

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE and SIERRA CLUB;)	Civil Action No.
Plaintiffs,)	
vs.)	PLAINTIFFS' MEMORANDUM IN
)	SUPPORT OF MOTION FOR
)	TEMPORARY RESTRAINING ORDER
)	IN RELATION TO BORDER WALL AND
BUREAU OF LAND MANAGEMENT; U.S. DEPARTMENT OF THE INTERIOR; U.S. ARMY CORPS OF ENGINEERS; and U.S. DEPARTMENT OF HOMELAND SECURITY)	ROAD CONSTRUCTION ON THE SAN PEDRO RIPARIAN NATIONAL
)	CONSERVATION AREA
Defendants.)	
)	
)	
_____)	

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INTRODUCTION

Plaintiffs seek an order temporarily enjoining construction of border fencing, an all-weather road, and drainage structures within the San Pedro Riparian National Conservation Area (“San Pedro NCA”). See San Pedro Riparian National Conservation Area Border Fence (“Border Fence EA”) (Plf. Exh. 1). This construction is currently being undertaken pursuant to a perpetual right-of-way (“ROW”) issued on August 31, 2007 by the Bureau of Land Management (“BLM”) to the U.S. Army Corps of Engineers (“Army Corps”), on behalf of Department of Homeland Security (“DHS”), having apparently commenced on Saturday, September 29, 2007. See Clark Decl. and accompanying photographs (Plf. Exh. 15).

As explained in detail below, plaintiffs are entitled to emergency injunctive relief. First, plaintiffs are likely to prevail on the merits of their claims. Defendant BLM issued its perpetual ROW without any prior public notice or opportunity for comment, violating the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. Additionally, although BLM did produce the Border Fence EA under NEPA, this EA is inadequate under the law, and the significant impacts of border wall construction, both within the San Pedro NCA specifically, and at a cumulative level throughout the Arizona borderlands region, requires the preparation of an Environmental Impact Statement (“EIS”). Finally, the BLM’s decision violates the Arizona-Idaho Conservation Act of 1988, 100 P.L. 696, 102 Stat. 4571, because the BLM’s authorization of border wall and road construction will not further the San Pedro NCA’s primary purposes, which include the conservation, protection, and enhancement of the NCA’s riparian area as well as its aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources.

The balance of the equities and public interest also support the relief sought by plaintiffs. Plaintiffs are not only in danger of losing their right under NEPA to be informed of, and participate, in federal government actions that impact the environment before they are made, but plaintiffs’ members will suffer serious harm to their use and enjoyment of the San Pedro NCA and its natural resources from the construction of a border wall and road currently occurring

within the San Pedro NCA. Such uses are precisely the type of interests that Congress intended to conserve and protect when it created the San Pedro NCA. Therefore, as reflected in the policy determination of Congress itself, the balance of equities and public interest strongly favor injunctive relief.

Moreover, the Army Corps began construction of the border fence and road immediately after plaintiffs filed an appeal and associated Petition for Stay of the BLM's action with the Interior Board of Land Appeals ("IBLA"). Plf. Exh. 2. Because ROW decisions are immediately effective under Department of the Interior ("DOI") regulations, plaintiffs in good faith requested that the BLM voluntarily suspend its ROW issuance during the 45-day period in which the IBLA has to respond to a Petition for Stay. Instead, however, BLM and Army Corps apparently rushed to begin construction on Saturday, September 29, 2007, the day after plaintiff mailed its appeal to BLM. Before filing this action, plaintiff contacted the DOI Field Solicitor in Arizona, again requesting a voluntary—and temporary—suspension of activities in order to avoid litigation and the need for emergency injunctive relief, but DOI need not agree to such suspension. With this motion, plaintiffs again simply seek a temporary suspension of construction activities until the merits of its preliminary injunctive request—either before this Court or before the IBLA—are resolved.

THE STATUTORY AND REGULATORY SCHEME

A. The National Environmental Policy Act

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Among the critical purposes of the statute are to “insure that environmental information is available to public officials and citizens before . . . actions are taken,” and to “help public officials make decisions that are based on understanding of environmental consequences.” *Id.* § 1500.1(b)-(c). To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a “detailed statement”—an EIS—regarding all “major federal actions

significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). NEPA’s implementing regulations further direct that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a).

NEPA requires that when an agency proposes to undertake any “action,” the agency “must first determine whether the action is one that normally requires” the preparation of an EIS pursuant to NEPA and the Council on Environmental Quality (“CEQ”) regulations implementing NEPA. 40 C.F.R. § 1501.4(a). If the agency is not certain whether an EIS is required, it must prepare an EA to determine whether an EIS is necessary. 40 C.F.R. § 1501.4. The EA must discuss the need for the proposal, evaluate alternatives that would cause less adverse environmental impacts, and provide sufficient evidence and analysis to support the agency’s determination as to whether the proposed action will significantly affect the environment. Id.

In determining whether a proposed action may significantly affect the environment, NEPA requires that both the context and intensity of that action be considered. 40 C.F.R. § 1508.27. In considering context, “[s]ignificance varies with the setting of the proposed action.” Id. Consideration of intensity, on the other hand, “refers to the severity of the impact,” including the unique characteristics of the area, proximity to ecologically sensitive areas, whether the action is related to other actions with cumulatively significant impacts, and to what degree the action involves unique or unknown risks. 40 C.F.R. § 1508.27(b)(3), (5), (7).

B. The Arizona-Idaho Conservation Act of 1988

The San Pedro Riparian National Conservation Area was created pursuant to the Arizona-Idaho Conservation Act of 1988. 100 P.L. 696, 102 Stat. 4571. Under this designation, the BLM is charged with managing the area “in a manner that conserves, protects, and enhances the

riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.” 16 U.S.C. § 460xx-1(a). The BLM is specifically directed to “only allow such uses of the conservation area as [it] finds will further [these] primary purposes.” *Id.* § 460xx-1(b).

C. The Secure Fence Act

The Secure Fence Act of 2006 authorizes the Homeland Security Secretary to provide for “at least 2 layers of reinforced fencing” on five distinct sections of the U.S.-Mexico border totaling approximately 700 miles. P.L. 109-367, Sec. 3, codified at 8 U.S.C. § 1103 note; Plf. Exh. 3 & 4. The longest of these sections, totaling approximately 370 miles, would run from Calexico, in the middle of California’s border with Baja California Norte, eastward to Douglas, Arizona—walling off the vast majority of Arizona’s border with the Mexican state of Sonora. P.L. 109-367, Section 3(2)(1)(A)(ii). The proposed wall would cross several protected areas of federal lands, including the Cabeza Prieta National Wildlife Refuge, Organ Pipe Cactus National Monument, Coronado National Forest, and San Pedro NCA. These lands provide habitat for a high concentration of imperiled and sensitive species, including several listed under the federal Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. For example, the Arizona fence segment would block critical corridors for numerous wildlife species, including at least three such corridors utilized by the only known jaguars in the U.S. See Plf. Exh. 3 & 4.

RELEVANT FACTS

A. The San Pedro River and San Pedro Riparian National Conservation Area

The San Pedro River is a unique and invaluable environmental resource—an undammed, free-flowing river, its perennial flow “is now a rare occurrence in the Southwest.” See Border Fence EA at p. 5. A binational River, the San Pedro flows from its headwaters near the town of Cananea, in Sonora, Mexico, approximately 25 miles before crossing the U.S.-Mexico border and into the San Pedro NCA, and ultimately joins the Gila River near Winkelman, Arizona.

In 1988, the 56,431-acre San Pedro Riparian National Conservation Area was established by Congress—the first such area to be created. 16 U.S.C. § 460xx. In 2000, the BLM created the National Landscape Conservation System (“NLCS”), the agency’s first attempt to create a unified system consisting of its premier lands and to raise public awareness concerning these areas’ scientific, cultural, educational, ecological, and other values. The NLCS consists of National Conservation Areas, National Monuments, Wilderness areas, Wilderness study areas, Wild and Scenic Rivers, and National Historic and Scenic Trails. The BLM today manages 15 National Monuments and 14 National Conservation Areas—including the San Pedro NCA—as part of the NLCS.

The San Pedro River and surrounding watershed are one of the most biologically diverse areas of the United States. *See* C. Hass, Landscape Fragmentation and Connectivity for Carnivores in the Upper San Pedro Basin. Plf. Exh. 5. This diversity stems from the San Pedro’s location at the convergence of four major ecosystems—the Sierra Madre and Rocky Mountains, and the Sonoran and Chihuahuan deserts. The River and its larger watershed consequently “contain[] floristic and faunal components of all four ecosystems.” *Id.* The San Pedro NCA “may represent an important conduit for genetic exchange” for wildlife “between source populations in Mexico and populations north of the border.” *Id.* Additionally, the “forested expanses” of the surrounding “Sky Island” mountain ranges “may also serve this function,” and “animals normally found in the forested areas of the sky islands may use the San Pedro River as an oasis while dispersing between isolated forests.” *Id.* Thus, maintaining these habitat linkages “may be critical for genetic exchange over a long time scale.”

The San Pedro River and NCA harbor particularly rich avian diversity—more than 100 species of breeding birds and an additional 250 species of migrant and wintering birds occur in the area, representing approximately half of all known breeding species in North America. Consequently, the San Pedro was recognized by the National Audubon Society as its first Globally Important Bird Area, and designated as a world heritage natural area by the United Nations World Heritage Program.

In addition, the San Pedro also harbors remarkable mammalian diversity, and was historically occupied by grizzly bears, wolves, jaguars, and ocelots. Today, “[c]arnivores currently found in the area include three species of procyonids (raccoons, coatis, and ringtails), four species of mephitids (hooded skunks, hog-nosed skunks, and striped skunks), two species of mustelids (badgers, and long-tailed weasels), three species of canids (coyotes, gray foxes, and kit foxes), two cats (bobcat and puma), and one bear (black bear).” Landscape Fragmentation and Connectivity, at p. 6.

B. The BLM’s Decision

In September 2006, the Army Corps, on behalf of DHS, requested a perpetual ROW on the San Pedro NCA for the construction of vehicle barriers along the U.S.-Mexico border. The decision on this request was never finalized. On August 10, 2007, the Army Corps submitted an amended ROW application to instead build border “pedestrian fencing” and an all-weather road along the NCA’s southern boundary.¹ Without public notification or opportunity for public comment, BLM issued the Border Fence EA, Decision Record (“DR”) and Finding of No Significant Impact (“FONSI”) on August 31, 2007. In its DR, the BLM chose to implement a “combination” Alternative which would build pedestrian fencing along most of the San Pedro NCA’s southern boundary, but would use temporary vehicle barriers within the San Pedro River corridor and floodplain, as well as the “corrals” area, and use permanent vehicle barriers rather than pedestrian fencing within five dry washes. Under the DR, temporary vehicle barriers would

¹ “Pedestrian fencing” is a generic term used to describe border fences or “walls.” The fencing considered in this instance is either “Bollard” or “Sandia” design. Under the Bollard design, offsetting double rows of 14’ to 17’ high steel pipe poles, approximately 6” in diameter are set in the 8.5” centers, and the pipes are then filled with concrete. This construction requires trenching 5’ deep and 2’ wide along the entire fence length. Under the Sandia design, vertical secure metal mesh panels are attached to 16’ steel poles, and then additional 6’ panels are secured to the top of these panels at an angle of 45 degrees. The poles are anchored by a 12” wide by 4’ deep concrete footing along the length of the fence. In this case, the Army Corps proposes to utilize a “modified” Sandia design with steel pipes arranged horizontally to a height of 3’, and the remaining height consisting of mesh. In contrast to pedestrian fencing, “vehicle barrier” refers to less intensive border barriers generally consisting of old railroad ties, which effectively block vehicular traffic but which are permeable to wildlife.

apparently be removed by crane “during periods of seasonal flooding.” Border Fence EA at p. 8-9.

As noted above, plaintiffs filed an IBLA appeal and Petition for Stay of this action pursuant to DOI regulations. Although plaintiffs requested that BLM voluntarily stay its action during the 45 days in which the IBLA has to decide on its Petition for Stay, the BLM and Army Corps apparently began construction on Saturday, September 29, 2007. See Clark Decl. and accompanying photographs. In addition to requests to the DOI Field Solicitor to voluntarily halt this construction, we also requested Department of Justice, on October 4, 2007, to help bring a voluntary suspension of construction activities so that this matter would not need to be heard on an emergency basis, but these efforts were unsuccessful.

ARGUMENT

A. Plaintiffs Are Likely To Succeed On The Merits

1. The BLM’s Decision Violates NEPA

In reviewing whether an agency has complied with NEPA, it is the Court’s role “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision[s] [are] not arbitrary or capricious.” Nat’l Comm. for the New River v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting Balt. Gas & Elec. v. NRDC, 462 U.S. 87, 97-98 (1983)). The Court must ensure that “the agency considered the relevant factors in a rational way,” Public Citizen v. Nat’l Highway Traffic Safety Admin., 848 F.2d 256, 266 (D.C. Cir. 1988) and “took a ‘hard look’ at the environmental consequences of its decision to go forward with the project.” Nat’l Comm. for the New River, 373 F.3d at 1327 (internal citations omitted). Because a fundamental objective of NEPA is to ensure that an “agency will not act on incomplete information, only to regret its decision after it is too late to correct,” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1990), as in all cases brought under the Administrative Procedure Act (“APA”), if the agency has “entirely failed to consider an

important aspect of the problem” its decision must be set aside. Motor Vehicle Mfs. Ass’n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43 (1983). By failing to analyze the individual, regional, and cumulative impacts resulting from its decisions to construct border fences within Arizona, the BLM has not taken the requisite “hard look” at the consequences of its actions or informed the public of these consequences, and has otherwise entirely failed to “consider an important aspect of the problem.” Id.

a. A Regional Environmental Impact Statement Is Required for the Proposed Arizona Border Fence

The border fence and road currently being constructed on the San Pedro NCA is not an isolated project, but rather a part of a larger, regional plan by the federal government to wall off the vast majority of Arizona’s common border with Mexico. Numerous federal agencies are involved in the planning, permitting, and construction of this proposal, including BLM; other federal land management agencies within DOI including Fish and Wildlife Service (“FWS”) and National Park Service; Army Corps, which is serving as a construction consultant, and is responsible for administering aspects of the Clean Water Act relating to the dredge and fill of waters of the United States; and DHS and its component agencies, which have primary responsibility for border security and construction of border security infrastructure projects. Under NEPA, the existence of this type of multi-agency, integrated program requires analysis in a regional or comprehensive EIS, produced cooperatively by all the involved federal agencies. See 42 U.S.C. § 4332(2)(C); Kleppe v. Sierra Club, 427 U.S. 390 (1976). Because border fence construction in Arizona constitutes a comprehensive federal plan with significant and cumulative environmental impacts, a regional EIS on such construction must be prepared before further work on the San Pedro fence project is conducted.

i. There Is a Comprehensive Federal Plan for the Development of the Arizona Border Fence

As defined by the Supreme Court in Kleppe, a “proposal” exists for purposes of NEPA when there is “a regional plan of development . . . [which] define[s] fairly precisely the scope

and limits of the proposed development of the region.” 427 U.S. at 401-02. Similarly, NEPA’s implementing regulations direct that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). In this instance, several factors demonstrate that a border fence construction “proposal” for the State of Arizona exists, including the simultaneous planning and development of several individual and segmented fence construction projects in different areas of the State, Congressional direction in the Secure Fence Act, and DHS’s actions in treating its activities in Arizona and other areas as programs.

In Kleppe, conservation organizations alleged that the actions of several federal agencies in permitting and authorizing development of coal reserves in the Northern Great Plains constituted a federal program demanding the preparation of a regional, comprehensive EIS. 427 U.S. at 395. In rejecting plaintiffs’ arguments, the Supreme Court found that there was “no evidence in the record of an action or proposal for an action of regional scope . . . [and] no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise related.” Kleppe, 427 U.S. at 400.

In contrast to Kleppe, and vividly illustrating the plain existence of an Arizona border fencing program and the clear need to conduct an EIS on that program now, before further construction goes forward, the scope and extent of fence construction within the Arizona borderlands has rapidly accelerated in the late summer and fall of 2007. Indeed, there are currently at least six distinct areas of fence construction that have been separately approved or proposed thus far this calendar year, including segments within the San Pedro NCA, Buenos Aires National Wildlife Refuge, Barry M. Goldwater Range, and Organ Pipe Cactus National

Monument. See Plf. Exh. 6.² The simultaneous construction of these fence segments together will total approximately 74 miles, or approximately 21% of Arizona's total shared border with Mexico. The fact that more than a fifth of the Arizona border would be walled under individual fence segments proposed in a period of less than nine months provides strong evidence of a "program" which will have a significant impact on the environment, and thus requires the preparation of a regional EIS.

The existence of an Arizona border fence proposal is further illustrated by provisions of the Secure Fence Act, which authorizes DHS to construct border fencing along a 370 mile-long corridor running eastward from Calexico, California to just east of Douglas, Arizona. P.L. 109-367, Section 3(2)(1)(A)(ii); Plf. Exh. 3 & 4. While the Act provides discretion to DHS on the manner of construction to utilize within areas where the topography is greater than a 10 percent grade, and does not override the duty of federal land management agencies to conserve the lands under their administration (as illustrated by BLM's refusal to allow pedestrian fence construction within the river corridor and flood plain of the San Pedro River), it nonetheless establishes with considerable precision the geographical areas in which border fences will likely be constructed.

Additionally, DHS, the agency responsible for fence construction under immigration law generally, and the Secure Fence Act specifically, recently announced its intention to prepare an EIS on a similar proposal in southern Texas, within the Border Patrol's Rio Grande Valley Sector. Notably, in the Federal Register notice announcing the initiation of this NEPA process, DHS explained that it "is proposing to install and operate tactical infrastructure consisting of pedestrian fences, supporting patrol roads, lights, and other infrastructure along approximately

² This map does not portray the construction proposed on the Barry Goldwater Range and Organ Pipe Cactus National Monument.

70 miles of the U.S/Mexico international border.” 72 Fed. Reg. 54,726 (Sept. 24, 2007). DHS further noted that the proposal “includes the installation of tactical infrastructure in 21 segments” in the vicinity of several Texas communities, and that “[i]ndividual segments might range from approximately 1 mile to more than 13 miles.” *Id.* (emphasis added). DHS’s recognition of a larger fencing proposal and need for an EIS in the Texas region highlights the urgency of conducting a similar analysis in Arizona, which may involve DHS acting as lead agency, but which must also include all other federal agencies that administer federal land or otherwise have permitting authority or involvement in the construction of the Arizona border fence. See 40 C.F.R. § 1501.5(a) (“A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either: (1) Proposes or is involved in the same action; or (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.”).³

ii. *Individual Fence Projects within Arizona Will Have Significant Synergistic and Cumulative Impacts on Wildlife and Landscape Connectivity*

A regional EIS must also be prepared because of the cumulative and synergistic effects the construction of individual fence segments will have on the Arizona borderland environment, particularly wildlife and their habitat. Under NEPA, “[a]n action insignificant in itself may be significant . . . if it is ‘related to other actions with individually insignificant but cumulatively significant impacts,’” Nat’l Wildlife Fed’n v. Norton, 332 F. Supp. 2d 170, 182 (D.D.C. 2004) (quoting 40 C.F.R. § 1508.27(b)(7)), or if “it is reasonable to anticipate a cumulatively

³ DHS has also itself defined its border security activities within the Arizona borderlands region as a “program” for purposes of NEPA analysis. In November 2002, the agency released a draft Programmatic EIS for its Arizona operations proposing 250 miles of pedestrian fencing and 880 miles of border roads.

significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7). The purpose of NEPA’s cumulative effects requirement “is to prevent agencies from dividing one project into multiple individual actions.” Natural Res. Def. Council v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) (emphasis added) (internal quotations and citations omitted).

The need to prepare a regional and cumulative EIS is further heightened when the actions being considered have “similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” 40 C.F.R. § 1508.25. In this case, because the “individual” fence projects being constructed and planned throughout the Arizona border region will have significant and cumulative adverse environmental consequences and are similar in terms of construction, timing, and geography, the federal agencies involved in permitting such construction must prepare a comprehensive EIS.

There is substantial scientific evidence that the six fence projects currently being constructed or planned will have significant cumulative effects on the Arizona border region’s wildlife, and the landscape habitat connectivity needed to sustain viable populations of those species. Hass Decl. (Plf. Exh. 7) ¶ 13; Flesch Decl. (Plf. Exh. 8) ¶ 9; Avila Decl. (Plf. Exh. 9) ¶ 22. Nonetheless, the BLM’s EA for the ROW on the San Pedro NCA—like previous border fence EAs—only considered potential cumulative impacts within the specific project area, rather than the overall impacts of fence construction on wildlife within the Arizona borderlands region.

Such analysis is especially imperative, however, given the unique position of the borderlands region at the convergence of several major ecosystems, and the resulting high diversity of wildlife. Hass Decl. ¶ 4 (“Southeastern Arizona is one of the most biologically diverse areas in the United States”); Avila Decl. ¶ 8 (noting over 2000 species of plants, more than 550 species of vertebrates, and countless species of invertebrates in Sonoran desert within

southwestern Arizona). Indeed, the Arizona borderlands region contains many species of plants and wildlife that have otherwise limited distributions within the United States, and in some circumstances, provide a species' only habitat in the country. Hass Decl. ¶ 5 ("Many subtropical species reach the northern extent of their ranges in this area, including jaguars, ocelots, white-nosed coatis, hooded skunks, Mexican fox squirrels, Merriam's deermice, Coue's deer, white-sided jackrabbits, [and the] Sonoran subspecies of the Virginia opossum); Avila Decl. ¶ 3 (discussing jaguar and ocelot).

For these species, which have larger core habitats within Mexico and countries further south, the construction of significant fencing along the San Pedro NCA and the majority of Arizona's border will result in fragmentation of habitat, genetic isolation, and high risk of extinction within the U.S. Hass Decl. ¶ 13 ("The biological integrity of the whole Madrean Archipelago region relies on genetic interchange through the region—by both plants and animals. Barriers to this genetic interchange may influence the long-term viability of populations, especially north of the border."); Avila Decl. ¶ 13 (border fencing projects "threaten the survival of jaguars in the United States, endanger the establishment of individuals and/or a viable breeding population and block passages the jaguars, as well as other big, medium, and small sized mammals use to reach the habitats where they naturally occur.").

The need to prepare a comprehensive EIS based on cumulative and regional effects on wildlife has been specifically recognized by the D.C. Circuit. For example, in Natural Resources Defense Council v. Hodel, 865 F.2d 288, conservation organizations alleged that DOI failed to consider adequately the cumulative effects of simultaneous offshore oil and gas leasing and development in the Pacific and Atlantic Oceans on migratory species including endangered cetaceans, marine mammals, salmon, and marine and coastal birds. The D.C. Circuit agreed with

plaintiffs, finding that the EIS “for the most part considers only the impact within each area” of leasing. *Id.* at 298 (emphasis in original). The Court thus held that the analysis did “not address the issue [] which NEPA requires the Secretary to consider: the cumulative impacts of [oil and gas leasing] development in different areas,” and that “allowing the Secretary’s ‘analysis’ to pass muster here would eviscerate NEPA.” *Id.* at 298-99 (quotations and emphasis in original); see also Friends of the Earth v. Army Corps of Eng’rs., 109 F. Supp. 2d 30 (D.D.C. 2000) (requiring consideration of the cumulative effects of constructing three barges in the Mississippi River).

Similarly, in this instance the Border Fence EA contains a brief discussion of cumulative impacts within the San Pedro River watershed but does not address or acknowledge the potential cumulative impacts of simultaneous fence construction being undertaken or planned within different areas of the Arizona border on natural resources adversely affected by fence construction within the San Pedro Riparian NCA, including the wildlife species discussed in detail above. Nor have previous EAs conducted recently, including those prepared for fence construction within Buenos Aires National Wildlife Refuge and Organ Pipe Cactus National Monument, considered such regional impacts. As this failure is directly comparable to the Army Corps’ segmentation of impacts in Friends of the Earth, a regional EIS must be prepared.

b. An Individual EIS Must be Prepared for the San Pedro Fence Project

In addition to the responsibilities of BLM, other federal land management agencies, and DHS to prepare a regional EIS on the border fence construction program within Arizona, the BLM is independently responsible for preparing an individual EIS on the significant environmental effects of its grant of a ROW to Army Corps for border fence construction within the San Pedro NCA. BLM’s action squarely implicates several of the factors identified in NEPA’s implementing regulations as indicators of significance, and the agency’s failure to take a “hard look” at these impacts renders its FONSI arbitrary and capricious. Because the existence

of only one factor has been held sufficient to establish significance, an EIS on the San Pedro border fence project must be prepared.

i. The Border Fence Will Significantly Impact the San Pedro River and Watershed, a Unique and Ecologically Critical Area

One factor for determining significance under NEPA is the “unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). The San Pedro River, San Pedro NCA, and its larger watershed implicate nearly all of these criteria. Specifically, the San Pedro is: (1) one of the last free-flowing rivers in the Southwest, protected within the park land of the San Pedro Riparian NCA, Border Fence EA at p. 5; (2) an area of incredible biological diversity, Hass Decl. ¶¶ 5-6; (3) an area of global importance to avian diversity, as demonstrated by the National Audubon Society’s designation of it as the first Globally Important Bird area, and its designation as a United Nations World Heritage Site, Border Fence EA at p. 5; (4) eligible for Wild and Scenic River designation, id. at p. 10; and (5) one of only two National Riparian Conservation areas in the nation. Just as the Ninth Circuit in National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001), noted that the “unique characteristics of Glacier Bay [National Park and Preserve] are undisputed and of overwhelming importance,” so too are the unique characteristics of the San Pedro, and thus an EIS on the effects of border fence and road construction on this irreplaceable treasure must be conducted.

ii. The Border Fencing Involves Highly Uncertain, Unique, and Unknown Risks to the San Pedro River That Are Not Adequately Addressed by the Proposed Mitigation

Another factor for determining significance pursuant to NEPA is the “degree to which the possible effects on the . . . environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(5); Grand Canyon Trust v. FAA, 290 F.3d 339, 340 (D.C. Cir. 2002) (If “any significant environmental impact might result from the proposed action” then an EIS must be prepared) (emphasis in original) (internal citation omitted). In this instance, BLM

presents very troubling predictions concerning the potential effects of fence and road construction on the overall hydrology of the San Pedro River, its wetlands, and even the course of the River itself—predictions that are supported by the effects of border fence construction that have already occurred in Arizona. Specifically, BLM predicts that building a border fence across more than 60 desert ephemeral washes will “significantly alter[] and rapidly destabilize[],” those drainages, resulting in increased erosion and sedimentation into the San Pedro River, potentially causing the River to “adjust laterally,” causing mass “bank failure and loss of riparian vegetation.” Border Fence EA at p. 6, 9. Additionally, as discussed in detail above, the border fence and road construction will adversely affect the unique and diverse assemblage of wildlife species within the San Pedro NCA. These unique potential impacts to the wildlife, hydrology, wetlands function, and riparian vegetation of the San Pedro River—in short, the overall environmental integrity and health of the River and its larger watershed—demand the preparation of an EIS.

While in some circumstances, mitigation measures can arguably justify a finding of no significant impact, this principle does not apply here. Davis v. Mineta, 302 F.3d 1104, 1225 (10th Cir. 2002) (citing Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,038 (Mar. 23, 1981)). Such measures must be “more than a possibility, and must be either required by statute or regulation or so integrated into the initial proposal that it is impossible to define the proposed project without them.” Id.; Nat’l Parks & Conservation Ass’n, 241 F.3d at 734 (holding a “perfunctory description” or “mere listing” of mitigation, without supporting analytical data, is insufficient to support finding of no significant impact). Here, however, the Border Fence EA demonstrates that: (1) the construction of pedestrian fencing across 66 ephemeral washes, common to all alternatives considered in the EA, is a primary contributor to the predicted effects to the San Pedro, and thus will not be mitigated by the use of vehicle barriers in other, limited areas; (2) BLM has little confidence in the proposed mitigation measures, and no data or experience to demonstrate their effectiveness; and (3) mitigation measures have not even been identified in

some circumstances. As a result, the uncertainty of the effectiveness of these measures further demonstrates the need for an EIS.

Thus, for example, BLM states that potential watershed impacts “may” be reduced if the pedestrian fencing is “designed to pass flood flows and sediment . . . for all drainages in the basin.” Border EA at p. 7; *id.* (“[T]here is a large degree of uncertainty concerning the effectiveness of the some [sic] of the proposed mitigation as many of the details have not been determined.”) (emphasis added). In circumstances such as these, the BLM’s “lack of knowledge does not excuse the preparation of an EIS; rather it requires [the BLM] to do the necessary work to obtain it.” *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 733. An agency’s failure to gather additional data, or to explain why it cannot do so, provides additional grounds for finding its NEPA analysis unlawful. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1999) (remanding EA where agency failed to provide “justification regarding why more definitive information could not be provided.”).

iii. The Proposed Border Fence, In Conjunction With Other Actions, Will Have a Significant Cumulative Impact on the San Pedro River and National Conservation Area

Not only would the construction of a border fence affect an ecologically critical area and pose enormous risks to the hydrology of the San Pedro River, but the impacts of the construction in conjunction with the current degradation of the river from other actions would cause cumulatively significant impacts, another factor to consider when determining significance. *See* 40 C.F.R. § 1508.27(b)(7). The CEQ regulations define “cumulative effect” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of which agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7. In light of all the other actions already degrading and severely threatening the San Pedro River currently, any additive adverse impact to the River is arguably “significant.” That conclusion is inescapable in this case

given the potentially devastating risks to the River from the proposed pedestrian fencing described above.

For example, according to a recent June 17, 2007 FWS Biological Opinion addressing the operations of Fort Huachuca, the San Pedro River has suffered a long-term decline in peak and overall water flows.⁴ As a result, the River is already experiencing an increasing number of no-flow days, and any additional decline in the flows of the San Pedro will threaten various endangered and threatened plant species, including the Huachuca water umbel. Biological Opinion at p. 81-86.

Given the extreme stress already affecting the San Pedro River from dewatering and other activities degrading the River and its watershed, it is clear that the construction of pedestrian fencing and roads will only exacerbate the already precarious ecological situation of the river. As described in detail above, the list of environmental impacts resulting from border fence construction on the San Pedro River is long and extensive, and the cumulative effects of these impacts in conjunction with dewatering and other activities that are already literally threatening the survival of the San Pedro River make it clear that an EIS must be prepared.

c. The BLM's Failure to Provide Opportunity for Public Participation on the Environmental Assessment Violates NEPA

One of NEPA's primary purposes is to provide the public with information and an opportunity to participate in gathering information. 40 C.F.R. § 1500.1(b); Baltimore Gas & Elec. Co. v. Nat'l. Res. Defense Council, 462 U.S. 87, 97-100 (1978). To this end, NEPA and its implementing regulations provide for significant public involvement in the drafting of both Environmental Assessments and Environmental Impact Statements. 40 C.F.R. § 1500.2 ("[f]ederal agencies shall to the fullest extent possible . . . implement procedures to . . . encourage and facilitate public involvement in decisions which affect the quality of the human

⁴ Available at: http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/070132_FortHuachucaFINAL.pdf

environment.”); *Id.* § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”); *Id.* § 1506.6(b) (federal agencies must “provide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.”). Despite the central importance of public participation under NEPA, and the myriad ways that the CEQ regulations emphasize that importance, the BLM has simply provided no notice of its proposed action to the public before approving the ROW on the San Pedro Riparian National Conservation Area, and no opportunity for public comment or involvement—a clear violation of NEPA.

2. The BLM’s Decision Violates The Arizona-Idaho Conservation Act Of 1988

The San Pedro NCA was created pursuant to the Arizona-Idaho Conservation Act of 1988. 100 P.L. 696, 102 Stat. 4571. Under this designation, the BLM is charged with managing the area “in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.” 16 U.S.C. § 460xx-1(a). The BLM is specifically directed to “only allow such uses of the conservation area as [it] finds will further [these] primary purposes.” *Id.* § 460xx-1(b).

The proposed border fence and road construction permitted under the BLM’s August 31 decision will have pronounced negative impacts on the area’s wildlife, the San Pedro River’s riparian area, and the River itself. Indeed, in addition to impacts of wildlife, the agency’s analysis suggests that fence and road construction will cause significant erosion and sedimentation, as well as the risk that these effects will be so pronounced that the entire river area will suffer a lateral shift. Thus, it is not apparent how BLM’s grant of a ROW for border

fence and road construction would possibly be consistent with its duty to “conserve, protect, and enhance” the natural and cultural resources of the San Pedro NCA. Moreover, there is no indication that the BLM even considered this relevant factor—the agency’s governing mandate for the San Pedro NCA—a cardinal example of arbitrary and capricious decision-making. Motor Vehicle Mfs. Ass’n., 463 U.S. at 43.

B. The Balance Of Equities And The Public Interest Also Favor Injunctive Relief

Since Plaintiffs have demonstrated a “particularly strong likelihood of success on the merits,” “even . . . a relatively slight showing of irreparable injury” is sufficient in order for them to prevail at the temporary restraining order or preliminary injunction stage. City Fed Fin. Corp. v. Ofc. Of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995); see also Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985) (justifying injunction with “either a high probability of success and some injury, or vice versa”). However, plaintiffs fully satisfy the remaining standards for emergency injunctive relief.

As demonstrated by the attached Clark Declaration and accompanying photographs, construction activities have commenced within the San Pedro NCA, involving substantial grading and filling of areas for road construction, bulldozing and piling of vegetation, and trenching in preparation for the erection of border fencing. Plf. Exh. 15. A significant amount of work has been done in the short time since plaintiffs filed their IBLA appeal and BLM, Army Corps, DHS have clearly indicated that they will not halt or slow construction efforts before the merits of plaintiffs’ claims are heard either before this Court or the IBLA. The length of border within the San Pedro NCA is only approximately two miles, and thus construction could be completed rapidly. The ongoing irreparable harm to plaintiffs’ interests, and the great risk that its legal claims could be mooted in short order, compel the request for emergency relief in this instance.

1. Plaintiffs Are Harmed By the Irreparable Impacts to the San Pedro River and NCA

Under its decision, the Army Corps is currently taking the following actions within the granted ROW, all of which will create irreparable injury: (1) clearing and grading of a 60-foot wide strip of land along the entire southern boundary of the NCA; (2) new road construction involving grading and leveling of proposed roadbeds, filling areas with existing materials or engineered fill, lifting and bedding stretches of road, and installing of drainage structures; and (3) construction of “pedestrian fencing” utilizing either “Bollard” or “Sandia” design.

The proposed fencing, permanent vehicle barriers, and temporary vehicle barriers will cross the San Pedro River and its floodplain, as well as 30 ephemeral drainages to the east of the River, and 36 ephemeral drainages to the west of the River. Border Fence EA at p. 6. “Field observation of pedestrian fence built through ephemeral drainages” in adjacent areas of the Arizona border “indicated excessive deposition above crossings and channel entrenchment below” to a maximum depth of six feet. *Id.*; *see also* Carlson Decl. (Plf. Exh. 10) and Photographs. The expected increased erosion from these tributary ephemeral drainages “will increase deposition of sediment in the San Pedro River,” resulting in bank erosion and channel incision, in turn “alter[ing] stream channel morphologic stability.” Border Fence EA at p. 7. “Potentially, if enough sedimentation occurs, then the river may adjust laterally, which will cause bank failure and loss of riparian vegetation.” *Id.* at p. 9.

This construction, and the negative environmental impacts, will irreparably harm plaintiffs’ members and their interests in their use and enjoyment of the San Pedro River. Miller Decl. (Plf. Exh. 11) ¶ 9 (“I was drawn to the San Pedro River because of its lush vegetation, abundant surface water and unmatched wildlife viewing opportunities.”); Neeley Decl. (Plf. Exh. 12) ¶ 8 (Noting that construction “will greatly impact my ability to enjoy the resources found in the San Pedro River and surrounding areas . . . by negatively impact[ing] the associated vegetation and water flows of the river, diminishing the remote and [quiet] nature of the outdoor

experience currently found there.”); Leonard Decl. (Plf. Exh. 13) ¶ 2 (“The greatest attraction of the Riparian Area is the presence of flowing water—an inestimable boon in our desert environment—and the attendant proliferation of wildlife, both avian and mammalian.”).

2. Plaintiffs Are Irreparably Harmed By the Impacts to Wildlife within the San Pedro NCA

Plaintiffs will also be harmed by the significant and irreparable impacts to wildlife. Notably, the “biological integrity” of this region “relies on genetic interchange . . . by both plants and animals.” Hass Decl. ¶ 13. As “barriers to this genetic interchange may influence the long-term viability of populations, especially north of the border,” construction of border fencing and roads thus presents “serious threats to long-term survival of wildlife on the border.” *Id.*; Avila Decl. ¶ 13; (border fencing projects “threaten the survival of jaguars in the United States”); Flesch Decl. ¶ 10 (noting that because cactus ferruginous pygmy-owls “tend to fly near the ground, virtually never fly above the height of canopy vegetation and tend to stay in areas with moderate to high vegetation cover,” border development “including fences and large clearings may reduce landscape connectivity for pygmy-owls,” which will “result in some degree of physical and perhaps genetic isolation from populations in Mexico.”).

The significant and irreparable harm to wildlife in turn negatively affects plaintiffs and their members’ interests—their use and enjoyment of the San Pedro NCA is heavily reliant on wildlife observation, as well as the mere knowledge that the area provides substantial habitat for healthy populations of wildlife. Miller Decl. ¶ 4 (border construction “will have significant negative impacts on both my professional life and goals, and my personal interest in the preservation of wildlife and our shared natural heritage with Mexico”); *id.* ¶ 10 (describing “outstanding birding experience” and “two full days birding, tracking wildlife, and exploring features” within San Pedro NCA as “exceptionally unique for Arizona”); Neeley Decl. ¶ 6

(describing visiting to enjoy “plant and animal species”); *id.* ¶ (construction and “resultant habitat destruction will subsequently decrease the number of wildlife species available for viewing.”); Bahr Decl. (Exh. 14) ¶ 4 (describing hiking along the River and viewing “a variety of wildlife species including coatimundi, turkeys, and several kinds of hummingbirds.”).

3. Defendants Are Irreparably Injuring Plaintiff by Depriving Them of Their Statutory Rights to Advance Notice and Public Participation

Defendants also irreparably harmed plaintiffs by depriving plaintiffs of prior notice and any opportunity to participate in the NEPA review process. “[W]here participation in the NEPA process is denied” to those who would otherwise participate, “irreparable” harm is presumed, as in an APA claim. *Natural Res. Def. Council v. Lujan*, 768 F. Supp. 870, 890 n.36 (D.D.C. 1991) (citing *Cnty. Nutrition Inst. v. Butz*, 420 F. Supp. 751, 757) (D.D.C. 1976). Here, Plaintiffs are being deprived of their legal right to fully participate in, and influence, the NEPA process, and are thus losing the opportunity (outside of litigation) to bring to BLM’s attention—before the border fence and road construction is completed—the serious impacts to the environment from the proposed construction on the San Pedro NCA, and serious cumulative impacts from that construction in conjunction with all other border fence construction being conducted in Arizona. See *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.) (“the difficulty of stopping a bureaucratic steam roller, once started, [is] a perfectly proper factor for a district court to take into account in assessing [the risk of injury] on a motion for a preliminary injunction”).

4. Federal Defendants Will Not Suffer Irreparable Harm If the Court Issues a Temporary Restraining Order

In contrast to the serious, irreparable harm to plaintiffs’ interests that will result if the border fence and road construction ROW is not temporarily enjoined and/or rescinded, defendant BLM will not suffer any substantial injury in the case of an injunction. BLM has no protectable interest in its discretionary grant of a ROW to Army Corps and DHS for construction of a border

fence and roads within the San Pedro NCA. Indeed, as detailed at length in this brief, this decision has been made without lawful environmental analysis and in violation of its duty to protect the natural resources of this protected area. In contrast, although Army Corps and DHS may have some interests in the ROW and construction, these impacts cannot be outweighed by the clear irreparable harm to plaintiffs, and the limited impact of a small delay for adjudication of plaintiffs' claims.

As for any potential financial impact on any private contractors that may be conducting the construction, to the extent that those interests should factor into the Court's analysis at all, "it is well established in this Circuit that monetary loss is usually accorded little or no weight in the irreparable-harm analysis." Pharmaceutical Research and Mfrs. of Am. v. U.S., 135 F. Supp. 2d 1, 18 (D.D.C. 2001), rev'd on other grounds by Pharmaceutical Research and Mfrs. of Am. v. Thompson, 251 F.3d 219 (D.C. Cir. 2001). This is because "[t]he key word in this consideration is irreparable. . . Financial injury . . . can [] be mitigated in the course of litigation." Segar v. Civiletti, 516 F. Supp. 314, 320 (D.D.C. 1981) (internal citations omitted).⁵

5. Injunctive Relief Is In the Public Interest

Preserving the San Pedro River and San Pedro NCA, one of the last free-flowing rivers in the Southwest and an area of incredible beauty, ecological importance, and biological diversity, is absolutely in the public interest. Possible "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e.,

⁵ If the Court grants this motion, plaintiffs respectfully request that the Court require the posting of no more than a nominal bond, as is ordinarily the case in public interest litigation. See Citizen's Alert Regarding Environment v. U.S. Dept. of Justice, 1995 WL 748246, *12 n.10 (D.D.C. 1995) (stating that "federal courts have broadly recognized that [a] nominal bond is sufficient and appropriate where public interest groups seek enforcement of environmental laws"); see also Natural Res. Def. Council v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971), aff'd, 458 F.2d 827 (D.C. Cir. 1972) (setting \$100 bond for preliminary injunction against large-scale offshore oil lease).

irreparable.” Amoco Prod. Co. v. Village of Gambel, 480 U.S. 531, 545 (1987). Additionally, “the public interest is best served by having federal agencies comply with the requirements of federal law.” Patriot, Inc. v. United States HUD, 963 F. Supp. 1, 6 (D.D.C. 1997); see also Fund for Animals v. Clark, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) (“[T]he public interest expressed by Congress was frustrated by the federal defendants not complying with NEPA. Therefore, the public interest would be served by having the federal defendants address the public’s expressed environmental concerns, as encompassed by NEPA, by complying with NEPA’s requirements.”) (citing Fund for Animals v. Espy, 814 F. Supp. 142, 152 (D.D.C. 1993)).

Plaintiffs anticipate the federal government will argue—and plaintiffs agree—that there is also a public interest in ensuring national security. However, Congress in passing the Secure Fence Act did not waive compliance with other laws.⁶ Moreover, the fact that DHS has recently announced its intention to prepare a regional EIS on border security operations in south Texas illustrates that the public interests inherent in both environmental preservation and national security are not mutually exclusive, but that each can be integrated with the other. Indeed, it is plaintiffs’ position that protecting our irreplaceable natural resources, and ensuring that our Nation’s environmental laws are adhered to, will compliment and strengthen our national security efforts.

In this case, Congress itself has articulated the strong public interest in protecting the San Pedro River and its rich natural heritage, by creating the San Pedro Riparian National Conservation Area and directing the BLM to protect its irreplaceable natural resources.

⁶ The DHS Secretary does have authority to waive laws pursuant to section 106 of the REAL ID, necessary to ensure the expeditious construction of border roads and barriers. DHS has not invoked this authority in this case, however.

Temporary injunctive relief against the BLM ROW in this matter would strongly serve the public interest by protecting this unparalleled area.

REQUESTED RELIEF

For the foregoing reasons, the Motion for a Temporary Restraining Order and/or Preliminary Injunction should be granted.

Respectfully Submitted this 5th day of October, 2007.

Brian Segee, Staff Attorney. D.C. Bar. 492098
Defenders of Wildlife
1130 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 682-9400

Bob Dreher, Vice President for Conservation Law and Litigation, D.C. Bar. No. 398722
Defenders of Wildlife
1130 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 682-9400

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing plaintiff's Motion for Temporary Restraining Order, accompanying memorandum, plaintiffs' exhibits 1-15, and a proposed Order has been made directly to the Court on this 5th day of October, 2007.

Brian Segee, D.C. Bar No. 492098
Staff Attorney
Defenders of Wildlife
1130 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 682-9400