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June 10, 2013

Dear Senator:

We are writing to express our strong objections to certain border security provisions contained in S. 744, “The Border Security, Economic Opportunity, and Immigration Modernization Act” that eliminate the rule of law, elevate fencing over other security measures, and institute unnecessary provisions. Our organizations would like to work to improve the bill with all Senators who share our concerns about eliminating the rule of law and the significant impacts that can result from that and other measures that will damage National Wildlife Refuges, National Parks, wilderness areas, other public lands, communities, private property, and wildlife.

Our concerns relate to: 1) the restatement and broadening of the provision allowing the Secretary of the Department of Homeland Security (DHS) to waive all laws for construction of roads, barriers and other physical tactical infrastructure; 2) the Southern Border Fencing Strategy; 3) the unnecessary provisions for U.S. Customs and Border Protection access to public lands (which they already have); and 4) the waiver of the National Environmental Policy Act (NEPA) for rules promulgated to implement Title II of the bill. We explain our concerns below.

Waiver of Laws

The 2005 REAL ID Act authorized the Secretary of Homeland Security to waive all legal requirements that the Secretary determined necessary to ensure expeditious construction of barriers and roads. The Congressional Research Service characterized this provision as providing for the largest waiver of law in American history. Secretary Michael Chertoff invoked the waiver five times for construction of hundreds of miles of border fencing and roads, and it is still actively being used for additional projects (for example, construction of a road through a national forest in southern Arizona). The waivers currently in place cover not only all federal and related state and local health and environmental laws, but also all laws protecting historic sites, archaeological findings, the Administrative Procedures Act and the Religious Freedom Act. Implementation of these waivers has done great harm to communities, private property, and our public lands. Typical judicial review afforded to parties aggrieved by federal government actions has also been eliminated.

Rather than repealing or narrowing the authority granted in 2005, this legislation actually broadens it to encompass “other physical tactical infrastructure”. Among other things, this would include the forward operating bases authorized in the bill. A number of forward operating bases have already been constructed at or near the southern border without invoking the waiver. There has been no litigation regarding forward operating bases or other infrastructure not covered under the present waivers or, for that matter, directed at operations at or within 100 miles of the border since 2008.

There has, however, been real physical damage done to towns, public lands, private property, and roads used for law enforcement purposes as the result of flooding caused in part by walls that were constructed hastily, without adequate regard for human safety, and in contradiction to readily available hydrological and meteorological data. Because of the current waivers, the construction of these fences did not go through typical interagency and public review. The waiver has also resulted in damage to public lands and to America’s wildlife. The waiver is a hindrance, not a help, to the enforcement of the nation’s laws and to the security of the U.S. citizens who rely on those laws for protection. This elimination of law will bring significant harm to the people, wildlife, water and lands of the Southwest, and its economy.

Southern Border Fencing Strategy

The bill requires the Secretary of DHS to develop a “Southern Border Fencing Strategy” to identify where fencing, infrastructure, and technology should be deployed along the southern border. The language should reflect the reality that this would be “additional fencing, infrastructure and technology” since over 650 miles of fencing has already been constructed, along with a considerable amount of other infrastructure, including many surveillance towers, sensors, lighting, and forward operating bases.

Our organizations oppose the construction of additional walls at the border. The walls constructed to date have resulted in serious environmental and economic impacts due to massive flooding, debris, and associated changes in hydrology. Indeed, in some places, the wall – built at a cost of millions of dollars per mile—has fallen down because of such problems. Private property, commercial businesses, roads and public lands have been damaged, and critical wildlife migration pathways have been severed. Further, there has been no evidence shown in reports by the Government Accountability Office (GAO) or other organizations that the wall has made a significant contribution to border security. Requiring a separate border fencing strategy elevates one approach over all other approaches and, at that, the approach that causes the most damage and is probably the least effective tool available for border security.

Access to Public Lands

Section 1105(b) directs the Secretaries of the Departments Agriculture and Interior to provide to U.S. Customs and Border Protection (CBP) immediate access to federal lands within 100 miles of the border in Arizona for routine motorized patrols and the deployment of communications, surveillance, and detection equipment. This is an unnecessary provision. There are already several forward operating bases and numerous surveillance, communication, and emergency assistance towers on public lands within 100 miles of the border. The 2006 interagency

agreement between the Department of Homeland Security, the Department of Agriculture and the Department of the Interior clearly anticipates the needs of Border Patrol to enter into all areas, including wilderness areas and wilderness study areas. Should anyone doubt that the Border Patrol has access to these areas, there is a government report documenting thousands of miles of off-road travel, primarily by Border Patrol agents, in the Cabeza Prieta National Wildlife Refuge Wilderness (July, 2011).

Waiver from the National Environmental Policy Act

Title II provides opportunities for legal status for undocumented persons currently in the U.S. who meet certain qualifications to obtain registered provisional legal status. It also addresses particular categories of people (“DREAMERS,” those who serve in the military, etc.) and it also includes a provision for long-term legal residents of the Commonwealth of the Northern Mariana Islands. Section 2110(c) of the Title dealing with rulemaking to implement this Title exempts “Any decision by the Secretary concerning any rulemaking action, plan, or program described in this section” from NEPA. This is another unnecessary provision; the types of activities covered under Title II generally do not have environmental impacts and would be covered by categorical exclusions under the Department of Homeland Security’s Directive 023-01.

In summary, the current version of the bill contains provisions that are damaging to America’s public lands and the environment and are also unnecessary. The authority to waive “all laws” is particularly egregious. In defending our country’s territorial integrity, we need not eliminate one of the pillars of this country’s character – that we are a nation of laws. No agency should be encouraged to operate outside of the law, especially law enforcement agencies. We look forward to working with like-minded decision-makers to improve this bill to better provide for a border security framework within our system of laws.

Sincerely,

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