

<sup>10</sup> Jenny Neeley, “Over the Line: Homeland Security’s Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure,” *Arizona Journal of Environmental Law & Policy* 1(2), 2011, pp. 139-165.

<sup>11</sup> Public Law 104-208, 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, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. § 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007).

Procedure Act, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and many more. No longer would DHS have to comply with any of these laws along much of the Mexican border.<sup>12</sup>

DHS has issued waivers of law at other times as well, but none of the other waivers has been as sweeping as the 2008 waiver.

**D. 2006 MOU.** As previously mentioned, the Departments of Homeland Security, Interior, and Agriculture signed an MOU in 2006 dealing with “Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Borders.”<sup>13</sup> The MOU covers federal lands managed by the U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, and Bureau of Reclamation.

The MOU declared that CBP operation and construction within the 60-foot border reservations is consistent with the purposes of those reservations and “that any CBP activity (including, but not limited to, operations and construction) within the sixty-foot reservations is outside the oversight and control of Federal land managers.”<sup>14</sup> This erroneous claim leaves wildernesses and national parks along the Northern Border very vulnerable to Border Patrol activities than can severely degrade wilderness values.

The MOU further allowed CBP’s Border Patrol agents to patrol, pursue, or apprehend suspects on foot or horseback in wilderness, recommended wilderness, or wilderness study areas.<sup>15</sup> Yet it also allowed agents to conduct *motorized* off-road pursuits of suspects in wilderness or recommended wilderness or wilderness study areas. Agents are supposed to use the least intrusive or damaging motorized vehicle readily available and, after the fact, CBP-BP may meet with Federal land managers to discuss any damage that motorized pursuits caused, though in practice such meetings rarely happen and few reports of wilderness incursions are ever written. CBP “may” request in writing, that the Federal land management agency authorize installation or construction of tactical infrastructure (such as observation points, remote video surveillance systems, motion sensors, vehicle barriers, fences, roads, and detection devices) in Wildernesses, subject to a minimum requirement or minimum tool analysis.<sup>16</sup>

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<sup>12</sup> DHS, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 1 Apr. 2008.

<sup>13</sup> Department of Homeland Security, Department of the Interior, U.S. Department of Agriculture, *Memorandum of Understanding Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Borders*, (Washington, DC, March 2006).

<sup>14</sup> *Ibid.*, p. 2.

<sup>15</sup> Border Patrol has traditionally conducted both foot and stock-mounted patrols in Wilderness and other wildlands along the Northern Border (see, for example, [http://www.denverpost.com/news/ci\\_17163894](http://www.denverpost.com/news/ci_17163894)). These patrols are compatible with preserving the area’s wilderness character and the authors are not suggesting that these kinds of patrols should be curtailed.

<sup>16</sup> Department of Homeland Security, Department of the Interior, U.S. Department of Agriculture, *Memorandum of Understanding Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Borders*, (Washington, DC, March 2006), pp. 5-6.



## Border Patrol Practices on the Southern Border and Implications for the North

Three significant Wildernesses in the National Wilderness Preservation System adjacent to the Mexican border have unfortunately suffered damage due to border concerns. These three are Organ Pipe Cactus Wilderness in Arizona, the Cabeza Prieta Wilderness in Arizona, and Otay Mountain Wilderness in California. Each of these three Wildernesses is managed by a separate federal land management agency, respectively the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management. Other Wildernesses also abut the Mexican border, but these three Wildernesses illustrate the damage that can occur.

**A. Border Wall Construction.** Border wall construction has included a mixture of 15-to-20-foot-tall steel border wall (with many variations in design), a variety of vehicle barriers that block motor vehicles but may permit wildlife crossing, and the accompanying patrol roads on or along the actual border.<sup>17</sup> Much of the construction occurred within the Roosevelt Reservation just outside the borders of Wilderness and brings some benefits to Wilderness by reducing illegal vehicle incursions. Where construction occurred inside Wilderness, however, the impacts were significant and long-term. This would certainly be the case should DHS decide to build a wall, fences, roads, or similar infrastructure through designated Wilderness along the Northern Border.

The rugged 16,885-acre **Otay Mountain Wilderness** east of San Diego is a case in point. Initially the Border Patrol determined it would not build a border wall along this Wilderness, due to the extremely rugged terrain. But the agency reversed itself, and, using the 2008 Chertoff waiver, constructed a 3.6-mile stretch of 18-foot border wall there. This necessitated building access roads *inside* the Wilderness, denuding rugged hillsides, and drilling, blasting, and excavating 530,000 cubic yards of rock, some *within* the Wilderness, to facilitate constructing of the wall. The wall zigs and zags along the border, with some segments inside the designated Wilderness.<sup>18</sup>

Border walls and fences have also caused unintended damage as evidenced at **Organ Pipe Cactus Wilderness**, which stretches about 30 miles along the Mexican border. By the fall of 2006, the National Park Service had constructed about 30 miles of vehicle barriers along the border, which effectively blocked most vehicle traffic.<sup>19</sup> In

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<sup>17</sup> For examples of border wall impacts on wildlife, see Divya Abhat, "Fenced Out: Wildlife Impacts of the U.S.-Mexico Border Fence," *The Wildlife Professional* 5(4), Winter 2011, pp. 24-25; Todd C. Atwood *et al*, "Modeling Connectivity of Black Bears in a Desert Island Archipelago," *Biological Conservation* 144 (2011): 2851-2862; and Jesse Lasky *et al*, "Conservation biogeography of the US-Mexico border: a trans-continental risk assessment of barriers to animal dispersal," *Diversity and Distributions* 17(4): 673-687.

<sup>18</sup> See Richard Marosi, \$57.7 Million Fence Added to an Already Grueling Illegal Immigration Route, *L.A. Times* (Feb. 10, 2010), <http://articles.latimes.com/2010/feb/15/local/la-me-fence15-2010feb15>; and Rob Davis, *A Barren Promise at the Border*, VOICEOFSANDIEGO.COM, [http://www.voiceofsandiego.org/environment/article\\_13330282-1245-5e49-bd68-5a10237c9f44.html](http://www.voiceofsandiego.org/environment/article_13330282-1245-5e49-bd68-5a10237c9f44.html).

<sup>19</sup> <http://www.nps.gov/orpi/planyourvisit/barrier.htm>



Road construction and excavation, Otay Mountain Wilderness. Photo: Roy Toft, ILCP, Lighthawk.

2008, DHS built a 5.2 mile-long, 18-foot-high pedestrian border wall on the southern boundary of this 312,600-acre Wilderness. This construction occurred using the 2008 Chertoff waiver. The wall and patrol road were constructed up and over Monument Hill, a steep mountain that harbors habitat for the sensitive Sonoran desert tortoise. The vehicle barriers also cut off southern access to Quitobaquito, a rare desert spring that provides reliable water to wildlife in this arid desert. On July 12, 2008, a monsoon storm delivered 1-2 inches of rain in 1.5 hours in southern Arizona; the wall impeded and redirected flash floodwaters, causing erosion, scouring, and sedimentation.<sup>20</sup>

In August 2011, flooding again occurred at this same section of border wall. The flooding was so severe that it collapsed a 40-foot section of the border wall.<sup>21</sup> Though the National Park Service had objected to the construction of the fence for just such

<sup>20</sup> National Park Service, *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Ariz., on Drainage Systems and Infrastructure, Organ Pipe Cactus Natl. Monument, Ariz.*, 1, 4 (Aug. 2008), available at [http://www.nps.gov/orpi/naturescience/upload/FloodReport\\_July2008\\_final.pdf](http://www.nps.gov/orpi/naturescience/upload/FloodReport_July2008_final.pdf).

See also *Arizona Daily Star*, 15 Aug. 2008, "Faulty design turned border fence into dam," at <http://borderwallinthenews.blogspot.com/2008/08/faulty-design-turned-border-fence-into.html>.

<sup>21</sup> See <http://latimesblogs.latimes.com/laplaza/2011/08/border-fence-arizona-flooding-washed-away.html>; [http://azstarnet.com/news/local/border/article\\_9eaead31-14eb-5474-a5c5-564a980049b2.html?mode=story](http://azstarnet.com/news/local/border/article_9eaead31-14eb-5474-a5c5-564a980049b2.html?mode=story); <http://ow.ly/64PHQ>; [http://azstarnet.com/news/local/border/article\\_ba9ab87e-f6d0-5949-8a12-f305534e0778.html](http://azstarnet.com/news/local/border/article_ba9ab87e-f6d0-5949-8a12-f305534e0778.html); [http://colorlines.com/archives/2011/08/rain\\_knocks\\_down\\_40\\_feet\\_of\\_border\\_fence\\_in\\_arizona.html](http://colorlines.com/archives/2011/08/rain_knocks_down_40_feet_of_border_fence_in_arizona.html).

concerns, DHS had assured the NPS that “the pedestrian fence would not impede the natural flow of water.”<sup>22</sup>

**B. Illegal Roads and Vehicle Routes.** The 803,418-acre Cabeza Prieta Wilderness stretches for 56 miles along the international border. In this Wilderness, U.S. Fish and Wildlife Service (FWS) staff recently delineated nearly 8,000 miles of illegal roads and vehicle routes within the Refuge, including 7,739 miles within the Wilderness, utilizing 2008 high-resolution aerial imagery, ground-truthing, and photo interpretation techniques. “The network of illegal vehicle routes within Refuge wilderness is both extensive and locally severe,” the agency wrote.<sup>23</sup> Some of these routes are so heavily used they resemble roads. “From a wilderness stewardship perspective, the density and extent of the off-road travel is alarming,” the agency wrote in another 2011 report.<sup>24</sup>

According to FWS officials, the actual number of routes is probably double the 8,000-mile figure because the imagery is now four years old. An article in *The Wildlife Professional* indicates that the figures are 8,000 miles made by illegal entrants, plus 12,000 miles made by law enforcement.<sup>25</sup> Both illegal cross-border incursions and interdiction efforts by law enforcement agencies created these miles of vehicle routes, but the FWS believes “that the pursuit of [undocumented aliens]/drug smugglers has created the greater proportion of trails.”<sup>26</sup> Indeed, since the vehicle barrier was completed, nearly all of the new vehicle routes in Wilderness have been made by Border Patrol or other law enforcement agencies.

The FWS concluded, “We are disturbed over both the magnitude and extent of the impacts we recorded during this inventory; we did not expect to find almost 8,000 miles of vehicle trails through the CPNWR wilderness area. The frequent use of mechanized transport associated with illegal smuggling activities and interdiction efforts precludes opportunities for solitude. Furthermore, the amount of damage from off-road activities may be significantly impacting the natural quality of wilderness character by such means as altering hydrological process, affecting plant distribution, impacts to wildlife inhabiting tunnels or dens beneath the surface, and disrupting habitat use of wildlife where high intensity traffic areas may be avoided due to the frequent presence of humans and vehicles.”<sup>27</sup>

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<sup>22</sup> National Park Service, *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Ariz., on Drainage Systems and Infrastructure, Organ Pipe Cactus Natl. Monument, Ariz.*, (Aug. 2008), p. 9.

<sup>23</sup> U.S. Fish and Wildlife Service, *Draft Environmental Assessment, Cabeza Prieta National Wildlife Refuge Sonoran Pronghorn Supplemental Water and Forage Project*, May 2011, p. 9.

<sup>24</sup> Cabeza Prieta National Wildlife Refuge, *Vehicle Trails Associated with Illegal Border Activities on Cabeza Prieta National Wildlife Refuge*, July 2011, p. 11.

<sup>25</sup> Divya Abhat, “Fenced Out: Wildlife Impacts of the U.S.-Mexico Border Fence,” *The Wildlife Professional* 5 (4), Winter 2011, pp. 24-25.

<sup>26</sup> Cabeza Prieta National Wildlife Refuge, *Vehicle Trails Associated with Illegal Border Activities on Cabeza Prieta National Wildlife Refuge*, July 2011, p. 4.

<sup>27</sup> *Ibid.*, p. 10.



Vehicle routes, Cabeza Prieta Wilderness. USFWS Photo.

Organ Pipe Cactus Wilderness also suffers from illegal roads and vehicle routes. In 2010, the National Park Service estimated that there had been 589 reported incursions in the Wilderness, with 2,553 miles of estimated incursion miles in the Organ Pipe Cactus Wilderness.<sup>28</sup>

**C. Border Security Infrastructure.** Border Patrol continues to build border security infrastructure along the Mexican border, and within Organ Pipe Cactus National Monument and the Cabeza Prieta National Wildlife Refuge. Two new permanent towers for surveillance and communications have been built right on the border within the Roosevelt easement, for example. These permanent towers replaced communications equipment previously supplied by mobile trucks.

In addition to the towers, Border Patrol has constructed Forward Operating Bases in both areas. Though surrounded by designated Wilderness, the current bases are located about 10 miles north of the border in a non-wilderness corridor along the El Camino del Diablo road. The Border Patrol has recently tripled the size of one of its Forward Operating Bases. Though not located within designated Wilderness, these bases and the activity associated with them nonetheless negatively impact the surrounding Wilderness with motor vehicles, noise, structures and installations visible within Wilderness, and disruption of wildlife like the endangered Sonoran pronghorn.

**D. Motorized Patrols.** Motorized patrols by Border Patrol and other law enforcement agencies, both by land and air, negatively impact Wildernesses along the border, both tangible damage as well as damage to more intangible wilderness values.

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<sup>28</sup> National Park Service, *Organ Pipe Cactus National Monument, Superintendent's 2010 Report on Natural Resource Vital Signs*, pp. 19-20. See <http://www.nps.gov/orpi/parkmgmt/index.htm>.

The tangible damage includes the illegal or unauthorized creation of vehicle routes and rough roads in Wilderness, as mentioned above. Motorized patrols also negatively impact intangible wilderness values, too. Solitude and a primitive or unconfined recreation, for example, can be destroyed for wilderness visitors when they see and hear motor vehicles, helicopters, or other aircraft patrolling in Wilderness. Wildlife is displaced and effective habitat is lost, further eroding wilderness values.

### **Emerging Major Threats to Wildernesses near the Northern Border**

**A. Congressional Legislation.** At least two different pieces of pending Congressional legislation contain threats to the Northern Border Wildernesses. The most egregious is the so-called “National Security and Federal Lands Protection Act,” H.R. 1505, known as the “Bishop Bill” in recognition of its sponsor Rep. Rob Bishop (R-UT).<sup>29</sup> This legislation affects both the southern border with Mexico as well as the Northern Border with Canada. The Bishop Bill’s more onerous provisions include:

- Prohibits the Departments of Interior and Agriculture from impeding, prohibiting, or restricting activities by DHS to achieve operational control within 100 miles of the international borders.<sup>30</sup>

- Allows DHS access to maintain and construct roads, construct a fence, use vehicles to patrol, and set up monitoring equipment on any federal public land, even those federal lands beyond 100 miles of the borders.<sup>31</sup>

- Waives 16 federal laws for DHS activities within 100 miles of the international borders, including the 1964 Wilderness Act, the Endangered Species Act, the 1906 Antiquities Act, the Wild and Scenic Rivers Act, the 1916 National Park Service Act, the Administrative Procedure Act, the National Environmental Policy Act, and others.<sup>32</sup>

The Bishop Bill passed the full House of Representatives on June 19, 2012, as part of a package of bills within H.R. 2578. The version that passed the House reduced the number of waived laws from over 30 to 16, but still included the significant land-protection laws listed above.<sup>33</sup>

In addition to the Bishop Bill there are two other ongoing border-related Congressional efforts that could result in serious harm to Wilderness:

- ***Quayle Amendment to H.R. 3116.*** Rep. Ben Quayle (R-AZ) drafted an amendment to the House Homeland Security Authorization bill, H.R. 3116. His amendment would give U.S. Customs and Border Protection (CBP) the ability to build

<sup>29</sup> H.R. 1505, 112<sup>th</sup> Cong., 1<sup>st</sup> Sess.; see also House-passed H.R. 2578, 112<sup>th</sup> Cong., Title 14.

<sup>30</sup> H.R. 1505, Sec. 2(a). See also H.R. 2578, Sec. 1401; this version does not use the term “operational control” but lists activities that achieve it.

<sup>31</sup> H.R. 1505, Sec. 2(b); and H.R. 2578, Sec. 1401 (c).

<sup>32</sup> H.R. 1505, Sec. 2(c)(2); and H.R. 2578, Sec. 1401(d)(2).

<sup>33</sup> H.R. 2578, Title 14.



roads, fences, forward operating bases, and other facilities and to conduct unlimited vehicle patrols on public or tribal lands within 100 miles of the U.S. borders with Canada and Mexico without any collaboration or consultation with federal land management agencies. Under this amendment, the Commissioner of CBP would have final say over whether activities are providing enough protection for the public's natural resources. The House committee adopted the Quayle amendment on October 13, 2011. H.R. 3116 is pending in the House.<sup>34</sup>

• **McCain Amendment to S. 1546.** Sen. John McCain (R-AZ) wrote an amendment to the pending Senate Homeland Security Authorization bill, S. 1546. Though currently this amendment deals 'only' with the zone within 100 miles of the southern border with Mexico, it could easily be amended to include the Northern Border as well. The McCain amendment would exempt the Border Patrol from following environmental laws and policies to protect public and tribal lands. The amendment would also give the Secretary of DHS final say regarding environmental safeguards needed for activities like motorized patrol through sensitive areas and the construction of facilities on public and tribal lands. The Senate committee adopted the McCain amendment, and S. 1546 is pending in the Senate.<sup>35</sup>

#### **B. Northern Border Programmatic Environmental Impact Statement (PEIS).**

In 2011, Customs and Border Protection (CBP) released a draft Programmatic Environmental Impact Statement (PEIS) for Northern Border Activities, dealing with the U.S.-Canada border, excluding Alaska.<sup>36</sup> In it, CBP produced five alternatives:

1. No action - status quo.
2. Development and Improvement Alternative - new or enhanced permanent facilities.
3. Detection, Inspection, Surveillance, and Communication Technology Expansion Alternative - communication and surveillance technology deployment.
4. Tactical Security Infrastructure Deployment Alternative - build barriers, roads, and related infrastructure.
5. Flexible Direction Alternative - all of the above.<sup>37</sup>

CBP chose Alternative 5, the Flexible Direction Alternative, as its preferred alternative. This means that all of the options listed -- barriers, fences, roads, new permanent facilities, surveillance and communications towers -- could be built or utilized in any of the Wildernesses within 100 miles of the Canadian border.

The draft Northern Border PEIS had many problems, and raised opposition in both the United States and Canada in part from its stated intent to build border walls,

<sup>34</sup> H.R. 3116, as amended in committee by Quayle amendment.

<sup>35</sup> S. 1546, as amended by McCain amendment.

<sup>36</sup> *Federal Register*, Vol. 76, Issue 180, 16 Sept. 2011, at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-16/html/2011-23993.htm>.

<sup>37</sup> The Northern Border Draft PEIS is available at: [http://www.cbp.gov/xp/cgov/about/sr/nobo\\_peis/](http://www.cbp.gov/xp/cgov/about/sr/nobo_peis/).

fences, roads, and other infrastructure at the border. The environmental community highlighted many of these problems in a lengthy comment letter in October 2011.<sup>38</sup>

In July 2012, CBP released the Final PEIS with a Draft Record of Decision. CBP selected both the “Detection, Inspection, Surveillance, and Communications Technology Expansion” alternative and the “Flexible Direction Alternative” “all of the above” as its preferred course of action. Though the agency committed itself to conduct additional specific environmental review for any particular project that it might develop, the “Flexible Direction Alternative” coupled with the DHS Secretary’s ability to waive any federal law he or she might choose means that Wildernesses along the Northern Border are put at great risk.<sup>39</sup>

**C. 2006 MOU and Motorized Patrols.** Under the MOU described earlier, Border Patrol agents currently use ORVs, trucks, jeeps, snowmobiles, airplanes, helicopters, unmanned drone aircraft, and other motor vehicles in Wilderness without notifying the Wilderness-managing agencies or without regard to damage to wilderness character. Motorized patrols degrade wilderness character, even those that occur by air, by destroying solitude, one of the key components of wilderness character specifically protected by the 1964 Wilderness Act, and they harass wildlife and can significantly reduce habitat effectiveness for sensitive species. Motorized patrols can also cause physical damage to the Wilderness and leave tracks and scars on the land. Even snowmobile use by Border Patrol agents in Wilderness leaves tracks in the snow that diminish wilderness character, encourage further illegal snowmobiling in Wilderness, and greatly complicate law enforcement efforts by the Federal land-managing agencies.

For example, during one night in the winter of 2008-2009, a helicopter (presumably from Border Patrol) hovered over a group of winter campers in the **Boundary Waters Canoe Area Wilderness (BWCAW)** in Minnesota, shining a spotlight down on the campers. Border Patrol never checked in with the U.S. Forest Service either before or after this incident.<sup>40</sup> This helicopter flight and other low-level flights violated the airspace reservation above the BWCAW, and destroyed the wilderness experience that that group of winter campers sought.<sup>41</sup>

In another disturbing example, in August 2012 a wilderness visitor in the **Pasayten Wilderness** along the Canadian border in Washington State reported being circled and buzzed by a large helicopter armed with what appeared to be missiles. The helicopter hovered and later lowered toward the ground (and likely landed). Nearby was a permanent tent camp that, according to a local outfitter, was operated by Border Patrol. The Forest Service wilderness rangers that the visitors encountered several days later knew nothing about the helicopter operation or the permanent camp.<sup>42</sup> Should Border

<sup>38</sup> See [http://www.wildernesswatch.org/pdf/Northern\\_Border\\_Draft\\_PEIS\\_Group\\_Comments.pdf](http://www.wildernesswatch.org/pdf/Northern_Border_Draft_PEIS_Group_Comments.pdf).

<sup>39</sup> [http://www.cbp.gov/xp/cgov/about/sr/nobo\\_peis/](http://www.cbp.gov/xp/cgov/about/sr/nobo_peis/).

<sup>40</sup> BWCAW Wilderness Rangers, “East Zone Wilderness Winter Program 2009: Accomplishments, Requests, and Discussion Topics,” Superior National Forest, p. 2.

<sup>41</sup> See Executive Order 10092, 17 Dec. 1949; and BWCAW Act, P.L. 95-495, sec. 8.

<sup>42</sup> This incident was described in an email to Wilderness Watch on 6 Sept. 2012.

Patrol activities increase along the Northern Border—even to a degree that is still substantially below that of the southern border—these kinds of motorized incursions would likely become routine.

In addition to these seemingly unlawful patrols, under the existing 1912 Taft Reservation and the 2006 MOU, the U.S. Border Patrol may believe that it can currently build roads, towers, fences, and more within 60 feet of the Canadian border in U.S. Wildernesses. Under the 2006 MOU, the federal land management agencies incorrectly stated that they had no measure of control over DHS activities in these 60-foot reservations. But the MOU did not and cannot amend the 1964 Wilderness Act nor absolve the federal land management agencies from enforcing the Wilderness Act in the 60-foot reservations where Wildernesses abut the Canadian border.

**D. Administrative Waiver of Federal Laws.** Just as the Department of Homeland Security did for much of the Mexican border in 2008, the Secretary of DHS could with a stroke of a pen waive all federal laws that currently protect Wildernesses along the Northern Border. Such a waiver could result in devastating damage to Wildernesses along the Northern Border.

**E. Clearing and Construction in Border Reservations.** The International Boundary Commission's work to periodically clear the Northern Border of brush and trees degrades the wilderness character of designated Wildernesses along the Canadian border. For areas managed to protect their untrammeled and undeveloped nature, clearcutting 20-foot swaths of forest along the border decidedly diminishes these wilderness qualities. In the winter of 2005-2006, for example, the IBC (acting with no notification to or coordination with the U.S. Forest Service) clearcut swaths along the international border in the BWCAW of Minnesota with chainsaws, both damaging the Wilderness and in one case opening a route for illegal snowmobile traffic along the Height of Land Portage.<sup>43</sup> Should DHS ramp up its Northern Border activities, the degree to which this swath of land is cleared and degraded could substantially increase.

**F. Conclusion.** Wilderness values along the Northern Border are threatened by a number of existing and proposed legislative and administrative actions related to border security. While recent efforts in Congress to waive environmental laws within 100 miles of the border have drawn well-deserved public scrutiny, many other less-publicized actions pose significant risks to these world-renowned Wildernesses. Foremost among these threats are authority granted to the Secretary of Homeland Security by the 2005 REAL ID Act that allows the Secretary to waive all laws for Border Patrol activities, proposals to develop extensive security infrastructure in the DHS's recently-released Northern Border Programmatic Environmental Impact Statement (PEIS), policies and practices -- enabled by the flawed 2006 MOU -- that ignore the wilderness status and wilderness values of areas along the Northern Border, and ongoing motorized patrols by Border Patrol or other enforcement agencies.

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<sup>43</sup> "International Border Clearcuts," *Friends of the Boundary Waters Wilderness Newsletter* 30 (1), Winter 2007, p. 6. See also Robert Pengally, Consulate General of Canada, to Kevin Proescholdt, 8 Mar. 2007.



## **Needed Actions to Reestablish and Affirm Wilderness Protections Along the Northern Border**

**A. Congress must repeal provisions of Homeland Security laws that damage Wilderness.** These laws include the waiver authority contained in both section 102(c) of the REAL ID as well as section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These laws grant too much authority to a lone unelected bureaucrat to waive more than 100 years of land conservation and environmental protection laws.

**B. The Secretaries of Interior, Agriculture, and Homeland Security must revise the 2006 MOU to acknowledge that Wilderness and national park laws and regulations must be followed for border security activities along the Northern Border.** The Secretaries of Interior and Agriculture should also ensure that federal land managers are aware of their responsibilities to uphold wilderness rules and regulations when dealing with Border Patrol activities.

**C. The Department of Homeland Security should revise the Northern Border PEIS and reject all its projects that would harm Wilderness.** The PEIS should be revised to move away from the “all of the above” alternative that paves the way for border infrastructure construction. The decision should limit border security efforts to foot and stock patrols as have traditionally been conducted in Northern Border wildernesses.

**D. Congress should reject legislation, such as H.R. 1505/2578 and similar measures, that would needlessly allow for wilderness and public lands degradation under the guise of border security.** There are no compelling reasons why border security cannot be achieved without degrading America’s Wilderness and national parks legacy, which are the envy of the world.

**E. Restore wilderness protection to equal footing with border security as a national priority.** Some border security measures have relegated wilderness protection to a problem that interferes with our nation’s safety, rather than as an important part of our nation’s public policy and heritage. Wilderness deserves to be restored to its rightful place in our national priorities.

## Appendix

### Wildernesses at Risk along the Northern Border

**A. Wilderness.** The Wildernesses at risk to Northern Border security measures represent a vast array of America's wild heritage. A total of 73 Wildernesses, stretching across 12 states and totaling more than 32 million acres, could be damaged by these measures. This total represents nearly 30% of the total size of the 110-million-acre National Wilderness Preservation System, a system that the American public and Congress have painstakingly assembled since 1964. The full listing of these threatened Wildernesses by state is included below.

The threatened Wildernesses within 100 miles of the Canadian border include some of America's most well-known and loved Wilderness areas: the Boundary Waters Canoe Area Wilderness in Minnesota, Montana's Bob Marshall Wilderness, Washington's Olympic Wilderness and the Stephen Mather Wilderness in North Cascades National Park, and iconic Alaskan Wildernesses like those in the Arctic National Wildlife Refuge, Wrangell-St. Elias National Park, Glacier Bay, and Misty Fjords.

**B. Recommended Wilderness.** In addition to these designated Wilderness Areas, additional areas of Recommended Wilderness also lie at risk from the Northern Border security measures. Recommended Wilderness occurs when the National Park Service has studied potential Wilderness areas within the borders of various National Parks, and recommends that portions of the parks be designated as Wilderness. Congress has not yet passed legislation to designate them as Wilderness, but the National Park Service manages Recommended Wilderness as Wilderness until such time as Congress acts.

Recommended Wildernesses along the Northern Border include such iconic National Parks as Glacier National Park in Montana and Voyageurs National Park in Minnesota. Like designated Wildernesses, Recommended Wildernesses also face threats from the Northern Border security measures.

**C. International Wilderness Complexes.** Particularly vexing are the threats to Wildernesses or Recommended Wildernesses that comprise a portion of an international wilderness complex of protected lands. In these places, land managers have tried to protect intact these seamless international wildland complexes irrespective of the U.S.-Canada border that runs through the complex. CBP activities have the potential of fragmenting the ecological integrity and wilderness character of these larger international areas by building roads, fences, or other structures where none now exist, either on the international border itself or within 100 miles of the border. Large unbroken wilderness areas could be fractured, remoteness shrunk, secure wildlife habitat invaded, and more.

Examples of these international complexes include the Glacier National Park/Waterton Lakes National Park complex in Montana and Alberta, and the Boundary

Waters Canoe Area Wilderness and Quetico Provincial Park complex of Minnesota and Ontario. Similar international wildland complexes in Alaska include the Arctic National Wildlife Refuge in Alaska and Ivvavik National Park and Vuntut National Park in the Yukon Territory, and Alaska's Wrangell-St. Elias National Park adjacent to the Yukon Territory's Kluane National Park, next to British Columbia's Tatshenshini-Alsek Wilderness Provincial Park, which lies adjacent to Alaska's Glacier Bay National Park.

**D. Other Federal Public Lands.** Beyond Wildernesses and Recommended Wildernesses, other federal public lands are also at risk within 100 miles of the Northern Border. These include other National Parks, National Wildlife Refuges, National Forests, and (particularly in western states) lands managed by the Bureau of Land Management (BLM).

### **U.S. Wilderness Areas within 100 miles of Canadian Border**

<b>Wilderness</b>	<b>Size (Acres)</b>
<b>MAINE</b>	
Caribou-Speckled Mountain Wilderness	11,233
Moosehorn (Baring Unit) Wilderness	4,680
Moosehorn Wilderness	2,712
State Total	18,625
<b>NEW HAMPSHIRE</b>	
Great Gulf Wilderness	5,658
Pemigewasset Wilderness	45,818
Presidential Range-Dry River Wilderness	27,606
Sandwich Range Wilderness	35,306
Wild River Wilderness	24,030
State Total	138,418
<b>VERMONT</b>	
Breadloaf Wilderness	24,985
Bristol Cliffs Wilderness	3,750
Joseph Battell Wilderness	12,336
State Total	41,071

**PENNSYLVANIA**

Allegheny Islands Wilderness	372
Hickory Creek Wilderness	8,630
State Total	9,002

**OHIO**

West Sister Island Wilderness	77
State Total	77

**MICHIGAN**

Beaver Basin Wilderness	11,740
Big Island Lake Wilderness	5,300
Delirium Wilderness	11,952
Horseshoe Bay Wilderness	3,782
Huron Islands Wilderness	147
Isle Royale Wilderness	132,018
Mackinac Wilderness	11,321
McCormick Wilderness	16,914
Michigan Islands Wilderness	12
Nordhouse Dunes Wilderness	3,285
Rock River Canyon Wilderness	4,678
Seney Wilderness	25,150
State Total	226,299

**WISCONSIN**

Gaylord A. Nelson Wilderness	33,500
State Total	33,500

**MINNESOTA**

Agassiz Wilderness	4,000
Boundary Waters Canoe Area Wilderness	1,098,057
State Total	1,102,057

**NORTH DAKOTA**

Lostwood Wilderness	5,577
Theodore Roosevelt Wilderness	29,920
State Total	35,497

**MONTANA**

Bob Marshall Wilderness	1,009,356
Cabinet Mountains Wilderness	94,272
Great Bear Wilderness	286,700
Mission Mountains Wilderness	73,877
UL Bend Wilderness	20,819
State Total	1,485,024

**WASHINGTON**

Alpine Lakes Wilderness	391,988
Boulder River Wilderness	49,343
Buckhorn Wilderness	44,319
Colonel Bob Wilderness	11,855
Glacier Peak Wilderness	566,057
Henry M. Jackson Wilderness	103,297
Lake Chelan-Sawtooth Wilderness	153,057
Mount Baker Wilderness	119,989
Mount Snokomish Wilderness	13,291
Noisy-Diobsud Wilderness	14,666
Olympic Wilderness	876,669
Paysayten Wilderness	531,539
Salmo-Priest Wilderness	43,348
San Juan Wilderness	353
Stephen Mather Wilderness (N. Cascades NP)	634,614
The Brothers Wilderness	16,337
Washington Islands Wilderness	452

Wild Sky Wilderness	105,561
Wonder Mountain Wilderness	2,200

State Total	3,678,935
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## **ALASKA**

Chuck River Wilderness	74,506
Coronation Island Wilderness	19,232
Endicott River Wilderness	98,729
Glacier Bay Wilderness	2,664,876
Karta River Wilderness	39,889
Kootznoowoo Wilderness	956,255
Kuiu Wilderness	60,581
Misty Fjords Wilderness	2,142,575
Mollie Beattie Wilderness (Arctic Refuge)	8,000,000
Russell Fjord Wilderness	348,701
Saint Lazaria Wilderness	65
South Baranoff Wilderness	319,568
South Prince of Wales Wilderness	90,968
Stikine-LeConte Wilderness	448,926
Tebenkof Bay Wilderness	66,812
Tracy Arms-Fords Terror Wilderness	653,179
West Chichagoff-Yakobi Wilderness	265,286
Wrangell-Saint Elias Wilderness	9,078,675

State Total	25,328,823
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## **U.S. TOTALS**

Number of States	12
Number of Wildernesses	73
Total Acres of Affected Wildernesses	32,097,328