

Committee on Natural Resources

Rob Bishop Chairman
Markup Memorandum

November 14, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff— Brandon Miller
Subcommittee on Federal Lands (x67736)

Markup: **H.R. 3593 (Rep. Mike Johnson)**, To amend the Wilderness Act to authorize U.S. Customs and Border Protection to conduct certain activities to secure the international land borders of the United States, and for other purposes
November 15, 2018, 9:30 AM; 1324 Longworth House Office Building

Summary of the Bill

H.R. 3593, introduced by Representative Mike Johnson (R-LA-04), would amend the Wilderness Act to authorize the Commissioner of U.S. Customs and Border Protection (CBP) to conduct border security activities in designated wilderness areas. These authorized activities include granting access to existing structures, permitting the use of motor vehicles and aircraft, and allowing for the deployment of temporary infrastructure in emergency situations. The legislation requires these activities to be carried out in a manner that protects the wilderness character of the area to the greatest extent possible.

Cosponsors

[10 Cosponsors](#)

Background

Federal- and tribal-owned land represent approximately 693 miles, or about 35 percent, of the Southern border, the overwhelming majority of which is managed by the Department of the Interior (DOI) and the U.S. Forest Service (USFS).¹ The rugged, isolated character of most federally-owned borderland² makes patrolling and the installation and maintenance of security infrastructure difficult. Regulatory delays and reliance on federal land managers for appropriate access to federally-owned borderland further hampers Border Patrol's efforts to adequately patrol, as well as build and maintain border security infrastructure. The same factors that hinder CBP's operations make federally-owned borderland a popular, but dangerous, crossing point for cross-border violators (CBV), such as illegal immigrants and drug traffickers.

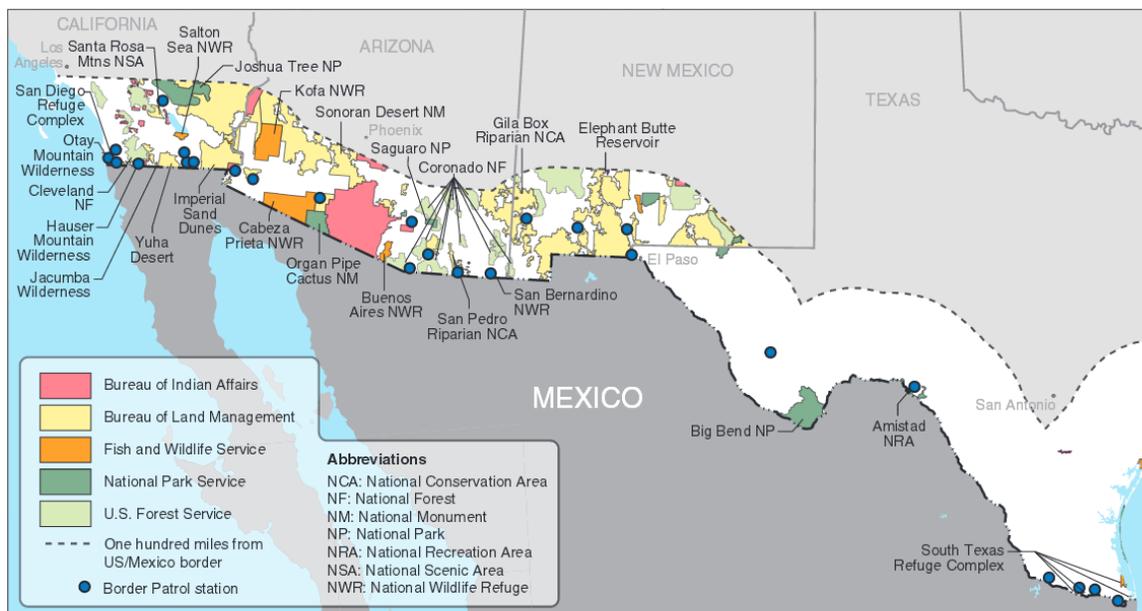
¹ Memorandum from Carol Hardy Vincent, Specialist in Natural Resources Policy, Congressional Research Service, to Staff, Oversight and Investigations Subcommittee., H. Comm. on Natural Resources (Nov. 9, 2017) (on file with H. Comm. on Natural Resources); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-38, *supra* note 1 at 4.

² The borderlands region encompasses the area extending from the United States-Mexico border north to 100 miles.

Regulatory Obstacles to Border Patrol Access

The CBP is tasked with gaining “operational control” of the international borders of the United States. Operational control is statutorily defined as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”³ In the years following September 11, 2001, Congress has authorized large increases in manpower and equipment for the CBP.⁴

Federal Lands on U.S. – Mexico Border



Sources: United States Geological Survey and GAO.

The REAL ID Act of 2005 granted the Secretary of Homeland Security authority to waive all legal requirements deemed necessary to “ensure expeditious construction of [border] barriers and roads” in areas of high illegal entry.⁵ While this waiver authority applies to border barrier construction, maintenance of existing infrastructure or roads can become a challenge for the CBP. Except for this waiver authority, Congress has largely left in place regulatory obstacles that can deter obtaining operational control of the border.

In August 2006, the Department of Homeland Security (DHS), DOI, and the Department of Agriculture (USDA) entered into a Memorandum of Understanding (MOU) to establish “consistent goals, principles, and guidance related to border security,” between the three

³ 8 U.S.C. § 1103 note (Section 102(b)(1) and (b)(3)); *see also* Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017) *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

⁴ U.S. Border Patrol Fiscal Year Budget Statistics (FY 1990 – 2017), U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Dec. 12, 2017), *available at* <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Budget%20History%201990-2017.pdf>

⁵ 8 U.S.C. § 1103 note; *see also* *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129-30 (D. D.C. 2007), *cert. denied*, 554 U.S. 918 (2008) (finding waiver authority constitutional).

departments.⁶ The MOU “provides guidance in the development of individual agreements, where appropriate, between [CBP] and the land management agencies.”⁷ While the MOU allows for CBP to conduct motorized pursuits in exigent or emergency situations within wilderness or wilderness study areas, the CBP must file a report with the federal land manager after each instance.⁸ Otherwise, CPB agents can generally patrol by foot or by horseback without prior authorization from the federal land manager.⁹

Any additional CBP access to federal lands is “subject to such terms and conditions that are mutually developed” by the CBP and federal land managers.¹⁰ In practice, this gives federal land managers a veto over CBP activities. For instance, CBP must receive permission to patrol areas not designated for off-road use and to install tactical security infrastructure, such as roads, motion sensors, cameras, and vehicle barriers.

Under the MOU, after receiving CBP’s written request, federal land managers have 90 days to execute a local agreement.¹¹ Negotiating a mutually acceptable agreement, however, can cause delays, which would ultimately disadvantage the CBP from successfully executing their mission. The power disparity between CBP and federal land management agencies is further exemplified through the numerous instances where DHS has agreed to fund environmental mitigation projects on land managed by USDA and DOI.¹²

CBP agents are oftentimes most constrained in federally-designated wilderness areas. In general, the Wilderness Act¹³ prohibits using motor vehicles, motorized equipment, landing of aircraft, and any form of mechanical transport in designated wilderness areas.¹⁴ Therefore, even when the CBP is authorized by the National Park Service to patrol or erect infrastructure in wilderness areas, transportation, equipment, and tools can be limited to non-motorized or non-mechanical devices.¹⁵ Undoubtedly, as professional drug or human smugglers, CBVs, do not observe such Wilderness Act restrictions to leave such areas unimpaired for the future use and enjoyment of others or preserve and protect natural conditions.

Therefore, the MOU robs the CBP agents of the operational flexibility essential to their mission of securing our borders. CBP agents have expressed frustration due to delayed approvals from federal land managers to remediate drug trafficking tunnels, repair existing roads, and

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

⁷ *Id.* at 2.

⁸ *Id.* at 6.

⁹ *Id.* at 4.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 5.

¹² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-38, *supra* note 1 at 56; *see also* Press Release, National Park Service, Dep’t of the Interior, DHS and DOI Sign Agreement for Mitigation of Border Security Impact on the Environment, (Jan. 15, 2009) (*last edited Apr. 4, 2016*), available at https://www.doi.gov/news/pressreleases/2009_01_15_releaseB.

¹³ 16 U.S.C. 1131et seq.

¹⁴ 16 U.S.C. 1133(c).

¹⁵ *Id.*

install tactical security infrastructure.¹⁶ At times, CBP agents working with land management agencies can experience lengthy delays in approval of tactical infrastructure road maintenance and repair projects.¹⁷

H.R. 3595 addresses these restrictions created by the Wilderness Act that are adversely impacting border security efforts. This legislation amends the Wilderness Act to empower the CBP to conduct necessary border security activities in designated wilderness areas. These border security activities are specifically listed in this legislation and include granting access to existing structures, permitting the use of motor vehicles and aircraft, and allowing for the deployment of temporary infrastructure in emergency situations. The bill requires the CPB to carry out these actions in a way that preserves wilderness areas to the best of CBP's ability, as circumstances permit.

Cost

A Congressional Budget Office cost estimate has not yet been completed for this bill.

Administration Position

The Administration's position is currently unknown.

Anticipated Amendments

Representative Mike Johnson will submit an amendment to make minor technical changes.

[Effect on Current Law \(Ramseyer\)](#)

¹⁶ Discussions with various Border Patrol agents, Congressional Delegation Bishop in Tucson Sector, Arizona. (Feb. 2018).

¹⁷ *Id.*